ELECTRONIC DISCOVERY IN 2018:
CURRENT CHALLENGES AND
HELPFUL RESOURCES

Sara Anne Hook, M.B.A., J.D., Indiana University
In 2011-2012, I wrote a four-part series of articles on electronic discovery (e-discovery), specifically as it related to bankruptcy, for NABTalk: The Journal of the National Association of Bankruptcy Trustees. Recent years have seen many developments in e-discovery, including amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, additional availability of technology to assist with e-discovery and vendors who offer specialized services that can support an e-discovery system. Moreover, we now have a much more extensive body of case law to draw upon.

On the other hand, the advent of new technologies brings new e-discovery challenges. One of the significant issues in e-discovery continues to be the sheer volume of electronic evidence (a lot of it unstructured data) that needs to be identified, collected, preserved, reviewed and produced.

This article will summarize some of the recent developments in e-discovery, highlight some of the current challenges and identify some of the resources and technologies that are available to provide guidance and support for an e-discovery process.

Rules Amendments

Some major amendments to the Federal Rules of Civil Procedure (FRCP) that have significant implications for e-discovery became effective on December 1, 2015. Key takeaways from the amendments concerning e-discovery are:

1. Proportionality in discovery is now part of the rules. The word “proportional” is now part of the definition of the scope of discovery in Rule 26(b)(1) and the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

2. Much-needed improvements were made to Rule 34(b)(2) regarding responses to document requests. Parties objecting to document requests must now state their objections with specificity.

3. Rule 37(e) has been completely rewritten to standardize sanction for failure to preserve Electronically Stored Information (ESI).

4. Document requests can be served 22 days after the complaint and summons are served, before any party has answered.

5. Rule 26 expressly authorizes an option of shifting expenses as part of a protective order.

Evidence Amendments

The Federal Rules of Evidence (FRE) also were recently amended to address electronic evidence, with the amendments becoming effective on December 1, 2017. For example, Rule 803(16) had permitted as an exception to hearsay an “ancient document”—defined as a document at least 20 years old and whose “authenticity is established.” New Rule 803(16) only applies to documents “prepared before January 1, 1998” and whose authenticity is established. As indicated in the Committee Note:

The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.

The Committee Note assures, however, that “[t]he limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8)—or under any ground available for any other document—remains unchanged.”

Another significant change is to Evidence Rule 902, “Evidence That Is Self-Authentication.” There are now two new types of self-authenticating evidence: 902(13) “Certified Records Generated by an Electronic Process or System,” and 902(14) “Certified Data Copied from an Electronic Device, Storage Medium, or File.” As indicated in the Committee Notes for both (13) and (14), “[a] challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided” and that the rule “is intended to cover certifications that are made in a foreign country.”

Helpful Sources for Guidance on E-Discovery

Knowing the rules, however, is only half the battle. Equally important is approaching and carrying out the e-discovery process. Fortunately, there are many tools that can help. For example, the Electronic Discovery Reference Model (EDRM) helps describe the e-discovery process and identifies which stages might be particularly problematic from a technological, logistical, human resources or ethical standpoint. (see next page for EDRM illustration)

EDRM also has led to the development of the Information Governance Reference Model (IGRM) which emphasizes information governance. (see next page for IGRM model)

These models approach the e-discovery process holistically and lawyers who work with their clients to put robust information...
governance programs in place will likely find the e-discovery process will go more smoothly when litigation arises. In addition, assisting clients with the implementation of an information governance program can be a practice builder for a law firm.

Law firms should also be certain that their own information governance policies and procedures are appropriate and up-to-date. Otherwise, a law firm can be the “weaklink” in a client’s information.10

Sources to Address Questions About E-Discovery

When faced with a question about e-discovery, there are numerous readily-available sources at your disposal, such as:

- K&L Gates’ e-discovery website, which provides summaries of the most recent and significant e-discovery cases as well as information about recent rules amendments, links to state and local district court rules, events, news and other resources and you can sign up for its blog updates.11
- Kroll Ontrack, an e-discovery and digital forensics vendor. Its website provides links to press releases, publications and events.12
- Exterro, which provides various materials, including infographics, product briefs, surveys and reports, webcasts, guides and white papers.13
- Some other excellent resources for e-discovery and related topics such as digital forensics, litigation support and information governance are Sensei Enterprises, the International Legal Technology Association (ILTA) and The Sedona Conference.14-16

