E-Discovery

SIFTING THROUGH THE ELECTRONIC ERA

Josh Ross

Angelene Falconer

By Josh Ross
OTLA Guardian

By Angelene Falconer

Although electronic discovery has been a regular part of litigation for many years, dealing with the many facets of identifying, collecting, managing, storing, requesting and producing electronically stored information (ESI) remains a daunting task. Frankly, it can be a headache. Over the past decade, the increased focus on electronic discovery has created a morass of disputes, costs and stresses for litigators and their clients. Adequately dealing with discovery of ESI requires a careful balance of competing interests: the need to fully investigate and uncover all potential evidence, and the desire to work efficiently and cost-effectively without bankrupting your client.

Despite volumes of articles, commentaries and blogs written on e-discovery — not to mention legal opinions — some lawyers choose to ignore it. For example, we represented a plaintiff in an accounting malpractice case a few years ago. The defendant produced key memoranda that we suspected were modified prior to production in litigation. To find out, we served a supplemental request for those documents in native format, including metadata showing when the documents were created, revised and printed. The opposing counsel's written response read, in part: The request "is unduly burdensome and vague. We do not know what it means, or what a response would look like."

Exploring possibilities

Judges, lawyers and clients expect ESI to play a significant role in discovery, particularly in business cases. And it is an attorney's obligation to understand what ESI may be available, how to access it and how to produce it. The *Zubulake* opinion authored by Senior Judge Shira Scheindlin of the Southern District of New York is important reading. Courts in Oregon and across the nation routinely rely on that opinion, which is now nearly a decade old, for guidance on an attorney's obligations in overseeing e-discovery.

The volume of ESI subject to discovery in most business cases can be significant. Even in the simplest of cases, consider the number of emails and other electronic communications exchanged between the parties or others concerning the subject matter of the litigation. The page count often expands because of word processing documents (such as letters, agreements and notices), drafts of those documents, spreadsheets, presentations and slideshows, all of which can be (and often are) subject to discovery. No matter what your practice area, knowing how to deal with e-discovery — and knowing when to ask for help — is critical.

As technology evolves every day, lawyers and courts will have to try and keep up. In considering tips for navigating through some of the potential issues, we believe the best advice is: plan early, be organized and don't plead ignorance.

Evaluating

Early on, you must determine the scope of potentially discoverable ESI in your client's possession or control. Do not wait until motions are filed or discovery has begun in earnest. If a dispute arises later, your client will benefit from having had early guidance from you.

- Quickly evaluate the claims with your client and determine what ESI may be reasonably calculated to lead to discovery of admissible evidence. For example, did your client send or receive emails or text messages concerning the issues underlying the case with the opposing parties or third parties? Are there key agreements or letters at issue, and does your client have prior drafts saved in electronic format?
- Speak to opposing counsel early. In Federal Court, Rule 26 mandates that the parties discuss electronic discovery. But, regardless of the forum, ask opposing counsel to detail the potential scope of discovery, to identify the key players and witnesses and to explain the format in which they want to receive electronic productions. Having these discussions early on — and documenting them — will help avoid disputes later. If you search for ESI using search terms, ask opposing counsel to review the list and comment on the terms before doing the work.
- In cases with significant electronic discovery, do not let discovery disputes snowball. Address disputes early, document all steps taken and work cooperatively with opposing counsel and your client.
- Remember to check for local rules or judges' practices that must be followed.

Preserving

The obligation to preserve information typically arises when a party reasonably knows evidence may be relevant to the anticipated litigation. A plaintiff's obligation usually arises earlier than a defendant's. This is where most disputes are likely to occur. Because of the risk of significant sanctions against you and your client, take the time to understand how your client manages ESI and take whatever reasonable steps are necessary to preserve information that may be subject to discovery.

- Send an exhaustive document preservation letter to your client or appropriate client representatives. Discuss those obligations and confirm they are understood.
- Ultimately, you are responsible for monitoring litigation holds. Throughout the litigation, send reminders to the client about the importance of preserving discoverable information. Failure to timely issue and monitor litigation holds can lead to severe sanctions. *Surowiec v. Capital Title Agency, Inc.*, 790 F.Supp.2d 997 (D. Ariz. 2011)
- Consider sending a preservation letter to opposing counsel as well.

Identifying

Your client's obligations are tempered by a "reasonableness" standard. But, evaluating how exhaustively to look for ESI in your client's possession (and when to do that) can be challenging.

- Carefully inventory the location of ESI in your client's possession and control. Discuss the steps that would be necessary to retrieve it. For example, does the client maintain several email accounts? Were those the accounts used at the time of the key events? How does the client manage other electronic information like memoranda and letters? How many computers does the client have? Does the client have cloud-based storage, back up hard drives or servers? Does the client use text messages or instant messaging?
- With business clients, map out how information is managed and explore whether employees follow a particular

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protocol for managing and saving information (e.g., automatic deletion of emails, back-up tapes or servers, storage of paper files). Make sure that these discussions involve the appropriate risk manager, human resources or information technology person.

