E-discovery: The Source, the Problem, the Cure

Changes in the format and nature of today's content are radically altering the document-discovery process. Yesterday's memos, letters, and reports have been replaced by today's word processing documents, emails, spreadsheets, Internet files, chat room transcripts, databases, and a vast assortment of other information types and formats, managed by numerous applications and stored on a variety of media. Today, lawyers not only need to know what information to ask for, but also how to access and use it. Judges need to know how to officiate the process. And companies need to know how to set up policies and procedures that can diminish the potentially overwhelming task of responding to requests for electronic documents.

When it comes to the discovery process, "we're in a transitional phase," explains Steven Bennett, partner with the international law firm Jones Day. Bennett describes a variety of discovery issues that have completely altered the way lawyers practice. "Vendors are developing technological solutions. Judges are getting more experience with digital information. The rules process is adapting. And more and more litigators are getting familiar with the issues."

To assist its lawyers in acquiring familiarity with the issues, Jones Day created an e-discovery committee. Bennett is head of that committee and describes the group as "a resource for gathering our collective [e-discovery] wisdom. It's an internal network of people who have experience in the area and who are counseling clients and participating in some of the rule-making organizations." Jones Day's creation of the committee underscores the importance the firm places on understanding the phenomena and figuring out what can be done about it.

The Source

In the days of yore, documents were handwritten or typed and stored on paper. There was a limit to how much could be produced and managed. Paper production has inherent limitations that have been largely overcome by computers. Consider these staggering facts. Today, some analysts estimate the growth of digital information at 96% per year. More than 80% of corporate information is now in digital form. In 1997, an estimated 67 million email users generated 2.7 trillion messages; by 2000, those numbers grew to 108 million and 6.8 trillion, respectively; and by 2003, the estimated messages reached 12.6 trillion. Technology has made the creation, conveyance, storage, and retrieval of information phenomenally easy and efficient. The result has been the continued rapid growth of information and the birth of new applications and technology to manage it. But with regard to the document-discovery process, the information boom has also become a legal bane.

The Problem

Basically, the e-discovery problem involves too much information in too many formats on too much media managed by too many applications. The preceding makes the e-discovery process complicated at best, overwhelming at worst. And that's from a litigator's perspective. Judges struggle with how to best officiate electronic discovery, and corporate counsel struggles with how to efficiently answer requests and, more important, how to properly implement preventive measures to minimize the impact of having to respond to those requests.

To place the problem of e-discovery in an historical perspective, there was a time when ignorance was a reasonable defense regarding errors of omission. In the early years of the e-discovery process, attorneys could answer requests for electronic documents with "they've been deleted" or "the tapes have been used to backup more recent emails." For instance, one of the typical ways in which companies often delete emails is by recycling backup media. Tapes and discs can be expensive. It makes good economic sense to reuse them. Once reused, the emails from just a few months ago are erased and covered over by new emails. There was a time when the company's backup process influenced what could or couldn't be produced. More recently, judges have been much more knowledgeable about digital information and much less forgiving of companies who fail to produce it. On July 21, 2004, the Washington, DC, District Court sanctioned the Philip Morris Company with a $2.75-million fine. The company had been ordered to preserve all potentially relevant records related to pending litigation, including emails, but failed to prevent employees from deleting their emails.
According to the international law office of Seyfarth Shaw, the Philip Morris case is significant for two reasons. In a *One Minute Memo* discussing the case, Seyfarth Shaw believes "the massive sanction signifies the financial consequences that may attach if a corporation fails to fully comply with a preservation order." And "the fact that the court imposed the sanction absent a finding of bad faith underscores the seriousness with which courts view electronic discovery."

In fact, after a long period of struggling with how best to address e-discovery issues, judges are starting to augment the Federal Rules of Civil Procedure with relevant guidelines of their own. In the U.S. District Court of Kansas, Magistrate David J. Waxse drafted e-discovery guidelines that focus on the 26(a) required disclosures. "The idea was we'll offer these as suggestions, not as requirements," commented Waxse. "The guidelines start with the premise that electronic information is out there and here's what you should do to deal with it." Waxse also noted, "The Federal Rules Committee has made several suggestions for revising the actual rules involving e-discovery. So things are changing."

