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E-DISCOVERY BASICS

> **"Because of their ubiquitous nature, documents stored in electronic form... should be specifically targeted by counsel in developing their discovery plans. Failing to do so may not only prejudice their case, but may also constitute malpractice."**
> Michael R. Overly, California Continuing Education of the Bar (1998 3d Ed), Civil Discovery Practice 3rd Ed., Vol. 2, §8.24, p. 711

So it was written, over seven years ago, in a major discovery treatise. Today, malpractice claims are rising as past errors and omissions are revealed; and, sophisticated clients are leaving established legal relationships for lawyers that can handle electronic discovery issues. Clients understand the significance of electronic data and expect their lawyers to gather and use such evidence.

E-discovery is not an option and must be considered in every discovery plan in every type of case. It can be as important in the slip and fall or divorce case as in intellectual property or antitrust litigation. Electronic data, information, and evidence permeates our lives. Many records are created in electronic media and are never converted to hard copy. Consequently, all lawyers must have a basic level of understanding and appreciation of the importance and nature of electronic records and information as well as the unique issues e-data raises in litigation. Why? To paraphrase Willie Sutton, that's where the evidence is. To paraphrase Michael Overly, that's where the malpractice is.

Any litigators who might believe their practice does not involve electronic data are in denial and inviting malpractice claims. Those who fail to consider it are ignoring a fertile source of vital evidence. Those who fail to advise their clients on preservation duties risk spoliation and discovery sanctions including adverse judgments.

E-DISCOVERY TODAY. For almost a decade, California lawyers have been exposed to e-discovery. C.E.B. presented a statewide program on the subject in 1999. Bar associations and other providers have saturated the CLE market with introductory e-discovery luncheons and programs. However, mere exposure and awareness is not enough. Today, every litigator, with the close collaboration of other professionals and experts, must analyze sources of electronic information and integrate e-discovery into every case.

As of April 2005, e-discovery cases are being reported regularly throughout the country. Numerous jurisdictions have adopted rules. The National Center for State Courts is in the process of adopting guidelines for state trial courts. The 9th Circuit has drafted guidelines

for trial courts. The Federal Rules of Civil Procedure have been under review for over five years and proposed rule amendments are pending. However, rules and court decisions will not resolve most issues; they will be resolved by lawyers applying discovery concepts to the electronic media and facts of their cases.

To date, most developments have occurred outside California state courts; but, California lawyers should read the following: *Dodge, Warren & Peters Ins. Services, Inc. v. Riley*, 105 Cal.App.4th 1414 (2003) [regarding the need and remedy for preservation of electronic data and treatment of such orders as injunctions]; Code Civ. Pro. §2031.280 [former Code Civ. Pro. §2031(g)(1), regarding the form of production and cost shifting]; *Toshiba America Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)*, 124 Cal.App.4th 762 (2004) [Code Civ. Pro. §2031.280, when applicable, mandates cost shifting of discovery costs for electronic data within that provision and to the extent such costs are reasonable]. *AdvantaCare Health Partners, LP v. Access IV*, 2004 U.S. Dist. LEXIS 16835 (N.D.Ca.2005) [illustrating the use of computer forensics and spoliation remedies]

WHAT IS E-DISCOVERY? E-discovery involves the access and use of information, data, and records created or maintained in electronic media. E-discovery is more than rephrasing discovery requests to include electronic records and data; it is more than printing out e-mails. It includes obtaining new information, in new forms, in new places, from new sources and using it in a new manner. E-discovery includes different approaches and disciplines: (1) computer forensics where scientific methods are employed to analyze sources of e-data such as as hard drives or servers to determine if evidence was accessed, destroyed or fabricated or to find computer generated evidence of which lay persons are unaware such as access logs or meta data; (2) the searching, gathering, reviewing, analyzing, producing and using large amounts of relevant information, in "routine" litigation, i.e. the equivalent to searching warehouses, waste baskets, file cabinets, home offices, personal notes etc., which is often performed or facilitated by outside service providers; (3) the focused search for electronically stored information particularly relevant to the specific case such as toll records, cell phone and GPS records, e-mail or instant messaging communications of key participants, a surveillance tape of the scene of the incident, a data base that identifies potential witnesses or records events, computer records in an automobile revealing information relevant to the accident, records of Internet activities.

Although such potential evidence has been discoverable for many years, it became essential due to the manner and form in which it permeates our lives and memorializes our activities, the retention of large amounts of information, and the ability to search and analyze such data electronically. The challenge to the bench and bar is to use technology to achieve cost effective discovery and improve the quality of the litigation process.

