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"Disruptive Change" Needed Toward E-Discovery Competence

by Gregory W. Herring

Electronically stored information ("ESI") is information that is stored in technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities. Electronic Discovery, or e-discovery, is the use of legal means to obtain ESI in the course of litigation for evidentiary purposes. Together, they constitute interesting and important considerations and challenges that overlay family law as well as traditional civil litigation.

But ignorance of and resistance to dealing with ESI remains high. An experienced and well-respected judge in one of my cases recently asked in the middle of an e-discovery hearing, "what is ESI?"!

In a recent meeting of managing partners of Southern California law firms, one participant bragged that his large firm accepts discovery productions of emails and websites solely through hard copy printouts. It was lost on him that discovery of ESI in its native form can reveal metadata (hidden "data regarding data") potentially critical to a case. It can be much more efficient to transfer from computers and devices in its native format. It can be reviewed by technology that is much more efficient than human eyeballs.

A 2016 survey of federal judges and attorneys addressed e-discovery best practices and trends. Grabbing attention was their observation that **being undereducated and underprepared in e-discovery "is no longer an option."** They continued, **"disruptive change is needed for lawyers to become e-discovery competent."** (The survey can be obtained through *exterro.com*.)

In his 2015 Year-end Report on the Federal Judiciary, Chief Justice John Roberts emphasized that new changes to the Federal Rules of Civil Procedure are in part intended to "address serious new problems associated with vast amounts of [ESI]."

Last year, the California State Bar issued a formal Opinion, providing guidance relating to ESI and e-discovery. (State Bar of California's Standing Committee on Professional Responsibility and Conduct ("COPRAC") Formal Opinion No 2015-193.) The Opinion points out that electronic document creation and/or storage, and electronic communications have become commonplace in modern life. It acknowledges that discovery of ESI is now a frequent part of

almost any litigated matter. It emphasizes that **attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery.**

"ESI is now an accepted part of a law practice, and may not be ignored simply because counsel may be 'highly experienced' in other aspects of litigation. Failure to be adequately prepared to conduct e-discovery qualifies as 'ethical incompetence." (A. Marco Turk.)

While not every litigated case involves e-discovery, in today's technological world almost every litigated case *potentially* does. As the Opinion emphasized, "the chances are significant that a party or a witness has used email or other electronic communication, stores information digitally, and/or has other forms of ESI related to the dispute."

Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI, and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.

Commonly heard pushback includes complaints that many clients cannot financially afford substantial ESI attention and that attorneys want to practice law, not computer forensics. But properly handling these issues and tasks need not cause heartburn. Rather, a practical and economical standard plan can easily include:

- Screening each incoming new case for ESI/e-discovery issues and tasks as part of the regular intake process – just add some new items to the usual intake checklist;
- Warning new clients through standard letters of the importance of ESI in the modern litigation environment and the need to preserve all hardware (smart phones, computers and other devices) and data when anticipating and while in litigation;
- Assessing clients' personal and business ESI storage systems. This can be as simple as learning whether an individual stores her personal data in a popular telecommunications cloud (icloud, etc.) or more complex, in the case of a businessperson, for instance. In the latter cases, a computer forensics professional can be retained to perform a basic audit, from which further assessments and planning can spring. At our firm, we regularly retain a local forensic who provides clients with no-charge initial audits, which we then use to budget and plan in concert with the client.

- Sending "ESI hold" letters to opposing counsel and then monitoring when it looks like ESI might be an issue.

Negligence or lack of basic knowledge regarding ESI and e-discovery requirements constitutes professional incompetence. Our firm has gathered a variety of letters, checklists and other communications designed to help manage ESI and e-discovery challenges. Please contact us at info@theherringlawgroup.com if you would like a set. We would be pleased to assist toward achieving e-discovery competence.