



EVIDENCE EXCHANGE UPDATE

Summer/Fall 2004

New Clients:

In 2004, Evidence Exchange has continued to expand its client base and service infrastructure. Recently, Evidence Exchange was selected to be a “preferred” electronic data discovery provider by four of New York’s twelve most profitable law firms. Commenting on these recent developments, Michael Prounis, CEO & Co-Founder noted, “we’re attracting new clients and actually renewing relationships with Firms that we’ve known and worked with since the late 1980’s”. Our client base is diverse and includes large and small corporations and the most successful law firms”.

Evidence Exchange is expanding its New York office, effective June 1, 2004. Myron Eagle, President and Co-Founder recently observed “Fortunately, a large parcel in our building became available and we will be able to make a relatively pain-free transition to new space without disruption to our existing clients and without interfering with our project deadlines. Everything (address, phone numbers, etc.) will stay the same except that we now will have triple the space to accommodate our company’s future growth”.

When Neutrality Is A Good Thing

When you think about “neutrals”, you think about court-appointed forensic examiners, mediators, etc. In litigation, it comes usually as a last resort when the parties cannot resolve a discovery dispute. Not always! In a recent assignment, Evidence Exchange has been asked by both parties of the dispute (without any Court involvement) to serve as a neutral to implement an agreed to “protocol” for mining e-mail and archived data. The protocol specifies that Evidence Exchange will collect the “native” source data; then parse/filter/search the “native” source data,; then provide “potentially” responsive data to Defendant for purposes of performing privilege and relevance review; and, then finally produce responsive data to Plaintiff. Based upon the following article “Are You Ready To Go Native?”, parties to a dispute may want to reach similar kinds of agreements with their opponents, at least until they’ve re-tooled their electronic discovery solution to handle the production of “native” source files (i.e., the e-document as created).

Electronic Discovery: The End Of The Innocence

by Michael Prounis

It has been amazing to observe over the last eighteen months or so the emergence of a New World Order in the

Electronic Discovery area. It seems that recent decisions of the “Judiciary” have taken most of the guesswork and mystery out of the Electronic Discovery puzzle. The Courts have been spending a great deal of time thinking about the core concepts behind Electronic Discovery and have stitched together enough case law to help guide their colleagues and all practitioners through what only two years ago was a “wild-west” environment. Today the Courts are actively involved in educating an ever expanding number of their Judicial colleagues as well as a growing number of private practitioners on their New World Order obligations. The unheralded Federal Judicial Center (“FJC”) has effectively functioned as a “system wide expert”, offering the Judiciary ad-hoc advice and counsel on emerging Electronic Discovery issues. A large cross-section of the Judiciary has been exposed to Electronic Discovery through FJC training programs and internal research projects.

Nowadays, a month doesn’t pass without some new Electronic Discovery issue being decided. Usually these new opinions reference the major recent cases in this area (Zubulake I-IV, Honeywell, Residential Funding, Rowe Entertainment, etc.). Likewise, the Sedona Principles are increasingly referenced in legal opinions. This 503c “think tank” is comprised mostly of “large company” general counsel, “large firm” practitioners and a diverse collection of technology consultants and academics. Sedona has made great progress in identifying a set of reasoned

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Electronic Discovery production principles and is currently expanding its scope into Electronic Records Management. While Defense oriented, the Judiciary has influenced the group and several key Judicial thought leaders sit on its Advisory Board. .

The Courts on a macro level are now considering proposed revisions to the rules of civil procedure to accommodate emerging discovery issues and technologies. In the last two years, Federal courts in New Jersey, Arkansas, Florida, and Wyoming have developed local rules specific to electronic discovery. Likewise, State courts in California, Illinois, Texas, and Mississippi also have modified rules to better define electronic discovery practices in their jurisdictions. But simply applying today's black letter law, a number of New World Order obligations and strategy options already exist:

Defendants are obliged to preserve potentially responsive electronic data immediately upon learning about a situation that could result in litigation or be of interest to a regulator.

As a general rule, the producing party will be responsible for the cost of production, unless discovery involves inaccessible data (back-up tapes, forensic analysis, etc.).

In the case of inaccessible data or forensic analysis, the Courts may employ sampling techniques to determine whether cost shifting should be applied. The producing party will "most definitely" need to produce the responsive materials in a "native" or searchable format. This includes the metadata (i.e., indication of who the bcc's of an e-mail may be, when the file was received, etc.)

If the native format is proprietary, the producing party will also need to assist with conversion or provide the appropriate software

Neutrals (party-appointed or Court appointed) will increasingly be used to perform many of the data collection, analysis and production-related activities.

Against this backdrop, government Regulators, through Sarbanes-Oxley, have been handed a new collection of tools to encourage trustworthy information disclosure on regulatory matters. Beyond Sarbanes-Oxley, the SEC's recent \$10 million fine of Bank Of America is another demonstration of this new "get tough" attitude (<http://www.sec.gov/litigation/admin/34-49386.htm>). Delay, sloppy work, incomplete productions, inconsistencies in reply will not be tolerated. After the dozens of accounting scandals, the regulatory environment has never been so harsh and the margin of error so small for legal practitioners.