Recent E-Discovery Cases Related to Bankruptcy

Recent bankruptcy-related cases addressed a myriad of e-discovery issues, including disputes over privilege, whether ESI is reasonably accessible, preservation, the adequacy of searching, identification and collection, handling back-up tapes, spoliation and sanctions and lack of cooperation. It is apparent bankruptcy proceedings also address the interpretation and application of the FRCP and the FBE in handling ESI issues.

For example, in a case involving a thumb drive containing several years of financial information, although the court in In re Heinz found that evidence compelled the conclusion that the debtor’s spoliation of electronic evidence, failure to preserve both ESI as well backup paper documentation, and failure to produce thumb drive was willful and intentional given the timing during imminent or ongoing litigation, the court declined to
impose a specific sanction against the debtor such as a default judgment and instead drew an adverse inference against the debtor to the extent it impacted the debtor's overall credibility. The court ultimately found that plaintiffs' claim against the debtor for $39,296, stemming from judgment obtained by plaintiffs against the debtor for breach of contract, was not dischargeable.\textsuperscript{17}

In another case involving a motion for sanctions, including email attachments and hard copy materials as well as ESI, the court in Black Diamond Mining Co. v. Genser found that accused spoliators had acted intentionally and/or negligently, but not in bad faith. The court found that sanctions were “unwarranted” for the negligent loss of certain email attachments because of defendant's failure to “access documents in an archive while gathering the original emails” - even despite finding that defendant acted with a “culpable state of mind” - where plaintiff failed to produce any evidence of the attachments' relevance. The court noted that defendant did not “actively delete the attachments” but rather its agents “forgot to take steps to preserve the documents before they were deleted from the archive.”

For the individual actors' negligent and intentional failures to preserve ESI and hard copy documents, the court found that the “test of relevance [was] satisfied” and imposed a permissive adverse inference, but declined to order reimbursement of the Trustee's fees or the costs of bringing the motion.\textsuperscript{18}

In an adversary proceeding involving privileged ESI, the court concluded that inadvertent production did not waive privilege, rejecting the bankruptcy trustee's argument that privilege was waived because there was insufficient action to have the privileged documents removed from the district court's electronic docket. The Court noted that measures taken to rectify an inadvertent disclosure is only one of five factors courts consider in determining whether privilege has been waived and other four factors weighed against a finding of waiver.\textsuperscript{19}

In Dornoch Holdings Int'l, LLC v. Conagra Foods Lamb Weston, Inc., a Special Master was directed to obtain ESI constituting more than one million documents from a bankruptcy trustee, to review it for privilege and to prepare a privilege log.\textsuperscript{20} The defendants objected to the subsequent privilege log arguing that the terms used were overly broad and that the log contained non-privileged documents. The Special Master then conducted an analysis of the terms used and made recommendations to address the objection.\textsuperscript{21}

This case demonstrates the care that must be taken when selecting keywords and other search parameters when working with an especially large set of ESI (more than one million documents in this case). This case also demonstrates that the technology currently available is not perfect, so results must be reviewed and the processes verified before producing anything to the opposing party.

As the sheer volume of ESI continues to increase, including unstructured data in a wide variety of formats and formats, it is important to remember to search all of the potential sources of ESI. For example, in In re Fraser/Exton Dev., L.P., the debtors sought to reopen their bankruptcy cases in order to obtain relief from a settlement agreement and plan of reorganization.\textsuperscript{22}

As summarized in the K&L Gates database, the court denied debtors' motion to reopen their bankruptcy cases in order to obtain relief from settlement agreement with debtors' largest creditor and plan of reorganization because debtors could not, as a matter of law, obtain the relief they sought under Rule 60 and it would therefore be futile for the court to reopen the record for the purpose of allowing the debtors to file a time-barred Rule 60 motion.\textsuperscript{23}

