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How To Avoid Being A Discovery Pushover

By **Allison Grande**

Law360, New York (November 24, 2014, 2:32 PM ET) -- When litigating a high-stakes case where at least one side has a trove of documents that could be relevant to the dispute at hand, disagreements over the scope and method for document preservation and production are more than likely to emerge. Sometimes, these disputes will get particularly heated, with one side refusing to budge from demands that the other side deems unreasonable or overly burdensome.

Facing an opponent who is relentlessly pushing for an unfavorable position can be daunting, especially to a younger attorney. But attorneys say that backing down isn't the solution; instead, those faced with a bully need to do their best to use reason and compromise to diffuse the situation while ensuring that their integrity — as well as their client's position in litigation — remain intact.

"For most judges, it doesn't matter who started the fight; the fact there is a fight will be enough to paint you with the same brush if you are not careful," Shook Hardy & Bacon LLP partner Humberto Ocariz said. "Keeping yourself from becoming a discovery pushover requires strategy, patience, and in extreme circumstances, responding with properly applied pressure."

Here are several strategies attorneys can use to tame discovery bullies and protect their client's chances of victory:

Have a Game Plan

Many of the most contentious discovery disputes stem from a failure on behalf of at least one of the parties to take an inventory of what documents they have and what information they need before going into the battle, making it imperative for attorneys that find themselves up against an aggressive adversary to be prepared, attorneys say.

"If you take a proactive rather than a reactive approach to discovery, then you can take the fight out of the bully," McCarter & English LLP associate and e-discovery committee member Makenzie Windfelder said. "If you have all the information at the outset and potential issues arise, you'll be able to address them head-on and put your client in a more strategically favorable position than being behind the eight ball."

Being ready requires figuring out where a client's data is stored, what is contained in those data sets and how difficult it will be to extract and produce the data from those repositories, according to attorneys.

“Both with respect to discovery you propound as well as discovery you respond to, the core issue will be what should reasonably be made by each side,” said Dean Herman, co-chair of the national insurance coverage and bad faith group at Kaufman Dolowich & Voluck. “At the outset of engagement, you should identify documents and data potentially at issue, and create clear lines of communications with your client.”

Hogan Lovells partner Alvin Lindsay explained that attorneys used to wait a few months for discovery to heat up to dig into clients’ databases, but that a 2006 amendment to Federal Rule of Civil Procedure 26(f) now requires litigants to make issues related to electronically stored information and data preservation part of the meeting that they have within the first 100 days of the case.

“A lot of lawyers make the mistake of just thinking that’s another box to check during the conference,” Lindsay said. “The rule is intended to bring issues to the forefront early in the case, and you can only take advantage of the rule if you’ve gotten into the nitty gritty and know what you’re willing to look for and what you’re not.”

An attorney going up against an adversary who’s being stubborn about handing over certain documents could also benefit from understanding the importance of preparation, attorneys noted.

“Most often, the occasion for situations in which adversaries say things like they can’t possibly agree to those search terms is that they don’t know their client’s data,” said Susan Usatine, the co-chair of the discovery services practice group at Cole Schotz Meisel Forman & Leonard PA. “So when an adversary is sounding a little defensive, it’s best to ask if they’ve spent time talking to their clients. Most of the time, they’ll agree to take the time to get that information and come back with what they’ve found, and tempers will come down.”

Many attorneys may be reluctant to discuss what documents they have or what they are planning to ask for so early in the case, but attorneys say that laying the cards out on the table is likely to avoid explosive disputes down the line.

“Early preparation and knowledge of your client’s data, understanding the facts and being cooperative does not make you a sucker,” Lindsay said. “It will promote your own credibility with the court and the opposing counsel.”

Draw a Line, But Be Willing to Compromise

Armed with the knowledge that they’ve gained from their early dive into their client's records, attorneys should embark on discovery disputes with a clear idea of what points they are willing to concede, and which requests they know will be too costly or unrealistic for their clients to maintain, experts say.

“If you pick lines in the sand that are principled and well thought out, that will help to narrow the issues as much as possible and get to the crux of the dispute,” said David Kessler, the co-head of the e-discovery and information governance practice at Norton Rose Fulbright.

But while the parties are likely to have a few issues they can’t resolve, attorneys say compromise is key to diffusing a potentially hostile discovery situation.

“You’re not a pushover when you concede points you’re unlikely to win, or disclose circumstances your client is operating under,” said Fernando Pinguelo, the co-chair of the crisis and risk management

practice at Scarinci Hollenbeck LLC. “Most e-discovery disputes can and should be resolved on logic and arguments premised on proportionality relative to the importance of the issues at stake. Any deviation from that will result in disputes that lead to motion practice that leads to higher litigation costs.”

