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COUNSEL COMMENTARY

IP: Avoiding the hidden dangers of the never-ending email string

PROPER EMAIL PRACTICES CAN LIMIT THE COST AND SCOPE OF DISCOVERY, AND PREVENT THE PRODUCTION OF SENSITIVE COMMUNICATIONS

Many companies expend significant time, money and effort to develop, capture and protect patents, trade secrets and copyrights. The failure to instruct researchers, designers, creators and inventors on basic email practices can undermine those efforts when email communications are produced during litigation. Specifically, a number of issues can arise when long email strings covering wide-ranging topics include reference to responsive matters. As frequent email users, most of us understand how a single email communication turns into an endless conversation discussing multiple issues when we automatically reply to the email sitting in our inbox regardless of its subject matter. To limit the cost and scope of discovery in civil litigation to relevant matters, employees should be encouraged to reconsider that impulse and to limit each email to one specific subject matter.

Additional expense in e-discovery

The usual discovery methods of limiting the pool of responsive documents, including keyword and concept searching, result in the identification of all email strings containing any responsive matter. The determination of which messages in the string are responsive and discoverable can generally only be made through attorney review and may require individual redaction of each copy of the email string collected from each custodian either for purposes of protecting attorney-client privilege or in some instances to prevent the production of irrelevant (and potentially commercially sensitive) email communications. This adds significantly to the cost of preparing documents for production and heightens the risk of inadvertent waiver through inconsistent redaction across multiple attorney reviewers.

Attorney-client privilege issues

Although it is universally accepted that it is proper to withhold attorney-client privileged communications from document production during litigation, it is less clear whether the email string in its entirety may be withheld from production or if each message in the string must be individually logged. Many courts have found that a party must separately log each email message in a string for which a privilege claim is made, although acknowledging that this task is expensive and time-consuming. There may be a limited exception where the last email communication in the string is forwarding non-privileged information to counsel requesting legal advice. In that instance, the very fact that non-privileged information was communicated to an attorney in a forwarded email string may itself be privileged, even if the underlying information is not protected and must be separately produced.

You may be required to produce non-responsive emails within the chain

Federal district courts disagree regarding the propriety of redacting allegedly non-responsive information contained in otherwise responsive documents. Courts allowing relevance redaction agree that it is a proper way to produce a document that contains both relevant and irrelevant information. Other courts have found that redaction of such information is not proper under the Federal Rules of Civil Procedure, relying in part on references to production and inspection of "documents" and "documents as they are kept in the usual course of business" in Rule 34 to require the production of the entire document. The redaction may be viewed as altering of potential evidence or depriving the receiving party of context for the relevant information. These courts often find that an appropriate protective order restricting distribution of confidential information is sufficient to address concerns about the production of irrelevant matters. Production of full email strings covering topics that may include business plans or products not yet on the market, or even personal information that may potentially be used to attack witness credibility, could allow the opposing party to broaden discovery, including deposition questioning, to matters that the responding party believes are irrelevant and that may be considered harmful to the producing party.

Email string suggested practices

Organizations should remind inventors, researchers, creators designers and others that careless email practices may be expensive and may even allow competitors unwanted access to sensitive company information or embarrassing personal information. To minimize these risks, employers should educateemployees about these email practices:

1. Limit your email conversations to one subject. Start a new email when discussing a new project, product or topic.

2. Copy only necessary parties on emails. This not only demonstrates proper care and treatment of trade secret information, but also minimizes the creation of unnecessary duplicate electronic files that may need to be gathered during the discovery process.

3. Try to avoid discussing attorney advice or pending litigation by email. Make an effort not to intermingle communications reflecting attorney advice in the midst of an email conversation.

4. Avoid discussions of potentially embarrassing personal matters, sensitive issues or the use of inappropriate humor or sarcasm in the middle of a long email string. While arguably irrelevant, this information can be used at deposition or trial to attack a witness's credibility.

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