INSIDE THE MINDS

Ethics in e-Discovery

Leading Lawyers and Consultants on Navigating Rules and Regulations and Effectively Handling Privacy Issues in the e-Discovery Process

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Staying Up to Speed with Changes in e-Discovery

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Introduction

Not so long ago, discovery in civil litigation required lawyers to meet with their clients, determine what potentially responsive documents and records existed in a matter, and put into place a process to collect, review, and produce those documents. Fifteen years ago, this process mostly involved the collection of paper files and records, and today it mostly involves the collection of electronic documents and records. E-discovery knowledge, methods, and technologies have evolved quickly, yet many lawyers and courts still struggle to understand how to deal effectively with electronic discovery.

Evolution of e-Discovery in Civil Litigation

After considerable study—and for the first time in a generation—the Federal Rules of Civil Procedure were amended on December 1, 2006, to embrace the concept of electronically stored information (ESI). The new rules provide both plaintiffs and defendants with a process for conducting e-discovery in a case. For example, the new rules require that parties in litigation meet and confer as soon as practical after a complaint is served on a defendant. The purpose of the conference is to attempt to agree on a proposed discovery plan that is then submitted to the court within fourteen days of the conference.

These rules have led to some extraordinary changes in terms of how lawyers deal with e-discovery. They now must know more about technology, the e-discovery process, and court rules. The consequences of not following the rules can be severe and can include monetary sanctions, outright dismissal, or other adverse rulings from a court. For example, Judge Shira A. Scheindlin, in the precedent-setting cases *Zubulake v. UBS Warburg* and *Pension Committee of the University of Montreal Pension Plan et al. v. Banc of America Securities, LLC, et al.*, addressed issues from spoliation of evidence to the events that trigger legal hold obligations.

Over the past few years, thirty-eight states have modified or amended their rules of civil procedure to incorporate the growing need to address e-discovery. In most instances, those rules embrace the Federal Rules of Civil Procedure, and in a growing number of states, additional special

requirements and procedures must be followed when conducting e-discovery. Texas, the first state to adopt e-discovery laws in 1999, has specific requirements regarding the use of a licensed private investigator to perform computer forensic collections.

Every state has a body of rules with respect to legal ethics, and while each set of rules is different, they all deal with how lawyers are supposed to conduct themselves. For example, lawyers are supposed to be competent and diligent when representing clients. One of the challenges presented by e-discovery is the requirement of maintaining client confidentiality. This can be particularly difficult given the increasing volumes of electronic data and the possibility that attorney-client privileged material might be inadvertently produced to the opposing party.

Lawyers also have duties to the court. Dealings with the judiciary require lawyers to use the utmost candor with the tribunal. In addition, lawyers have duties of fairness to their opposition and their clients. Essentially, a panoply of ethical rules existed in the legal profession long before the advent of e-discovery. Now the question that lawyers must address is: how do those ethical rules, which in some cases have been around for centuries, confront the issues associated with e-discovery?

For example, the e-discovery process often involves third parties who are not lawyers. The lawyer who represents the client before the court retains the duty to supervise individuals to ensure they discharge their duties correctly. Several parties could potentially be part of the e-discovery process. These parties can include paralegals, contract lawyers, and third-party vendors. Simply put, it is the duty of the lawyer to supervise subordinate lawyers as well as any third parties, and the consequence of not supervising those individuals may be a malpractice claim.

Both the American Bar Association Model Rules of Professional Conduct and state ethics rules require that lawyers be competent in order to adequately represent their clients. Unfortunately, the vast majority of lawyers are woefully unprepared to deal with e-discovery issues due to a lack of knowledge about the subject, lack of training about current technologies and e-discovery methodologies, or both. As a result, lawyers

risk being charged with professional malpractice for their inability to appropriately represent clients in this area.

The Evolving e-Discovery Process

Two studies highlight the urgency for lawyers to learn the evolving e-discovery process. Eric Schmidt, Google's chief executive officer, revealed an amazing statistic at the Techonomy conference in Lake Tahoe in 2010. Every two days, we create as much information as was created from the dawn of civilization up until 2003. He went on to site that the real issue is user-generated data. In 2009, technology storage giant EMC announced at its customer and partner conference findings from an IDC study that showed the digital universe is doubling every eighteen months. EMC also reported that 70 percent of the data is created by individuals, but much responsibility for managing it resides in the enterprise.

