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DISCOVERY

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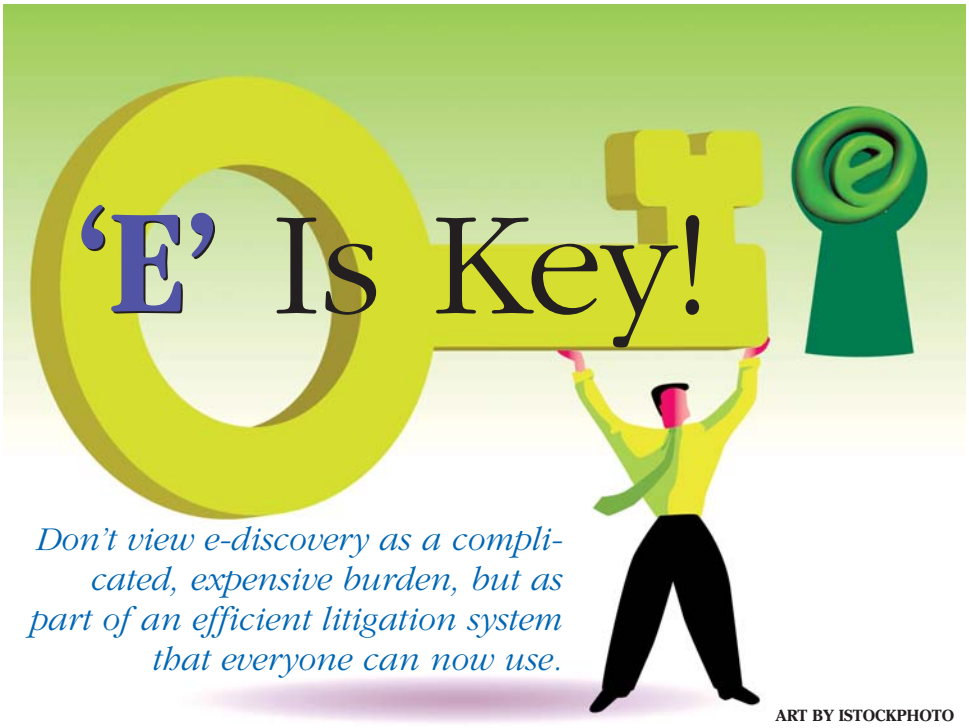

Don't view e-discovery as a complicated, expensive burden, but as part of an efficient litigation system that everyone can now use.

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BY THOMAS G. JACKSON, MICHAEL S. FISCHMAN AND ELIZABETH A. ADINOLFI

DISCOVERY OF electronic material is increasingly important, not only for attorneys involved in class actions, multi-district litigations or other traditionally document-intensive matters, but for federal and state court practitioners alike involved in virtually any commercial dispute.[1]

Yet, because so much of what is written about e-discovery emanates from large law firms with attorneys, paralegals and technology staff dedicated to these efforts, and which often represent clients with their own sophisticated information technology (IT) departments, many attorneys (and as a result, their clients) still do not have a thorough understanding of the nearly universal applications of e-discovery.

E-discovery should not be viewed as an expensive tool that should only be used in "other cases" or for "other clients" or in "other firms." The technological advances allow even the smallest firm to tackle cases formerly reserved only for the largest.

The impact of electronic information is everywhere. In February 2006, USA Today reported on how The New England Journal of Medicine used word processing functions to reveal that Merck deleted data about Vioxx and heart attacks, and that similar technology revealed that a White House policy paper on Iraq was authored by someone outside the administration.[2]

Yet searches of caselaw in the New York courts reveal almost no reported disputes over e-discovery, despite the obvious potential for such information in litigation. This, we suggest, is not because attorneys are cooperating in e-discovery, but because there is an unspoken agreement in many cases to "not go there." Cost-conscious clients may resist, and attorneys familiar only with paper discovery may be hesitant to raise the issue or tackle new technologies.

The proliferation of computers means that it is rare to find a case involving only paper documents—attorneys must now consider a universe measured in "bytes" as opposed to pages. At the same time, as courts become more familiar with the issues, and as technological developments continue to facilitate e-discovery, attempts to avoid it by claiming that it poses an "undue burden or expense" are increasingly falling on deaf ears.

This shift in favor of e-discovery was foreshadowed in *Zubulake v. USB Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003), where the court took issue with the automatic assumption "that an undue burden or expense may arise simply because electronic evidence is involved."

My Client's Not Into Technology

Clients of all sizes generate, send, receive and store much, if not all, material in some electronic format. These materials include e-mails, word-processed documents, spreadsheets, Microsoft PowerPoint presentations and documents created or preserved in Portable Document Format (PDF files). Most businesses maintain their accounting and financial data in some electronic format, often utilizing software programs for processing data and producing reports. Companies track orders,

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inventory, production and distribution electronically as well.

