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Strategic Use of E-Discovery Counsel to Manage Risk and Cost

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Technology has forever changed civil discovery. Gone are the days when a requesting party could reasonably ask for "all documents related to" a dispute, and a responding party could reasonably expect to meet that request with a thorough search of its file room and perhaps offsite storage. Nearly all information created today is created in digital form, with dizzying arrays of technologies creating dizzying arrays of data types, at rates and in volumes that continue to grow geometrically, with an estimated 89 billion business emails sent *each day* and large organizations now measuring data stores in *petabytes*. At the same time, advances in digital forensics, information retrieval, and other disciplines have yielded a plethora of tools that make it possible to conduct discovery in even the largest cases in a manner that is defensible, timely, and cost-effective. Put simply, technology has affected discovery so profoundly that lawyers today cannot ignore electronic discovery any more than the eighteenth-century Luddites could ignore the Industrial Revolution.

Not surprisingly, the rapid growth of technology and its far-ranging impact on civil discovery have been accompanied by similarly rapid growth in the law. Among other developments, the Federal Rules of Civil Procedure have been through one round of "e-discovery amendments" and appear headed toward another; "e-discovery pilot programs" and other local initiatives have been adopted in numerous federal and state courts; the ABA has amended its Model Rules of Professional Conduct "to reflect the realities of the digital age"; and Congress entered the fray with Federal Rule of Evidence 502. At the same time, case law on e-discovery issues has grown from tens of decisions in a year to hundreds (if not thousands) per year, on issues ranging from the common-law duty to preserve evidence and related issues of spoliation and sanctions; to proportionality, cost-shifting, and form of production; to whether and under what circumstances machine learning algorithms and related technologies can be used in legal search and review; to name just a few.

The ubiquity, complexity, and importance of electronically stored information (ESI) in modern practice and the rapid development of the law have affected not only litigation, but also litigators. In the early days of e-discovery, when the "e-" meant simply adding a few emails (often in printed form) to a traditional review and production, there was little need for knowledge beyond what most litigators had in the so-called paper world. But as ESI exploded and began to dominate discovery, as case law mushroomed, and as technology advanced and the market for e-discovery software grew from nothing into a $1.4 billion market in 2012, two things happened. First, the body of knowledge relevant to e-discovery quickly surpassed what most general litigators could acquire and maintain in the normal course of practice. And second, the risks for

clients inherent in not having that body of knowledge on, or at least available to, their litigation teams became substantial.

The emergence of e-discovery as a discipline in itself and the significant, often high-profile and headline-grabbing consequences where missteps by litigants and counsel that either did not have or did not apply that body of knowledge led to spoliation or other sanctionable conduct, together created a role, and in many cases a pressing need, for "e-discovery counsel"—that is, for counsel dually proficient in law and in technology, who not only understands the client's legal rights and duties, but also understands the electronic systems that create and store the client's data and the myriad technologies that make it possible to retrieve, search, and review that data effectively and without incurring costs that may dwarf the amounts in dispute.

Of course, the precise needs of any given case are fact-specific, and some litigation involves little or simple ESI, requiring limited specialized knowledge or experience. But in most complex litigation—such as commercial disputes, class actions, and regulatory proceedings where discovery involves significant corporate data stores—the need for such knowledge and experience quickly becomes apparent.

Understanding "Relevant Technology"

The complexity of e-discovery and the importance, in many circumstances, of having counsel that understands technology as well as law have been widely recognized, including by the ABA in its Model Rules of Professional Conduct. In August 2012, the ABA Commission on Ethics 20/20 reported that "technology has irrevocably changed and continues to alter the practice of law in fundamental ways," and recommended updates to the Model Rules, subsequently adopted by the House of Delegates, "to reflect the realities of the digital age." The most significant of these updates appears in the comments to Model Rule 1.1—the cornerstone requirement that an attorney shall provide "competent representation" to a client. Specifically, Comment 8 (formerly Comment 6) was revised in relevant part to state:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

(Emphasis added.) According to the 20/20 Commission, it believed that "[b]ecause of the sometimes bewildering pace of technological change, . . . it [was] important to make explicit that a lawyer's duty of competence . . . includes understanding relevant technology's benefits and risks."

The 20/20 Commission placed electronic discovery squarely within the "relevant technology" to which the revised comment was addressed:

> Technology is also having a related impact on how lawyers conduct investigations, engage in legal research, advise their clients, and conduct discovery. *These tasks now require lawyers to have a firm grasp on how*

> *electronic information is created, stored, and retrieved. For example, lawyers need to know how to make and respond to electronic discovery requests and to advise their clients regarding electronic discovery obligations. . . .* These developments highlight the importance of keeping abreast of changes in relevant technology in order to ensure that clients receive competent and efficient legal services.