Finally, in a case involving the loss of email, backups and miscellaneous ESI that were in the custody of third-party vendors, the court in Official Comm. Of Unsecured Creditors of Exeter Holdings Ltd v. Haitman considered a motion for sanctions.\textsuperscript{24} The court found that Exeter had a duty to preserve potentially relevant ESI since 2009, its loss of ESI was “intentional and done in bad faith” absent evidence of any efforts to ensure preservation or to contact the third-party providers and inform them of the duty, and that as a result of the intentional loss, a presumption of relevance was warranted. The Court, therefore, recommended the sanction of a permissive adverse inference at trial.\textsuperscript{25}

The District Court adopted the recommendation and held that “when there has been intentional destruction of evidence by an officer of a closely held corporation, other officers of the closely held entity may be subject to sanctions, even if they did not have direct control of the evidence at issue.”\textsuperscript{26}

This case is particularly important for several reasons. It emphasizes when the duty to preserve begins. It highlights the duty of parties to work with any third-party vendors who may have custody of potentially relevant ESI so that this material is properly preserved. And it indicates that courts are quite willing to impose sanctions for intentional conduct that results in spoliation of evidence.

On a more general level, one expert offers several insights from what he considers the top e-discovery cases from 2017. Themes he identifies from these cases include: the importance of having clients institute defensible policies for data disposal as opposed to a “preserve everything” mentality; the necessity of being specific when making discovery requests and objections; the need for understanding what information is under your or your client's control; and identification of the steps to be taken for appropriately protecting privileged documents.\textsuperscript{27}

New Technologies That Support E-Discovery

As technology adds to the complexity and expense of an e-discovery process, there have been attempts to use more technology to try to address these problems. In the past ten years, vendors have improved and enhanced their services and software for e-discovery, digital forensics, litigation support and information governance.\textsuperscript{28} One of the most promising technologies appears to be predictive coding. Initially, such tools were regarded with considerable suspicion, even though information retrieval, machine learning and data mining have been used in other disciplines for many years.

The reticence to use predictive coding has faded, primarily due to the strong support of computer-assisted review articulated in Da Silva Moore v. Publicis Groupe. Da Silva Moore has been described as one of the first published opinion recognizing the technology as “an acceptable way to search for relevant ESI in appropriate cases.”\textsuperscript{29} Summaries of recent cases about predictive coding can be found in The Sedona Conference’s new publication, TAR Case Law Primer.\textsuperscript{30}

continued on next page
In addition, a combination of sophisticated technology under the broad heading of artificial intelligence (AI) is now being considered as a way to assist with e-discovery and other law firm activities. Experts in many fields have been conducting research and developing tools to solve some of the complex issues when substituting software, data mining and algorithms for human cognition. The legal profession is not immune from efforts to replace some aspects of practice with technology.

Conclusions

A popular expression occurs to me as I reflect on how e-discovery has evolved since my articles were published in NABTalk back in 2011-2012. The first is the popular greeting “may you live in interesting times.” These are clearly interesting times for lawyers, parties, judges and trustees who continue to grapple with the challenges in e-discovery, even as the rules, cases, vendors and technology provide greater clarity, guidance, efficiency and support for the process.

On the other hand, new technologies will continue to add new forms and formats of ESI that must be properly handled at each stage of an e-discovery process. In an era of increasing amounts of unstructured data, everyone involved in a bankruptcy case must be mindful of the problems and pitfalls that might arise. In other words, as my mother used to say, “there’s many a slip twixt the cup and the lip.”

FOOTNOTES:

1 Sara Anne Hook, Electronic Discovery: The Basics, 27 NABTalk 16 (Fall 2011); Sara Anne Hook & Katherine Taft, Social Media and Electronic Discovery: A Potential Source of Evidence in Bankruptcy Proceedings, 27 NABTalk 24 (Winter 2011); Sara Anne Hook, Electronic Discovery and Bankruptcy: A Review of Recent Cases, 28 NABTalk 12 (Spring 2012); Sara Anne Hook, Electronic Discovery and Bankruptcy: Technology, Sanctions and Lessons Learned, 28 NABTalk 34 (Summer 2012).


4 Id.

5 Id.

6 Id.

7 Id.


21 Id.


23 K&L Gates E-Discovery database, accessed 1/19/18.


26 Id.


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