The advent of eDiscovery

Nevada attorneys, businesses face information management challenges

The legal profession is now under the gun to obtain software management systems due to the federal rules mandating eDiscovery and the globalization of electronic document transmission. Whether it is for litigation, due diligence in business acquisition, merger, or investment, the mounds of paperwork must be reasonably retrievable with economic and expeditious search capabilities.

Due to the volume of emails written and distributed on a daily basis, businesses and their attorneys must now be more watchful than ever. They need to have an organized system in place to manage emails, as well as other electronic documents they receive.

To fully understand eDiscovery, it is a process, not a thing. Every business will at some point be involved in the process of eDiscovery. eDiscovery occurs during a lawsuit when one party to a suit requests communications, documents, and records from the other party, regarding the subject of the lawsuit. The "e" part concerns electronic communications, or hard copies that have been scanned into a computer or network system. eDiscovery includes chat rooms, blogs, emails, attachments to emails and documents of every kind and format. It may also include the meta data for those communications. Meta data is the identification of the origin of the documents or communications, such as when it was created, by whom, and in what format it originated.

When the Science and Technology Committee of the American Bar Association proposed new federal rules covering Electronically Stored Information (ESI) in 2005, it attempted to put some structure on a growing phenomenon — computers have transformed the paper world into the electronic world, from the intra-communication, to the inter-communication in enterprises. The rules not only required transmission upon request of one party to another of all electronically stored information specified in the request, they also provided penalties for not doing so.

Nevadans held their breath during the case of *Premiere Digital Access, Inc. v. Central Telephone Co. d/b/a/Sprint of Nevada*. During the case, Premiere Digital Access requested that Sprint produce documents, including all electronically stored communications. Sprint submitted more than 1,200 pages of documents, which inadvertently included a five-page string of email between Sprint employees and in-house counsel. Sprint was not aware of the inclusion until more than one year later when Premiere included the email in its motion for summary judgment (which would have determined without trial the case against Sprint). When Sprint asked the magistrate for a protective order to prevent the emails from being disclosed and used in the lawsuit, the magistrate judge reasoned that the attorney-client privilege should be narrowly construed, and Sprint did not meet its burden of establishing the privilege (meaning that the communications between the in-house counsel and the employees could be submitted as evidence in the case).

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The district court agreed with Sprint that the email was clearly privileged and therefore protectable under Nevada law. The district court reversed the magistrate's ruling thereby giving Sprint another opportunity to prevent private and privileged communications from being made public, and used, in the lawsuit. If the decision had not gone Sprint's way, the lawsuit could have been decided against it without a trial.

In other lawsuits where disputes arose from withholding requested electronic communications, attorneys and clients have either been penalized with stiff fines, monetary sanctions, or — even worse — instructions from the judge to the jury that the withholding of such information can be construed to be proof that the withholding party had something to hide or was not honest or credible. In *Qualcomm Inc. v. Broadcom Corp*. for instance, Qualcomm was ordered to pay all of Broadcom's litigation fees, which amounted to approximately $10 million, due to the attorneys failing to produce evidence until four months *after* the trial. In a case involving Morgan Stanley & Co., a judge said the failure of attorneys to provide e-mails in a timely manner, and their argument that the production would be burdensome, amounted to substantive proof of Morgan Stanley's willfulness and wrongdoing. (An appeals court later overturned the compensatory and punitive damages in the case.)

Both businesses and their legal counsel need a methodology, or organized system for retrieving emails (as well as other documents) pertaining to a particular subject matter. Many of the software packages available today are generally either very expensive, and/or very difficult to work with. However, there are a few software packages that do not require a huge amount of effort to learn and implement. The market is struggling to make technology available that is specifically applicable to the eDiscovery and the document retention process. The good news is that there is progress, and manufacturers are creating more affordable and user-friendly software to aid in this arena.

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