In terms of volume, this huge explosion of data is driving lawyers to increase their knowledge of the e-discovery process. Additionally, types of data now include new media content, such as video and Internet data. The evolution of technology will continue to add more data, with new devices and new technologies being incorporated into the daily lives of many people.

This rapidly expanding digital world means lawyers need to learn new skills to deal with where most of the evidence in cases is found. In many instances, electronic evidence allows a lawyer to prove his or her case or establish a defense. Consequently, it is increasingly critical for lawyers to have a deep understanding of the e-discovery process to effectively represent their clients.

Finding Out Where ESI May Be Located

Very few cases do not involve some element of e-discovery. For example, many new cars have a black box with a chip that records information about the driver's activities. Therefore, if a client is involved in an automobile accident, their car's black box would indicate the car's speed, the driver's braking actions, and other parameters with respect to what the client did at the time of the accident that could prove or disprove a case theory. Consequently, it would be important to obtain the data chip from the client's car.

It is important for lawyers to meet with their clients to find out where case-related information is created and stored. Litigation hold notices should be drafted and sent at the outset of litigation. Litigation hold notices typically include requirements about preserving data, and it is important that the notice be thorough. After litigation holds have been sent out, a common workflow involves conducting interviews (individual custodians and people involved with information technology) to identify potentially relevant data sources and data volumes.

A lawyer's client may have many different potentially relevant data locations, each of which needs to be evaluated to determine if it contains potentially responsive ESI. Clients modernize their information technology at various rates and may have different versions of technologies, which increases the burden on lawyers to understand both older and newer systems. Enterprise e-mail archiving systems are becoming more commonplace and often replace the use of personal archive folders (PSTs) in Microsoft Outlook to archive e-mails. Collaborative technologies, such as SharePoint, are another example of clients with more evolved information technology systems than those who still use file shares for document management. However, advanced information technology infrastructure does not always mean easier or less costly e-discovery, since many new enterprise technologies are initially released with minimal e-discovery functionality.

Understanding where potential ESI is located helps a lawyer evaluate ESI volumes that may need to be collected and reviewed. This information is an important step in a thoughtful e-discovery plan. Unfortunately, the next step, evaluating what the data is, creates three key challenges: analysis and review of the data (volumes, types, complexity, and privacy), proportionality issues, and education.

Data Volumes and Analysis

It is not uncommon for clients to have five or ten times more volume of data today than they had five years ago. Back then, it was not uncommon for an individual custodian to have 1 to 3 gigabytes of data in a case and for a network share to be fewer than 500 gigabytes. Today custodian collections can be as high as 5 to 10 gigabytes, and network shares can be terabytes in size. Depending on the types of data contained in a collection, a gigabyte of data can include between 30,000 and 60,000 documents that have to be put

through an e-discovery process for review and production. This explosion of data volumes means that additional processes and costs may need to be evaluated and considered when creating an e-discovery plan for a client.
The evolution of modern information technologies includes new data types that did not exist a few years ago. A lawyer must evaluate whether software as a service, video, and Internet data are potentially relevant to a matter. Both Microsoft (Office 365) and Google (Google Apps) have cloud-based applications for e-mail and document technology. Both companies recently launched archiving add-ons that support some e-discovery processes.

As a lawyer works through the identification process of ESI, it is paramount that he or she evaluates what privacy requirements may be required for any identified and preserved data. Health Insurance Portability and Accountability Act (HIPAA) laws in the United States and data privacy laws in the European Union are good examples of data that has specific privacy requirements that need to be followed throughout the e-discovery process. Lawyers must supervise and understand the privacy requirements of data to comply with data privacy laws.

Document Processing, Review, and Production

The evolution of e-discovery intersects with increased data volumes and has led to a large focus on document review. A recent study by the Rand Corporation, entitled "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery," found that 0.73 cents of every e-discovery dollar is going to document review. This staggering number creates burdens on lawyers to understand how data is processed so data sets can be reduced, and it puts added responsibility on efficiently managing document review.