(Emphasis added.)

The commission's report makes clear that all litigators must possess some baseline understanding of how to conduct discovery in the digital age. At the same time, the commission acknowledged that

[i]n some situations, a matter may require the use of technology that is beyond the ordinary lawyer's expertise. *For example, electronic discovery may require a sophisticated knowledge of how electronic information is stored and retrieved.* Thus, another development associated with technology is that lawyers are increasingly disaggregating work *by retaining other lawyers* and nonlawyers outside the firm . . . to perform critical tasks.

(Emphasis added.)

Many matters involving significant amounts of electronic discovery will involve "the use of technology that is beyond the ordinary lawyer's expertise." Where this is the case, not only is it appropriate, but an attorney may have an ethical obligation, to involve another with the necessary knowledge and experience, to ensure that the client is properly advised on all technical and associated legal issues that may affect its interests.

Risks Abound for Both Clients and Counsel

There are great perils for both clients and lawyers who misstep in e-discovery. A study published by the *Duke Law Journal* in December 2010 found that sanctions were sought in more cases and awarded in more cases during 2009, than in all years before 2005 combined. Dan H. Willoughby, Jr., et al., "Sanctions for E-Discovery Violations: By the Numbers," 60 Duke L.J. 789, 794 (2010). Spoliation and the resulting adverse inference were pivotal in a $920 million jury verdict in a highly publicized trade-secrets case involving DuPont's Kevlar fiber. *E.I. Du Pont Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469 (E.D. Va. 2011). In *Mt. Hawley Insurance Co. v. Felman Production, Inc.*, the court held attorney-client privilege waived as to a highly sensitive document that had been produced inadvertently, in significant part because the producing party had "fail[ed] to test the reliability of its keyword searches by appropriate sampling. . . ." No. 3:09-CV-00481, 2010 WL 1990555, *13 (S.D. W.Va. May 18, 2010). And in *Green v. Blitz U.S.A., Inc.*, a products liability action, a failure by the defendant and its counsel properly to supervise the collection process and resulting non-production of key documents led the court to impose civil contempt sanctions of $250,000 and, further, to order the defendant to file a copy of the sanctions order in every lawsuit in which it had been involved during the two years prior and would be involved in the five years subsequent. No. 2:07-cv-37, 2011 U.S. Dist. LEXIS 20353, *4 (E.D. Tex. Mar. 1, 2011). A comprehensive discussion of the many and varied

bad things that can happen when e-discovery goes awry is beyond the scope of this article, but *Du Pont*, *Felman*, and *Green* are illustrative.

Finally, sanctions may be the lesser of law firms' worries when e-discovery goes wrong. In *J-M Manufacturing Co. v. McDermott Will & Emery*, a client sued its former counsel for legal malpractice based on counsel's allegedly negligent handling of e-discovery. No. BC462832 (Cal. Super. Ct., L.A. Cnty., June 2, 2011). Specifically, the plaintiff alleges that its former law firm failed to properly supervise the review and production of the client's ESI, including the application of search terms and a privilege filter by two well-known e-discovery vendors and document review staffed by an equally well-known legal-staffing firm. As a result, counsel twice produced thousands of privileged documents to the government in a False Claims Act case, which subsequently led to a finding of waiver as to the same documents in related litigation brought by private plaintiffs. The client seeks compensatory and punitive damages from its former counsel and the suit remains pending.

Although *J-M Manufacturing* appears to be the first case of its kind, it will not be the last. The inherent complexity of electronic discovery, the innumerable ways that it can go off the rails without experienced counsel to guide it, and the potentially severe consequences when it does go off the rails, all point toward more malpractice claims arising from such matters.

Law and Technology Are Inextricably Intertwined

The 20/20 Commission's emphasis on electronic discovery is no surprise. Keeping abreast of "the benefits and risks associated with relevant technology" is especially challenging in the discovery context because, particularly in complex litigation involving corporate data stores, "relevant technology" is everywhere. It pervades both the issues and problems that the lawyer is engaged to address (for example, the client's obligations related to preservation, collection, review, and production of ESI), and many of the responses and solutions to those problems (for example, the use of forensic tools to collect and process data, predictive coding and other analytic tools for search, and hosted environments for online review). As a result, lawyers representing clients in such matters must understand not only the technologies that *create and store* data relevant to litigation, but also an entirely separate array of technologies that enable that relevant data *to be discovered*—i.e., preserved, collected, processed, reviewed, and produced—in a manner that is accurate, efficient, and consistent with all of the client's legal obligations.