Beyond fines, these new regulatory discovery weapons may look to impose jail time as well as fines to all and any offenders. The notion of obstruction of justice can be focused not only on the act being investigated but also on how the party responds to the Regulatory inquiry. And, lawyers are by no means immune from this calculus. After a recent seminar on Electronic Discovery, a well-known Federal Judge and thought leader observed how surprised she was at how many lawyers ignore their duty to preserve electronic evidence.

Many lawyers don't seem to realize that preservation is no longer a voluntary or passive activity and that proactive steps must be taken or evidence will be destroyed. My concern is that the intersection of this widespread failure to preserve electronic documents with the emergence of new case law, statutes and regulatory practice will lead to more corporate meltdowns and self-destructs.

The distinct possibility of lawyers, consultants and/or corporate employees spending time in jail

because data is destroyed when it should have been preserved and the Regulator concludes that this constitutes obstruction of justice. Under Sarbanes-Oxley, this is not some off the wall scenario. This is why SOX (i.e., the Sarbanes-Oxley legislation) is expected to put wrinkles on many young faces and, over the next few years, quite a few legal practitioners may need to invest in Botox treatments if they hope to maintain their youthful appearance!

So in this New World Order, we have a well-informed Judiciary combined with an energized Regulatory community, but how prepared for this New World Order is the private Bar? A "disconnect" may exist between the Courts and a large segment of private practitioners and/or between the Regulators and the regulated. The Courts and/or the Regulators have different expectations as to what private practitioners and the Regulated are obligated to do with respect to Electronic Discovery. This can and will likely cause tremendous problems for business, unless some balance is restored. A growing number of surveys show that too few companies have a sufficient handle over the Electronic Records Management and Retention process to avoid being accused of spoliation, ordinary negligence and/or the unnecessary delay of production.

If most practitioners are ill prepared or uninformed about their New World obligations, what can corporate and law firm leaders do to avoid or at least minimize this courtship with disaster? Clearly, after its record SEC fine, Bank of America isn't going to ignore them; nor will the handful of other companies that have paid and survived the Electronic Discovery tax. But, for the thousands of other players in this arena, the price of admission to this New World Order will soon become staggering! Future offenders are likely to face even stiffer penalties. While it is encouraging to see

the American Bar Association taking a leadership role in developing Electronic Discovery guidelines <http://www.abanet.org/litigation/taskforces/electronic/home.html>, individual companies and their outside counsel must embark on a full court press to move their clients to safe harbor. This can only be accomplished through effective records management practices.

Finally, new thought should be given to the required changes in law school curriculum, as a full understanding of this emerging New World Order will definitely require new skills be learned in the classroom. Such skills will separate those who succeed from those who are destined to fail. These new practice risks and training requirements not only extend to litigation practitioners, but also to M&A, bankruptcy, IP, labor, antitrust and numerous other practice areas. All practitioners must invest the time to digest the societal transformation that has taken place as we move from physical evidence to a world where everything is electronic and must be protected if it is to remain accessible.

New Tech Development Are You Ready To Go Native?

During last summer's ABA Litigation Series TeleConference and Live Audio Webcast on "Demystifying Electronic Discovery", the audience heard a brilliant analysis of the current situation by Judge Shira Scheindlin, US District Court, Southern District of New York and Magistrate Judge John Facciola, U.S. District Court for the District of Columbia. Both Justices have gained acclaim and visibility in the Electronic Discovery area for their opinions in *Zubulake v. UBS*

Warburg LLC and *McPeck v. Ashcroft*, respectively.

What is so significant about their observations is that they highlight the flaws that exist in most law firms and corporate law departments' current thinking when dealing with the most basic of electronic discovery questions. During discovery, even when electronic documents are encountered, most lawyers do not preserve, examine or produce the "native" source files. Instead, they work with renditions of the "native" source files, usually in TIFF, paper or PDF. By doing so, they expose themselves and their clients to considerable risk! These risks include the possibility of being accused of altering the "native" source files or being less than complete in your examination of the discovery documents, because a search was not performed on metadata, etc. In some cases, the risk may also be of not



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uncovering a helpful fact that could win your case!

This is what Judge Scheindlin had to say on the subject:

"It's really important for people to understand the words we've been throwing around like TIFF and PDF. While that's an electronic production, it is not the same as native format. Native format is the way the document was created on your computer and that's where it would have the metadata and imbedded data. Once someone converts it to TIFF or a PDF image, it's just like a photocopy. So

it's a very different form of production. We're not just talking about electronic versus paper productions, we're also talking about within electronic production, is it being produced as written or is it being produced in a special format that is only a picture of the document itself?" Later when asked to further comment on native productions and whether there are any considerations for not requiring the producing party to produce source [native] files, Judge Scheindlin noted that, "my default view is that actually the document should be produced in its native format because that's how it was created. And just as in your file cabinet, you don't go around with white-out and you don't go around redacting your documents, you're kind of stuck producing them as they were created. My view is that they should not be converted to a TIFF type file or PDF-like file, but should be produced as created. And, we have found in many litigations that in the metadata is the smoking gun...it is the time of creation, who saw it, who edited it, we've learned sometimes that in fact the document is a fake because we can tell from the metadata where it really originated. I think it is a pretty important part of the case!".

