

## What's New With E-Discovery?

With the growing importance of e-discovery, new tools and time-saving strategies are making the process smoother and more efficient for litigation support professionals, attorneys and their clients.

“Today, e-discovery is playing a role in every type of case,” said Matthew E. Druckman, director, litigation support, Cherry, Bekaert & Holland, L.L.P. in Coral Gables. “Everything is out there someplace.”

From email and text messages to social media posts and financial records, more and more relevant documentation is stored in electronic format.

In some cases, a discovery motion may need to include records from desktop and laptop systems, smartphones, tablets or archived material on disks, backup tapes, mirror drives or cloud service providers.

“Attorneys need to learn as much as they can about e-discovery from the technology side,” said Steven Berwick, partner, Kaufman Rossin & Co., P.A., Miami. “You don’t have to be a technology expert, but you need to understand how the process works so you can better advise your clients.”

Like other forensic analysts, Berwick recommends bringing in an e-discovery expert early in the case. “If you are an in-house counsel, you need to identify the potential documents that may need to be produced and ensure that a litigation hold is in place,” he said. “Once the subpoenas start going back and forth, you may need to outsource with a service that can identify the data, capture the information and preserve the documents.”



Steven M. Berwick

One of the key issues for both sides is how much needs to be produced in discovery. “A plaintiff might ask for every email for the past five years relating to a certain matter,” Berwick said. “The defense would say that’s overly burdensome. So what you need to do is understand where the relevant data might be, and narrow the scope of the request. That reduces the costs while allowing the plaintiff to get the material most relevant to the case.”



**Marin K. Williams**

Martin K. Williams, partner, Fiske & Company, Plantation, says the size and scope of e-discovery can vary based on the nature of the case. For instance class action or commercial litigation cases can generate massive amounts of information. “On the other hand, a real estate or a family law attorney might only need documents on a computer hard drive or a flash drive,” he said. “However, the nuances of e-discovery are similar, regardless of the scale.”

### **Predictive Coding**

One of the fast-emerging tools to help accelerate the search for relevant documents is predictive coding. Although still in its infancy, predictive coding will allow an attorney and litigation support team to apply an algorithm or set of instructions to identify the key documents in a computer-generated e-discovery search.



**Daniel A. Medina**

For example, a forensic team might be asked to review 5,000 emails related to a case, Berwick said. With predictive coding, the legal-forensic team could review 200 or 300 messages, noting which are relevant and which are not. “That trains the computer, which can then go through the rest of the messages and note which emails are responsive to the subpoena and which are not,” Berwick said.

“From an attorney’s perspective this is new technology,” said Daniel A. Medina, partner, Grant Thornton LLP Miami. “It has been gaining a lot of support and we expect it will be tested and tried in a case in the next six months to a year.”

Since the volume of electronic data is increasing exponentially, predictive coding may become necessary to prepare a relative set of documents, Medina says. “None of us realize just how much storage email takes up,” he said. One gigabyte of email could fill 40 to 50 banker boxes of printed documents, and just one flash drive could hold 5 to 16 gigabytes.

“There is no easier button that magically processes the data we collect,” Medina said. “I

was in West Palm Beach recently and collected 2 terabytes (2,048 gigabytes) of data. We have to carve through a lot of information that has nothing to do with the case in order to extract the relevant documents. It takes time to do that in the laboratory. So the goal is to avoid processing mountains of garbage and get our clients what they need to focus on for their cases.”

### **Native Formatting**

Another key to saving time and money is the ability to obtain financial statements, tax returns and other accounting records in their native formats, says Williams. “Rather than summarized statements, we can now get an actual copy of the file in QuickBooks or similar application,” Williams said. “Having that file in native format makes it easier to search for information. That simplicity is a huge factor today, since attorneys are looking for the biggest bang for the buck.”

Williams recently assisted an attorney whose client claimed he was swindled out of \$2 million in a real estate development. The original discovery request produced architectural drawings and building permits, but nothing relating to the financial side of the case. “We told our client that we needed the QuickBooks files, rather than spend our time going through box after box of irrelevant paper data,” Williams said.

Although it took six months, the defendant finally produced the electronic files in native QuickBooks format. “Within an hour of reviewing the numbers, we could see a blatant pattern of fraud,” Williams said. “It was clear there was a complete misappropriation of the development funds into personal accounts.” When the case was tried, the client received a judgment of \$11 million, compared with the actual \$2 million loss.

While QuickBooks dominates the small business market, forensic analysts can also review financial applications in native format or export the data to a Microsoft Excel spreadsheet. “With an Excel file you can search thousands of transactions in minutes and summarize the findings,” Williams said. “Also, you can look at the formulas in the spreadsheet, since if they are wrong the data sets will be wrong as well.”

Other advantages of e-discovery include being able to simplify the findings and provide a high-level summary for counsel and the court, Williams added. “If you find a ‘smoking gun’ in the native financial files, you know you have solid evidence. After all, if you’re asked the question, ‘Where did you get this information?’ you can point to your opponent and say, ‘These are your own books and financial records.’”

### **Preserving Privacy**

For in-house attorneys, Druckman says the key issues relating to e-discovery include preserving confidentiality and privacy. “When you’re dealing with sensitive information, you need to understand the defensibility of production requests,” he said.

Another important step is understanding where data is being kept – particularly as cloud service providers play a bigger role in archiving and backing up documents. “I think this is the way of the future,”

Druckman said. “With cloud computing, you can set up virtual databases and data rooms, giving access to whomever you want.”



Matthew E. Druckman

But from an in-house perspective, you need to do due diligence on the service provider and “dig into” the terms of service agreements, he added. “Be sure to negotiate those terms so that they meet your particular requirements,” he said.

### **Florida Considers New Rules**

The era of e-discovery dates back to December 2006 when a key modification of the federal rules of civil procedure required both sides to meet and confer to discuss the production of electronic documents. Since then, forensic analysts, attorneys and judges have all been wrestling with e-discovery issues in the federal courts.

However, Florida has not yet adopted a similar e-discovery rule. According to Berwick, The Florida Bar has been looking at e-discovery recommendations that would go to the state Legislature, which could modify the current law. In general those recommendations follow the federal rules with two exceptions. There may not be a “meet and confer” requirement because the cases in state court are generally smaller.

The other potential difference could be in litigation hold requirements. Under the federal rule, information relevant to a lawsuit must be preserved if you have reason to believe you will be sued. Under the proposed Florida rule, the litigation hold would not go into effect until a lawsuit is filed. “South Florida attorneys should be aware of these potential changes,” Berwick said, “because they could affect the litigation process.”

### **Plan Ahead – and Be Patient**

Medina says it’s important to consider the e-discovery issues as early in the case as possible. That’s one of the best ways to avoid the two pitfalls of over-production or under-production of data. “In one recent case, non-forensic professionals collected the data but key documents were missing,” Medina said. “In other cases, privileged data was

sent to the other side.”

Berwick notes that there has been a change to the federal clawback rule relating to e-discovery. “If you inadvertently produce a privileged document, you can now take it back. You still have to do your due diligence, but if something slips through the cracks, you can now get it back.”

Finally, Williams advises attorneys to be persistent and patient in these cases. “Don’t stop trying to obtain e-discovery even if you are denied once or twice,” he said. “Eventually, you should get what you request. And remember that e-discovery is not as cumbersome a process as you would think.”

*South Florida Legal Guide Midyear 2012 Edition*