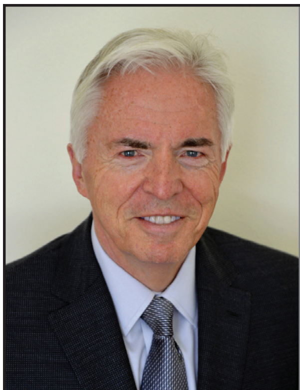

ELECTRONIC DISCOVERY: ARE WE COMPETENT?

By Viggo Boserup, Esq.

The State Bar of California has issued perhaps the country's most straightforward and candid directive to litigators to learn the ins and outs of electronic discovery (e-discovery). In a proposed formal opinion, it states, "Not every litigated case ultimately involves e-discovery; however, in today's technological world, almost every litigation matter potentially does." It goes on to say that, as a matter of competency, the attorney handling e-discovery should be able to do the following nine things:

1. Assess e-discovery needs;
2. Implement appropriate preservation procedures;
3. Analyze and understand clients' electronically stored information (ESI) systems and storage;
4. Identify custodians of relevant ESI;
5. Perform appropriate searches;
6. Collect responsive ESI in a manner that preserves its integrity;
7. Advise clients on available options for collection and preservation of ESI;
8. Engage in a "competent and meaningful" meet-and-confer to address e-discovery plan; and
9. Produce responsive ESI in an appropriate manner.

The opinion, in essence, states that counsel in California have three options:

1. Be competent to handle e-discovery;
2. Find someone who is competent in e-discovery; or
3. Decline the representation.

While the California advisory opinion is only proposed, it is arguably a model for other jurisdictions and certainly provides a useful checklist for assessing counsel's own preparedness for e-discovery any place in the country.

Faced with the foregoing, what is the average law firm to do?

While a firm's litigators have the clearest need for e-discovery competence, it is important to recognize that non-litigators within a firm play an important role in e-discovery as well. It is often the case that a non-litigator happens to be the primary contact with the outside client, and that attorney can play a crucial role in having the client prepared for e-discovery at all times. By counseling the client on issues of information governance, the attorney facilitates the client's preparedness for future e-discovery issues. Getting it right before litigation can save enormous amounts of resources. In order to provide effective counseling, it is, of course, essential that such counsel understand what may be expected in the event of litigation involving

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e-discovery. For that reason, it is important that all counsel participate in at least the initial steps of preparing for e-discovery competence.

The presentation of a framework or outline will facilitate a broader understanding of the various phases of e-discovery. The process itself makes clear that while each phase of e-discovery is important, the first phase, of designing and creating the plan, is critical to achieving the last phase. It is at the outset that counsel needs to engage in what is probably counterintuitive to the litigation process. All parties are highly incentivized to get it right the first time since it is not just the producing party who is at risk. If the producing party asks the requesting party for information or input regarding an element of ultimate production, the requesting party cannot remain silent and then complain later that such element was insufficient. Failure to cooperate may wind up giving the producing party uneven control over the ultimate production. Thus, collaboration is critical to all parties at various points in the e-discovery process. Getting all parties on the same page in a well-planned and transparent plan minimizes the opportunity for surprises at the ultimate production.

Following an overview of e-discovery, it may be best to appoint a primary e-discovery liaison within the firm and to identify a technical liaison with whom to work.

When handling a specific piece of litigation involving e-discovery, it is critical at the outset that counsel familiarize him- or herself with the status of ESI held internally by that client. A client questionnaire should address issues like document retention policies, the identity of key players as to subject matter and technology, the identity and location of ESI creation and storage devices, network infrastructure, email systems history and retention structure, encryption technologies, archiving and many more.

Having taken an in-depth inventory of the client's ESI infrastructure, within the context of a particular litigated matter, counsel is better equipped to determine the level of outside assistance appropriate to the case. In addition, many firms find that the technical expertise necessary, as well as the rapidly changing nature of technology itself, calls for the services of a vendor specialized in the area. Any such outside assistance is normally associated with some phase of discovery: preservation, collection, processing, review or production.

After determining the level of assistance required from a vendor, counsel needs to conduct its due diligence of the proposed vendor. This involves an analysis of the vendor's financial viability, disaster prevention and backup plan, data security (vendor certifications such as SSAE 16 and ISO 27001) and, not least of all, its cost. Given the wide variety of products and pricing methods, it is often difficult to find apples-to-apples comparisons.

Simultaneously with the foregoing, the parties should prepare for the initial exchanges and meet and confer, which should result in an agenda and a draft discovery plan. The plan itself depends entirely on the nature of the particular case, the dollars at stake, available resources, time constraints and the like. Armed with a thorough analysis of the client's ESI issues, as well as an understanding of the discreet phases of e-discovery and available methods of implementation, counsel will be well prepared to create an effective and defensible e-discovery plan. ■

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