- Identify key custodians, including both former and current employees, and interview them to determine where additional ESI may reside (company issued laptops or personal devices used for work).
- Explore your client's goals and the litigation strategy. In some cases, the cost of an exhaustive ESI collection effort is prohibitive. But, in a high value case, the risk of foregoing early collection may deny you the value of key evidence.
- Exhaustive collection of ESI can cost thousands (or tens of thousands) of dollars and cause major disruptions to your client's life or business. On the other hand, the failure to do so can be equally costly. Clients and witnesses often forget about particular emails or communications, or may not appreciate the positive or negative impact a particular communication may have on the case.

- The forum in which the case is pending may influence the scope of the parties' obligations and drive what is "reasonable." In federal court, the obligations are clear. Recent amendments to ORCP 43 have helped make your obligations in Oregon state court more clear. In arbitration, whether the arbitrator(s) will require exhaustive and expensive discovery of ESI, and the risk of adverse consequences, must be carefully considered.

Collecting

Above all, it is critical to keep detailed records of what steps have been taken to identify and collect ESI. In the event a dispute arises, you will have to defend the steps you have taken as reasonable.

- In most cases involving individuals, the attorney will need to work with the client to run searches through email and text messages, and on hard drives of computers. Business cases will require far more exhaustive collection efforts.
- Use uniform language in your responses to discovery requests and in requests you send to opposing parties regarding the format or manner of production. Do not request production in a format that you are unable to provide to the other side.
- When appropriate, get help from outside vendors, consultants or co-counsel. Experts can efficiently evaluate needs and costs when dealing with large volumes of data and provide invaluable back up and testimony in the event of a dispute. Costs may be recoverable. Ask vendors for referrals.
- Consider whether it is feasible or reasonable to mine information from different sources (e.g., backup tapes, servers, hard drives).
- Do it once! Gather information in a logical, organized manner and in the appropriate format. Again, keep records in case of a dispute.
- Different document management tools are on the market, with a wide variety of capabilities. Consider your needs up front before selecting a tool for mining, storing and managing data. Will you process native documents and/or extract metadata? Will the volume of data warrant use of de-duplication software to eliminate true duplicates? Will you need to text search and sort documents? Will you code and "tag" documents for use during litigation? Will you benefit from a tool that electronically redacts and prepares documents for production?

Beware of consequences

It is no longer justifiable to respond "we don't know what it means." Courts and opposing counsel demand that lawyers and their clients deal with electronic discovery as they would other discovery obligations. Sanctions against parties and their attorneys are increasing in number and severity. (*Sanctions for E-Discovery Violations: By the Numbers* by Dan H. Willouby, Jr., Rose Hunter Jones & Gregory R. Antine, available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=dlj.)

- Beware of spoliation of evidence, even when ESI is only "potentially relevant" to litigation. *Siskiyou Buckle Co., Inc. v. Gamewear, Inc.*, 2012 WL 37230 (D. Or.). Attorneys must take extra precautions to preserve ESI.
- Courts have inherent authority to impose sanctions for abusive litigation practices, even without a finding of bad faith, including monetary sanc-

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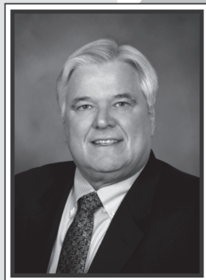

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tions, *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Cal.); adverse inference instructions to the jury, *Med. Lab. Mgmt. Consultants v. Am. Broad. Co., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002); exclusion of testimony based on destroyed evidence, *Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 368-69 (9th Cir. 1992); and dismissal of claims *Mariner Health Care, Inc. v. PricewaterhouseCoopers LLP*, 638 S.E.2d 340 (Ga. App. 2006).

- If you suspect spoliation by an opposing party, demand native review of ESI. To prevent accusations of spoliation, consider mirroring hard drives to preserve the integrity of metadata or invest in litigation support software or pay a vendor to house and produce documents.

Most people and businesses — even technologically unsophisticated clients and attorneys — generate significant amounts of electronic data every day. In 2012, the Pew Research Center reported that half of Americans now carry a smartphone or tablet. In our society, most people conduct business and communicate (and store that information) using computers and other electronic devices, not on paper. In light of that reality, it is critical to investigate where your client stores electronic information at the earliest moment that litigation is anticipated. Document the details of how you have managed, preserved and collected that information. Consider whether or not you have the ability and capacity to manage e-discovery inhouse, or whether you should get help.

Ignoring e-discovery means choosing to ignore much of your client's potentially relevant information. For practitioners to comply with evolving discovery obligations, the question is not whether to engage in e-discovery, but rather, how to best invest in technology and training so that you can manage it efficiently and effectively.

Josh Ross is a shareholder at Stoll Berne, a Portland-based firm known best for its expertise in complex business litigation, intellectual property litigation, plaintiff class actions and real estate transactions. He contributes to the OTLA Guardians of Civil Justice at the Friends level. Stoll Berne is located at 209 SW Oak Ste 500, Portland OR 97204. You can reach Ross at jross@stollberne.com or 503-227-1600.

Angelene Falconer has been a paralegal with Stoll Berne since 2006. She supports attorneys and clients through the entire litigation process and has worked on cases involving the securities laws, complex commercial disputes, class actions, unfair competition and trade secrets. Falconer writes for the Stoll Berne Legal Tech Blog, found at www.stollberne.com/LegalTech-Blog. She can be reached at 503-227-1600 or afalconer@stollberne.com.

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