

## **MAKING E-DISCOVERY WORK**

Electronic discovery is a part of every case and the legal professions must have a basic understanding how legal issues and rights are affected by the technology and the electronic media. The good news is that well known legal concepts can be applied to the media. To make electronic discovery work, consider revisiting the basic principles of discovery and applying them with new insight to electronic data and documents. But to do so, we need to understand the impact of the media and its technology on its legal environment.

Expertise in the technology is both important and rapidly changing. To function, some knowledge and understanding is required. Beyond that lawyers may either master the technology and keep abreast of recent developments or obtain the services and establish a relationship, either in house or outside, with professionals who have such knowledge and expertise. Such professionals should be welcomed and embraced as partners in the litigation process. Regardless of the knowledge of the lawyer, an independent expert is desirable for any presentation to the court.

Expert assistance is required at the outset of any case and should be part of the planning and budgeting process. Lawyers and parties can miss opportunities and can destroy their own credibility with opposing counsel and the courts if they avoid this subject or mistakenly make representations and promises that are incorrect or cannot be fulfilled.

Early attention to e-discovery issues is essential. Before electronic discovery issues become a formal motion involving considerable legal and expert fees, mutual understanding with opponents and court guidance should be sought. Tens of thousands of dollars might be saved by a telephone conference call. In some cases, a meaningful case management order may be worth hundreds of thousands. At the very least, the parties will know what information the court may need to resolve the dispute should a formal motion be required. Early case management conferences or motions will not only educate the

court and counsel but avoid spoliation charges, expensive motions, or misguided discovery.

Litigators have an opportunity to revolutionize the litigation process by using proven technology and it starts with electronic discovery. Because most data and information is created and remains in electronic form, conducting electronic discovery is not an option. Electronic discovery and other technology should be viewed as tools to conduct cost effective litigation, e. g. by applying search techniques and software to analyze, manipulate, evaluate, store, retrieve, produce and present evidence and information. As litigation moves into the digital world it is worth noting some basic differences in electronic media, such as volume and volatility, so that discovery concepts can be properly applied. It is also worth noting our lack of knowledge in this area, the need to educate ourselves and the need for expert assistance. With increased knowledge and experience we can apply discovery concepts properly to the new media to realize cost effective discovery and litigation.

## **REVISITING BASIC PRINCIPLES**

The decision in *Rowe Entertainment v. The William Morris Agency* (S.D.N.Y. 2002), 205 F.R.D. 421 involved a million dollar e-mail production. The court recognized that common assumptions and practices as to discovery needed to be revisited. To apply some rule of thumb or simplistic principle that worked in the 25 document case would not suffice for the million document case. It might not be fair to force a party to spend a million dollars to produce something just because it was relevant and not privileged when the case was worth \$50,000. The court identified but did not limit consideration to eight factors that should be considered; it encouraged counsel to suggest others. Those factors and others suggested in decisions, guidelines and commentaries that followed are not exhaustive and are not new to discovery law. They illustrate the multifaceted approach and the fact specific nature of any discovery resolution process.

As we approach the new media, we must review and reexamine the old 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. Civil discovery is a living organism that expands and contracts and adapts to solve new problems and challenges. Its efficacy depends upon the proper application of such concepts as “good cause”, “burden”, “relevance”, “due process” and “reasonable” which must be grounded firmly in experience and knowledge. Understanding and applying these concepts properly enables us to make the system work and to apply it to any “new” issues such as those raised by the digital world.

Each discovery device has its unique purpose, function, limitations, advantages and disadvantages. Each case has its unique elements. Each discovery issue has its unique facts, interpretations and application of the various discovery concepts. That is why the system employs lawyers and judges rather than computers to resolve discovery issues. Some issues are clear and should never be in court. But many do not fit a mold. Good lawyering can make a big difference in the realm of discovery, especially when electronic data and information is involved..

There are rules that provide some certainty and should be inflexible in most cases. Clear rules must be followed and enforced so litigants can rely upon them and plan accordingly. Failure to follow and enforce clear rules without good reason, justification, explanation and legal basis makes a mockery of the litigation process and breeds cynicism and contempt for the system. Failure to enforce the rules often rewards the culpable party and punishes those who operate in good faith. Such practice can frustrate the discovery process, create uncertainty, increase litigation costs, and result in injustice.