Even if material is available in hard copy, the electronic version often contains additional information, known as "metadata,"[3] that is not visible on the printed document. The electronic version is often dynamic and can be searched, sorted and/or exported into other software, a significantly more efficient process than poring over hundreds of pages of documents.

As courts become more aware of the advantages of electronic data vs. paper documents, lawyers who insist on doing things "the old-fashioned way" run a risk. See, e.g., *In re Instinet Group, Inc. Shareholders Litig.*, 2005 WL 3501708 (Del. Ch. Dec. 14, 2005) (reducing attorney's fees by almost one third after finding that "[r]ather than simply copying the electronic media to permit the plaintiffs' lawyers…to search and review the document production on a computer screen, the plaintiffs spewed the digital production onto paper and, then, copied the paper for review.")

But Where Do I Start?

The first step in tackling e-discovery is making sure that you are equipped to handle electronic data.

There are many document database software systems (Summation, Concordance, Documatrix, etc.) capable of accepting electronic documents, which is a significant change from several years ago when these systems were primarily used for storage of scanned images of paper documents. One advantage of these products in handling e-mail is that they automatically create a coded database.

In the past a paralegal would be handed a stack of documents and asked to create a Word or Excel index of objective data (date, author, recipient, etc.). Today, products such as these can extract the information and populate the fields in a searchable database, enabling targeted review of e-mails to or from key individuals, or every e-mail with a certain word in the body or subject line. Such advances have significantly reduced the cost of e-discovery.

While having the proper software is indispensable, it is also necessary to have the right hardware. If your firm is networked through servers, it is important to make certain that you have enough capacity to store the data without hampering the performance of your network. Displays of sufficient size to make an entire document readable on a single screen are also a must.

The next step is to meet with the client to identify where relevant data may exist, whether in active systems, archived systems (which may require restoration) or both, and whether relevant electronic files may have been deleted.[4] Identifying who, if anyone, is responsible for the client's computer systems, and involving those individuals as early as possible, will facilitate this process.

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It is important to discuss how the client manages electronic data. Does the client have an electronic document management system? Are documents stored on individual hard drives or on networked servers? Is data on backup tapes or other media such as CD-Rs or DVD-Rs? Do the client's employees work at home or from other remote locations on personal computers? Do the client's employees use a PDA such as a Palm® or BlackBerry® device?

You must also ensure that the client has implemented a litigation hold, particularly halting any routinely scheduled deletions of e-mail or other forms of electronic data. Reassure the client that you will not be spending (billable) time reading every retrieved item, but will take advantage of the search capabilities of the software programs used to determine what is relevant.

Because electronic data exist in myriad locations, it is rarely possible for counsel to simply visit a client's office to locate and copy documents. You may find that your firm's IT personnel can be of enormous assistance in understanding how to go about collecting client data. Although they may not know the rules governing discovery, they routinely manage the type of information you are securing, and will likely be maintaining the database that you will use to organize the material. There also are an ever-increasing number of vendors that specialize in retrieving electronic files from a client's office.[5]

Avoid at all costs having your client forward, via e-mail, e-mail messages that it thinks are relevant. Apart from the logistical headaches in producing such material (you will need extensive redacting to remove the forwarding information), you will no doubt fail to locate all of the relevant or discoverable data. As new issues emerge in the case, you may find the client's initial review inadequate. You also will lose the ability to have the e-mails automatically encoded by the database software.

If the client insists on doing an initial review, a better practice is to have the client "burn" the relevant e-mails to a CD for your review.

What to Do With All This Data?

Of course, not everything found in electronic files will be responsive or relevant. The large volume of material requires methods for its efficient and expeditious review and production.

This is where e-discovery is most misunderstood—it should not be viewed as a burden, but as a part of an efficient litigation system. Ever-improving, user-friendly technologies developed to support the needs of larger, million document (or "megabyte") cases can be used in small to mid-size cases as a vital tool to process and exploit information and actually reduce discovery costs.

One of the more difficult aspects of dealing with any large collection of data is determining how to easily review, analyze and produce it. In the early 1990s, for example, this firm was involved in a case where approximately 7 million pages from various locations were produced.

One million pages were microfilmed and reviewed by dozens of "coders" at an outside facility. The coded documents were reviewed on a database and individual documents retrieved by paralegals from microfilm. Obviously, very few clients could afford such labor-intensive, costly efforts.

At that time, to our disbelief, contractors told us of upcoming technology where documents would be "scanned," stored on a few metal disks and run through a program that could make every word searchable. What

seemed like science fiction 15 years ago is readily available today, and usable in cases (and firms) of every size.

Attorneys used to reviewing documents in paper form, page by page and box by box, must now learn to accept the idea of maintaining documents in an electronic format. Those who do will find that document database software, used appropriately, can provide all the benefits of paper discovery. Often, it proves to be much better.