Increasingly, the use of new e-discovery technology is being built into the review process. Technology-assisted review, sometimes referred to as predictive coding, is just starting to be adopted by some lawyers to minimize the costs of review. While this technology holds great promise, it has yet to be fully vetted by the courts, and a lawyer who plans on using the technology may need experts to support its use.

Proportionality

A lawyer with a case that is worth $1 million does not want to spend $750,000 doing e-discovery, as that would not be a proportional expenditure. In fact, both the bench and the bar are wrestling with the question of what is proportional in terms of e-discovery. To that end, the Federal Rules of Civil Procedure and many of the state analogs to those rules require the parties in a dispute to confer early in the litigation process—i.e., in the first 120 days or so—to fashion a discovery plan that is proportional to what is involved in the case.

Cooperation is key in this particular area, and the consequences of not doing so can be very expensive. For example, in a recent employment class action case (*Pippins v. KPMG LLP*) in the Southern District of New York, the federal court ordered preservation of 2,500 hard drives as a result of the defendants not agreeing to a sampling protocol or seeking the court's guidance early in the case. Basically, it is a good idea to put together an e-discovery plan early and be as transparent as possible about the plan with the other side. If the other side is not forthcoming or reasonable in this area, a lawyer may need to go to court to get a protective order or some other ruling that will keep the e-discovery process proportional to what is involved in the case.

The type of case also drives how to handle an e-discovery plan. For example, a lawyer who has an intellectual property case in a jurisdiction such as Delaware or the Eastern District of Texas may have a different e-discovery plan than for a product liability or class action lawsuit in another venue. Consequently, this area requires lawyers to be very nimble in terms of figuring out what kind of a case they have and what type of e-discovery strategy will allow them to discharge their duties to the court while meeting discovery obligations, and without breaking the bank.

Educating the Bench and Bar

Once inside the courtroom, it is often the responsibility of the lawyer to explain e-discovery to the bench. Lawyers need to understand and articulate how their clients' systems work or why a certain e-discovery process is

flawed or burdensome. Early cooperation and agreement on a plan is one of the best approaches for educating all parties in this regard. Courts are more receptive to education on the front end of discovery and less likely to be happily educated further downstream. Sometimes experts are needed to assist lawyers in explaining costs, burdens, privacy, and technology issues.
An emerging set of standards is helpful in educating both the bench and the bar. The Electronic Discovery Reference Model publishes a process that has become an industry standard for conducting e-discovery. It presents a model for the identification, preservation, collection, processing, analysis, review, production, and presentation of ESI.

Additionally, on its website[1], the Electronic Discovery Reference Model features about 3,000 pages of information that explain in great detail the steps in the e-discovery process, from information management to the actual presentation of e-discovery material at trial. This site can be very helpful to lawyers learning the e-discovery process.

Staying Current with e-Discovery Cases and Issues

There are many helpful resources for lawyers who want to stay up to speed in the area of e-discovery methods. For example, K&L Gates maintains a website (www.e-discoverylaw.com) with a database of some 3,000 e-discovery cases that have been decided nationwide. Many other rich resources are available on the Internet for anyone willing to take the time to read them to stay up to speed.

Many seminar providers have regular events at which e-discovery issues are discussed. Another rich resource is the Sedona Conference, which has working groups that produce significant papers on this topic. Unfortunately, until very recently, most law schools had not offered e-discovery courses—probably because most of the tenured professors are not knowledgeable in this area.

However, it is important to keep in mind that this is an area where a lawyer must be constantly learning, as this is a fast-moving field. E-discovery rulings and opinions come down with increasing frequency. In

[1] THE ELECTRONIC DISCOVERY REFERENCE MODEL, www.edrm.net.

the years to come, it is likely that the concept of e-mail will change as the growth of other social media technologies evolves, along with other important components of e-discovery. Therefore, attending continuing legal education courses will be critical for lawyers who want to stay on the right track.

