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Top 10 Caveats When Conducting E-Discovery

By Bruce A. Olson

INTRODUCTION

When dealing with E-Discovery most of us are entering a brave new world; one filled with many potential pitfalls. The majority of attorneys and clients are unprepared for the expense, the disruption to the client's operations and the attorney's normal practice routines, and the significant amount of time devoted to dealing with the many concerns that arise in the area of E-Discovery.

While we obviously must keep up with the developing case law in the area, and remain cognizant of the new E-Discovery Amendments to the Federal Rules of Civil Procedure that became effective December 1, 2006, we must also be aware of some of the common issues that come up when dealing with E-Discovery on a practical, day-to-day basis.

Keeping in mind the following caveats will help you in dealing with recurring issues and hopefully make the process a little less daunting.

1. HAVE A WELL THOUGHT OUT PLAN BEFORE YOU START

One of the big problems with E-Discovery lies in the excess of potentially (and often marginally) relevant electronically stored information (ESI) that must be harvested, reviewed, and produced. You can't just pull out your standard set of interrogatories or requests for production, tweak them, and figure you've done all that is necessary to start the E-Discovery process.

You also cannot afford to wait until you receive an E-Discovery demand to begin figuring out what you need to do to produce your client's ESI. You have preservation obligations that arise as soon as litigation is reasonably anticipated, and your failure or your client's failure to be aware of this fact can lead to spoliation and potentially drastic consequences.

It can also be extraordinarily costly to harvest and produce ESI and to prepare it for use in some readily accessible form for your working file. Thus, you need to take time at the outset of a case to consider all aspects of E-Discovery that may come up and develop a specific plan to address them.

2. USE APPROPRIATE EXPERTS EARLY IN THE PROCESS TO ENSURE SUCCESS

If you are not knowledgeable in the area, one of the first things you should consider doing is hiring an appropriate expert to help. This may take the form of retaining an E-Discovery vendor, a computer forensic expert, or even associating another attorney of-counsel to help you manage your E-Discovery needs. Each of these experts brings different skills to bear and you need to determine which expert is appropriate for your case given your own level of expertise.

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E-Discovery vendors can help you generate a plan for harvesting ESI or generating your own client's ESI. They can harvest, de-dupe, search for responsive information, and generate deliverables that you can provide to the other side and/or use with your own litigation support software. If you don't anticipate the need to find a "smoking gun" or need an expert to testify in court on issues such as improper copying, modification, or deletion of files, an E-Discovery Vendor may be all you need. However, if you do need to look at the type of activity that suggests spoliation, you will probably want to retain a highly

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qualified computer forensic expert who can secure and analyze the ESI with an eye toward ultimately testifying in court. Many E-Discovery vendors also offer forensic services. You need to consider their qualifications and determine if they offer the right person for court, or if a different type of expert witness might be appropriate.

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Finally, we are starting to see a new practice area emerge where attorneys, and in some cases even whole firms, specialize in dealing with ESI, E-Discovery, and electronic records retention and management. They are the highly informed generalists in this area who possess a depth of knowledge and experience that may not be cost effective for you to develop on your own. They can help you develop your E-Discovery plan. They can assist in securing RFP's from vendors so you can accurately compare quotations in a field where there can be dramatic price variations in quotations for the same work. They can help negotiate effective vendor contracts. They can even help you with E-Discovery conferences, requests, and motions. Bringing them on board in an of-counsel capacity also has the advantage of creating a relationship that has attorney client privilege protection.

3. WORK WITH OPPOSING COUNSEL IN AN EFFORT TO REACH AGREEMENT ON SCOPE AND METHODOLOGY

The new amendments to the Federal Rules of Civil Procedure regarding meet and confer obligations to address ESI related issues codifies what has generally been acknowledged in prior case law as the preferred practice. Counsel should confer immediately regarding preservation and production of ESI. They should do so in as cooperative a fashion as possible. Judges expect attorneys to work things out without the need to file motions over every minute dispute concerning the discovery of ESI. Scorched earth discovery tactics will no longer be tolerated, and attorneys engaging in them do so at their peril. You should make every effort to arrive at stipulated procedures to make the process as cost effective as possible, and to avoid unnecessary disruption of your client's operations.

4. WHEN RESPONDING TO E-DISCOVERY DEMANDS DON'T INADVERTENTLY WAIVE PRIVILEGE

Because of the amount of information that is often subject to disclosure when dealing with ESI, and because of the way it is produced, there is an enhanced risk of inadvertent disclosure of attorney work product or attorney client protected information. The new E-Discovery amendments to the Federal Rules of Civil Procedure provide certain default provisions to address these concerns. You should also be aware of the concepts of "claw back" agreements and "sneak peek" agreements, and consider their use as part of your overall agreement with the other side in addressing production of ESI. It is often impractical to have a truly reliable, full and complete review of every item prior to production. Therefore, it is very important to preserve your rights using the new mechanisms that have been developed.

5. WHEN SEEKING ELECTRONICALLY STORED INFORMATION BE AS SPECIFIC AND NARROW AS POSSIBLE IN WHAT YOU ASK FOR

One of the quickest ways to end up in front of a judge on a motion for a protective order is to be overbroad in your demand for ESI. Even worse, you could find yourself buried by terabytes of information, much of it ultimately worthless. Your client will have to pay to have it analyzed and if it ends up discarded you may have a lot of explaining to do. You need to make your requests as targeted as possible. If you do so, a judge will be more inclined to recognize the legitimacy of your request, order the information produced, and not shift the cost of production to your client. Consider the option of incremental productions, where you do sampling first to determine if there is ESI that is truly responsive to your requests. If your sampling warrants further dis-

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covery you can move on to additional production; if it does not, you can avoid unnecessary expense. Simply put, the give me everything approach to discovery no longer works.