One of the biggest reasons for the rules' changing is the growth of information and the increasing sophistication of lawyers who ask for it. Ann Curme Shaw, Associate General Counsel for Ceridian Corporation, has had plenty of experience dealing with requests for electronic information. Lately, she's seen an increase in pre-suit letters to halt document destruction. "Opposing counsel wants to make sure we're making backups of everything," she says, even before they file their initial complaint.

Once the complaint is filed and company lawyers are forced to respond to requests for electronic information, it can cost hundreds of thousands of dollars to comply with the order to save everything and review it for relevant documents. Ms. Curme Shaw recalls one case in which two legal assistants spent eight months reviewing backup emails. "The problem is the proliferation of email usage. If you have to look through everything for anything relevant, the task can be enormous. You can negotiate to do targeted word searches," Curme Shaw adds, "but sometimes it's still too broad."

**The Cure**

Lawyers, judges, and others are taking a multi-faceted approach to addressing difficult e-discovery issues. For starters, the legal community is beginning to address gaps in the rule-making process that fail to adequately cover the e-discovery process. In addition to local guidelines like those Magistrate Waxse produced, the federal rules concerning discovery are also being revised.

In an effort to respond to difficult e-discovery issues at Ceridian Corporation, Ann Curme Shaw is attacking the problem on a variety of fronts. In some cases, she's returned to court to limit the scope of initial requests. At the company level, she is part of a group that is "reviewing and updating our document retention policy to see if we have everything we need, to review timelines for destruction, and [to] make sure we're educating people about what it says and how it pertains to e-documents." Part of her ongoing educational efforts involves training managers on the company's ethics policies. To that process, she has now added a key component involving document retention, "educating managers about what it says, particularly with regard to e-documents."

Not surprisingly, there are now litigation-support companies which specialize in helping businesses respond to e-discovery requests. But they're not cheap. For example, an average cost for processing a company's emails is approximately 14 cents per email. That's not terribly expensive for 1,000 emails. But considering the rate at which emails are written and the problems some businesses have of figuring out how to limit or review those emails, it's conceivable some companies would have to produce millions of documents. That's when you start getting into real expense.

But the assistance of these new high-tech companies can be indispensable. The nature of information technology is radically different than when documents were produced on paper. These days, the multitude of file types and the applications (including versions of applications) required to access and use them can be mind-boggling. Michelle Lange, Legal Technology Staff Attorney for Kroll Ontrack, Inc., and the author of *Electronic Evidence and Discovery: What Every Lawyer Should Know* (ABA: summer 2004), describes how quickly the e-discovery landscape has changed.
“When I first started here and we'd meet with attorneys, I remember a few times when they said, 'You can't possibly imagine that a judge would force me to search a computer.' Now I sit down with attorneys and they say, 'I know e-documents are going to be an important part of this case. I need to get up to speed on this stuff.'"

Becoming informed about digital information and how it's managed is becoming an essential part of the e-discovery process. Because if you understand how the technology works, you have a decided advantage over counsel who rely on less progressive methods of organizing and accessing information.

"A year ago," Ms. Lange notes, "people were requesting printouts [of electronic documents], but not the format in which they were being produced. We advised our clients to get it in the original format because of the meta data you're missing. They weren't getting the full value of the information." Today, Ms. Lange is seeing quite a few cases that discuss the format of the electronic information, which she points to as "an example of understanding the ins and outs of the technology and how it can work for you."

Joan Feldman, founder and President of Computer Forensics, Inc., counsels companies on a variety of e-discovery issues. She mentions three actions most companies can take that could easily save them time and money. First, most companies need to "bridge the gap between corporate counsel and the information technology (IT) group." There needs to be "communication between IT and the legal group regarding records, with emphasis about mapping out data location, so in discovery I'd be able to move quickly to get what I wanted."

Ms. Feldman also suggests making sure document-retention policies address "email and other computer-based documents."

And finally, "corporate counsel needs to work with the human resource group to make sure there's a clear exit protocol for employees to cleanup their data, or" when necessary "to hold onto it." Ms. Feldman believes "these preventive measures could save hundreds of thousands of dollars."

The digital revolution has dramatically changed the way American companies operate. It has also fundamentally changed document discovery. Today, lawyers have little choice but to become knowledgeable about the new e-discovery process.