Practical Considerations in Electronic Discovery

By Stephanie E. Ambs and Katherine L. Heckert of Carlton Fields, P.A.

Electronic discovery in litigation can be confusing and intimidating. Corporate counsel who are involved even indirectly with litigation may benefit from an understanding of the general concepts applicable to electronic discovery. In some instances, corporate counsel directly handle the collection and production of documents or work with outside counsel to assist in preparing protocols for dealing with electronic-discovery issues. Counsel in larger organizations may have to discuss discovery and data collection with outside counsel and provide advice and guidance regarding risks associated with production to internal clients. This article is intended to provide a brief primer on the basics of electronic discovery and some practical considerations for addressing electronic-discovery related projects and issues.

New Emphasis on Technology for Florida Lawyers.

All Florida lawyers are now required to have some knowledge regarding the impact of technology and electronic-discovery related issues on their clients. The Official Comments to Rule 4-1.1 of the Rules Regulating The Florida Bar were amended in September 2016 to expressly provide that, in order for lawyers to maintain competence, they should keep abreast of changes in the law and its practice "including an understanding of the benefits and risks associated with the use of technology[.]"[1] The Florida Bar also enacted a requirement that Florida lawyers obtain at least three CLE credits in technology programs per reporting period. Similarly, courts throughout the state now expect attorneys and litigants to be prepared, knowledgeable, and diligent when it comes to the retention and production of electronic data in litigation.

[1]*In re Amendments to Rules Regulating The Florida Bar 4-1.1, 6-10.3*, 200 So. 3d 1225 (Fla. 2016). The ABA Model Rules of Professional Conduct have provided that competency requires current knowledge of the impact of electronic discovery on litigation, since 2012.

Basic Electronic-Discovery Concepts to Know.

1. Litigation Hold

When litigation is initiated or is anticipated, the first thing a party to the litigation should do is institute a litigation hold. A litigation hold is essentially a directive to all relevant personnel to retain and not delete any documents or files related to the subject of the litigation to ensure that all documents and emails are retained and not destroyed. Depending on the organization, the litigation hold may also involve modifying or stopping certain automatic deletion or data backup programs. A litigation hold should be tailored to account for the scope of the litigation, the issues involved, the employees at the organization who would have information and documents related to the issues, and the organization's existing data retention and storage policies.

2. Metadata

Metadata is the underlying data contained in an electronic document or file. Some examples of metadata are (i) the time and date the file was created, (ii) the people who accessed and altered the file and when, and (iii) the size of the file and where it was stored on the computer system. Metadata is not always important in litigation, but can be key where the timing of the creation or modification of a document impacts an issue in the case, such as when a party knew a certain piece of information. Metadata also significantly enhances search capabilities when using a document-review program, as it enables the reviewer to search for information in certain fields, such as email sender, recipient, and date, instead of being limited to searching for words that appear only on the face of a document. Litigation that is not document-intensive, such as litigation involving slip and falls or car accidents, is less likely to require the use and production of metadata.

3. Native, Static, or PDF?

Once litigation has reached the phase where the parties will begin producing documents to their opponents, they must decide whether to produce documents with or without metadata. To produce files with metadata, they have to be produced in either "native" or "static" format. A native production requires the producing party to gather the actual data files in their original format, such as Microsoft Outlook email files or Microsoft Excel workbook files. These files can either be reviewed on the program in which the file was created (such as Outlook or Excel), or can be uploaded into a legal-review platform. In a static production, instead of the actual native files, the producing party produces image files (e.g., PDFs or TIFFs) accompanied by load files which contain some, but not all, of the metadata in the original files. Static-format productions are usually more expensive than native productions because they require conversion of the original files to static files.

Native and static productions require the reviewing party to have either a document-review tool or the programs on which the produced files were created. The advantages to the requesting party are that the documents will be searchable and will contain metadata. A native or static production may be required if the party requesting the discovery has expressly requested metadata or if the parties have an agreement to produce documents with metadata.

The other method of production is a PDF or paper production, which contains no metadata related to the files being produced, is not easily searchable, and will not allow for the use of many functions in a legal-review platform. A PDF production may be appropriate if metadata is not needed by the requesting party, or where the scope of the litigation and the technological capabilities of the parties warrant a simple, low-tech production. For most contemporary

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litigation, production of metadata will be necessary.

Collection and Production.

After a party requests electronic discovery in litigation, the responding party must timely respond to the requests and work to timely produce responsive documents and files as soon as possible. It is important that the responding party make a good faith effort to thoroughly search for, collect, and produce all non-privileged responsive documents in the party's possession, custody or control. In a larger organization (and even in many small ones), this can be a daunting task, especially in litigation that involves multiple issues, employees, products, etc. Regardless of how closely a party-organization works with outside litigation counsel in connection with discovery, the organization's employees likely will be in the best position to ensure a complete collection of responsive documents because they will have the best understanding of the facts involved and where relevant files, documents, and data are created and stored.

For an in-house lawyer assisting in this process, a good first step toward a complete collection of relevant data is to become knowledgeable regarding his or her organization's data retention and destruction policies and the architecture of its computer and data-storage systems. If outside counsel is involved in the collection process, he or she should have an understanding of these as well. The next step is to identify the "document custodians" – the key employees and departments that likely (or even possibly) have documents and files related to the litigation and understand how these entities use and store data and files. For example, some employees may save files to the organization-wide server while others may save documents locally to their individual computer terminals. The organization should involve its IT personnel to make sure all potential sources of relevant documents are identified.