In most of e-discovery, relevant technology is inextricably entangled with applicable law, and vice-versa. For example, legal issues regarding the duty to preserve often involve technical issues such as understanding the client's IT systems and applications; how, where, and in what format those systems and applications create, store, and replicate potentially relevant data; how such data might be altered or lost, intentionally or inadvertently; and which of many potential methods for preserving such data (e.g., forensic imaging, logical acquisitions, or preservation in place) is reasonable and proportionate in any given case. Questions of spoliation often turn on very similar questions, and also often require an understanding of digital forensics, such as the workings of computer operating systems and storage media and the investigation, recovery, and analysis of digital evidence.

Likewise, the legal question of whether a particular form of production, such as native files or *.tiff images, is "reasonably usable" usually turns on technical issues such as the functionality of different file formats and data-load files; the existence and relevance of different forms of metadata, much of which varies across data types; and verification of file integrity through computer algorithms (e.g., MD5 or SHA1 hash values). And the legal question of whether a party has fulfilled its discovery obligations by making a "reasonable inquiry" often involves technical questions such as what data types and sources were collected; how that data was processed and culled; what technologies and processes were used for search and review (e.g., keywords and Boolean searches, linguistic modeling, supervised or unsupervised machine learning, and others); and whether and how results were validated (e.g., use of metrics, statistical sampling, null-set review, and so on).

All of these illustrations are just that—illustrations. They neither attempt nor even begin to exhaust the ways that, in e-discovery, law and technology are inseparably intertwined. They do, however, underscore the need for counsel, particularly in complex matters, to be dually proficient in both law and technology.

To be clear, "dually proficient" does not mean "equally proficient." The lawyer's core province is and always should be law, and in most cases, even experienced e-discovery counsel will work with one or more technologists—such as the client's IT staff, litigation support, a third-party vendor or consultant, or multiple of these—to understand intricacies and to plan and execute a defensible and cost-effective e-discovery strategy. But given the depth of entanglement between law and technology, to provide *competent legal representation* in matters involving significant e-discovery, it is valuable and often essential that counsel have, or involve another who has, *a strong understanding of relevant technologies*—again, both those that create and store relevant data and those that can be used to retrieve, search, and review such data. Only then will counsel be able to communicate effectively with (or, as is often said, "speak the same language as") the technologists, as well as with opposing counsel and the court, and only then will counsel be able adequately to understand for each technology, among other things, what it does, how it works, what its strengths and weaknesses are, what risks and benefits it presents, and where it fits within the paramount goal of all civil procedure, namely, to secure the "just, speedy, and inexpensive determination" of the parties' claims and defenses.

A Sound Investment, Too

In addition to furthering the client's compliance with legal rights and obligations and mitigating the risk of costly missteps, e-discovery counsel also furthers the client's interest in cost-effective discovery. In its seminal 2012 paper *Where The Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, the RAND Institute for Civil Justice estimated that in a typical case for the eight large corporations it studied, total e-discovery expenditure was around $18,000 *per gigabyte of data reviewed*, with total e-discovery costs on 45 cases having a median value of $1.8 million. The institute further found that the major cost driver—estimated to account for at least 70 percent of expenditures—was review for relevance, responsiveness, and privilege, and concluded that "[t]he most promising alternative available today for large-scale reviews is the use of predictive coding and other computerized categorization strategies," citing

"evidence that the number of hours of attorney time that would be required in a large-scale review could be reduced by as much as three-fourths."

Predictive coding and related technologies are indeed powerful tools with great potential not only to reduce the amount of time and money spent in discovery, but also to deliver superior results—in other words, simultaneously to deliver significant improvements on *all three sides* of the so-called unattainable triangle of quality, price, and speed. At the same time, such technologies are not "easy buttons" or "plug and produce" solutions, nor are they appropriate in every case. Predictive coding and related technologies use sophisticated algorithms to extrapolate human assessments from small samples to entire populations of documents, then use statistical sampling and other quantitative and qualitative techniques to validate resulting categorizations. The marketplace is crowded with many vendors offering many different applications under the broad umbrella of "technology-assisted review," most with their own proprietary technologies that vary widely in operation, functionality, and effectiveness.

Used appropriately, in the right cases, by knowledgeable counsel supported by qualified technologists, and with workflows properly designed and tailored to the data set at hand, predictive coding and related technologies are effective and eminently defensible. Indeed, some researchers have concluded that technology-assisted review is *more* effective than exhaustive manual review, at a fraction of the cost. Such technologies are gaining traction both in the marketplace and in the courts. However, precisely because such technologies work by extrapolating from small samples to very large populations, the processes used for training and validation are critical, and without proper planning and execution, such tools can be ineffective or, worse, actually *increase* cost and risk rather than mitigate them. Again, having counsel that understands how these tools work, what tools best fit a particular data set or review objective, and how to integrate such tools effectively and defensibly as part of an overall e-discovery strategy, is key to success.

