Ignorance May be Bliss but not When it Comes to E-discovery

Like most cases with a substantial e-discovery element, *In Re: A & M Florida Properties II* was a web of complex and intertwined legal and technological issues. Unfortunately for plaintiff's counsel, untangling this web was a bit more than they could muster. Miscommunication between plaintiff and counsel aggravated matters, and the result has become a finger-pointing contest, pitting client against counsel.

Arising from a dispute over the terms of a purchase and sale agreement for property, A & M Properties claimed that defendants, American Federated Title Corporation, failed to disclose key information about the sale of the property. During discovery, the defendant requested emails and other electronically stored information (ESI) from the plaintiff. Several missteps in the e-discovery process resulted in only partial production of the requested material. The defendants cried foul, and after further computer forensic examination, plaintiffs turned over more than 9,500 additional emails.

In a move of bold honesty, counsel fell on its sword claiming that it did not fully "understand the technical depths to which electronic discovery can sometimes go." If ignorance truly is bliss, then counsel for the plaintiff must be in pure heaven. Unfortunately, Judge Arthur Gonzalez does not seem to share this view. He ordered an award of monetary sanctions to cover the cost of both defendant's attorney and the computer forensic expert. Adding insult to injury, Gonzalez has ordered plaintiff and counsel to split the cost of the award between them.

For A & M Properties and their attorneys the damage is already done. For the rest of us, there are several lessons we may learn from their mistakes.

First, communication is the key. Whether corporate or outside counsel, there is a duty to the client to over-communicate—especially in matters of e-discovery. In *A & M,* a large portion of the problem stemmed from failure explicitly to convey what databases to search. Overbroad terms such as "company-wide" failed to specify the scope of the search. This includes the use of generic phrases. In *A & M* the computer forensic expert overlooked an archive that the Chief Technology Officer knew existed but failed to adequately communicate to counsel. Had this information been more freely flowing perhaps they could have avoided the finger pointing.

Next, it is incumbent on attorneys to educate the client about the risks of poorly executed e-discovery. A few hours of heart-to-heart chats can save hours of he-said-she-said arguments that will cost both the client and counsel in time, money, and reputation.

Lastly, e-discovery is here to stay. Technology and the rigors of preserving ESI will only become more complex. Therefore, regardless of whether techno-savvy or techno-phobic, attorney's owe a fiduciary duty to their clients to become adequately educated about the proper solutions to e-discovery dilemmas. At the very minimum, consider hiring qualified experts to act as consultants.

Long gone are the days when ignorance about technology can serve as shield. Technology and the impact that it has on e-discovery is sure to grow, and as it does, lawyers' duties to their clients will increase. In fact, as *A & M* clearly points out, ignorance is far from bliss, is it actually the sword of Damocles, dangling above every case. Ignore it at your own peril.