Overriding such rules is a philosophy and purpose that is often reflected in case law, the legislative history and scholarly observations. Rules also have shortcomings and unintended consequences. Often there are multiple and conflicting concepts, some of more importance than others, that impact on the discovery at issue. Any discovery concept or practice in the extreme is likely to come in conflict with countervailing discovery concepts. It is the responsibility of the bench and bar to recognize such

conflicts and adjust accordingly. When the system seems to be malfunctioning, all players need to recognize and identify any problem, to pause and reflect on it, to identify the concepts in conflict, and to adjust the process accordingly.

Civil discovery law does not embrace sharp practice, stonewalling, and other obstructions or abuses of the process. No court wants to deprive a party of discovery necessary for due process or to force a settlement under the duress of oppressive discovery. Finding the proper balance is more likely if it is a mutual goal of all players within the adversarial system. Those who do not participate in the process will not have much influence on the end result and have only themselves to blame for any failure to fully accommodate their interests. This philosophy is reflected in the “meet and confer” rules adopted by most courts, though they too can be a tool of abuse. Ultimately the courts are responsible for making the system work but they need help.

## **E-DISCOVERY IN EVERY CASE**

E-discovery ranges from computer forensics to document management to seeking new sources and types of evidence. No one can ignore the common knowledge that 93% or more of the documents are created in electronic media and most never exist in hard copy. Nor can anyone ignore that a smoking gun may exist, or that significant cost savings may be derived, or that better analysis, organization and presentation of evidence can occur with the use of technology. Electronic discovery may be as important in the slip and fall case, the auto accident case, the contract case, etc as it is in the class action or antitrust case. Whether propounding or responding to discovery, no lawyer can ignore the importance of electronic data. Several courts have adopted local rules directing counsel to be familiar with their client's information management systems and to be

prepared to discuss electronic discovery needs from the outset in every case. It may not be necessary to conduct electronic discovery in every case but it must be considered. Lawyers should discuss and present a cost/benefit analysis and proposed e-discovery budget to the client.

Electronic or digital data has been around as long as computers. Consequently, courts have engaged in electronic discovery and the authentication and introduction of electronic evidence for several decades. In the old days of the early 90's, the process involved printing data and documents stored in electronic form in response to a request for documents and perhaps scanning them. Sometimes, the evidence had to be obtained from backup tapes, as in the Iran-Contra cases of the 80's, when attempts were made to destroy important evidence or it was not otherwise available. The proliferation of personal computers and e-mail focused attention on the potential smoking gun in every case from the Microsoft antitrust case to the average employment law case. The proliferation of electronic devices in our daily lives--- the world wide web, surveillance cameras, cell phones, electronic door locks, PDA's, GPS tracking, voice mail, RF tracking, grocery discount and credit cards, computers in cars--- illustrates the importance and variety of sources of electronic evidence. The enormous accumulation and storage of electronic data not only provided evidence but illustrated the problem of too much evidence for human beings to examine in hard copy.

The general awareness of electronic evidence has resulted and been facilitated by continuing legal education programs running from one hour to one week or more in duration. Increased awareness of potential evidence has resulted in increased sophistication as trial courts have addressed the issues. A few years ago, the issue was who pays for the cost of printing out the e-mails to hard copy. It quickly moved to issues such as whether meta data was included in document requests, whether documents had to be produced in native format, and the duty and problem of preserving evidence when the normal operation of a business altered or destroyed the data and documents.

The legal profession's first response to electronic data issues has been to consider and sometimes adopt new rules or guidelines to resolve the issues. Various organizations

with participants involved in the electronic discovery process, such as the ABA, ARMA and the Sedona Conference, have provided guidelines for electronic discovery and document preservation. Several states such as Texas, Illinois and Mississippi and local courts such as the Kansas, Wyoming and New Jersey federal district courts, have adopted rules or guidelines. Most state and the federal rules committees have considered rules for electronic discovery. In the meantime, the trial courts have resolved the issues as they have evolved and been presented. In doing so, they have adapted discovery concepts to the problems presented by the new media in a factual context.

Electronic evidence and discovery comes in different forms with different issues and problems. In response, there are different areas of expertise to address a variety of issues and different service providers who may or may not have all the skills required for your case. In some cases, the computer forensic skills to discover “deleted” evidence or to simply search for evidence is required. Professionals with law enforcement backgrounds have moved into this area and software, both proprietary and off the shelf, has been developed. The issue may be one of economically culling through and producing relevant documents from the millions available without violating privileges or privacy rights. Professionals from litigation support and records management backgrounds have moved into this area; search software and case management software has and continues to be developed to meet the needs. Sometimes the expertise of persons with an IT background and knowledge of networks, network security, and various operating systems is required. Sometimes expertise in a particular software program or operating system is required. Sometimes discontinued hardware or software is required to access the data. Just as one lawyer may not be able to handle every legal problem, one expert may not be enough to assist with e-discovery.

