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Hot Topics and Recent Court Decisions in E-Discovery

By Zachary G. Newman – June 20, 2012

From in-house servers to hard drives to flash drives to cloud computing and remote servers, there is an astounding amount of storage repositories and devices available to conduct discovery. Information is not limited to computers or backup tapes any longer as material information is now stored on smart phones, tablets, laptops, blogs, and even social media. *See VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 42, 939 N.Y.S.2d 321 (N.Y. App. Div. 1st Dep't 2012).

The plethora of available electronically stored information (ESI) can be daunting, and courts are becoming increasingly progressive in granting discovery orders revolving around electronic information and even social media. *See, e.g., People v. Malcom Harris*, 2012 N.Y.Slip Op. 22109, 2012 WL1381238 (N.Y. Crim. Ct. Apr. 20, 2012) (upholding the district attorney's subpoena on the Twitter account of the defendant alleged to have participated in a protest march). These decisions and the complexities of e-discovery have caused the process to be both unpredictable in terms of costs and difficult to balance with the amounts actually in dispute in the litigation.

Advice and a Report Card

"Broad discovery is an important tool for the litigant. . . ." *WWP, Inc. v. Wounded Warriors Family Support, Inc.,* 628 F.3d 1032, 1039 (8th Cir. 2011) (citing Fed. R. Civ. P. 26(b)(1)). When used with electronic information, however, this tool has spawned expensive discovery quests that are dominating litigation budgets. E-discovery has evolved into a very expensive endeavor, spawning a cottage industry of products, technology, and vendors, all claiming superiority in proficiency and accuracy to search, collect, and produce ESI. But do clients care about the technology or the impact e-discovery is having on their business operations and litigation costs? The answer is a resounding yes.

We surveyed a number of in-house counsel in the banking, insurance, real estate, and investment industries to gauge their experiences and views toward e-discovery. Surprisingly, most of them reported being dissatisfied with the manner in which e-discovery is managed and the lack of sophistication at their outside law firms with respect to e-discovery. One reported that outside counsel generally fails to appreciate and understand the burden e-discovery places on the business, recommending that outside law firms should offer their in-house information technology staff whenever possible to ease the burden.

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A general counsel in the banking industry responded that "most outside counsel could do a better job of managing e-discovery by understanding the systems and data stores of their clients, so that they can better advise in all phases of e-discovery." Our survey participants consistently recommend that outside lawyers should be more conversant in basic IT skills relating to their litigation-management systems and general principles concerning networks and data, as in-house counsel usually has, at a minimum, a basic understanding of these systems.

A senior litigation counsel at a global insurance company succinctly commented that "outside counsel [generally do not] understand how costly preserving or restoring backup tapes can be and often promises the court the delivery of documents on a schedule that is unrealistic." Counsel noted that the outside firms "need to be a little more proactive in understanding the client's 'pain points' and 'wish lists' when it comes to e-discovery and more forceful in arguing them." Our in-house counsel reminds outside lawyers that the business units do not "bill for time spent assisting Legal and outside counsel with discovery, so outside counsel need to think creatively sometimes to help streamline and facilitate [the e-discovery process]."

Outside firms also need to be acutely aware of the growing displeasure in-house counsel have with the rising costs of e-discovery and the inability to accurately budget those costs within the context of pending litigation. In fact, FTI just published a comprehensive survey based on interviews with 31 in-house counsel with e-discovery responsibilities, most of whom work at Fortune 1000 companies. The survey found that 94 percent of respondents found the cost of e-discovery "frustrating." *New Study Says Cost Is Most Frustrating Factor in E-Discovery*, InsideCounsel, Feb. 9, 2012.

Accordingly, outside firms are well advised to understand the impact of e-discovery on their business clients and to stay abreast of information technology and the constantly evolving state of the law concerning e-discovery.

Recent Developments

Courts are becoming increasingly sophisticated in addressing and resolving e-discovery disputes, which are yielding diverse and, in some instances, punitive results. Therefore, litigants must strive to avoid e-discovery failures, which can materially increase costs and potentially damage the client's credibility before the court. Discovery failures also may result in time-consuming motion practice that can result in cost-shifting rulings, adverse inferences, and sanctions.

