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COMPLEX LITIGATION & *E-Discovery*

Game Plan: Scoring Points and Avoiding Turnovers During E-Discovery

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Most law firms have three types of lawyers, as least as far as e-discovery goes. Those in first group know how to manage e-discovery effectively, those in the second group think they know how to manage e-discovery effectively, and those in the third group know that they are clueless. The big problem is that way too many case litigation teams involve members drawn from groups two and three, and not group one. Thus, to score points effectively and consistently during e-discovery and to avoid the sort of turnovers that can have untoward consequences for lawyers and clients, litigation practices must development game plans that prepare Group 1 members to coach clients and colleagues. Having an "Electronically Saved & Stored Information Standards Team" within your firm's litigation practices provides litigators and clients with the support needed to deal with the fast-breaking events and swarming pressures that e-discovery can bring.

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Why have a team? You should consider having within your firm a group of attorneys and support personnel dedicated to assisting attorneys in the firm and firm clients through turn-key or tested approaches to issues involving electronically saved and stored information or as a resource available to help in collecting, sorting, analyzing, reviewing and producing electronically stored information, whether it be part of responding to discovery requests in litigation, the needs of some internal investigation, the information requirements of a corporate due diligence, or the response to a government subpoena or demand. The team should stress planning and oversight protocols, created early in an engagement and then carried through the engagement as technical know-how and experience are needed. This promotes efficiency and effectiveness for the life of the matter — and provides for the right level of technology assistance necessary from outside vendors and firm personnel in each given case, engagement or matter. This results ultimately in saving time and money and in having much better control over information flow than any more ad hoc approach. This sort of team can assist you in facing the full court press of a governmental subpoena, internal investigation, corporate due diligence, regulatory or complex litigation matter, and to provide you direction and assistance to avoid miscues and turnovers, to deal the pressures involved in the clock winding down, and to deal with the aggressive tactics of opposing parties with regard to issues involving Electronically Saved & Stored Information.

Dealing with Electronically Saved & Stored Information should not be alien to attorneys, and the concepts important there are certainly not beyond the ken and experience of many attorneys. But, like patent practice or bankruptcy matters, dealing with Electronically Saved & Stored Information in legal proceedings has already developed a specialized language that allows those who have mastered it to communicate more efficiently. While that is a good thing, it can intimidate those unfamiliar with the jargon, who either feign understanding at their peril or concede misunderstanding to their disadvantage.

A Three Pointer

So, one should understand some basic terms and steps when beginning any project or matter involving Electronically Saved & Stored Information. First, one must understand three basic concepts that are in the electronic document and information gathering world added to, or more important than in, the traditional paper discovery world.

Metadata: This is data or the information behind visible printed information. It includes all the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archi-

val electronic information or records. Metadata can come from a variety of sources. It can be created automatically by a computer, supplied by a user, or inferred through a relationship to another document. Metadata is created, modified and disposed of at many points during the life of electronic information or records. Examples of metadata include: a file's name, a file's location, file format or file type, file size, file dates and file permissions. Other examples of metadata include track changes in Microsoft Word and blind copies on emails. One of the most common forms of metadata, which has been the subject of litigation, are formulas and hidden columns in Microsoft Excel spreadsheets. If a company does keep metadata or is capable of preserving metadata, it may be discoverable in litigation and must be preserved when a company anticipates litigation. In addition, metadata can provide valuable information about authenticity, so business decisions regarding metadata should be made with care.

Cost-shifting: A party need not provide discovery of electronically saved & stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Costs of electronic information gathering and searching can be avoided or shifted. But the key to doing that is planning and documentation of why a client should not have to do searches of a certain scope or should be able to shift cost. Factors to be considered and supported are: (1) extent to which a request is specifically tailored; (2) availability of such information from other sources; (3) cost compared to amount in controversy; (4) cost compared to relative resources of each party; (5) each party's ability and incentive to control costs; (6) importance of issues being addressed in matter, and; (7) relative benefits to parties of obtaining information.

Outsourcing: This refers to sending work to an outside contractor, including to those who will assist in review of documents and information for responsiveness to requests and subpoenas. This frequently now involves use of overseas contractors to reduce costs in large volume matters. When deploying such resources, one must take care to assure compliance with applicable law and ethical standards

And a Starting Five

Second, one then must understand the five steps that start every consideration of a project involving Electronically Saved & Stored Information.

Don't Assume "It" Will Get Done: Counsel has to coordinate the effort. This starts with understanding the client's business, systems and IT capabilities and making the client understand what is involved in finding, collecting, preserving and producing electronically saved and stored information. It also means managing and doing quality control over vendors

Preservation: The first step is to preserve and protect. That means more than hold notices. It also means preserving metadata, and disabling auto-delete and backup overwriting processes. As long as you have confidence that the widest appropriate scope of information is preserved, you can move aggressively to limit what needs to be disclosed or produced

Culling & Searching: Understand how this is being done, whether by client, vendor or EBG. Engage the process in a way that is informed by knowledge of client's business, applicable substantive law and e-discovery principles

Consideration of Cost: Work to reduce and control costs to the client, but do so in a way that educates the client as to extreme risk and long-term cost involved doing and redoing tasks piecemeal rather than doing it right and completely initially.

Documentation: Create and keep a "defensibility" binder that documents steps 1-4 and each sub-issue, and why the choices that were made were made. It is likely that some issue will arise that will require that one refer back and rely on such documented history.

Bench Strength Resources: Your team must have multitalented and varied personnel. It should have attorneys experienced in e-discovery, privilege and confidentiality, and investigatory matters, as well as a variety of substantive areas of the law, who also have some comfort discussing technology and, when necessary, their own ignorance. You also need litigation support personnel that are technologically sophisticated, service-oriented, and cost-conscious. Finally, you need paralegals adept at document management in various media.The firm should supplement this personnel with a list of vendors that the firm has road tested in matters involving data collection, forensics, metadata preservation, production review and control, and related matters.

Your personnel should be well-equipped as well. They should have working models of multiple documents so that the can react quickly when they need: client systems questionnaire, form hold notice to adversary, to the client and also to the client personnel, hold/harvest ,SOP, searching/culling SOP, review/production SOP, form discovery requests and responses, chain of custody criteria/log and a sample affidavit of likely costs of restoration and review of back-up tapes.

Game on — what your team does: Your team must prepare to respond quickly, and having an experienced, coordinated team will serve your client better than some ad hoc group. This means having a team that not only can make sure that the stars are aligned, but that is also ready to find out: (i) how the client's or the adversary's e-mail system works; (ii) how personal computers, laptops, work stations and other electronic devices are linked, maintained and serviced; (iii) how file servers are used, linked and maintained; (iv) how back ups are done, maintained, and recycled; (v) what other forms of media — such as floppy disks, Jaz disks, CDs or other removable media — are used, and how they are stored and logged; (vi) what databases are used and maintained; (vii) what legacy systems are maintained, and how the information from them is stored and accessed; (viii) whether this data collection project will cover more than one physical location; (ix) how many custodians of interest are in each physical location; and (x) what the game plan should be to do all this. ■