E-DATA IS DIFFERENT. The challenge in approaching e-discovery issues is to apply basic discovery principles and concepts to the new media; but, not in a naive or simplistic manner. Proper application involves both an understanding and reevaluation of discovery principles and an appreciation of the differences and similarities between e-data and paper. Most records are created electronically and many do not exist in hard copy. Hard copy versions of e-records are incomplete in that they do not contain all the information

contained in e-records such as metadata, hidden comments, prior versions, changes etc. A computer print out of a "document" would not reveal that it was significantly modified just prior to printing or created long after the purported date; but, a computer forensics examination could reveal those facts. E-data is different, involving huge volumes, high volatility, constant change, ease of manipulation and fabrication, and portability. On one level it is easy to destroy; but, on another level, it can often be recovered; if not, evidence of destruction will likely be available. E-discovery involves new records and information such as e-mail, databases, metadata (data about the data such as who created or changed it and when), hidden comments, and computer logs. It involves records created by computers without the knowledge of the user. It involves new sources of informations such as backup recovery and storage devices, hard drives and servers, PDAs, cell phones, laptops and voice mail. It involves a great proliferation of information due to ease of duplication and inexpensive, unlimited storage. The discovery of electronic information may involve several non-legal but highly skilled disciplines about which lawyers should be familiar: computer forensics, network forensics, records management, and litigation technology support. Because of rapidly evolving technology, lawyers and courts must embrace continuing education on the relevant technology and reevaluation of the application of basic discovery concepts.

Civil discovery law provides more than a set of rules to be used and abused in litigation strife. It provides a changing and adaptable organism of concepts and principles to facilitate the discovery of facts and evidence in accord with its purpose and function and the needs of the case. Its efficacy depends upon the proper application, grounded firmly in experience and knowledge, of such concepts as “good cause”, “undue burden”, “relevance”, “due process”, "cost shifting", "cost / benefit", "sampling", and “reasonable particularity”. It expands, contracts and adapts to solve new problems and challenges such as those arising from electronic data.

The decision in *Rowe Entertainment v. The William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002) focused attention on the need to revisit and reevaluate basic discovery assumptions, principles and practices in view of the potential high cost and burden associated with some e-discovery. Rigid, simplistic or generic rules would not suffice when the cost of producing relevant e-mails exceeded $1 million. The Court recognized the need to consider all relevant factors to equitably resolve e-discovery disputes and suggested eight factors to consider on the cost shifting issue.

The differences between paper and electronic discovery suggest consideration of the following propositions. Rapid change of electronic data and high volatility may require prompt action to preserve evidence. Fabrication and alteration of evidence has never been easier, or more tempting, for the average person. Early involvement and consultation with experts will be invaluable in formulating a discovery plan, seeking sources of information, advising your own client on preservation and discovery duties, and presenting issues to the court. Do not assume a reasonable search has been conducted by your adversary or your client and be proactive in seeking electronic data. It may be impossible to read all relevant documents or to thoroughly screen them for privileges. Discovery does not have to be perfect or exhaustive but it should be done intelligently, precisely and effectively. Avoid discovery drift and address issues with opposing counsel early and in good faith. Employ judicial guidance and assistance early in the case before

problems arise and irreparable damage occurs. Law firms should retain or hire experts or assign partners to the task of monitoring and continually educating lawyers on developments.

E-DATA EVIDENCE IN EVERY CASE. Electronic data may be the only evidence, the most reliable evidence, or the "smoking gun". It pervades and records many aspects of our daily lives; it creates records and evidence of our activities, our movements, our communications, our locations, our purchases, and our thoughts.

People are aware of the numerous ways and continuous manner in which they deposit electronic evidence and records as they go about their daily lives; they can expect their lawyers to pursue such evidence. Thus, a lawyer limited to hard copy is only considering a small percentage of the potential evidence in a case. A lawyer may decide not to pursue the discovery of some or all electronic evidence, but that should be an informed decision involving cost / benefit factors as with any other discovery decision and strategy. It cannot be a decision by default based on ignorance.

Lawyers not only have a duty to prepare their cases by adequate discovery; they have a duty to advise their clients of their preservation and discovery obligations. That latter duty poses the greater threat of malpractice claims. Failure to pursue evidence results in less evidence but the consequences are not obvious. Failure to preserve and produce electronic data results in claims of spoliation and demands for sanctions. Courts throughout the country are less tolerant of parties and lawyers who fail to preserve, search for, and produce electronic evidence in litigation. Courts are awarding spoliation and discovery sanctions against those who fail to preserve and produce electronic records: judgments, evidence, money, adverse inference instructions. ***Coleman (Parent) Holdings Inc. v. Morgan Stanley, Inc.*** 2005 WL 674885 (Fla.Cir.Ct.) *United States v. Philip Morris USA, Inc*., 327 F. Supp. 2d 21 (D.D.C.2004) In the 5th decision of the well known Wall Street employment law case, ***Zubulake v. UBS Warburg LLC,*** **2004 WL 1620866 (S.D.N.Y.) at *8** the Court noted the duty of counsel with regard to electronic data:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.****Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. ****
> Once a "litigation hold" is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed "on hold," .... To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. ....Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.

