

Educating the bar and the bench to manage electronic discovery

Song and Woan discuss the FRCP

BY GIYOUNG SONG, TANSY WOAN

The cost associated with discovery of electronically stored information (ESI) is substantial, and the risk of peril for clients and lawyers continues to run high. The proposed amendments to the Federal Rules of Civil Procedure, adopted in April by the U.S. Supreme Court and submitted to Congress for final approval, were a culmination of "near-unanimous agreement" among participants, which included judges, practitioners and academics, "that the disposition of civil actions could be improved by advancing cooperation among parties, proportionality in the use of available procedures, and early judicial case management." Participants also agreed that the overarching goal of reducing costs should be pursued by several means, including the "education of the bench and the bar."

I. E-discovery Competence

In a recent survey of 22 federal district court and magistrate judges regarding e-discovery issues, participating judges observed that "too many attorneys have not gained the knowledge they need to effectively represent their clients," and that lack of understanding about the subject causes lawyers to neglect their e-discovery responsibilities.

The importance of educating lawyers on e-discovery is recognized by the American Bar Association (ABA) in its Model Rules of Professional Conduct, which were updated in August 2012 to require, among other things, that in competently representing clients pursuant to Rule 1.1, "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology . . .*" ABA Model Rule 1.1, Comment 8 (updates in italics).

According to the ABA's Commission on Ethics 20/20, conducting fact investigations and discovery, and advising clients, "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."

Cases also guide that lawyers need to understand clients' information systems, and the process for finding, searching and producing ESI. See, e.g., *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134 (S.D.N.Y. 2009); *Qualcomm Inc. v. Broadcom Corp.*, No. 05-CV-1958-B (BLM), 2008 WL 66932, at *9 (S.D. Cal. Jan. 7, 2008); *Green v. Blitz U.S.A., Inc.*, No.

2:07-CV-372 (TJW), 2011 WL 806011 (E.D. Tex. Mar. 1, 2011).

State bar associations are revising their ethical rules and issuing opinions to address the need for e-discovery competence. Most recently, the State Bar of California issued a proposed ethics opinion listing functions lawyers are expected to be able to perform (assess initial e-discovery needs, implement ESI preservation procedures, understand ESI system and storage, identify custodians of relevant ESI, engage in competent meet and confer to develop discovery plan, etc.).

The duty of competence extends to the use of technology to conduct discovery tasks involving collection and processing, and review and production of ESI. For example, use of technology-assisted review (TAR) tools, which, if properly employed, can reduce costs and risks, requires understanding of the technology and the process for its application to ESI.

When delegating or outsourcing document review projects, lawyers must properly select the review team and provide adequate supervision. This is a two-part duty under Rule 1.1 governing competence, and Rules 5.1 and 5.3 relating to supervision of other lawyers and non-lawyers. ABA's Formal Opinion 08-451 explains the challenge is "to ensure that tasks are

delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately."

Lawyers have a duty to prevent disclosure of confidential and privileged information. ABA Model Rule 1.6, Comment 18. The legislative history of Fed. R. Evid. 502 addresses the use of technology to prevent inadvertent disclosure: "[d]epending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure." At least one scholar argued that "[i]f a lawyer fails to employ the technological tools and resources at her disposal to prevent the production of privileged material, an inadvertent disclosure might constitute not only a waiver of the privilege, but also a violation of ABA Model Rule 1.6," which addresses a lawyer's duty to protect confidential information.

There are risks associated with handling privileged ESI. For example, courts have held that precautions taken to prevent inadvertent disclosure were not reasonable, therefore resulting in a waiver of privilege, primarily because the producing party did not use appropriate sampling techniques to test the reliability of the keyword

searches. *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125, 136 (S.D. W. Va. 2010). A claim for legal malpractice was premised on allegations that a production of privileged documents to the government resulted from outside counsel's failure to properly supervise the review and production of ESI by contract attorneys. *J-M Mfg. Co. v. McDermott Will & Emery*, No. BC-462-832 (Cal. Super. Ct., Los Angeles Cnty. filed June 2, 2011).

II. E-discovery Education

In an effort to promote cooperation, proportionality and active judicial case management, educational resources and programs are being made available by the judiciary, bar associations, law schools and research organizations.

The Federal Judicial Center (FJC), which is the research and education agency of the federal judicial system, is tasked with a statutory mission to develop and conduct education programs for the judiciary. The FJC publishes materials on active case management of e-discovery, and also provides training to federal judges on emerging e-discovery issues and advanced technologies. According to Judge Jeremy Fogel of the United States District Court in the Northern District of California, who currently serves as the

Director of the FJC, the need for education on e-discovery will significantly increase if and when the U.S. Supreme Court approves (which it recently did) the proposed amendments to the federal rules.

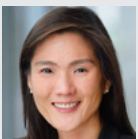
E-discovery is a key subject under the ABA's Section of Litigation, which provides resources on preservation, sanctions, collection, production and cost control, among others. The association also offers live programs with faculty of jurists and practitioners covering developments and strategies for managing e-discovery. State bars like the New York State Bar Association publishes best e-discovery practices guidelines for practitioners in New York state and federal courts, and offers continuing legal education courses on e-discovery law.

The United States Department of Justice established a Civil Electronic Discovery Committee with representatives from its divisions, including the Antitrust and Civil divisions, which have attorneys dedicated to e-discovery. This group conducts training courses for lawyers, paralegals, and litigation support personnel in the department.

Law schools are offering e-discovery courses, and some are launching programs that provide recent law school graduates with hands-on training and employment experience in the practice of e-discovery.

The Sedona Conference (TSC) offers training programs and publishes various guidelines for e-discovery practitioners. TSC also publishes the Sedona Conference Cooperation Proclamation: Resources for the Judiciary, which is intended to aid state and federal courts judges in managing cases with discovery of ESI.

CONTRIBUTING AUTHORS



Giyoung Song is a Discovery Counsel in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP where she represents financial institutions, corporations and individuals in complex litigation involving corporate, commercial and securities-related matters in federal and state courts. Ms. Song's practice is dedicated primarily to discovery-focused litigation, advice and counsel in federal and state court-based class actions, multidistrict litigation and other disputes.



Tansy Woan is a Litigation associate in Skadden's New York office.