Recent decisions suggest that litigants continue to fail to appreciate the seriousness and urgency of preserving e-discovery and imposing effective litigation holds. Companies and their counsel continue to fail to implement and monitor the protocols. This very issue caused Delta Airlines anguish in *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 2012 U.S. Dist. LEXIS 13462, 9-10 (N.D. Ga. Feb. 3, 2012). The Georgia federal court imposed sanctions under FRCP Rules 26(g) and 37 after Delta failed to produce responsive ESI. Delta's failures stemmed from a failure to implement the litigation hold as several key emails were deleted due to regularly scheduled maintenance and backup-tape overwriting. Delta also was found to have exhibited poor

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collection protocols by failing to realize that several drives, which were preserved, were not made available to the adversary.

The same transgression resulted in an adverse inference against the defendant in *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 93 A.D.3d 33, 939 N.Y.S.2d 321, 327–28 (N.Y. App. Div. 1st Dep't 2012). EchoStar failed to implement a litigation hold as soon as it became reasonably likely that the parties were heading toward litigation, and EchoStar lost a series of material emails as a result of its routine deletion policy.The New York appellate court concluded that an adverse inference was warranted because "EchoStar's spoliation of electronic evidence was the result of gross negligence at the very least."

Failing to meet e-discovery obligations can result in a court order permitting the requesting party access to the recalcitrant party's ESI, thereby divesting counsel of control over its own discovery production. While courts are generally reluctant to give counsel the keys to the adversary's citadel, this remedy is being considered more often to address deficient preservation, collection, and production protocols.

In the recent decision, *Jensen v. eClinical Works, LLC*, 29 Mass. L. Rep. 380 (Mass. Super. Ct. Jan. 26, 2012), the court, apparently disgusted with the defendant's lack of candor and failure to disclose, allowed the plaintiff's discovery vendor to conduct an on-site visit to determine what should be searched for responsive information and shifted discovery costs to the defendant, despite the limited damages being sought. Although the defendant's affidavit had attested to full production, the plaintiff found a number of publicly available sources of information showing complaints about the performance of the software, and argued that there must have been additional documents associated with the performance problems that were not produced.

A failure to preserve ESI may also permit the requesting party to take detailed discovery about collection and preservation methods. In *Cannata v. Wyndham Worldwide Corp.*, 2011 U.S. Dist. LEXIS 133061 (D.Nev. Nov. 17, 2011), after a failed Rule 30(b)(6) deposition of Wyndham's director of corporate compliance regarding ESI, the court noted that the actual litigation hold itself was not discoverable, but then held that the details surrounding the litigation hold were indeed discoverable, and required Wyndham to disclose information surrounding the litigation hold, including who received the hold and what kinds and categories of ESI were identified.

A request for a party to be given access to an adversary's ESI is not routine. *MPCA King of Spades v. T.E.C. 2 Broad. Inc.*, No. 1:11cv00080, 2012 U.S. Dist. LEXIS 50162 (W.D. Va. Apr. 10, 2012). The *MPCA* court noted that the request was appropriately made given "defendants' purposeful failure to retain" information "in an easily accessible format, a failure that continued after the . . . litigation and after specific discovery requests for the information [are] discarded." *See also Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist. LEXIS 48551, 2006 WL 1851243, at *3 (W.D. Mich. June 30, 2006) (imaging of an opponent's computer hard drive is not to be routinely granted under Fed. R. Civ. P. 34, but may be justified if the court finds inadequate production responses or deleted relevant material).

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What Is Counsel's Obligation?
A number of recent decisions have focused on the counsel's responsibility when complying with e-discovery demands. The issue is whether counsel's delegation to its client to preserve, assemble, and collect ESI satisfies counsel's ethical and professional responsibilities. In *Auriga Capital Corp. v. Gatz Properties, LLC*, C.A. No. 4390-CS, 2012 Del. Ch. LEXIS 19, 2012 WL 361677 (Del. Ch. Jan. 27, 2012), Chancellor Leo Strine Jr. condemned counsel for allowing the defendant to copy his own hard drive, seemingly suggesting that counsel may not rely entirely on his client to perform the data collection.

