Ediscovery profoundly changing lawyering

By Chris Mondics

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When the Internet was still in its infancy, say in the long-ago past of 2006, the rules governing evidence in most civil cases were limited largely to paper.

But that all changed officially Dec. 1, 2006, with the enactment of new federal standards requiring lawyers and their clients to handle e-mail, spread sheets and other electronic information just as they would the paper records that had formed the foundation of civil cases for decades.

The enactment of those rules and some case law that developed a few years earlier has profoundly changed the litigation landscape.

A whole new universe of information - once out of reach to lawyers seeking to push their point in court - is now available in everything from commercial to matrimonial cases. Communications via BlackBerry, desktop e-mail, and voice mail now routinely are entered as evidence in civil cases.

Even E-ZPass records can be subpoenaed to establish a litigant's whereabouts.

In essence, the rules say that if there is even a remote hint that e-mail or other electronic data might become evidence in a civil case, it must be preserved. And there can be substantial penalties in the way of fines for lawyers and their clients if they breach those rules.

"It has changed litigation in fundamental ways," said Benjamin Barnett, a trial lawyer at Dechert L.L.P., who advises clients on electronic discovery. "This is not limited to any one type of litigation. There are instances where a marriage is dissolving, and people want to find out what the other person is googling."

Not everyone believes this development, known in the legal world as ediscovery, is serving the interest of justice.

Defense lawyers complain that their clients often are forced to supply voluminous information at great cost with little benefit. And because there is so much more information potentially subject to a discovery order, the chances are greater that a client might violate the order by inadvertently deleting data.

"Does this enhance justice? Not usually," said Tess Blair, a partner at Morgan, Lewis & Bockius L.L.P., who heads the 1,350-lawyer firm's electronic-data-discovery unit. "It becomes a weapon in many cases."

Theresa Loscalzo, a partner at the 180-lawyer Schnader, Harrison, Segal & Lewis L.L.P., said the proliferation of discovery involving electronically stored information has become a big burden for clients.

"It increases costs dramatically," she said.

Yet some lawyers say this flood of new data has helped even the playing field for plaintiffs, and they argue that the costs have been overstated.

Jeffrey Killino, a Center City trial lawyer involved in various product-liability cases, said the searchability of an electronic database had greatly expedited document review. And because so much more information is now available, plaintiffs seeking to hold companies accountable for bad conduct have a better chance of proving their cases, he said.

"Ediscovery is balancing the scales of justice for plaintiffs," Killino said. "It is allowing for full and fair disclosure of information that plaintiffs are entitled to."

No one disputes that the volume of ediscovery information can be huge.

Blair says she has headed up ediscovery cases involving one or more terabytes of computer-stored information - each terabyte is equal to 75 million or more pages of data.

All of that information needs to be sorted, initially through data-mining techniques, but ultimately, millions of pages are reviewed by actual lawyers, an expensive proposition.

To handle the enormous workload, big firms like Morgan Lewis and the 1,000-lawyer Dechert will assign hundreds of contract attorneys, lawyers who are not firm employees, but who are brought in for specific tasks.

Such was the case when Dechert and other firms defended Merck & Co. Inc., the pharmaceutical-maker, in massive multidistrict litigation involving Vioxx, an anti-inflammatory medication. The company pulled the drug from the market in 2004 after the disclosure of clinical trial data showing that patients taking the medication long term had double the risk of heart attacks and strokes.

Dechert and other firms employed hundreds of contract lawyers around the country who reviewed electronic and paper documents in the case, which was settled.

The initial ground rules for ediscovery were laid out in 2001 by Judge Shira Scheindlin, a federal district judge, in an employment discrimination case against UBS Warburg filed by one of its traders, a woman who said she had been passed over for promotions.

In a series of rulings, Scheindlin, sitting in Manhattan, concluded that UBS Warburg had a duty to preserve pertinent electronic data when it became clear that the woman, Laura Zubulake, might sue and that it was obligated to produce the information at its own cost.

In a later ruling, Scheindlin concluded that the company had deliberately destroyed relevant e-mails, and she instructed jurors to infer from that action that the company was seeking to cover up damaging information.

In an even more sobering decision for defense lawyers in 2005, a Florida judge essentially gutted the defense of investment banking firm Morgan Stanley in a commercial dispute with Revlon chairman Ron Perelman after concluding that the firm had obstructed efforts to obtain electronic information.

Perelman won a $1.45 billion decision. Although the verdict eventually was overturned on appeal, it got the attention of defense lawyers around the country.

Thus, the game for many defense lawyers focuses on limiting discovery in the first place.

Scott Vernick, the managing partner of the Philadelphia office of Fox Rothschild L.L.P., said the objective of defense attorneys should be to get a sense of how much information might be subject to discovery and where it is in the company's information infrastructure.

Vernick says that whenever there is even a hint of a lawsuit, he advises clients to preserve all potentially relevant data.

"There are consequences when stuff goes missing," he said.

Vernick says his objective in such cases is to limit discovery to the "low-hanging fruit" of easily accessed data on hard drives. That limits the scope and reduces costs, he said.

Like most firms, the 400-lawyer Fox Rothschild firm relies on vendors for data-mining and -sorting, a booming business.

Vendors will supply search software and often store or "host" the data on their own servers, so as not to burden the computers of the law firms.

They'll employ data-mining techniques and even provide staff to do document review in some cases.

But it is up to the outside counsel typically to oversee the process.

Eric Meyer of the 100-lawyer firm Dilworth Paxson L.L.P. says courts are open to arguments that a requested search might be nothing more than a costly fishing expedition with little likelihood of generating information relevant to the case.

Meyer says some lawyers view electronic information as a legal can of worms for their clients, and they seek agreements where discovery of electronic documents is very limited, or doesn't take place at all.

Yet, he said, ediscovery "has forced attorneys, will force attorneys, to become more computer proficient and to have a better understanding of the universe of computer-stored information."