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TOP PLAINTIFF LAWYERS

Using ESI-specified discovery in a post-COVID-19 data-driven world

By Stephanie Yee

In March, Google advised its employees in the United States and all over the world to work from home in order to prevent the spread of COVID-19. Now, many of those employees are expected to continue this practice through the end of the 2020 year. The story is the same at Facebook and Box. In a much more drastic move and perhaps shift in attitude about productivity and costs, Twitter, Shopify and Square may allow employees to work from home permanently; even after the risks presented by the virus subside. There is no doubt the work from home movement is a growing trend incubated by this virus. And where major companies have created a more flexible work schedule, other companies from all different sectors may follow.

According to one Gallup poll, approximately 59% of Americans would prefer to continue working from home as much as possible. Time will tell whether this wide scale experiment has managed to convince employers that at least some employees mange to function with little loss of productivity outside of the office and create a demand for new work from home policies. This time may signal a revolution in employees who will demand a more flexible workspace, raising remote work higher in the rank of perks offered to sought-after talent. As the larger tech companies have already moved to implement these new changes, they may inspire or force smaller entities in all different sectors to follow.

How Work From Home Impacts Litigation

These changes to the working environment will no doubt lead to a massive increase in electronic communications. Fewer in-person discussions mean more casual, blasé comments made in emails, text messages, or messaging apps, which if discovered, can hurt or help a case. Attorneys know that it is nigh on impossible to stop employees or anyone for that matter from leaving "smoking guns" in informal communications, especially ones they think are private. There are going to be a lot more smoking guns lying around in the future.

With so many people throughout the world forced or choosing to work apart from colleagues and business partners, there will be a much larger reliance on electronically transmitted and stored written communications; more data created electronically; and more remote access to company resources. Which lead to increased electronic storage of information and metadata. Such electronic information remains in the digital realm, never being committed to physical paper. Attorneys need to familiarize themselves now with the different methods of discovering ESI and in what forms that ESI might reside. Failure to request or effectively review electronic discovery will mean a failure to discover vital information in the course of litigation, affecting an attorney's effectiveness at trial and denying opportunities to gain information that could lead to resolution before trial.

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E-Discovery Rules

Both the California Code of Civil Procedure and the Federal Rules of Civil Procedure promulgate rules to govern electronic discovery. California signed its Electronic Discovery Act into law on June 29, 2009. The Federal Rules of Civil Procedure were amended Dec. 1, 2006 and Dec. 1, 2015 to specifically address electronic discovery.

California

California's Electronic Discovery Act was incorporated into the existing discovery rules. Most significantly, it:

- defined electronically stored information (CCP Section 2016.020);
- dictated the format in which it must be produced (CCP Sections 2031.030, 2031.280);
- introduced limits on discovery, allowing for withholding ESI that is not reasonably accessible (CCP Sections 2031.060, 2031.310, 2031.210);
- allowed recall in the event of inadvertent production of privileged materials (CCP Section 2031.285);
- and provided a safe harbor for good faith loss or deletion of information (CCP Sections 2031.060, 2031.300, 2031.310, 2031.320).

Federal

The e-discovery amendments made to rules 16, 26, 33, 34, 37, and 45 of the Federal Rules of Civil Procedure in 2006 established the initial rules for

- production and limits (FRCP 26, 34, 45);
- responses (FRCP 34);
- form of production (FRCP 34; 45)
- requirements to meet and confer/ participate in pre-trial conferences to facilitate production (FRCP 16);
- and consequences for failure to preserve ESI (FRCP 37).

The 2015 amendments materially affected rules 26 and 37. A proportionality test was implemented, allowing discovery to the extent it is proportional to the needs of the case, considering the importance of the issues. Allocation of discovery costs came under stricter control; for good cause, costs could be governed by the courts. The amendment also punishes parties for failing to take reasonable steps to preserve electronic information, removing the safe harbor that had previously allowed for a party to escape sanction if ESI was lost due to a routine, good faith operation of the system.

Future Considerations

The increase in volume of ESI is certain to increase litigation costs as well. At the very least, email usage has increased greatly. Additionally, paranoid employers are also producing mass amounts of ESI, monitoring their employees' every move. Employers can install keystroke loggers on work computers and record employees with activity trackers that are capable of not only telling when they are inactive but also taking screenshots of whatever they are doing. More and more data to sift though is created every minute, driving up the cost of its future review.

Increased e-discovery costs may eventually lead to further changes to California's Code of Civil Procedure much as the Federal Code of Civil Procedure was amended to address the time and expense of sifting through ESI. Perhaps an equitable distribution of ESI costs will be implemented to encourage parties to cooperate and narrow the scope of production. At the very least, court pressure to meet and confer prior to and during the production will increase as disputes specific to ESI become more frequent.

Nevertheless, now is the time for attorneys to begin or supplement their education on the types of electronic information and the methods by which to conduct electronic discovery. Ignorance about what kind of data and metadata exist and the information they can provide does not serve the client's goals. Not to mention that fundamental misunderstandings about electronic mediums can lead to costly discovery disputes and waste of the courts' time. ■

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