



HOW TO LEVEL YOUR E-DISCOVERY PLAYING FIELD

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It is not an exaggeration to say that most lawyers are uncomfortable talking about electronic evidence and E-discovery. This is so because most lawyers are “word people”, and computers deal with numbers; lots of bits and bytes and other incomprehensible technical concepts wrapped in a technical jargon that appears to be created specifically to obscure meaning and understanding rather than enhance it. Sound familiar?

There is no avoiding the fact that information technology (IT) represents a separate discipline, complex and technical, requiring knowledge, experience, and skill quite different from that found in the legal profession. Up until now, lawyers have attempted to avoid IT with some success. However, the development of technology has now intersected with the application of law at the “e-discovery crossroads” to create an environment of fundamental and unpleasant change for some lawyers and an opportunity for others.

Similar to other unpleasant developments, some lawyers have just refused to acknowledge the change and continue to operate as if it was not occurring. However, their professional and ethical obligations, case law outlining severe sanctions for non compliance, and the realization that with 95% of all corporate data being created is in electronic format, has caused even the most recalcitrant lawyer to conclude that he/she needs to take e-discovery seriously.

Professional and Ethical Obligations

Rule 1.1 of the ABA Model Rules of Professional Conduct states that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 26(g) of the FRCP requires counsel to obtain a level of familiarity with the client’s data retention systems after a “reasonable inquiry” so as to effectively define, locate and preserve all information potentially relevant to the claims and defenses presented in each case. This requires knowledge of how the client’s system creates and stores information, how that information can be lost or deleted, how accessible the information is, and specifically where potentially relevant information is stored.

Recently, the court in Mancia v. Mayflower Textile Services Co., 2008 WL 4595275 (D. MD Oct. 15, 2008) chided both plaintiff and defense counsel for their failure to conduct “reasonable inquiries” into ESI prior to certifying their discovery requests and responses.

Many district courts, (like the U.S. District Court, Western District of Pennsylvania) have adopted new local rules explicitly referring to a “duty to investigate” (Rule 26.2) the client’s ESI in order to discuss how the ESI (electronically stored information) “can be preserved, accessed, retrieved, and produced”.

ABA Model Rule 3.4 further clarifies counsel’s obligation to preserve and produce all potentially relevant and responsive ESI by stating that “a lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potentially evidentiary value. A lawyer shall not counsel or assist another person to do any such act... [Model Rule 3.4(a)]. In pretrial procedure, a lawyer shall not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party [Model Rule 3.4(d)].

It’s clear that a thorough knowledge of e-discovery is required for competent and ethical representation. If you have any doubt about this assertion, please take the time to read Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), where after severe and expensive sanctions were ordered for their client, six lawyers were personally sanctioned by the court for their role in mishandling e-discovery (one of whom graduated from a Pittsburgh law school).

In addition to the personal liability for e-discovery shortcomings, there are a broad range of sanctions that the courts have not hesitated to invoke against clients for e-discovery shortcomings; from extending the discovery period or barring certain evidence or testimony at trial for minor infractions involving ordinary negligence, to granting adverse inferences and judgments against a party for infractions involving gross negligence or deliberate evidence spoliation. In at least one instance, criminal charges have been filed for the deliberate destruction of electronic evidence.

For all these reasons, e-discovery competence has become a professional and ethical requirement.

If this is a skill that you currently lack, let's take a moment to review your options. One, you can go back to school to acquire an advanced degree in computer science from CMU, OR, you can augment the skill on your litigation team through the aid of an E-Discovery Counsel, an attorney with legal and technical experience and skill who limits his/her practice to law relating to electronic evidence and e-discovery.

Responsibilities and Value of an E-Discovery Counsel

Key responsibilities of E-Discovery counsel include, but are not limited to:

Advise on the proper timing and execution of electronic evidence preservation and collection of potentially relevant data when duty to preserve arises.

Assist with the creation and issuance of the litigation hold, including training, response and tracking compliance.

Advocating on behalf of clients prior to, during and after the Rule 26(f) "meet & confer" conference

Conduct 30(b)(6) depositions of IT personnel and others to determine where network data resides, how it can be accessed, if it is accessible or inaccessible, and in what format it should be produced

Assist in the preparation of discovery requests and responses

Write specific, targeted, document requests after performing a "reasonable inquiry"

Seek cost estimates of proposed document requests

Advise/counsel on issues related to the review and production.

Provide trial support, as required.

As you know, in litigation a competitive edge may mean the difference between success and failure. If you are going up against a firm that has access to an internal E-Discovery Counsel and you don't, you may want to "level the e-discovery playing field" by adding an E-Discovery Counsel to your legal team, especially at the front end of the process.

As the notes accompanying the new FRCP explain, the key to successfully addressing e-discovery issues is prior preparation on the part of counsel and their clients, and adept negotiation of e-discovery issues with opposing counsel before, during, and after the Rule 26(f) "meet & confer".

With adequate preparation and competent representation, the vast majority of e-discovery issues can be addressed in the early stages of a matter saving time, money and potential embarrassment and/or court sanctions. Smart litigators and the courts both recognize that litigation costs and court dockets can be reduced if e-discovery disputes are identified and resolved by the litigants "up front".

For those instances where agreement on critical e-discovery issues can't be reached early, the extent and depth of the disagreements identified during competently executed "meet & confer" deliberations, provides critical information necessary to assess risks, costs and develop case strategy.

Having an experienced E-Discovery Counsel involved "early on" will help prevent errors that could result in costly mistakes or court sanctions, making the investment not only a reasonable and prudent expense, but a great value.

Conclusion

Some large firms who you may come up against may have created E-Discovery practices within their firm who are providing competent assistance in this important new area. If so, you may be working at a competitive disadvantage. E-Discovery has become critical to litigation success. To understand where electronic evidence resides within large corporate networks, you need to determine the applications and the devices where it resides, determine if it's "accessible" or "inaccessible" due to undue burden and cost, determine how to successfully request it, and determine the format in which it should be produced. To do all this you need a lawyer who knows IT and evolving e-discovery law and can help you "get at" the critical electronic evidence that you need. This is the value of the E-Discovery Counsel.

As you know, winning your case is hard work. Don't let e-discovery tilt the field against you. Level it..... or it may level you.

In the next edition of *The Advocate*, we'll look at Part II of this E-Discovery Series, "The Rule 26(f) "Meet & Confer": Six Issues That You Need to be Prepared to Discuss".

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