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A-Z on E-Discovery: What Does the Future Hold?

The Evolution and Explosion of the Information Superhighway Continues in 2012

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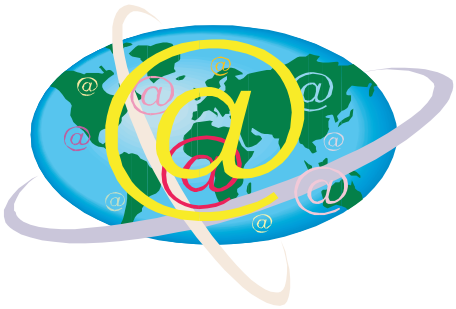
E-discovery is a $20 billion industry that is growing exponentially. It has become a staple of American civil litigation — the most expensive and time-consuming part of pretrial practice.

Given the volume of emails alone (more than 3 billion U.S. business emails daily); that 90 percent of all documents generated are electronic; and that a single hard drive has a storage equivalency of 40 million pages, e-discovery is the proverbial "Pandora's box" that U.S. District Judge Lee H. Rosenthal of the Southern District of Texas so aptly described in her summer 2010 article in *The Advocate*. Rosenthal chronicled the state of affairs: "Is e-discovery working? Yes (most cases); In every case? No; Systemic Failure? No; Perception of a larger failure? Yes (to some extent). . . ."

In the same edition of *The Advocate*, Texas Supreme Court Justice Nathan Hecht projected that "with e-discovery on the increase, the time may have come to revisit Rule 196.4 [of the Texas Rules of Civil Procedure]. Many groups continue to formulate best practices and guidelines, some of which might find their place in the rules."

With continued reliance on e-discovery forecasted, activity and debate are pervasive — congressional hearings, model rules and orders, and pilot programs, as well as scrutiny by the Judicial Conference Committee on Rules of Practice and Procedure, the Federal Judicial Center, the American Bar Association, the American College of Trial Lawyers, and the Institute for the Advancement of the American Legal System, among others. Social media and gadgets such as instant messages, texts (3.5 billion U.S. text messages), cell phones (4.5 billion subscriptions worldwide), Twitter (2 million daily), Facebook (800 million subscribers) and YouTube bring another dimension to the e-discovery universe. Professor Daniel Solove from George Washington University Law School points out what parties have seen played out in court: Access to this "permanent chronicle of people's lives" can be a game-changer in litigation.



Counsel should be aware that trends in 2012 show increased judicial involvement in e-discovery management, advocacy for cooperation and proportionality in the desire for reasonable and cost-effective discovery, concerns regarding the ethics and logistics of cloud computing, and unknown ramifications of the social media boom nationally and internationally.

- *The amendments debate continues:* The distinctive features of e-discovery (volume, broad dispersal, difficulty of review and preservation) necessitated the 2006 Amendments to the Federal Rules of Civil Procedure. On the fifth anniversary of the passage of the amendments, their import is evident as the national debate on the parameters and cost of e-discovery continues. At congressional hearings in December 2011, corporate America advocated for preservation rule reform, with clarification regarding what events trigger the duty to preserve, the scope of preservation and the standards for spoliation sanctions. Conversely, others suggested that a change in the rules would be premature because not enough time has passed to effectively test the amendments. They advocate the status quo or limited change, if any. There's clearly more to come — the Advisory Committee meets again in early 2012.

Across the country, creative e-discovery solutions such as recommended protocols, pilot programs and model orders abound. At the September 2011 Eastern District of Texas Bench Bar Conference, Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit introduced the Model Order Regarding E-Discovery in Patent Cases to "streamline e-discovery, particularly email production, and require litigants to focus on the proper purpose of discovery — the gathering of material information — rather than on unlimited fishing expeditions." Rader identified what other courts and commentators have honed in on — that the first inquiry regarding such discovery should be relevance, not cost.

In November 2011, the Southern District of New York implemented a Pilot Program for Complex Cases including the Joint Electronic Discovery Submission requiring parties to confer regarding preservation; search and review protocols; potential sources of electronically stored information (ESI); forms of production; limitations on production (including identity of custodians, potential date ranges and timing of production); inadvertent production; and cost allocation. Other jurisdictions have followed suit with revised rules and model orders.

- *Cooperation mantra (confer, compromise and cost):* The Sedona Conference Cooperation Proclamation serves as a paradigm dialogue in the ESI discovery realm. Its authors note that, in the face of data deluge, "all stakeholders in the system — judges, lawyers, clients, and the general public" benefit from the

creation and implementation of "a culture of cooperation." Rosenthal and others have called for "sensible and creative protocols," with proportionality as "the gold standard," and judges "managing, staging and tailoring" discovery. Accordingly, stipulations on standard file production format, a procedure for identifying ESI custodians and a procedure for identifying ESI search terms increasingly are the norm for streamlining production, process and cost.

