E-DISCOVERY ESSENTIALS FOR IN-HOUSERS

by Michael A. Gold

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Many lawyers are overwhelmed with the new federal rules governing electronic discovery. It's no wonder: Effective compliance with the new rules requires a fundamental understanding of how digital technology works; sufficient skill to manage the identification, harvesting and production of electronic information; and an ability to communicate with the court, opposing counsel, outside litigation counsel and the client in a way that both serves the objectives of the new rules and protects the client's litigation interests.

Despite this tricky juggling act, in-house lawyers expect their outside counsel to be able to handle e-discovery in a competent and cost-effective manner. The stakes are high: In-house lawyers know that poorly planned or executed e-discovery can throw a litigation budget badly out of whack and even jeopardize the company.

But how many lawyers are really equipped to capably handle a significant e-discovery project? Probably not too many. Many lawyers have not had enough encounters with technology to be adept at e-discovery. Even lawyers brought up in the "computer age" who know their way around a laptop or the Internet are not armed with these necessary skills. Proficiency with the new rules requires training to develop a complex skill set.

One of the most critical skills is the ability to understand every dimension of the e-discovery process, from the creation of discoverable information to the business use of such information and — this is where many lawyers will falter — to the effective addressing of e-discovery issues with the client and the coordination of e-discovery between in-house and outside litigation counsel. There are endless articles and programs about the new rules.

Lawyers frequently come away from them wondering if they have learned anything to put to immediate practical use. But even with something as complicated as e-discovery, it is useful to create a foundation for learning by starting with small steps. A good way to begin the learning process may be with a simple guide.

A STARTING POINT

In-house counsel expect their outside litigation counsel to be equipped to understand how the client creates and uses electronic information in order to effectively advise in-house personnel and management. In-house counsel also know that, unless their outside counsel has both a strong understanding of the law and an ability to communicate intelligently about the relevant technologies, non-lawyers such as IT staff will tend to discount or even ignore their advice.

One of outside counsel's most important tasks is to coordinate between the relevant managers and personnel and outside litigation counsel. In-house counsel expect to be responsible for two things: confirming that outside counsel understand how the client handles electronic

1900 Avenue of the Stars, 7th Floor
Los Angeles, California 90067
310.203.8080—(fax) 310.203.0567

Two Embarcadero Center, 5th Floor
San Francisco, California 94111
415.398.8080—(fax) 415.398.5584

3 Park Place
Irvine, California 92614
949.623.7200—(fax) 949.623.7202

information and confirming that the client is providing outside counsel with the necessary information in a timely and efficient manner.

In-house counsel also expect, however, that outside litigation counsel will be prepared to manage the information effectively and will adequately communicate the needs of the litigation to the client. Indeed, this is a key failure by many outside counsel. In the fifth Zubulake v. UBS Warburg LLC, et al. opinion, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York summed up UBS Warburg's counsel's many e-discovery lapses by noting, "Although counsel determined that Tong kept her files on Zubulake in an "archive,' they apparently made no effort to learn what that meant." Zubulake, in short, offers a good lesson.

Of course, in-house counsel will also have in mind the March 23, 2005, decision by Florida's 15th Circuit Court in Coleman (Parent) Holdings Inc. v. Morgan Stanley & Co. Inc., whenever the client balks at complying with an e-discovery request. There, the court gave an adverse inference instruction to the jury, because of numerous e-discovery lapses by Morgan Stanley and its lawyers, which led to a $1.5 billion jury verdict against Morgan Stanley. Although the case was recently reversed on grounds unrelated to the discovery sanction, the trial court's treatment of the sanctions issue should give pause to any responsible lawyer.

EARLY MEETING

Rule 26(f) requires counsel to discuss "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it shall be produced." Most lawyers think the Rule 26(f) early meeting is the key initial encounter in cases involving e-discovery. This conventional wisdom is not entirely sound. The most important "early meeting" likely to occur in an e-discovery case is the one between outside litigation counsel and the client. Why? Because most clients still do not grasp the full dimensions of their e-discovery obligations under the new rules. Outside counsel must make the client aware during this first meeting of what the client's obligations are, the timeline, the probable costs, and what outside counsel will need to know in order to comply with the new rules and protect the client's interests in court.