As litigation proceeds, litigation-hold instructions given at the outset of litigation should be repeated frequently and compliance with the litigation hold should be monitored. Archived data such as backup tapes should be segregated and safeguarded in preparation for review and potential production depending on what is actually requested by the opposing party in the litigation. Depending on the size of the litigation and the amount of data to be collected, reviewed, and produced, the organization may want to consider retaining a vendor that specializes in data collection and production to handle all or part of this process. This service will be an added expense of the litigation but can be invaluable in ensuring a complete, unbiased collection and production of documents. Additionally, opposing counsel and courts may view a production aided by a vendor as being more reliably complete. Accordingly, use of a vendor can allow a litigant to avoid potential future attorneys' fees associated with litigation of discovery disputes.

In obtaining the necessary support and cooperation to carry out a thorough document collection and production, in-house counsel may need to persuade internal clients of the importance of discovery and the risks involved in failing to adequately preserve, collect, and produce relevant and responsive files in litigation. Such a failure, even if it is unintentional, can subject a litigant to severe and very costly sanctions. Where litigants serve incomplete or untimely productions, are dilatory in their search for relevant, responsive documents, or where parties inadvertently fail to preserve relevant documents; courts have full discretion to sanction the offending party. Sanctions for discovery violations can include monetary penalties, such as requiring the offending party to pay the requesting party's attorneys' fees incurred in moving to compel production of documents. Additionally, where the requesting party is prejudiced by the producing party's failure, courts can sanction the offending party using adverse-inference jury instructions, preclusion of evidence, or even case-dispositive sanctions such as dismissal or entry of final judgment, depending on the gravity of the circumstances.[2] Accordingly, under severe circumstances, a failure to produce documents could cost the producing party the entire case.

Proportionality Limits on Discovery.

Luckily, litigants are prohibited from swamping opponents with expansive discovery requests if the cost and burden of the discovery is disproportionate to the size of the litigation or benefit to the requesting party. The Federal and Florida rules of civil procedure limit the scope of production to that which is proportionate to (i) the importance of the issues at stake in the action, (ii) the amount in controversy, (iii) the parties' relative access to relevant information, (iv) the parties' resources, (v) the importance of the discovery in resolving the issues, and (vi) whether the burden or expense of the proposed discovery outweighs its likely benefit.[3] Whether discovery requests are burdensome and not proportionate to one of the six relevant factors depends on the circumstances in the case. Many courts require a party raising such an objection and resisting discovery to produce an affidavit or other testimony or evidence explaining the nature of the burden or lack of proportionality.[4] Accordingly, in deciding whether to object to discovery for these reasons, consideration should be given to whether there is an individual in the organization that has both the requisite personal knowledge of the circumstances and the willingness to attest to specifics regarding the cost and burdensomeness of the requested production.

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[2]See, e.g., Compass Bank v. Morris Cerullo World Evangelism, 104 F. Supp. 3d 1040 (S.D. Cal. 2015); Alabama Aircraft Industries, Inc. v. Boeing Co., 319 F.R.D. 730 (N.D. Ala. March 9, 2017); Morrison v. Veale, 2017 WL 372980 (M.D. Ala. Jan. 25, 2017).

[3]Fed. R. Civ. P. 26(b)(1), (b)(2)(C)(iii); Fla. R. Civ. P. 1.280(d)(2).

[4]See, e.g., Areizaga v. ADW Corp., 314 F.R.D. 428, 434 (N.D. Tex. 2016); Topp Telecom, Inc. v. Atkins, 763 So.2d 1197 (Fla. 4th DCA 2000); Allstate Ins. Co. v. Boecher, 733 So.2d 993, 994 (Fla. 1999).

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On the Horizon: Discovery of Text Messages.

In rendering advice regarding data security, retention, and production—whether in the litigation context or not—internal managers and employees should be advised that their text messages are discoverable in litigation. Members of many organizations conduct more sensitive communication via text messaging since it is faster than email and may feel more private or secure because text messages are likely not stored on the organization's servers. However, litigants are increasingly seeking (and courts are compelling) discovery of text messages sent and received by a party's employees, regardless of whether they are stored on a personal or company device. Accordingly, an organization's members should be advised that those communications may be discoverable and viewed by opposing parties and their counsel in litigation.

Conclusion

Although electronic discovery related issues can be daunting, organizations can take steps to ensure the discovery process goes smoothly and any risks are minimized. If your organization has to be involved in litigation; careful planning, a thorough understanding of the organization's data-storage systems and protocols, and the enlistment of key personnel to assist, can help contribute to issue-free discovery.

Stephanie practices commercial litigation and bankruptcy in Carlton Fields' Orlando office. As part of her practice, Stephanie routinely manages all aspects of the discovery process¬—from data collection and production to discovery disputes—in both state and Federal court litigation.

Katherine is a Florida Board Certified Specialist in Construction Law in Carlton Fields' Tampa office. She advises and represents construction litigants in contract disputes, construction defect matters, regulatory investigations, and lien and bond disputes.