Firms have to be especially careful about preserving their own data as well should they be called upon later to produce the information. This is what occurred in *FDIC v. Malik*, 2012 U.S. Dist. LEXIS 41178 (E.D.N.Y. Mar. 26, 2012), where a New York federal court found that a bank's former lawyers had an ethical obligation and a legal duty to preserve certain ESI relating to their prior representation when the law firm could only produce some emails concerning many loans it had documented. The court noted that the law firm had an affirmative duty to preserve the emails regarding loans the law firm worked on for the bank based on applicable professional-responsibility rules and attorney-ethics opinions. While the underlying claims in *Malik* revolved around legal malpractice, it will be interesting to see if other courts begin to hold counsel responsible for discovery failures that occurred at the client level.

Many courts enable the process by requiring e-discovery coordinators to be appointed "to promote communication and cooperation between the parties." *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 7999 (S.D. Ohio Jan. 24, 2012) (citing the N.D. Ohio Local Rule App. K Default Standard for Discovery of Electronically Stored Information). The Ohio federal court specifically noted, however, that notwithstanding the appointment of the discovery coordinators, the attorneys at "all times" will be "responsible for responding to e-discovery requests." *Id*. at *18.

It is thus incumbent upon outside counsel to be vigilant and diligent in reminding their clients as to the necessity of preserving critical ESI, as parties continue to run afoul of preservation rules, invoking the court's ire and sanction powers. *See, e.g*., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (noting that if the district court concludes after analysis of all of the relevant factors that there was "bad faith and prejudice, the record evidence may indeed justify a dispositive sanction").

Beware of Search-Protocol Pitfalls
Devising an agreed-upon search protocol is critical to a successful e-discovery process. Counsel should meet and confer early in the discovery process to negotiate acceptable search terms, custodian lists, and the temporal limits of the search. When a dispute arises, the parties can turn to the court for guidance.

Failing to raise protocol issues to the court promptly can result in preclusion. For example, in *In re Nat'l Ass'n of Music Merchs., Musical Instr. and Equip. Antitrust Litig.*, 2011 U.S. Dist. LEXIS 145804 (S.D.Ca. Dec. 19, 2011), the plaintiff sought to compel the defendant to run

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document searches containing abbreviations and acronyms for agreed-upon search terms and concepts. The plaintiff argued that the defendant, after producing an initial round of e-discovery, should be compelled to identify abbreviations or acronyms commonly used within the defendant company, and assuming that abbreviations and acronyms were used, the defendant should be ordered to re-run its search and produce new responsive documents.

The court disagreed with the plaintiff's position, finding that the plaintiff had ample opportunity to obtain discovery regarding abbreviations and acronyms, and the burden and expense to the defendants to comply outweighed its likely benefit. The court also acknowledged that the defendants already searched and produced a significant number of documents, thereby incurring a significant expense. The new search terms would require the defendants to review tens of thousands of additional documents that would likely only yield a "very small number of additional responsive documents." The court did conclude that if the plaintiff chose to bear the costs for the discovery, the court would order the discovery.

Ineffective search protocols also can be a hazard for litigants. In *Green v. Blitz U.S.A., Inc*, No. 2:07-CV-372 (TJW), 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. Mar. 1, 2011), the court swiftly issued sanctions against the defendant for failing to produce key emails regarding the subject flame arrester because it failed to do a simple search for "flame arrester," which would have found relevant emails regarding a key issue in the products-liability litigation. The defendant shockingly placed an employee in charge of searching for and collecting documents for the litigation, who admitted that he was basically computer illiterate. Here, the court found a willful intent to destroy evidence and awarded sanctions involving a $250,000 payment to the plaintiff for the prejudice that occurred from the defendant's discovery violations and conditionally awarded another $500,000 if the defendant did not produce the court's decision to every plaintiff in every lawsuit it was defending or had defended in the past two years. The defendant was even ordered to file the court's decision with its first pleading or filing in every future litigation for the next five years.

