

Publications

Client Alert: Brown v. Tellermate Holdings, Ltd.; Confirming that Candor and Communication are Keys to Discovery

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As reflected in the recent decision by the United States District Court for the Southern District of Ohio in *Brown v. Tellermate Holdings, Ltd.*, communication and candor are key components of modern discovery. Indeed, the *Brown* decision emphasizes that, not only do attorneys have an affirmative obligation to speak to the key players related to the matter being litigated so that counsel and client together can identify, preserve, and search the sources of discoverable information, but doing so is necessary for effective advocacy.

The Browns brought an employment discrimination case alleging age discrimination. They sought discovery related to, among other things, their productivity as compared to other employees. The Browns therefore sought access to information provided from their employer to salesforce.com, a third-party application with whom their former employer contracted to track employees' sales activity. The court ultimately found that, after making a partial production, counsel inaccurately represented—both to opposing counsel and to the court—that there were no additional documents to be produced and that they could not obtain documents hosted by the third party even if they wanted to. This statement was belied by the contract between the former employer and salesforce.com, causing the court to conclude that it was not only false, but at minimum the result of counsel's failure to be diligent about the accuracy of representations concerning discovery. The court noted that counsel failed to communicate with the appropriate personnel at the client, who would have been able to provide accurate information.

These false statements, emanating at least partly from a failure to communicate, arguably caused a loss of relevant information, and ultimately led to sanctions for both the client and counsel. Specifically, the court awarded fees and costs (borne jointly between client and counsel) and also prospectively precluded the employer from using any evidence that would tend to show that the Browns were terminated for performance-related reasons.

Condemning the party's discovery practices, the court in *Brown* explained that the underlying principles governing discovery do not change just because ESI is involved; rather, counsel has a duty to:

- Cooperate in the discovery process;
- Be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and
- Exercise sufficient diligence to ensure that all representations made to opposing parties and to the court are truthful and are based upon a reasonable investigation of the facts.

In order to satisfy that duty and avoid the type of sanctions levied in *Brown*, counsel and client must work together to formulate and implement a discovery plan. Such a plan, at its core, requires effective and clear communication between client and counsel. As demonstrated in the *Brown* decision, such a plan at a minimum should include the following:

- Communication between counsel and an appropriate IT personnel so that counsel can obtain:
 - A detailed understanding of the client's IT infrastructure;
 - The types of ESI at issue;
 - The location of the ESI at issue; and
 - The retention policy applicable to the ESI at issue;
- Communication between counsel and the personnel having responsibilities for the matters which are the subject of the discovery request and all employees likely to have been the authors, recipients or custodians of documents falling within the request in order to ensure proper identification, preservation and collection of ESI;
- Communication between client and counsel during the identification, preservation and collection stages in order to maintain some degree of oversight to ensure that the client's employees are acting competently, diligently and ethically.
- Truthful and accurate communications to the court and to opposing counsel regarding the parties' ability to locate and produce responsive information.

These steps, as the court in *Brown* reminded litigants, is part of the objective "reasonable inquiry" required by Rule 26(g) and, again, is dependent upon clear and effective communication. Clear and effective communication with the client will allow the attorney to appropriately respond to discovery requests, clearly and effectively communicate with opposing counsel and, if necessary, the court. On the other hand, as *Brown* also demonstrates, a breakdown in that communication, advertent or inadvertent, can lead not only to an unnecessary expenditure of time and money, but can also be detrimental to the entire case.