In the *Zubulake* case, an adverse inference instruction was given to the jury and it awarded $29.3 million. Similarly, in the *Coleman* case the jury awarded $1.45 billion. Will your client blame you for failing to advise and counsel them properly on their preservation duty or for failing to pursue and obtain that surveillance tape from the opposing party that would have resolved the case?

MAJOR ISSUES IN E-DISCOVERY Issues in e-discovery change as sophistication changes. A major issue just a few years ago was as to who should pay for the print out of the e-mail. That issue largely disappeared as lawyers learned that hard copy was not as desirable as electronic data.

Spoliation. Loosely described as the destruction of potential evidence, spoliation has been an issue for a long time. See *The FORTUNA--Krause, et al. Claimants*,15 U.S. 161,4 L.Ed. 209, 2 Wheat. 161(1817). Spoliation like fabrication of evidence goes to the heart of the judicial system. As such, courts often rely on inherent powers to control and remedy it rather than the statutory discovery sanctions. In California it was eliminated as an independent tort and subsumed as a remedy to be applied in the pending litigation. *Cedars-Sinai Medical Center v. Superior Court (Bowyer),* 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 954 P.2d 511(1998). At page 12 of that case, the Court suggested spoliation would also be an abuse of the discovery process within Code Civ. Pro. §2023.

With regard to electronic data and discovery, spoliation has assumed new importance because the normal operation of a computer destroys or changes information in the normal course of operations. Information contained in databases is continually updated; old information is destroyed. Data or information no longer relevant to current business activities may be destroyed. Important evidence can be lost if not preserved. This gives rise to several issues: the duty to preserve evidence [what is it and when does it arise?]; the duty to adopt and enforce appropriate document preservation policies; the duty to issue a "litigation hold" on such practices as well as its scope, duration and enforcement protocol; the duty of counsel to advise and supervise preservation, searches and production; the timing, need, issuance, scope and form of preservation orders [see the *Dodge, Warren* case, *supra*]; the appropriate remedy for spoliation. Most issues require a balancing of interests and consideration of multiple factors and consequences. For example, the need to move quickly to preserve evidence before it is destroyed or altered in the normal course of business must be weighed against the danger that an overbroad protective order, literally followed, would shut down the operations of an ongoing business.

Cost Shifting. This discovery tool received new attention and importance with the advent of voluminous e-records. Lawyers discovered e-mail and then discovered backup tapes which are used by business to restore basic business information in case of disaster. The backup tapes are a snapshot of the corporate data at a given point in time and can contain evidence such as e-mail that is otherwise unavailable. Unfortunately, backup tapes were not designed for storage and retrieval of information. The cost of retrieving e-mail of a few key players on a limited subject from backup tapes may exceed a million dollars. Numerous cases, including the *Rowe Entertainment* and *Zubulake* cases, *supra*, applied multi-factor evaluations to determine whether and what costs should be shifted to the requesting party. The *Toshiba America* case, *supra*, addressed this issue in connection with the application of Code Civ. Pro. §2031.280 but left many issues to be resolved. When does the section apply? What are "reasonable expenses"? When is it "necessary" to use detection devices to translate data compilations into reasonably usable form?