Michael Prounis of Evidence Exchange was honored to join both Judge Shira Schiendlin and Judge Cecelia Morris at this year's ABI Annual Meeting presentation on Electronic Discovery. The moderator of the panel was Slayton Dabney from McGuire Woods LLP. Evidence Exchange To Participate In The Sedona Conference. Michael Prounis, CEO of Evidence Exchange will again be participating in the Working Group Addressing Best Practices for Electronic Document Retention and Production. Michael Prounis to chair Georgetown University panel on electronic discovery.

Upcoming Events



May

Evidence Exchange to co-sponsor the Legal Technology Summit on May 16-18, 2004 at the Ritz-Carlton Marina del Rey, Marina del Rey, California. Featured guest speakers to include Judge Dennis Beck, Louis Freeh and Barry Scheck.

December

2nd Annual Executive Roundtable On Best Practices In Electronic Records Management & Retention

Evidence Exchange is hosting the 2nd Annual Executive Roundtable sessions on Best Practices in Electronic Records Management & Retention

Few topics have received more attention in corporate boardrooms, in Washington and in the press following the outcome of several celebrated cases, the enactment of Sarbanes-Oxley and recent judicial decisions on the subject. What records to keep? How long to keep them? Two questions that frame the issue. And, the answers to which determine or influence a company's Electronic Records Management and Retention risk profile.

The Executive Roundtable is designed to assist Companies and improve their performance in this area by learning from industry experts and from other colleagues wrestling with similar issues at varying stages of development. The Agenda is participatory and each Roundtable participant will be asked to, (at a minimum) briefly describe their current strategy and

perhaps share some of their key challenges and opportunities. Explore how other Corporate Counsel protect their electronic assets, manage their electronic archives, reduce the cost of compliance and look to avoid deficiencies leading to spoliation sanctions, criminal charges and / or regulatory penalties.

The first Roundtable was held in Houston on July 17, 2003. Seven energy companies participated. This year, the focus in New York will be on the financial services industry. Additional details to be provided over the summer! E-mail us to be placed on our Roundtable Mailing List or please contact Michael Prounis, CEO & Co-Founder of Evidence Exchange at (212) 594-2500 ext. 314 or at michael.prounis@evidenceexchange.com.

Evidence Exchange invites you to a free one hour CLE Accredited Program on the latest trends in Electronic Discovery www.evidenceexchange.com

New York State Approves Another Evidence Exchange Seminar On Electronic Discovery

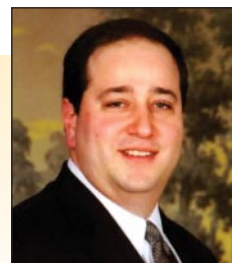
Evidence Exchange invites you to a free one hour New York State CLE Accredited Program on Electronic Discovery. We offer two approved courses:

- 1) Planning For Problem Cases – Electronic Discovery
- 2) Surviving The High Stakes Game Of Electronic Discovery In The Current Environment (NEW)

During 2003 / 2004, Evidence Exchange has given numerous CLE training courses in New York, Florida and Texas. The Texas seminar was co-sponsored by Fulbright & Jaworski LLP and was attended by 86 of their clients.

Myron Eagle, Esq. Co-Founder

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Did you know?

Evidence Exchange's Secure Digital Photocopier is the "best" e-discovery solution when your electronic document production involves "native" files! We consult on e-document retention & preservation; offer specialized software for "native" file document productions and convert all types of "native" files to "notarized" PDF / TIFF or paper.

In The News:

Evidence Exchange Co-Founders invited to co-author chapter for the ABA Information Security Committee's Digital Evidence Project.

New Article On Admissability Of E-Evidence By Myron Eagle, Esq., Co-Founder & President Of Evidence Exchange

Computer evidence processed with Evidence Exchange Secure Digital Photocopier's underlying technology (MD-5 and SHA-1) has been successfully admitted in civil and criminal cases worldwide. To date, there are no known challenges to such technology on authentication grounds. In fact, recent case law has upheld the validity of its underlying MD-5 technology. The full article can be found at www.evidenceexchange.com under Expert Opinion and In The News.

The ruling is significant as it provides that Evidence Exchange's processed materials can potentially be authenticated at trial, even if the examiner who created it is unavailable to testify. Evidence Exchange's data integrity service is based upon Surety's Digital Notary[®] engine, which provides mathematical, cryptographically verifiable proof of electronic record integrity. It is able to detect the alteration of a single bit in an electronic record or the alteration of the timestamp associated with that electronic record.