• *Dark data (metadata, etc.):* According to the Sedona Conference Glossary, metadata describes "how, when, and by whom ESI was collected, created, accessed, modified, and how it is formatted." Although the 2006 Amendments to the Federal Rules of Civil Procedure do not directly address metadata, district courts have held that where the information is relevant and not privileged, metadata generally is discoverable.

Texas was the first state to adopt a rule tailored to ESI. Texas Rule of Civil Procedure 196.4 predated the 2006 Amendments by seven years and requires that "the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced."

With alarming ease, electronic discovery transcends traditional geographic borders.

Today, parties regularly include metadata in their laundry list of requested ESI items. Because metadata potentially contains valuable information, the timing and scope of its production usually is a topic of discussion. Parties may want to stipulate to timing and parameters of native format production to avoid unnecessary costs. Otherwise, the metadata "discussion" easily can devolve into a laborious and expensive endeavor that necessarily involves the court.

• *Electronic information and e-discovery ethical considerations:* Failure to properly preserve, manage and produce electronic information can result in ethical consequences for the lawyer, as well as monetary sanctions and devastating spoliation instructions against the client at trial. Notably, the ABA's Commission on Ethics 20/20 Working Group on the Implications of New Technologies is examining technology's impact on the legal profession and is expecting to publish its findings in 2012. New technologies, such as cloud computing, raise concerns about confidentiality and privacy because data storage is controlled by third parties. An often-asked question is, "Does cloud computing reduce protections against discovery of the data by third parties?" The answer is "no." At least three states recently have issued new and proposed ethics opinions that cloud computing is perfectly ethical *if* lawyers take the appropriate precautions to safeguard their data.

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• *The international terrain:* The authors of The Sedona Conference International Principles on Discovery, Disclosure & Data Protection highlight the e-discovery challenges ahead: "Today, an employee from a Toronto company can conduct business from a cafe in Paris, while sending electronic messages to customers in Dubai that attach documents from 'cloud' servers located in Singapore, Dallas, and Amsterdam." This "new 'flat world,' " the authors suggest, generates conflicts where a party is obligated to disclose information in a U.S. forum, but that information is located outside the United States and is shielded by a data-protection law prohibiting its disclosure. The next horizon in e-discovery is this cross-border conundrum, with those affected seeking meaningful dialogue and solutions for data protection, privacy and discovery when multiple countries are involved.

With alarming ease, electronic discovery transcends traditional geographic borders. In this global e-discovery arena, lawyers and their clients would be wise to research how U.S. preservation and discovery obligations intersect with foreign countries' data protection laws.

• *Privilege:* Because the likelihood of inadvertent production of privileged information greatly increases with the magnitude of electronic information generated, privilege considerations are paramount when responding to e-discovery requests. Meticulous review of electronically stored information (ESI), which often requires the expenditure of great amounts of time and money to avoid risk of waiver of privileges, may delay the discovery process.

Predictably, there has been much dialogue on the subject of post-production claims of privilege by the responding party and use of agreements such as the "open peek" (parties agree to an "open file" review of each other's data collections prior to formal discovery while reserving rights to assert privilege when responding to the actual document request) and the "clawback" or "snap back" (parties agree to protect against waiver of privilege, including work product due to inadvertent production of documents or data).

In *Oracle v. Google*, a 2011 federal case out of the Northern District of California, Google fought relentlessly to protect as privileged an email from its engineer Tim Lindholm to a vice president at Oracle and all drafts of the email, including a draft that Oracle had received by mistake and disclosed. As a result of the now famous "Lindholm email," a question emerges: Are draft emails discoverable, especially if they have not been shared with anyone? There is no real answer to this question yet. However, one thing *is* clear according to e-discovery blogger Venkat Rangan in his December 2011 post: "Google and its legal team would have been well-served by email analytical software that can isolate drafts and offer them for removal from production. Also, using a capability such as Near Duplicate Identification would have identified these drafts as similar to the final ones that were marked as privileged."

Taking steps such as these regarding emails that arguably are privileged will help protect against inadvertent production of draft emails and allow the parties to frame their argument to the court before production, rather than having to respond after the damage already has been done.

• *Proportionality:* Proportionality, which requires that the benefits of discovery be in line with the burdens associated with such discovery, is considered by practitioners, academicians and the judiciary to be equally as important as cooperation. Some argue that an amended federal rule should be implemented to mandate proportionality in e-discovery.

Utah has established a blueprint for proportionality by requiring that the discovery be reasonable and "expressly comply with the general cost cutting mandate of Federal Rule of Civil Procedure 1." Accordingly, it must be based on the amount in controversy, the parties' resources, and the complexity and

relevance of the issues. Significantly, Utah Rule of Civil Procedure 26(b)(3) shifts the burden of demonstrating proportionality from the responding party under Federal Rules of Civil Procedure 26(b)(2) and 26(c) to the party seeking discovery.