Reasonable Search. Looming on the horizon are issues as to whether, in addressing huge volumes of e-records, a responding party has conducted a reasonable search to find "each and every document that refers or relates to ...." and whether they have identified, in proper response to Code Civ. Pro. §2031, those documents that they are unable to produce. Given the volume of e-records, a literal search and review by humans is problematic. Because computers are more accurate and cheaper than humans in repetitive examinations of documents, lawyers are relying on boolean and key word searches and the development of search software to address this problem. Attempts to evaluate and measure the effectiveness of search software to establish standards of reliability and general acceptability are under consideration by the industry and academics.
Privilege. The huge volume of e-records gives rise to issues regarding review for privilege and waiver by inadvertent production. The major reason for the high expense of some e-discovery is the high expense of attorney fees attributed to review of huge volumes of documents for relevance and privilege. Better records management, document control and technical advances in search technology may provide a breakthrough of this expensive bottleneck. Privilege law and the concept of waiver by inadvertent production varies by jurisdiction but the nature of electronic data makes inadvertent production inevitable. Stipulations by parties regarding inadvertent production may resolve issues between those parties but are not likely to bind third parties or courts in other jurisdictions. Unlike Federal jurisdictions, California privilege law is based on statute and can be addressed by legislation. See the currently pending AB1133. As of April 2005, the Supreme Court has the issue of inadvertent waiver before it in both *Jasmine Networks Inc. v. Marvell Semiconductor Inc.*,117 Cal.App.4th 794 (2004) and *Rico v. Mitsubishi Motors Corp***.** , 116 Cal. App.4th 51 (2004).
Form and Format. How documents are produced affects the value and use of the information and the cost of discovery. Requesters, especially the government in their investigations, are increasingly demanding native format and meta data. Requesters want the advantages of e-records: the ability to search, analyze and manipulate data and documents efficiently. Producers know that production in hard copy and some electronic formats can render the discovery useless or very expensive. Code Civ. Pro. §2031.280(a) and F.R.C.P Rule34 allow, as an alternative to producing in the categories requested, production of documents "as they are kept in the usual course of business" which today is, arguably, native electronic format. The proposed amendments to F.R.C.P. Rule 34 allow the requester to specify the format subject to the producer's objections. To access the information in electronic format requires appropriate hardware and software. Sometimes, issues arise because one or both no longer exist or are proprietary or subject to license restrictions on use.

THE PROMISE OF E-DISCOVERY.

> “**We must become much more efficient and more clever in the ways we find new sources of data, mine information from the new and old, generate information, make it available for analysis, convert it to knowledge, and create actionable options.”**
> Admiral John Poindexter, Director, Information Awareness Office. 8/2/02 prepared remarks, *DARPATech 2002 Conference, Anaheim, Ca*
> http://www.fas.org/irp/agency/dod/poindexter.html

To date, lawyers and courts have focused on the dark side of e-discovery: massive increases in the volume of data, excessive and prohibitive costs, rumors of coerced settlements as an alternative to discovery expenses, spoliation and discovery sanctions, legal malpractice. Many cases are illustrative of the mistakes that lawyers and courts have made in approaching this subject. But there is a bright side and hope for a revolution in the discovery and litigation process. Technology produces cost savings as lawyers progress toward paperless litigation. Information can be obtained, analyzed, organized, stored, recalled, modified, manipulated and used, when needed in the litigation process, in electronic form, with comparative ease, resulting in more efficient trial preparation and the elimination of copying, scanning, transportation and storage costs. Often, what appears to be cost prohibitive discovery is easily and inexpensively obtained once the IT experts are called upon to use their talents to make the discovery process work. Search technology is continually improving and evolving from key word searching to concept searching and to artificial intelligence. Corporations are improving their electronic records management to improve the accuracy and reduce the costs of retrieval.

E-DISCOVERY TIPS

Be Prepared.

LAW IS NOT ENOUGH. Establish a systematic continuing education program relating to all aspects and technological developments of e-discovery.

DO NOT AWAIT DISASTER. Research and establish relationships with experts and electronic discovery professionals now for possible use in the future.

KNOW WHAT YOU DO NOT KNOW. Enlist and embrace the guidance and support of experts and other professionals early and use them throughout the litigation process.

KNOW YOUR CASE. E-discovery is fact and technology specific and it is unlikely that a reported case will be controlling or even current.

TECHNOLOGY CHANGES. Obtain a third or forth opinion.

Be Proactive

GO WHERE THE EVIDENCE IS. Consider discovery of electronic data and records in every case.

DELAY BEGETS DISASTER. Focus on electronic data of your client, the opponent and non-parties early in the case.

NOTICE BEGETS DUTY BEGETS SPOLIATION Notify your opponent and the court by preservation letter, motion and discovery requests that you seek preservation and discovery of e-data.

AVOID DISCOVERY DRIFT. Engage in early and continuing discussions with opposing counsel and seek guidance from the court to reduce expenses, avoid misunderstandings, and avoid catastrophic results.

DO NOT ASSUME COMPLIANCE. Persevere and follow up to assure your client and your opponent have conducted adequate searches, preserved and produced e-data.

Be Professional

Good lawyering supported by technical expertise is the most important factor for success with e-discovery; do not await court rules or legislation or case law developments or expect them to resolve most discovery issues

Be Insured.
FURTHER INFORMATION. Continuing education is essential in this rapidly changing area of practice. E-discovery case law and and additional resources are available on the California Civil Discovery web page section on Electronic Data at http://CaliforniaDiscovery.findlaw.com.