## **SOME QUESTIONS TO ASK**

Often litigation and discovery disputes are about money: who pays for the high costs attendant to the discovery or the preservation of potential evidence? Those costs may include attorney review time, business down time, time consumed in searching and

retrieving documents, storage costs, duplication costs, costs of preparing indices, etc. Recognizing that the application of discovery principles depends on the facts, issues and technology applicable to the particular issues and at a risk of repeating concepts and questions familiar to all, the following questions should be considered when approaching burdensome and oppressive objections or cost shifting and apportionment. In essence, a cost / benefit analysis is required in most cases.

The benefit side of the cost benefit analysis cannot be overlooked or taken for granted in an electronic discovery dispute. Before the cost of the proposed discovery are born by anyone, how likely is it to produce evidence and of what value will the likely evidence be? How important is the discovery? How urgent is the discovery? Does the document or data even exist? How do you know? Why do you think it does? Although a party is only required to show discovery relevance, in electronic discovery it is better to anticipate objections of burden or cost, and even privilege and privacy, and make a greater showing. Despite “liberal discovery” concepts, to the extent possible the proponent of the discovery should specify its potential value by showing the type of information likely to be produced and how it directly relates to a specific issue in the case. Although this is somewhat speculative by its nature and source, the showing can be made based on legal issues in the case, preliminary discovery, experience and common sense. With electronic discovery that showing can be persuasively supported or made by an expert declaration tailored to the discovery at issue and based on the experts experience and knowledge about the operating systems, the relevant software or the networking and storage systems at issue. The expert should show the likelihood that the desired data exists and the need and ease of obtaining it. When appropriate, the expert can show the volatility of the data and need to preserve it or obtain it before it is altered or lost. Clearly demonstrated relevance and discoverability beyond the minimal standards, or the contrary showing, is an important psychological factor as well as an essential legal requirement and may influence decisions on cost shifting and sanctions. Show whether the information is directly relevant and critical, whether it is likely to exist in electronic form, whether it is readily obtainable, and whether it is retrievable in the

normal course of business. Try to get the court firmly on your side of this issue from the start and the rest of the dominoes may fall into place.

Most courts insist that parties attempt in good faith to resolve discovery disputes before making a motion or coming to court and this is not a perfunctory exercise. Since many discovery requests and responses border on boilerplate, the meet and confer process is an important opportunity for both sides to narrow or resolve the issues so they can be determined rather than postponed at greater expense to all in the long run. The parties may want to have their experts participate in such discussions. Sometimes, lawyers have found that leaving the experts alone in a non-adversarial environment to discuss the technological feasibility and alternatives of discovery is the most efficacious course. Sometimes, it may be desirable to educate an opponent or its expert on your system. At this point the responding party might want to suggest alternatives. Although that may facilitate discovery by the opponent, the cost savings and good will may more than justify aiding the enemy, especially if the discovery is likely to occur anyway and it is not devastating. In contrast, "hardball" tactics may just waste time and money. At a minimum, the discovery can occur on a limited basis or as some form of sampling process without prejudice to propounding further discovery on the subject. Such "temporary" resolutions may not only be the best alternative at the time but may eliminate the need for further discovery.

The burdensome and oppressive objection is not unique to e-discovery but it has its unique elements. Is this discovery really burdensome and oppressive? If so, why? The volume of electronic data is staggering at first blush: millions of e-mails or billions of documents, or terabytes or petabytes of data. But an expert might explain how the data can be reduced and searched for a relatively minor cost without human contact or how the production of 20,000 documents in electronic form is more economical than the production of 200 documents in hard copy. A court might be shocked by the volume into denying discovery. Or, the court might rely on one of the clichés of discovery and require a print out of all documents: it's your business and your data; you chose to store it and how to store it; so, it's your job to produce it and that's the cost of running a business.

Neither alternative is compelling especially to the losing party. In the Rowe case, the court recognized that easy answers are not just and that the court should consider various factors and alternatives. The responding party has the burden on this issue and burden is never “obvious”.