Utah's proportionality mandate is consistent with the new Federal Circuit Model Order on E-Discovery in Patent Cases that incorporates tiered and extraordinary constraints on discovery of ESI. Indicative of the import of proportionality to the judiciary, a new publication called *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary* is dedicated to "assembl[ing] and promot[ing] a variety of proven judicial management tools" and is part of a larger effort to create an "interactive website for judges to view, comment on, and contribute to over time."

• *Social media:* Online social networks and blogs are an increasing facet of everyday life. As a result, it is inevitable that social media information will become commonly requested in civil cases. To this point, Dean Gonsowski, VP eDiscovery Services for Clearwell Systems, notes in a December 2011 post on the e-discovery 2.0 blog that "while email has been the eDiscovery darling for the past decade, it is getting a little long in the tooth."

Courts too have joined in the "cultural tsunami" of social media, a term utilized by e-discovery commentators. The Pennsylvania Supreme Court established a Twitter feed to "increase online access to its rulings," and we predict others will follow.

With more than 800 million users collectively spending 7 billion minutes a day on Facebook, information on such social network sites can be instrumental in litigation and could be outcome-determinative. Those seeking discovery of this information, however, face the hurdles of potential lack of access to metadata as well as the protections afforded by the Stored Communication Act (SCA), which protects the privacy of Internet users by prohibiting Internet service providers from generally disclosing the contents of electronic communications while in storage by that service.

Courts have been inconsistent regarding the applicability of the SCA to social networks and the discoverability of such information. Some courts, under the premise that such information is public because it is disclosed to third parties, have ignored the SCA and allowed broad production of a party's entire social network site without requiring specific requests narrowly tailored to the case. Other courts have applied the SCA, yet also have required that some portions of the social network site be produced. In his March 2011 article in the *Harvard Journal of Law & Technology,* Ryan Ward voiced the concerns of e-discovery analysts when he criticized broad production and proffered the following approach to judges dealing with requests for discovery of social network sites: Apply the Rules of Civil Procedure and then apply the SCA. Ward correctly observes, however, that "most courts seem to reverse the steps, addressing a party's SCA arguments before determining whether the request is overbroad or unlikely to produce admissible evidence." A recurring theme exists: With the volume and breadth of ESI, courts need to be careful to evaluate relevance *before* privacy and cost considerations.

As social network requests become more common in civil cases, understanding how courts are analyzing these issues is crucial. Arguments regarding expectations of privacy (distinctions between public and private profiles) as well as authentication of digital information (threshold generally quite low) are central to these e-discovery disputes. Company data retention policies and litigation holds also are impacted by social networking in the workplace, such as company fan pages, employee instant messages and employee-specific social networking pages.

• Zubulake *Revisited and* Rimkus: Two key cases articulate the methodology courts have utilized in deciding whether to impose sanctions for spoliation of evidence. In *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities LLC, et al.*, subtitled "*Zubulake* Revisited: Six Years Later," Judge Shira Scheindlin of the Southern District of New York detailed the analysis to be conducted for imposing severe sanctions for discovery failures. In *Rimkus Consulting Group Inc. v. Cammarata*, Judge Lee H. Rosenthal of the Southern District of Texas adopted a different approach for determining when to impose sanctions for failure to preserve electronic information.

Despite their different approaches, both courts emphasized the necessity of issuing timely and comprehensive written litigation holds. In *Rimkus*, Rosenthal required a showing of *bad faith* before imposing severe sanctions while the standard applied by Scheindlin in *Pension Committee* was *gross negligence* or *willful behavior*. Some jurisdictions follow the Rosenthal approach, while others adopt the Scheindlin standard.

What does all this mean for parties worried about exposure to a spoliation instruction? Scheindlin candidly admits that there is no one test for determining whether to award sanctions because it is an "inherently subjective" and "fact intensive" decision that must be based on judicial experience.

In an October 2007 *Fordham Law Review* article, Rosenthal expertly foreshadowed the ever-growing complications and challenges of e-discovery when she commented, "I no longer think of the world as divided into plaintiffs or defendants; it is data requesters versus data producers. At some point in our lives we are all — and increasingly so — data producers." Indeed, the amount of data created and stored increases tenfold every five years. According to an IDC White Paper, "The Diverse and Exploding Digital Universe — An Updated Forecast of Worldwide Information Growth Through 2011," the number of bits stored already exceeds the estimated number of stars in the universe.

Litigation in the 21st century, particularly e-discovery, has been the subject of vigorous substantive debate and detailed study. Opinions are pointed and varied as to the state of litigation and whether systemic reform truly is needed. Undoubtedly, e-discovery is the information highway most traveled.

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