Goodbye Paper Documents, Hello E-Discovery

The world has changed enormously since the last major overhaul of the California Discovery Act. No longer is paper the principle data storage media. Well over 95 percent of all newly created data exists as electronically stored information, found on desktop and laptop computers, personal digital assistants, Blackberries, voicemail, disks, tapes, hard drives, servers, cellular telephones, etc. It takes the form of documents created by various applications software, e.g., word processors, spreadsheets, databases, PowerPoint presentations, e-mails, voice messages, instant messaging, web content, text messaging, etc.

Not only has the number of places data may be located exploded, but also the sheer volume of information has increased exponentially. By 2011, there will be 1.8 sextillion bytes of electronically stored information. Converting all 1.8 sextillion bytes into paper documents would require approximately 5 billion miles of shelves, or more than the distance from the Sun to Pluto. The exponential growth of electronically stored information has become an increasingly important aspect of properly handling business and tort disputes. The sheer volume of electronic documents makes the traditional way of looking at documents cost prohibitive.

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Electronic discovery procedures have been promulgated through the Federal Rules of Civil Procedure and California Discovery Act to establish uniform processes and procedures by restoring predictability to what was becoming an increasingly chaotic aspect of civil discovery. In the federal system, dozens of published opinions by federal magistrate judges have done much to establish best practices for e-discovery. Unfortunately, published opinions about e-discovery under the California Discovery Act will be very slow to develop because trial courts and discovery referees do not issue published opinions. Fortunately, fruitful alternatives to relying on published appellate decisions do exist.

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Litigators can avoid trouble by taking one of two paths. They can follow best practices, which are generally quite demanding and often expensive, or they can work cooperatively by limiting what electronically stored information will be subject to discovery, adopting agreed search criteria, stipulating to clawback procedures and the like. California litigators can make their lives and their clients' easier by borrowing a page from the Federal Rules of Civil Procedure and obtaining orders governing e-discovery in each case where significant issues are likely to arise. Those orders may be obtained either through stipulations or motions for protective orders.

First, federal decisions provide persuasive authority, particularly with respect to best practices. Significant guidance exists as to best practices relating to litigation holds, collection, review and production of electronically stored information in response to discovery requests. Many similarities exist between the amended Federal Rules of Civil Procedure and California Discovery Act (particularly when recent amendments to the California Rules of Court are considered). Recognizing the distinctions between the regimens identifies where uniquely California arguments will have to be crafted.

For example, the California Discovery Act does not provide for an early meeting of counsel to address e-discovery issues as does Federal Rules of Civil Procedure Rule 26(f); however, California Rules of Court Rule 3.724 provides for an analogous procedure. The California Rules of Court does not require counsel to prepare a written discovery program for the court's approval the way Rule 26(f) does. Similarly, the California superior courts are not required to issue orders governing e-discovery in the same way federal district courts are by Rule 16. The California Discovery Act requires production of all potentially relevant electronically stored information regardless of how difficult it is to collect and process unless the producing party obtains a protective order excusing the obligation to produce. The Federal Rules of Civil Procedure, however, allows counsel to frequently avoid production of inaccessible electronically stored information. California has no substantive clawback protections comparable to recently amended Federal Rule of Evidence Rule 502 to preserve the confidentiality of inadvertently produced confidential or privileged information.

Additionally, the scope of the safe harbor for negligent loss of data after a litigation hold goes into effect may be broader under the California Discovery Act. Where federal authority is inapplicable, California counsel may look to The Sedona Conference, Electronic Discovery Reference Model and the Test Retrieval Conference Legal Track project for guidance.

Second, until a consensus as to what constitutes "best practices" under California law evolves, counsel can eliminate uncertainties as to obligations under the California Discovery Act by agreeing to procedures for handling e-discovery as each case arises. Federal magistrate judges emphasize that most difficulties could have been avoided had counsel spent more time establishing consensual ground rules for handling production of electronically stored information and inadvertently produced confidential information.

Unlike paper discovery in the 20th century, counsel must find new ways to review the data produced and obtained through discovery. They must be sensitive to protecting private or privileged electronically stored information and to the plethora of new state and federal laws limiting the ways in which that containing personal information can be used. Fortunately, there are 21st century solutions to these 21st century problems, starting with a simplified, predictable process.

An examination of detailed billing statements from law firms and service providers on large discovery matters uncovers the following trends: 45 percent to 75 percent of pre-trial litigation expense is document discovery; 75 percent to 90 percent of document discovery expense is attorneys reviewing documents; and 10 percent to 40 percent of documents reviewed by attorneys rise to the level of relevancy (60 percent to 90 percent do not).

The majority of corporate litigation dollars are spent on attorneys reviewing non-relevant documents. This can be combated with a two-pronged approach to discovery management and cost savings: aggressively and defensibly reduce the volume of non-relevant documents upstream of the document review; and reduce the cycle time and cost for those documents that require attorney review.

A systemic approach is required to evaluate the entire discovery process as a whole rather than focusing on individual parts. The corporation and service provider - in conjunction with outside counsel - must work as an integrated team with assigned roles and responsibilities, designed to defensibly reduce out non-relevant documents, leaving only documents that are likely responsive to be reviewed by attorneys. While an e-discovery consultant might suggest any number of viable processes to reduce the document set, the following, which is based on sampling and close interaction between provider and counsel, has proven especially effective.

The review process starts with collection, so designing a thoughtful collection strategy is paramount. Once data is collected, a statistical sampling of the data is an inexpensive quality process that enables us to reject or accept whole batches, provides reviewer feedback throughout the process, identifies problem reviewers who need additional training, finds issues not previously identified, identifies problems with knowledge transfer and provides insight into the nature of the data set. Sampling can aid in speeding the review by illustrating what the population looks like, confirming or disproving initial hypotheses and providing a richness assessment (an assessment of the expected percentage of responsive documents). Is the population 40 percent to 60 percent responsive? If so, there are a host of automated processes available. Is the population less than 5 percent rich or greater than 90 percent rich? If so, this will likely alter the process and automation options.

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The next step is to prepare to dramatically speed the legal team's review by utilizing a culling and filtering process. This process also involves data mining to learn about the population and early document assessment. These methodologies allow the legal team to cull large populations quickly - often in weeks rather than months - and cost effectively arrive at a targeted population for substantive review (more effectively than by applying traditional keyword filters, which tend to be over and under inclusive). With the data in the database, the legal team can experiment with keywords at their own speed along with a concept search option without relying on a service provider to run these searches and reports.

Once the legal team has initially culled the population, attorneys must provide a substantive review of the remaining documents. Leading organizations are now choosing a "hybrid" process, whereby full-time attorneys overseas are doing most of the day-to-day review work while integrated with supplier and outside counsel management, testing and quality control handled in the United States. The documents reside in the United States and are reviewed securely at substantial savings by integrating overseas resources. Documents can be sampled by batch to provide reviewer feedback and identify inconsistencies. With outside counsel's involvement they can feel comfortable that the review has met quality standards and can be certified under the California Discovery Act or the Federal Rules.