Is there any extraordinary cost associated with the discovery ? If so, why? What is the amount? How can that cost be broken down into elements to be evaluated as to necessity and possible allocation? Why is the total and each aspect of costs extraordinary? Why should the other side pay all or some of the costs? Are some costs normally associated with search and retrieval, review for privilege, etc. that is normally a cost of production ? Is there a less expensive alternative? The norm in discovery is that a party requests discovery and the producer searches, locates and provides it at the expense of that party. Some courts may assert that attorney review costs are always born by the producing party. But what if the case is worth \$50,000 and attorney review costs \$100,000? Excess costs can arise because the requester demands an extraordinary search, demands production of extraordinary volumes, demands production in the most expensive form or serves an overbroad request. It can also arise because the responding party misinterprets the request so as to make it extraordinary. In the electronic storage context it may arise due to a misconception of what is readily available. Initially, these issues may lend themselves to resolution by meet and confer efforts by counsel or mediation type of resolution by the court from an informal conference or a formal motion.

What are the costs? Generalities and the eloquence of the arguments of counsel will not suffice. Declarations of experts and service providers that clearly identify what they propose to do at what costs are essential. Often costs can be broken down into segments and can be evaluated and allocated as appropriate. For example, in producing large volumes of documents, service providers often break down the costs: e.g. identification and location of data, production, restoration, de-duplication, conversion to searchable format, search, review for relevance, review for privilege, preparation of index, costs of printing and/or duplication, conversion to TIFF, cost of software to access

and review etc. Allocation can be considered on an item by item basis based on some or all of the considerations mentioned in the cost allocation cases. Courts and lawyers need to be careful to compare like items. Is someone printing out hard copy to the detriment of all and at increased expense? The costs estimates for a search of backup tapes may vary considerably as illustrated in the reported cases depending upon what each service provider is proposing to do. There is one clear rule: always get a second opinion or a third. Technology and the costs of electronic search and production not only vary widely but are constantly changing --- usually for the benefit of discovery.

Are the costs extraordinary? Of course what is “extraordinary cost” is in the eyes of the beholder but some relationship to the value of the case and the resources of the parties can add perspective. Is this a normal business cost? Are the documents stored for the purpose of retrieval in the normal course of business or because they are required by law to be retained? Or were they stored for no reason or for disaster recovery purposes.

Assuming the discovery is necessary and the costs are extraordinary, what compromises or alternatives are available? Are there alternative sources of similar or comparable data at less cost? Can the discovery needs be satisfied by some alternative such as a stipulation to facts or issues that the propounder hoped to establish with discovery or the preclusion of evidence by the responder if the goal is to protect against surprise at trial? Will good faith production from the most likely sources produce 80% and is that good enough? Or is this a smoking gun case? Can discovery be limited by time, scope or persons so as to reduce costs? Should sampling or some staged progression of production from the most likely to the least likely sources of valuable information be employed? Should discovery be limited to hard drives of key players? For the time being, is it sufficient if image copies of hard drives are made and backup tapes are pulled from recycling so as to preserve the data and postpone the cost issues for another day? Is a reasonable search by concept or key word sufficient or is a thorough search and review demanded? If the latter, how should that impact cost allocation? Should a neutral expert be appointed to solve all problems? Will that solve or create problems? Will it increase or decrease the cost? Is it an abdication of the court and the lawyers of their responsibility

or a common sense solution to the common problems

## **SHOULD A HARD DRIVE BE PRODUCED?**

A relatively simple and common request for production of a computer hard drive illustrates the questions and issues that might be raised in an electronic discovery motion. It seems to be a specific request for a particular item. Yet, clearly, it is not a request for a document or even several files. Analogous to the real world, it is in effect a request for the keys to the office, an opportunity to rummage through all the file cabinets, the storage room, the confidential file documents, personal papers, financial records, the closets, plus an opportunity to rummage through the trash and shredded documents from recent years. If printed out, the contents of today's hard drives would be more documents than anyone could read or would want. Does this meet even the broadest test of relevancy or satisfy the requirement that a request be made with reasonable particularity? Would anyone seriously request the keys to the office and unlimited rights to rummage through it? Is there good cause to compel a party to produce the keys to the office and the home? Multiply the hard drive many times over and one can only imagine what is contained on backup tapes. Yet hard drives and backup tapes are frequently sought in discovery.

