In considering e-discovery, the most overlooked participants are often the most important — your in-house information technology staff. One of the most enduring aspects of e-discovery is the persistent disconnect between those who run businesses and their attorneys, on the one hand, and the businesses’ IT staff, on the other. With the e-discovery amendments to the Federal Rules of Civil Procedure soon taking effect, this disconnect must diminish. As "best practices" emerge in e-discovery — both compelled and voluntary — businesses and their outside counsel need to automatically consult with the client's IT staff before any e-discovery occurs. Presently, however, this is rare.

The usual scenario goes something like this: after receiving a discovery request, outside counsel generally provides those requests to the in-house counsel or other business contact at the client, but not to the IT staff that ultimately will have to collect and retrieve digitally stored information. Counsel will then work with the in-house counsel and businessperson to prepare responses and reach agreements on the scope of what will be produced. Still, the IT staff is not consulted. Frequently, it is not until after an agreement of some kind is reached with the opposing party and the clock is ticking on the production deadline that the IT staff is finally consulted.

Not surprisingly, counsel (both inside and outside) will then learn to their dismay that the scope of the agreed-upon production either cannot be met at all or cannot be met in the time frame that was agreed upon. Moreover, the lack of communication with the IT staff often continues into the document retrieval process, leaving the IT staff to make judgment calls on what to retrieve.

This dismal scenario is not unusual. And it reflects a serious shortsightedness by in-house and outside counsel — a failure to recognize that a company's IT staff is both a key component of the e-discovery process and a most helpful one as well. It is critical for businesses and their attorneys to communicate and coordinate with the IT staff before agreeing to e-discovery requests and throughout the document retrieval process. There are five basic questions you need to ask your IT staff before any e-discovery agreement is confirmed with the other side:
1. **How long will it take to respond to the discovery request?**
   Your IT staff likely will tell you that you can't know until you determine the extent of what needs to be searched. There could be millions of emails and documents spanning dozens of applications, all of which need to be searched, and some of which must be reviewed by a person, not a computer. Documents and emails can be stored in a variety of places — office computers, Blackberry's and Treos, home computers, AOL, MSN, and so on. Unless steps have been taken ahead of time to corral that information, you can't know how long it will take.

2. **How will I know when I've gotten what I'm looking for?**
   If they're being candid with you, your IT staff may tell you that you may never know, for the same reason that you can't know how long it will take to respond. Unless effective search and retrieval protocols are in place, the final document may be in a document retention system, in a folder in a firm laptop, on a personal home computer, as an attachment to an email, on a thumb drive or CD-ROM, or any of a number of other locations.

3. **Where do we need to look to respond to the discovery request?**
   Your IT staff will tell you more places than they can list without carefully and extensively researching the subject. There are the obvious ones — document retention systems, secure business servers, business archives, and so on — but it takes creativity to find every possible location. Did an employee take his or her documents on an unencrypted thumb drive so they could be used in a hotel courtesy office or while negotiating an agreement at a law firm? Were they burned onto a CD-ROM? Did an employee borrow a laptop for the business trip? Until all possibilities are considered, you can't know where to look.

4. **Do we have the resources to respond effectively to an e-document request?**
   Your IT staff will confirm that this is a real problem. You can't know until you analyze the e-discovery request, but it's unlikely you do. Searching all the places where documents might reside, and analyzing all those documents, requires computers and people. Worse yet, the search and analysis process is likely to require computers and people who are already in full-time use.

5. **Can we set up a system that works?**
   It is, your IT people tell you, possible to do so. But it takes dedication of personnel and physical resources to make it happen. It is not just a matter of getting the right equipment; it is a matter of creating meaningful standards and enforcing them throughout the enterprise. Responding to e-discovery requires the convergence of a number of parties — your business personnel, your counsel and your IT staff. Given the time and effort required to properly respond to e-discovery requests, it is critical to
prepare for e-discovery before it happens and to involve your IT staff from the beginning. It is critical to ask your IT staff the right questions and then effectively use the information they provide.

JMBM's Discovery Technology Group™ can help. We review and advise on management policies and plans to prepare for e-discovery issues before they arise. We can work with your in-house counsel, business personnel and IT staff to create e-document policies and procedures that will make the e-discovery process more useful in litigation, more time and cost effective, and enable you to better control your company's electronic documents, whether or not there is future litigation involving e-discovery.

Contacts:

Stanley M. Gibson  
310.201.3548 • mailto:SGibson@jmbm.com

Dan P. Sedor  
310.201.3554 • mailto:DSedor@jmbm.com

Michael A. Gold  
310.201.3529 • mailto:MGold@jmbm.com

Robert E. Braun  
310.785.5331 • mailto:RBraun@jmbm.com

©2006, Jeffer, Mangels, Butler & Marmaro LLP