Data Privacy Issues and e-Discovery Laws

HIPAA legislation in the United States requires that both specific privacy steps and process protocols be followed by clients. They must prepare and follow a HIPAA compliance policy. Servers and workstations should be secure and password-protected. Laptops should be encrypted. Among the procedures the policy needs to address is the encryption of PII/PHI (personal information) data in e-mails and documents.

All of these issues may come into play when handling ESI on a matter. Lawyers should safeguard their client's data with appropriate encryption technologies. For example, HIPAA personal information needs to be protected from most people supporting the e-discovery process and not produced without redaction.

The federal government and several states have adopted data privacy laws. Data privacy issues are increasingly a concern of clients and lawyers, and they should be addressed when conducting e-discovery. Data encryption, data protection, and response to data breaches are all subject matters a lawyer needs to be aware of. Some matters require that certain types of data breaches follow a prescribed formula for agency notifications and client remediation.

E-discovery laws differ from country to country. In the United States, evidence in relation to a person's personal life will likely be revealed in court if it is relevant to a claim or defense in the litigation matter. For example, Facebook postings, other social media content, and even text messages sent from a cell phone can be discoverable in a case. In Europe and Asia, on the other hand, there are increasing calls for more data privacy rules and regulations. It should be noted that the Internet has redefined the notion of privacy to a great extent, and now that the "genie is out of the bottle," so to speak, it will be difficult to put it back in.

It should also be noted that while the United States and United Kingdom have a common law system, the United Kingdom has different and specific e-disclosure requirements. Also, most European countries have civil law systems. In Germany, for example, there is no right to pre-trial discovery. Therefore, when it comes to litigation in general, and the e-discovery process in particular in other countries, it is important that a lawyer hire good, competent local counsel to assist with discovery and data privacy issues. For instance, France has enacted blocking statutes that prohibit French companies from complying with US discovery requests. Ultimately, when engaging in e-discovery abroad, lawyers will deal with situations that involve profound ambiguity.

To help clients navigate e-discovery regulations, lawyers must first figure out what their case entails. Again, if engaging in e-discovery in Europe, lawyers will need to deal with the data privacy regulators in the particular country where a client does business, and they will probably need to negotiate with those regulators to conduct a review in-country and minimize the amount of data that is produced. In addition, they may need to find some way to make the data anonymous in order to comply with current and proposed European Union data privacy rules.

Helping Clients Safeguard Privacy Rights

Barry Goldwater once said, "Eternal vigilance is the price of safety," and that certainly applies to the protection of a client's privacy rights in the e-discovery process. For example, it is important for clients to think through the impacts of using Facebook or Twitter prior to and during litigation, because "old sins can cast long shadows." Pictures on a Facebook account of a drunken party can be collected and used by a litigation opponent. Also, tagging pictures can open facial recognition software, which enables people to find other pictures that may be posted on the Internet. Once something is posted, it is hard to prevent it from being used as potential evidence in a case. For example, in a recent Virginia case, a lawyer told his client to take down some pictures and postings on the client's Facebook page. The client did so, and now both the client and the lawyer have been accused of destroying evidence.

Again, people need to try to separate their personal lives from their work lives, though there are places on the Internet where those lines cross—i.e.,

social media activities that are business-related, such as LinkedIn. The best advice is to keep your personal life separate from your business life if you want to protect your privacy in the ESI realm.

Important e-Discovery Issues Going Forward

Perhaps the most important e-discovery issue going forward will be attorney competence, or the lack thereof. Lawyers need to meet the challenge of understanding what is going on in the e-discovery field.
To that end, we will likely see more online courses that offer innovative ways of teaching e-discovery methods and certifications provided by various organizations. Essentially, alternative educational sources are rushing to meet the educational gap that academia has not traditionally fulfilled, largely because there is such a critical need for this type of education. A variety of organizations offer seminars and webinars on these topics, and such programs provide a good way for people who are just entering the industry to obtain some basic knowledge.