Besides helping to reduce discovery costs, being willing to compromise on points of disagreement will also prove beneficial if the dispute winds up before a judge, according to attorneys.

“Where the sides are being unreasonable and not willing to bend, that leaves a bad taste in the court’s mouth,” Windfelder said. “By taking a more cooperative tone to discovery, you have a better chance that the dispute will work out in your favor.”

Robert Brownstone, the co-chair of the electronic information practice at Fenwick & West LLP, pointed to a pair of court decisions issued a decade apart that highlight the importance of compromise.

The first decision came in 2002, when the District of Delaware ordered Dell Inc. to make its senior executives’ records available in a patent infringement case, while the Southern District of New York followed up the ruling by refusing to go along with KPMG Inc.’s bid to limit the scope of its preservation obligations in a Fair Labor Standards Act case. In both rulings, the judges cited the defendants’ prior refusal to budge on their positions in imposing the contested obligations on them.

“Judges over time have come to expect more cooperation in discovery,” Brownstone said.

Use Discovery Rules to Your Advantage

When efforts to compromise don’t seem to be working, attorneys shouldn’t hesitate to use discovery rules and sanctions to derail a particularly pushy adversary, experts say.

“Sometimes, the ‘Rambo’ lawyer needs to meet ‘Mr. Schwarzenegger,’” Ocariz said. “When properly used, the rules of procedure provide a powerful arsenal to keep the pressure on the opposing party and its counsel.”

For example, an attorney can use a scheduling order as provided for under the rules to impose deadlines that keep pressure on a particularly aggressive adversary and guard against voluminous discovery request and one-sided tactics, Ocariz said.

Andrew Barrios of Vedder Price LLP agreed that “knowing the rules and knowing how to use them to get what you want” is key to avoiding petty disputes with opposing counsel.

He specifically pointed to an electronic discovery pilot program currently being implemented in the Seventh Circuit that compels the parties to cooperate or face sanctions.

Attorneys can also seize on provisions in federal and some state discovery laws that allow for the recovery of some costs from an adversary for the production of data that is not reasonably accessible to push back against overly broad requests, Lindsay noted.

“One thing that I advise colleagues and clients is to be raising cost-shifting really early when the other side is looking for data in order to put the burden on them,” Lindsay said.

Craft Thoughtful Responses

The most aggressive and potentially explosive attacks are likely to be raised by an adversary in a written communication, making it important that attorneys compose responses that are forceful yet respectful, experts say.

“Even if opposing counsel is ramping up the volume, you want to remain professional and be the level-headed party,” said Vedder Price data privacy and information management practice group chairman Bruce Radke. “That’s going to give you an advantage when a judge is looking at this in hindsight.”

Rather than engaging in a nasty war of words with an adversary, attorneys should strive to articulate their position in a way that makes their reservations clear while charting a path for a potential middle ground, attorneys say.

“When one side says no with no reasoning behind it, that’s when you end up with unnecessary fights,” Kessler said. “A person who doesn’t understand a situation will effectively say no and not reach an agreement. By explaining your position, you begin talking to each other rather than at each other.”

Making sure to keep complete records of any written discovery spats could also prove useful in the long run, attorneys noted.

“Discovery disputes are about, at least in part, the perceptions created,” Ocariz said. “You’d be surprised at the number of baseless accusations that are easily beaten back by an email or letter that documented the event at issue.”

Don't Cry Wolf to the Judge

While judges undoubtedly play an important role in litigation, attorneys should be careful not to run to the court with every single disagreement they may have with their adversary, according to attorneys.

“You’ve got to pick your battles with the judge,” Radke said. “The last thing you want to be is the boy who cried wolf. If you’re running to the court every time you have a nickel-and-dime dispute, then when you have a major dispute that does require court intervention, the court’s reception may not be that good.”

Issues that are likely to spark the court’s involvement include disputes over sensitive documents, costly requests and demands where an unbreakable impasse has been reached, attorneys say. But no matter the topics, attorneys need to be able to demonstrate that they have at least made an effort to work out their differences before charging into the court, according to attorneys.

“The parties need to show the court that they have legitimate arguments and are not just picking a fight,” Kessler said. “A court would much rather see a discovery fight not where two people can’t get along, but where two people see the law differently, which is ultimately what the court is there to resolve.”

--Editing by John Quinn and Philip Shea.
