

# Document Discovery Can Make or Break Your Case

by SHAYDA ZAERPOOR LE of Barran Liebman LLP

For many, the term "lawsuit" brings to mind images of courtrooms, juries, and attorneys. For most lawyers, the term brings to mind discovery: the documents, emails and other information that establish the facts of your case. Gathering factual information is at the core of our legal discovery system, and with the cost of modern litigation, cases can start and end during discovery. For the cases that proceed through to trial, effective discovery is of course essential, but compliant discovery can also make or break your case.



not inadvertently destroyed. Document destruction systems should be suspended.

Failure to preserve relevant documents could prevent you from mounting an effective defense, and could even result in the judge giving the jury negative instructions about destroyed documents.

Employees who may have been involved with or aware of the underlying events and claims at issue should be instructed that they are not to delete or destroy any materials relating to the person and events which you have identified.

Some businesses will choose to make a copy or a mirror of certain hard drives or email accounts, in order to protect against inadvertent or even purposeful deletions. The company should also make a meaningful evaluation of the people and systems related to the employee or event at issue, in order to best determine who should be encompassed within this litigation hold. As always, these processes and communications should be formally documented and retained, in case the opposing party raises a claim of destruction or "spoliation" of evidence.

### DOCUMENT PRODUCTION REQUIREMENTS

Producing documents consistent with discovery rules involves determining what documents in your possession and control are covered by the requests from the opposing party in a civil dispute. Upon receiving the request, your attorney will object to anything that is overly broad or unduly burdensome, or which seeks documents protected by some type of

privilege. After reviewing the requests, you and your attorney will determine which people in your employ could potentially have information relevant to the litigation, and what mediums they may have used.

Email is often the most prevalent type of document discovery in terms of volume, but many businesses and employees will use handwritten notes, personal email accounts, text messages, Facebook messages, mobile applications, and a variety of other types of electronic mediums. Electronic data can often be managed with a discovery software system or database, which can facilitate narrowing the data collected by date ranges and key word searches. Client assistance in meaningfully identifying and evaluating the people involved, the mediums used, and the relevant terms can significantly contribute to managing document review and reducing discovery costs.

### RISKS OF NONCOMPLIANCE

A recent Oregon case decided earlier this year, provides a timely reminder of the potential pitfalls of failing to provide documents required by the discovery rules. The jury awarded a former employee \$1.2 million, after the judge prohibited the company from putting on a defense to the former employee's age discrimination claim. This prohibition was a sanction for failure to provide certain documents during the discovery phase of the case.

Noncompliance with discovery obligations isn't just about failure to comply, it can also be about inability to comply (such as where document

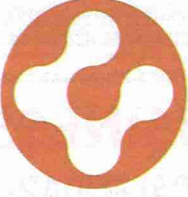
destruction practices are not paused), from making an incomplete review of the range of potentially relevant documents, or from simply misunderstanding the applicable obligations.

Discovery sanctions for noncompliance can range from a negative inference in the case, to not being able to put on a particular defense, to losing the lawsuit. You may even have to pay fees and costs to the other side, including the attorneys' fees the opposing party incurred in trying to get you to comply, not just your own attorneys' fees. On the non-legal side, noncompliance can also result in negative publicity for the company, where public perception is something that many businesses have worked very hard to build. It can also result in disruptions to the business, where employees are forced to halt their work—their real work—to respond to the demands of the litigation.

### PREPARING YOUR EMPLOYEES

Understanding your discovery obligations and partnering effectively with your human resources and legal professionals can not only help you in establishing the storyline and defenses in your case, it can protect you against potential discovery sanctions and risks of noncompliance. In addition, effectively preparing your employees for the implications of a lawsuit and the resulting review of their documents and communications can help in complying with your obligations and reducing disruptions to your business.

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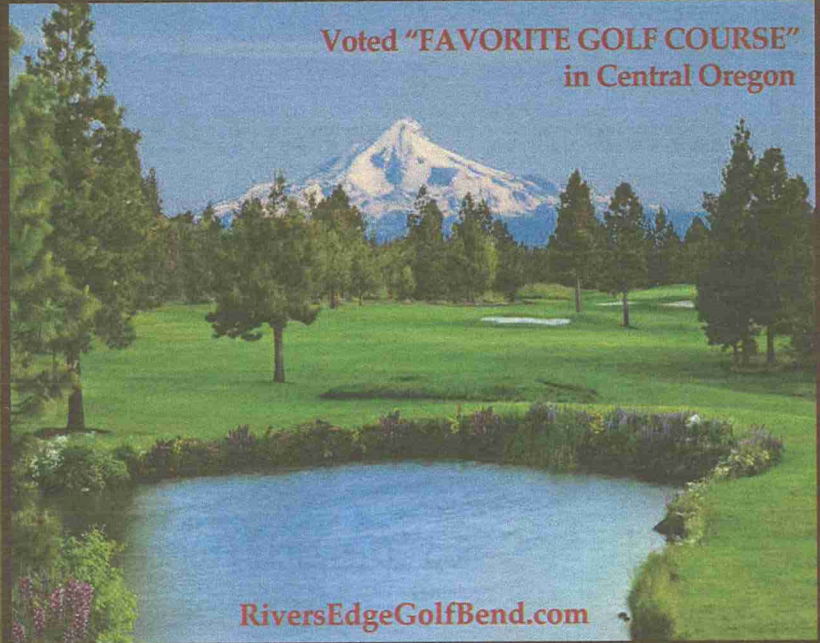
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