Thus, parties are well advised to work together to devise acceptable search parameters at the outset of discovery, and avoid tackling issues late in the discovery stage. *See, e.g., McGrath v. United States*, 2012 U.S. Claims LEXIS 98 (Fed. Cl. Mar. 6, 2012) (each requesting party limited to a total of 10 search terms per custodian per party, but allowing the parties to modify the limit without court leave); *Remark Elec. Corp. v. Manshul Constr. Corp.*, 242 A.D.2d 694, 695, 662 N.Y.S.2d 592, 593 (N.Y. App. Div., 2d Dep't 1997) (denying a motion to compel discovery because the movant waited approximately 20 months before moving to compel); *Lee v. Granoff*, 2009 NY Slip Op 30749U, 2009 N.Y. Misc. LEXIS 4685, at *33 (N.Y. Sup. Ct. Kings Co. Mar. 30, 2009) (failure to move to compel within a reasonable time is a basis to deny the motion).

Predictive Coding and Collection Tools

According to a recent ALM eDiscovery Market Study, "survey respondents overwhelmingly identified review, processing and analysis as the top three most expensive segments" of e-discovery. "With over half of the ALM survey respondents claiming to spend more than

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$100,000 on [e-discovery] for each matter, effective budgeting in the areas of processing, review and analysis is a high priority, especially for serial litigants who must allocate budgets across multiple matters." *Daegis Offers Cost-predictability with eDiscovery Calculators*, MarketWatch, Apr. 14, 2012.

With e-discovery costs on the rise, technology companies are hard at work in deriving technology solutions to the assembly-and-collection process. The hesitancy in employing these technologies, however, is the uncertainty of whether a court will accept and endorse the technology.

In a ruling of first impression, U.S. Magistrate Judge Andrew Peck ruled that computer-assisted review known as predictive coding may be an acceptable way to search for relevant data provided the same quality-control standards are met that apply to any other type of document review. *Da Silva Moore v. Publicis Groupe & MSL Group*, 11 Civ. 1279, 2012 U.S. Dist. LEXIS 23350, at *27 (S.D.N.Y. Feb. 24, 2012), *adopt'd by Moore v. Publicis Groupe SA*, 2012 U.S. Dist. LEXIS 58742 (S.D.N.Y., Apr. 25, 2012) (approving parties' use of predictive coding to cull down three million electronic documents to those most relevant to reduce the cost of reviewing the documents).

Predictive coding uses "sophisticated algorithms to enable the computer to determine relevance, based on interaction with (*i.e.,* training by) a human reviewer." The court noted that "[j]udicial decisions have criticized specific keyword searches" and that in "too many cases . . . the way lawyers choose keywords is the equivalent of the child's game of 'Go Fish.'" Judge Peck, who had previously written on the subject of predictive coding, explained that "[c]omputer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases."

> What the Bar should take away from this Opinion is that computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. Counsel no longer have to worry about being the "first" or "guinea pig" for judicial acceptance of computer-assisted review.

Id. at *27.

Predictive coding is not appropriate in every case, and even Judge Peck cautioned that appropriate and reliable processes must be designed and implemented. While predictive coding and numerous other existing and emerging technologies (a Google search for "electronic discovery collector" yields over 2.8 million results) can harvest a manageable and relevant group of electronic evidence, it is fairly debatable whether computer searches can or should substitute for the traditional, initial attorney review. Erika C. Birg, a partner at Nelson Mullins Riley & Scarborough in Atlanta, cautioned:

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> . . . [T]he algorithms cannot ultimately replace the human element, particularly the lawyers' responsibility to know the key facts and documents in play and to ensure a full and complete production. **Ultimately, lawyers will not be able to abdicate their role to machines.** Associates play a key role in ensuring that the team (in large cases) or the lead attorney (in smaller cases) has all the facts at their disposal. Additionally, predictive coding as of yet cannot, to my knowledge, address issues relating to multinational proceedings and multiple languages.

Does Predictive Coding Spell Doom for Entry-Level Associates?, Law Technology News, May 3, 2012, (emphasis added).

Conclusion

E-discovery is and will continue to be an evolving area of the law that all litigators must keep keenly aware of with respect to the trends, responsibilities, and technological advances. As our judicial system is demanding precision with respect to preservation, collection, and production of ESI, both outside counsel and in-house counsel must work in tandem to produce complete, efficient, and predictable solutions, designed to minimize risk and to refocus efforts on winning the case as opposed to drowning in discovery costs.

Keywords: litigation, corporate counsel, ESI, e-discovery, predictive code

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