The new rules require that outside counsel take real command of the e-discovery process. From the start of the process (such as the legal or litigation hold, likely implemented by in-house counsel) through the early meeting of counsel, the initial case management process, and, ultimately, trial, outside counsel have certain duties that cannot be delegated. Zubulake, which predates the new rules but was an important precursor to their development, identifies at least three duties of litigation counsel: duty to monitor compliance; duty to locate relevant information; and duty (continuing) to ensure preservation.

The new rules incorporate these duties.

IN-HOUSE COUNSEL ACTIONS

Clients may balk at the effort and expense of e-discovery, complaining that spending so much

time and money on e-discovery is like the tail wagging the dog, with the merits of the case assuming secondary importance. There is of course some validity to this concern, with one recent survey estimating that e-discovery will become a $3.13 billion market by 2008.

However, the danger in this way of thinking is that when a client is not conversant with the new rules or with e-discovery in general, counsel will be unable to effectively deal with e-discovery during litigation merely by waiting until litigation unfolds, and then blindly trusting in directives from outside counsel. With over 95 percent of business information now available in electronic form, clients need to realize that there is no getting around e-discovery.

In-house counsel also face pressures to which outside counsel should be sensitive, such as dealing with budgets and keeping senior management informed about the status of big cases. Therefore, outside counsel should inform in-house counsel about changes in e-discovery that may affect costs or outcomes. Outside counsel should also find out how involved the in-house counsel and the client will want to be in e-discovery issues, when and how to share information, and how to avoid surprises. Outside counsel also need to make in-house counsel familiar with e-discovery vendor selection issues, the e-discovery management plan, and the expected costs, and when it is appropriate to seek advice from outside counsel.

ASSEMBLING THE TEAM

One of the most important steps in e-discovery takes place when outside counsel develops an effective working relationship with the client's IT staff. In "traditional" litigation, there is the usual roster of players. With e-discovery, there are several more — the client's IT staff, an outside e-discovery expert (who may be retained by in-house counsel or outside counsel), and, of course, the opposing party's IT staff and outside e-discovery expert. The overall strategy must actively involve all of the new players and — because of the responsibilities that the new rules impose on attorneys — the general counsel needs to be in command of what the IT people on the inside are doing.

THE AUDIT

Outside counsel also must ensure that the client audits its retention policies and computer system architecture to determine where and how its electronic information is stored. In the early meeting, outside counsel needs to discuss disclosure or discovery, including the form of production, and claims of privilege or work product.

The client or nonlegal personnel (such as the IT staff) may balk at this audit, but in-house counsel must understand that Rule 26(f) requires both in-house and outside counsel to be more proactive when it comes to electronic information, even without a discovery request. If the client will not permit an audit, it must understand that it has taken the first step on a very dangerous road.

THE LEGAL HOLD

When the client reasonably contemplates litigation — and certainly if a lawsuit has already been filed — it is critical to implement the

appropriate litigation hold or face the probability of some form of sanctions. The legal hold process is dynamic. While in-house counsel and the client's IT staff may assume the technical job of implementing the hold, the new rules make it very clear that outside counsel must be in charge of the process.

Thus, in-house and outside counsel and the client need to coordinate in order to determine what information to preserve. But for the hold to be at all meaningful, outside counsel will also need to document the hold to defend against any challenge to its reasonableness. This requires that the general counsel specify what documents are being held, why these records were selected, why certain individuals were selected as likely to be holding relevant electronic information and others were excluded, why the company thinks that the information being held is likely to lead to admissible evidence, how it will be preserved, and what methodology will be used to preserve it in its present form.

For any hold to be effective, it must be communicated to the appropriate individuals, including IT staff, records managers, and individual employees. The hold must communicate precisely what each individual should do to preserve records.

Finally, the hold must be actively managed and enforced, and periodically revisited during the litigation, to ensure compliance and the ability to respond to discovery requests.

The client must also understand that courts tend to assign more significance to e-discovery lapses than to errors or omissions in traditional paper discovery. As the Florida trial court noted in Coleman, "[e]lectronic data are the modern-day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence." In fact, courts are more suspicious of, and quicker to sanction, e-discovery omissions.