Cooperation as a Practical—and Ethical—Imperative

The 20/20 Commission was spot-on when it stated: "[T]echnology has irrevocably changed and continues to alter the practice of law in fundamental ways." Yet arguably the most significant development in professional responsibility that has been spurred in recent years by the many challenges associated with electronic discovery has neither resulted from, nor required, any amendment to the Model Rules; nor has it resulted from or required any amendment to the Federal Rules of Civil Procedure, any act of Congress, or any common-law doctrine. Specifically, the inherent complexity and sheer volume of information that must be navigated and the staggering costs that can result in the absence of diligence and candor have led courts, commentators, and practitioners—especially those focused on e-discovery—increasingly to recognize that in many cases, the interests of all parties are often best served when counsel approach electronic discovery in a cooperative manner that promotes transparency and candor and eschews gamesmanship, abusive practices, and unnecessary disputes. It is also becoming increasingly clear that in the particular context of e-discovery, such cooperation not only is consistent with, but in most circumstances positively advances the objectives of, applicable rules of professional conduct and civil procedure.

The Sedona Conference explained the practical and ethical imperatives of cooperation in discovery in its watershed *Cooperation Proclamation*:

> Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests—it enhances it. Only when lawyers confuse *advocacy with adversarial conduct* are these twin duties in conflict.

The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 (Supp.) Sedona Conf. J. 331, 331 (2009) (emphasis in original). As of October 2012, approximately 135 judges had endorsed the *Cooperation Proclamation*, along with "trial attorneys, corporate counsel, government lawyers and others" who have "pledg[ed] to reverse the legal culture of adversarial discovery that is driving up costs and delaying justice. . . ."; *see also* The Sedona Conference, *The Case for Cooperation*, 10 (Supp.) Sedona Conf. J. 339 (2009).

Soon after the Sedona Conference issued its proclamation, then–Magistrate Judge (now–District Judge) Paul Grimm, widely regarded as a thought leader in matters related to e-discovery, strongly endorsed cooperation in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008):

> It cannot seriously be disputed that compliance with the "spirit and purposes" of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionally large to what is at stake in the litigation. *Counsel cannot "behave responsibly" during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation*. (Emphasis added.)

Most recently, in *Kleen Products, LLC, et al. v. Packaging Corp. of America, et al.*, 2012 U.S. Dist. LEXIS 139632, *58 (N.D. Ill. Sep. 28, 2012), Magistrate Judge Nan Nolan, another widely recognized thought leader and a cofounder and former cochair of the Seventh Circuit Electronic Discovery Pilot Program, issued a lengthy opinion that starts by quoting from the *Cooperation Proclamation*, then proceeds to address a series of discovery disputes through the lens of cooperation and the related doctrine of proportionality. Judge Nolan ultimately draws three lessons about cooperation:

> First, the approach should be started early in the case. It is difficult or impossible to unwind procedures that have already been implemented. Second, in multiple party cases represented by separate counsel, it may be beneficial for liaisons to be assigned to each party. Finally, to the extent possible, discovery phases should be discussed and agreed to at the onset of discovery.

Id. at *59.

Finally, a number of courts—including the Seventh Circuit and Federal Circuit Courts of Appeals and the U.S. district courts in the Southern District of New York, the Eastern District of Texas, the District of Delaware, and the Northern District of California, among others—have established pilot programs, model orders, and guidelines directed entirely or partly at electronic discovery, with the goal of streamlining the discovery process and encouraging cooperation to effectuate the "paradigm shift" called for by the *Cooperation Proclamation* and to achieve the overarching goal of the Federal Rules, placed appropriately in Fed. R. Civ. P. 1, to "secure the just, speedy, and inexpensive determination of every action and proceeding."

Conclusion

The Canadian communications philosopher Marshall McLuhan, often credited for predicting the World Wide Web 30 years before it was invented, once said "[i]t is the framework which changes with each new technology and not just the picture within the frame." In few areas has the framework for litigation changed as much or as rapidly in the past decade as electronic discovery, and the rapid advancement of technology that has been the primary driver of that change shows no sign of slowing. Particularly in complex matters, it is imperative that counsel understand both relevant law and relevant technology to provide competent and cost-effective representation to clients. For many attorneys, particularly those who practice with colleagues who concentrate in such matters, the best approach will be to maintain the baseline understanding required of all lawyers by Model Rule 1.1 and to leverage the greater knowledge and expertise of such colleagues as needed in specific cases. There is simply too much technology, growing too fast and changing too quickly, for most lawyers to keep up with all of it, on top of staying abreast of the substantive areas of law in which they practice.

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