There is a concomitant need for judicial education regarding e-discovery issues and methods. Unfortunately, at this time very few resources for judicial education exist, and most judges got their law licenses long before these huge changes in technology overtook the practice of law. Therefore, just as the vast majority of lawyers struggle with these issues, so do the judges who hear these cases. Currently, federal courts do a much better job than state courts of educating their judges in this area, as most states lack significant resources for judicial training. Until there is a judiciary that is well educated on these topics, practicing lawyers are obligated to be able to explain to judges the potential consequences of a decision. Ultimately, both lawyers and judges need to understand these issues if we are going to have a court system that truly allows for effective and cost-effective dispute resolution.

Conclusion

There is no doubt that the continued growth of electronic information will put increasing demands and pressures on lawyers who must deal with ESI and e-discovery. Staying up to date on technology in general, what clients

are using in particular, and what the judiciary is doing with respect to case rulings and new statutes are all key elements for a lawyer to effectively provide competent and diligent counsel.

The e-discovery process will continue to evolve to address the changes discussed in this chapter. Continuous learning is available and is a must for lawyers who want to stay current in the industry. Attending conferences, participating in e-learning webinars, and joining e-discovery learning organizations are all methods for practicing lawyers to educate themselves and their colleagues about staying up to speed with changes in e-discovery.

Key Takeaways

- Keep in mind that it is your duty to supervise subordinate lawyers and any third parties you may utilize in the e-discovery process. The consequences of not supervising those individuals may be a malpractice charge.
- Hire a good, competent local counsel to guide you through the data privacy issues you will encounter when engaging in e-discovery in other countries. Negotiate with the data privacy regulators in the country where your client does business in order to conduct a review in-country and minimize the amount of data that is produced.
- Impose a written litigation hold at the outset of litigation. Failing to do so may cause you to lose your case before you have even filed it. Also, lawyers can get into serious trouble by not informing their clients of their litigation hold requirements.
- Put together an e-discovery plan early on, and be transparent with the other side as to what you intend to do. If the other side is not forthcoming or reasonable in this area, you may need to go to court to get a protective order that will keep the e-discovery process proportional to what is involved in the case.
- Stay current and educated on issues in this area by taking continuing legal education courses, reading blogs, attending webinars and seminars, and meeting with other lawyers who specialize in this field.

Related Resources

Cases

- *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).
- *Pension Comm.e of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D. N.Y. 2010). *Moore v. Publicis Groupe*, 11 CIV. 1279 ALC AJP, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012), *adopted sub nom. Moore v. Publicis Groupe SA*, 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).
- *Pippins v. KPMG LLP*, 279 F.R.D. 245, 247 (S.D.N.Y. 2012).

Internet Resources

- ELECTRONIC DISCOVERY REFERENCE MODEL, http://www.edrm.net/
- SEDONA CONFERENCE, https://thesedonaconference.org/
- K&L GATES E-DISCOVERY CASE DATABASE, http://www.ediscoverylaw.com/

Richard Finkelman *is a director and e-discovery practice leader at Berkeley Research Group, LLC. He brings more than twenty-five years of experience helping clients manage information in litigation, regulatory, and business matters. His experience includes assisting clients with all aspects of litigation support in complex matters, ranging from securities class actions to intellectual property disputes to high-profile regulatory matters.*

As a consultant, Mr. Finkelman has advised clients on matter-specific identification, preservation, collection, processing, hosting, review, and production of electronically stored information. He has also served as a 30(b)(6) witness for companies on complex matters and is a regular speaker on e-discovery topics at industry conferences and seminars. His clients have included global corporations from technology, retail, automotive, transportation, insurance, finance, and construction industries.

Mr. Finkelman regularly works with clients to help them assess, select, and implement technology to support the legal and compliance needs of companies. He has worked on projects

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Mr. Marean is co-author of the 2010 edition of Electronic Discovery and Records Management Guide: Rules, Checklists, and Forms*, published by West, and* Conducting Discovery in an Electronic World: Electronic Data and Discovery*, published by California Civil Discovery Practice. He has been named a San Diego "Super Lawyer."*

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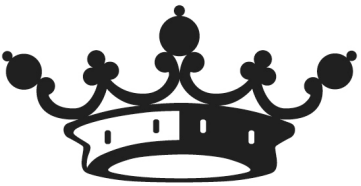

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