6. WHEN RESPONDING TO AN E-DISCOVERY DEMAND KNOW THE CAPABILITIES AND LIMITATIONS OF THE SOFTWARE USED TO CREATE YOUR RESPONSE

Electronically created information should be produced and worked with electronically. Furthermore, your default position should be that the information be produced in native format so you have access to any pertinent metadata. Given this reality, you need to understand the output capabilities of the vendors or forensic experts you retain. If they cannot generate a load file that works with your litigation support program, or that of the opposing party, you may need to reconsider who you use. You also need to know what your own litigation support capabilities are when dealing with ESI. You want to obtain deliverables usable by you or your staff as quickly as possible without the need to do additional manipulation of the electronic files to make them useful. Avoid the temptation to work with image files processed from the native files. While it may be a technological advance for you personally to look at a PDF instead of a piece of paper, you may lose the ability to search and organize information or access useful metadata if you don't work with the native files.

7. DEVELOP AN RFP TO USE WITH E-DISCOVERY VENDORS TO MAKE SURE YOU COMPARE APPLES TO APPLES WHEN ASSESSING THEIR BIDS

I have had the disconcerting experience of sending out identical RFPs to multiple E-Discovery vendors of varying sizes and notoriety. I've received bids to process the same work in the same exact fashion that were literally hundreds of thousands of dollars apart. You need to be a highly knowledgeable consumer of E-Discovery services, and that means knowing how to create RFPs that generate apples to apples comparisons. You also need to know how to negotiate the terms of any agreement you strike with a vendor and make sure it is as specific and complete as possible. Otherwise, you may find yourself with a huge bill. I've even seen situations where the legitimate cost of processing the relevant ESI exceeds the value of the claim. You need to do appropriate cost benefit analyses from the outset when looking at large dollar amounts to deal with E-Discovery.

8. CREATE AN E-DISCOVERY TEAM OF KNOWLEDGEABLE ATTORNEYS AND PARALEGALS TO MANAGE E-DISCOVERY

While some attorneys may want to handle E-Discovery by themselves, and others may want to delegate to associates or paralegals, success in this area really requires a team approach. The team should include attorneys, paralegals, IT, and litigation support staff if you work in a firm that is large enough to have dedicated litigation support personnel.

I personally believe it makes sense in larger firms to have a designated team that can assist other litigators solely on E-Discovery related issues. Such a group can also work with transactional attorneys to provide clients with proactive recommendations on managing their ESI to minimize the impact of E-Discovery demands in the event of litigation. This area is sufficiently technical, and the applicable law and technology are changing so rapidly, that it just doesn't make sense to expect every attorney to have the same level of expertise. If this isn't something you want to do, you at least need to know when to call in a specialist. The key is knowing your own limitations.

9. DEVELOP LITIGATION HOLD POLICIES, PRESERVATION LETTERS, AND OTHER WRITTEN MATERIALS IN ADVANCE THAT CAN BE QUICKLY ADAPTED TO THE INDIVIDUAL NEEDS OF THE CASE

The obligation to suspend normal operating procedures and institute a litigation hold arises as soon as litigation is reasonably anticipated. Furthermore, the case law that has developed has created an affirmative duty on the part of the attorney to meet with the client and its key management and IT staff in order to understand the client's technology infrastructure and to implement a litigation hold

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policy. The existence of the policy also needs to be reiterated by counsel from time to time.

Thus, to avoid malpractice, every trial attorney should have written litigation hold policies developed that you can immediately share with clients and staff so that an appropriate litigation hold can immediately be put in place. It also makes sense to have preservation letters for clients and opposing counsel ready to go, and basic written discovery documents or forms developed that are designed to provide necessary basic information regarding any applicable technologies. You should periodically review and update such items, and you will need to tailor them to the facts of a given case. However, having the basics available at the outset helps you to get a jump-start on E-Discovery.

10. MEET EARLY WITH YOUR CLIENTS TO PREPARE THEM FOR THE UNFAMILIAR AND SUBSTANTIAL COSTS OF E-DISCOVERY, THE NEED FOR COMPLETE ADHERENCE TO A LITIGATION HOLD POLICY, AND THE POTENTIAL CONSEQUENCES OF FAILING TO LIVE UP TO THE OBLIGATION TO PRESERVE

The biggest drawback of E-Discovery is the additional layer of expense it has added to the already burdensome cost of litigation. However, it is a necessary evil as long as we use computers and other technologies at work. I recently had a case where the cost of purchasing additional backup tapes needed to meet the litigation hold obligations pending a stipulation on data preservation was actually four times the amount paid to settle the case. I've also seen cases where the client no longer wanted to be quite so aggressive when they realized the added cost of dealing with E-Discovery, and settlement quickly ensued.

Furthermore, when clients begin to understand the consequences of spoliation of ESI and the potentially disastrous outcomes that have come about in many celebrated cases, they quickly lose their appetite for all out war. You need to make sure the client understands from the outset what this new component of litigation entails. It may disrupt their business. It may add a huge expense. You simply don't want to wait until the expenses have been incurred to discuss them with your client.

CONCLUSION

While dealing with E-Discovery has resulted in additional challenges that many of us never would have imagined only a few years ago, there are practical steps you can take to minimize the impact of E-Discovery. Following the suggestions above will help. They should also open your eyes to the need to develop a deeper understanding of this new and rapidly evolving area of the law.

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