The more efficient approach to e-discovery is to agree with opposing counsel to run searches using agreed upon terms. Once all documents containing those terms are identified, that limited universe can then be reviewed for responsiveness and privilege.[6]

An advantage of using database software is that it permits the attorney to code the documents as they are being reviewed to indicate whether a document is responsive, if it is subject to any privilege or confidentiality, or for any other relevant criteria. Once the review is completed, an attorney can then retrieve every document on a particular issue and sort those documents by a desired criteria in seconds.

A paralegal easily can do witness pulls and organize those documents by date, subject, etc. All responsive, non-privileged documents can be burned to a CD for production. It is even possible to generate the bulk of a privilege log from the coded information in the database. Again, tasks that once required numerous hours of support staff time can now be accomplished in a matter of minutes.

One urge many attorneys have is to attempt to remove duplicative documents (called "de-duping"). De-duping can be a complex and costly process requiring the services of an outside vendor. It is also largely unnecessary, particularly with e-mail that is automatically encoded.

Simply sorting the e-mails by date and subject will usually bring all duplicative e-mails (or other coded documents) together in the list for review, allowing them either to be skipped or coded by simply copying the coding from the previous document. The expense and effort of de-duping may outweigh the cost of a quick scan and coding.

Once attorneys experience the ease and efficiency of working with electronic document databases, it becomes clear that the same technology has great advantages for paper documents as well.

The cost of creating a copy set of paper documents is usually about the same as scanning them to create images that can be loaded into a database. It is much easier to deal with 50,000 or even 10,000 documents scanned and coded in a database than with boxes containing the same documents and separate paper indices. (You also can not misplace a document from a database the way you can with documents left in physical files.)

The documents can be processed using OCR (Optical Character Recognition) technology that renders them text-searchable. While paper documents do not encode themselves the way e-mail does, there are vendors that can take scanned images and code the objective data, usually for a per document fee. If using an outside vendor is not an option, a paralegal can code documents in the database instead of generating separate Word or Excel indices.

Once the document images have been "OCRed" and coded, the information can be easily located even if the key issues in the case change. If "Joseph Smith" unexpectedly becomes a critical witness, it is easy to find documents authored or received by Mr. Smith. Similarly, if a particular word or phrase becomes critical, it too can be searched for and located in seconds.

The Added Benefits

These databases also permit the attorney to be more efficient and better prepared in the litigation.

How many times have you known that there is a document concerning an important issue, but just can't seem to get your hands on it? The database system allows you to retrieve and print on short notice.

In a deposition, or in court, the ability to retrieve a document for immediate review can be extraordinarily important. The tools created as a result of the increasing use of electronic data now allow an attorney to carry the documents for an entire case on a laptop computer that can be used as a "virtual paralegal."

In a lengthy trial in New York State Supreme Court we maintained approximately 50,000 pages of discovery in a searchable document database on a single laptop. When unanticipated issues arose during cross-examination, we were able to locate documents and print them in the courtroom. The same database maintained all deposition transcripts, as well as "OCRed" pleadings and briefs.

While our adversary had a paralegal in the courtroom throughout the case, we did not need to incur that expense. There is no reliable way to quantify the benefits of being able to locate a document to rebut the testimony of a witness on the stand, or the fact that the witness knew that we possessed that ability.

Try It, You'll Like It, and Need It

You have to start somewhere. Take the next case and execute an e-discovery plan.

1. E-discovery is not just an issue for cases in federal court. Effective Jan. 17, 2006, Part 202 of the Uniform Rules of the Supreme and County Courts was amended to add section 202.70 relating to the Commercial Division of the Supreme Court, requiring attorneys in such cases to discuss "anticipated electronic discovery issues," including "identification of relevant data," prior to the preliminary conference: N.Y. Comp. Codes. R. & Regs. tit. 22, § 202.70 (2006).

2. Bergstein, Brian, "Bigger Efforts Made Against Embarrassing 'Metadata,'" USA Today, Feb. 13, 2006.

3. Metadata (literally "data about data"), are "the data that describe the structure and workings of an organization's use of information, and which describe the systems it uses to manage that information." Wikipedia, "Metadata," available at http://en.wikipedia.org/wiki/Metadata_(computing)#References, quoting David C. Hay, Data Model Patterns: A Metadata Map (2006).

4. The delete function on a computer does not "destroy" documents. Rather, it moves them to unallocated space on a hard drive. Attempts to retrieve deleted data should wait until after discussions with opposing counsel as to whether it is necessary.

5. Use of such firms will also provide an available source for authenticating electronic data.

6. Searches can be used to eliminate the endless variety of personal e-mails we receive. In any office with multiple employees, numerous e-mails can be eliminated by searching for "eBay," "Amazon," "Travelocity" and "Orbitz."