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Mainstream use of e-discovery calls for some clarity on the rules

By J. Stott Matthews

For litigators, in-house counsel, and paralegals, the legal landscape is changing in dramatic ways. A variety of factors and new court rules governing electronic discovery are forcing many attorneys to change the way they are practicing law and how to properly advise their clients.

For many attorneys and paralegals, these changes are completely new to their repertoire and involve one area in particular: discovery. More specifically, electronic discovery and computer forensics.

Once the change from strictly paper-based discovery began to finally gain momentum within the past few years, the interest in gaining a better command of e-discovery began to take shape. However, leveraging the potentially significant benefits of digital-discovery (e-discovery or computer forensics) was rarely pursued for numerous reasons.

First, there was the expense, with only some of the larger class-action suits utilizing this seemingly high-tech solution to the discovery process. Secondly, there was a general lack of familiarity with the process. Some of this was unique to Michigan with its limitations on certain types of litigation.

Other factors included simple risk aversion in terms of trying something new, untested, and unfamiliar. For others, there was the issue of leaving ones comfort zone and sailing untested waters.

Regardless of the reasons for not employing e-discovery or computer forensics, there was the basic fact that it simply was not required by the law. Certainly case law was setting some very key precedents in recent years in the e-discovery space, but that still left many jurisdictions in the clear.

However, in December 2006, the significant changes in the Federal Rules of Civil Procedure (FRCP) did appear to usher in a new level of electronic discovery. Its impact perhaps distills into two important elements:

- More effort will be required by all parties to identify the universe of discoverable data (and define its level of accessibility into two categories).
- Much more effort will be required in terms of data retention and data destruction, to limit to the greatest extent possible any claims of spoliation. Spoliation will continue to be a primary concern for all litigants and continue to make and break cases, unless adroitly managed.

With these changes at the Federal level, momentum to gain mastery, if not a modicum, of understanding of e-discovery did finally begin to take hold. Law firms began creating electronic-discovery teams, staffed with litigators and paralegals, and sometimes included the input of outside e-discovery experts.

E-discovery was not the only new facet of the digital-discovery landscape, as the need for hybrid cases – those with both an electronic-discovery component as well as a computer-forensics component – began to punctuate more of the cases that appeared before our courts.

For litigators and their paralegals, getting in front of what can become a very large, complex, and potentially expensive snowball can be a very significant challenge, notwithstanding the best efforts of both groups. The daunting nature of identifying a vendor that can provide both of these services further complicates their challenge in some circumstances.

With all the changes, challenges, and emerging rules to discovery, paralegals and attorneys have become frustrated by the lack of clarity into the process and requirements for satisfying the rules and ensuring a successful engagement.

Revision to the FRCP: Much Ado about Nothing?

When the FRCP were amended in December of 2006, the changes sought to make much more explicit and detailed what should occur in the discovery phase of any type of litigation. When reading through the revised language itself, certainly many in the e-discovery community believed it would result in a significant change in the use and application of electronic data in litigation. That simply was not to be the case.

As with other aspects of the legal community, change sometimes comes very slowly and those embodied in the revised FRCP were no different. With its "Meet and Confer" requirements and its most critical requirement that discovery include data stored on computer and electronic systems, the revision requires that either the paralegal or litigator gain some knowledge of what such discovery entails.

With these new rules, it is clear there was some fear from paralegals and litigators alike that they suddenly needed to become proficient in computers, systems, email, and email recovery, and myriad of similar electronic and digital media.

Certainly it is not necessary to become completely versed in the inner workings of electronic discovery, but as in all commercial transactions, the more knowledgeable the buyer, the better the discovery-service buy is likely to be. Often times simply understanding the basic steps will help ensure a better result.

Though slow to develop, the reaction to the revisions have been significant and are impacting how clients are managing their cases. Perhaps the biggest change relates to the retention of an organization's electronic documents. With *Zubulake v Warburg*, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y., Oct. 22, 2003), and other federal cases showing the po-

tential consequences of poor data-retention policies and the implications of complacent outside counsel, more and more attorneys are working with their clients (and outside discovery providers) to archive key data once litigation appears to be or is likely to be in play.

Other Complicating Factors

Apart from the not insignificant issues of identifying competent vendors, computer forensics specialists are now required to become licensed professsional investigators under PA 146 (2008). However, there are no requirements for a PI to have any computer training to conduct computer-forensic investigations, the law does require computer-forensics types to be a PI.

Without getting into the details of this contradiction, this law does add complexity to the process of identifying a vendor that meets the requirements set forth in the legislation. This is potentially even true in regards to simply collecting data on a large scale, something few if any traditional PI entities are capable of entertaining.

Despite all the potential complications in the realm of digital discovery, fortunately for all parties in need of support and direction, excellent resources do exist.

Apart from being a key driver in the revisions that were incorporated into the revised FRCP, the Sedona Conference is an invaluable source of information pertaining to e-discovery.

With PDF files on a range of e-discovery topics available for download (add link), this resource alone will provide the litigator and paralegal alike with excellent resource materials. It even has a pro-forma RFQ package designed to assist in the selection of an e-discovery vendor.

Though overkill for all but the most massive discovery engagements, it nonetheless provides some of the areas a paralegal buyer should understand when looking to engage such services.

Though the demands of billable hours and the crush of caseloads limit the amount of available time a litigator has for investments in many CLE-type pursuits, paralegals generally do not face similar demands on their time. More importantly, in comparison to a litigator, it is a paralegal's charge to stay abreast of changes in the discovery space.

There are a variety of organizations that support such an objective, but a recent addition is the Michigan chapter of the Association of Litigation Support Professionals (ALSP). As their Website says, "The ALSP Michigan Chapter invites litigation support professionals from throughout the state to join this new community of industry professionals."

Its mission "…is dedicated to establishing global professional standards for the litigation support profession through collaboration, education and certification."

With the continuing evolution in electronic discovery, legally, technically and legislatively, legal assistants and paralegals have a critical part to play in this part of the litigation process. The more knowledgeable they become, the more they can help their litigators avoid expensive errors or omissions.

Also, as case law continues to highlight the various faults in the discovery process, an increased sense of what is important will help them add additional value in their litigation-support efforts.

Electronic discovery and computer forensics will be an increasing fixture in the process of litigation and pre-litigation. The pervasiveness of technology in all aspects of our professional and personal lives guarantees this.

However, gone are the days when only large and very expensive national firms are the sole players in the marketplace. There are many regional and local providers capable of providing solutions for all but the most large, multi-national cases.

This is great news for the paralegals, attorneys, and general counsel who must navigate this critical and increasingly integral part of their professions.

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