Courts have dealt with hard drives in a variety of ways. Some lawyers have been content with the production of a list of the names of files even though anyone can rename their files. The requesting party then identifies the specific files it wants and parties proceed in the conventional manner as to those specific files. In the real world, would anyone ask for the names of all files someone has in their file cabinet or office? Courts have appointed neutral experts to search a hard drive for relevant files under the directions of the court which defines the parameters of relevancy. After identifying the relevant files, the parties proceed in the normal manner. But couldn't the responding party search for relevancy and produce on its own as it does in the real world? Does the

responding party feel that it has protected its own secrets as well as those of non-parties by allowing a so-called neutral to view everything?

Some courts may take the position that a request for a key player's hard drive is sufficiently specific and it is up to the responding party to assert any need for privacy or any privilege by identifying specific protected documents. However, searching for and reviewing every active file as well as deleted data and computer logs may be an enormous and unnecessary expense. Perhaps a “blind” search of a hard drive can be conducted without violating the 4<sup>th</sup> amendment and identify only those files likely to contain relevant documents while eliminating those likely to contain privileged information. With improved search software this may be an effective and cost efficient manner of conducting discovery. A good expert declaration may convince the judge that this is the best way to conduct discovery and is not an abuse of the adversary's rights. However, if an opponent is to have access to a hard drive, or more likely an image copy of the hard drive, then the producing party is forced to hire a computer forensic expert to conduct a thorough examination to determine what is being produced. Such examination would not only include the active files but deleted files and all other relevant data. The expert and attorney fees for such a review could be astronomical but a convincing expert declaration will be required to point that out to the court.

Often there are additional factors that may justify examination of a hard drive. Perhaps there is strong reason to believe that evidence was fabricated or destroyed and an examination by a computer forensic expert may determine the truth and even recover the destroyed evidence. A lawyer thoroughly prepared and supported by an expert declaration may be able to make that presentation to the court in a convincing manner.

Reported cases and anecdotal evidence suggests that court's may go either way on the hard drive issue with most seeking alternatives to actual production. Most likely, the facts in the case, the expert declarations, and the knowledge, preparation and presentation by counsel will make a difference. For cases dealing with hard drive production see [http://californiadiscovery.findlaw.com/electronic\\_discovery\\_general.htm#HARD\\_drive\\_prodction](http://californiadiscovery.findlaw.com/electronic_discovery_general.htm#HARD_drive_prodction).

## PRESERVATION ORDERS

Preserving evidence and the status quo seems like an obvious way to act without causing any harm. But, computerized information, data bases, and logs are constantly changing with the normal operation of the computer or the business. So, a simple order to preserve the status quo could literally shut down all computers and the business. Sometimes preservation orders cause harm and in 1979 a California appellate court said such orders were injunctions with all their attendant requirements and prerequisites. A recent decision reaffirmed that approach while granting a preservation and production order regarding electronic data. *Dodge Warren & Peters Ins. Serv. v. Riley* (2003), 105 Cal.App.4th 1414. The opposite approach as to the nature of the order and showing required was recently taken by a federal court in *Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corporation* (W.D. Pa.4/21/04) but that court denied both motions for orders preserving evidence. In *Capricorn Power* the court noted the legal requirements for issuing preservation orders was not established by case law despite the common practice of doing so. It suggested a three part balancing test: (1) a significant reason for concern that evidence will be destroyed supported by facts, (2) some irreparable harm that will result, and (3) no unreasonable burden from the preservation order. The court also suggested that the costs of preservation might be shifted among the parties. Other requirements that might be urged on a trial court are that the order add some duty to the general obligation that parties have to preserve potential evidence and that the order be specific as to the duty and the subject matter of that duty. Such orders can have significant consequences. Violation of a discovery order provides a clear basis for terminating sanctions under most discovery rules. But, to find a violation and impose a proper sanction, the violation should be clear and that requires a clear order.

## RESOURCES

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<http://CaliforniaDiscovery.findlaw.com>

The electronic discovery business has exploded, most service providers have websites and many of those websites have valuable information and resources. Several compile summaries of electronic discovery cases and offer e-mail updates on the law. Several provide free web seminars. Many are prepared to come to law firms and local bar association luncheons to present seminars and demonstrate their products. The time for lawyers to educate themselves and develop trusted relationships with service providers is now while the information is free and plentiful; and, before a dispute arises and you are preparing a motion. For additional e-discovery resources see [http://californiadiscovery.findlaw.com/electronic\\_data\\_discovery.htm](http://californiadiscovery.findlaw.com/electronic_data_discovery.htm)

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