

DOJ FACES 'BIGGEST PROSECUTORIAL MASHUP IN MODERN TIMES' IN CAPITOL INSURRECTION E-DISCOVERY

A brisk pace and an onslaught of data sources is complicating the e-discovery efforts related to the Jan. 6 Capitol insurrection. But despite the DOJ's struggles, some e-discovery practitioners say they're impressed with how the agency is handling the challenge.

BY FRANK READY

Prosecutors are required to give defendants and their lawyers access to any exculpatory information that may arise over the course of an investigation. But in the case of the investigation into the Jan. 6 insurrection at the U.S. Capitol building, the sheer deluge of body cam footage, cell phone video and social media posts that are still being captured is causing delays in the more than 506 cases already being pursued.

Last month, Politico reported that the Department of Justice (DOJ) agreed to pay \$6.1 million to Deloitte Financial Advisory Services to help create a "massive" database that would give defensive attorneys access to relevant electronic evidence from the DOJ's investigation into the Jan. 6 Capitol insurrection. But in an opinion filed July 16, a U.S. district judge for the District of Columbia ruled evidence that had already been seen by a grand jury could not be placed in the database, further complicating efforts to deliver speedy trials.



Washington, D.C. Jan. 6, 2021: Protesters seen all over Capitol building where pro-Trump supporters riot and breached the Capitol.

Mary Mack, CEO and chief legal technologist at EDRM, noted that the DOJ does go after RICO cases, among others, that involve multiple defendants and require interconnected e-discovery productions that are rooted in one central place.

"So yes, they probably should have had something like that [database] ready, like a shell. But I don't know that anybody anticipated the enormity of this particular investigation. It's [defendants] from all over the country. They are being arrested

in different jurisdictions. Different people are handling the evidence,” she said.

To be sure, the investigation of the events Jan. 6 has overturned no shortage of digital evidence, from body cam and cell phone footage to posts ripped directly from various social media platforms. Complicating matters further is that evidence obtained from one defendant’s phone, for example, may also have relevance to the cases of any alleged rioters who happen to appear in the background of a selfie or video.

Craig Ball, a trial attorney and an adjunct professor of e-discovery at the University of Texas at Austin School of Law, called it “the biggest prosecutorial mashup in modern times.”

He explained, “You have this amorphous amount of people and we have this tremendous amount of real-time documentation. Amateur journalists on the scene who are bloggers, posting to Instagram and so forth and Tik-Tok videos ... [That evidence] is having to be assessed in real time and it has to be in the form of a very sophisticated database.”

Still, Ball noted that he is “really quite impressed” by the results that the DOJ has been able to achieve. “They appear to me to be taking seriously their obligation to provide both inculpatory and exculpatory information,” he said.

It’s possible it took the department some time to reorient its

focus beyond the institution’s usual purview. Anna Mercado Clark, a partner at Phillips Lytle, explained that a DOJ investigation typically targets a specific individual or organization. It’s a much different vantage point to be in a situation where a single cell phone video taken on the steps of the Capitol could have implications not only in the case of the person taking the video, but those captured in the background as well.

“It seems as if there was a collection of data and only now are [the DOJ] trying to make heads or tails and kind of look at it from the big picture standpoint, as opposed to looking at pockets of data as they pertain to a particular individual,” she said.

A Tech Education

Moving forward, Clark suggested that the DOJ should “take a step back” and focus on getting a plan into place for dealing with the large volumes of data it’s confronting. “As opposed to rushing to process the data without a plan in place ... At least in my experience, the times where we have not been as effective is when we’ve been rushing to do something.”

However, it’s not just process, but technology that the DOJ will have to contend with. Mack at EDRM opined that given the volume of cases springing out of the Jan. 6 investigation, the database that Deloitte has been charged with building will have

to be able to scale over the course of “probably” the next 10 years.

“They’ll have to back it up, they’ll have to secure it and they’ll have to have very granular permissions in it,” she said.

But while Deloitte may be able to handle many of technical challenges involved, the real burden absorbed by the DOJ may have to do with bringing employees up to speed on the ins and outs of the technology. Mercado Clark at Phillips Lytle has worked with various government agencies in the past and noted there tends to be “varying sophistication” among personnel when it comes to using e-discovery related technologies.

That lack of familiarity can prove fatal in the courtroom. Mercado Clark noted that attorneys sometimes lose cases they should have won simply because they failed to adequately explain a technology-assisted review process to the judge involved.

When it comes to the more than 506 cases springing out of the January 6 investigation, relying on Deloitte to do all of the heavy lifting in court might be a mistake. “When [attorneys] rely on their vendors to [explain tech processes], it’s not as effective as when you have the lawyer who is in the case explaining it to the court, especially when they have a relationship with that court,” Mercado Clark said.