The Maturing Marketplace for eDiscovery Services and Tools

By David L. Stanton, partner at Pillsbury Winthrop Shaw Pittman

We're Just Getting Started

EDiscovery is essentially a brand new field. It arises in the context of technologies that did not exist just a short few years ago, and many of today's litigators remember matters that didn't involve a single email or text message, which is now extremely rare. In fact, the bulk of jurisprudence in this area is barely ten years old (commencing with the *Zubulake* decisions in 2004 and continuing with cases addressing the 2006 Amendments to the Federal Rules of Civil Procedure).

On top of its newness, eDiscovery continuously reinvents itself. At least three factors can be seen to drive this ongoing change. First, discovery law must adapt to the ever-evolving technologies that litigants use to create, access, convey and store their information. Precedents set in cases involving emails and laptops, for instance, must be re-interpreted and refreshed in the context of mobile app contents stored in the cloud, or whatever comes next. Second, challenges to the sufficiency of a party's discovery efforts have become routine, and there is the potential for such a dispute in just about every case. This has resulted in thousands of legal opinions that have been written to resolve eDiscovery issues. The body of applicable case law has expanded incrementally with each one, and rapidly because there are so many. Third, like the advancements in information systems that are the targets of eDiscovery, there have been significant developments in the tools, technologies, systems and methods used to "do" eDiscovery. New ways to access, to interpret and to extract meaning from massive discovery databases continue to emerge, and these new analytic tools make the process more sophisticated, nuanced and complex than ever.

What it means to practice law, moreover, has changed dramatically for those who focus on this novel and evolving field. EDiscovery is integral to litigation, and like other aspects of representing a client before a tribunal, it must be performed by licensed attorneys, consistent with the applicable rules of unfolding case law. But the process itself can be likened to a supply chain (of custody)—a program or process erected to mine, refine and extract case-relevant information from a client's native repositories. In this regard, it is a highly technical, multi-faceted operation, involving dozens of individuals (not all of them lawyers), vast amounts of electronic data, and a significant amount of technology (and technical expertise) to complete. This required blending of legal acumen, technical proficiency and technological resources can be tremendously expensive, and putting these pieces together economically, and successfully, is no simple matter.

The Marketplace is Evolving

In the roughly ten years since eDiscovery came on the scene in routine litigation, a multi-billion dollar industry of legal service providers has arisen to address the related needs that lawyers now have in their cases. Legal service vendors provide forensic acquisitions and data collections; processing and hosting services; review, analytic and categorization tools; and low-cost contract attorneys who can be engaged to help with first-level document reviews. These providers all advertise legal support services geared toward helping lawyers and clients meet their legal obligations in discovery. Collectively, they employ thousands of non-practicing attorneys, sales and marketing professionals and technicians, who generally make it their business to be familiar with the latest opinions and trends in eDiscovery case law, and these firms all offer solutions designed to satisfy the legal requirements established through judicial opinions. In turn, the case law precedents necessarily focus on the discrete question of whether or not the particular discovery effort at issue meets the requirements of the law. Has the producing party reasonably produced the requested documents? Have the methods used to identify and select documents and data for production been reliable and valid? In other words, has the discovery effort or system been in compliance with what the law requires?

This is an important inquiry, surely; but from the perspective of a consumer of eDiscovery services or tools, this focus on compliance is not the most enlightening perspective. Saying that an eDiscovery system or method complies with the law is almost redundant. If it did not, it would have no room in the market. What really matters to those who practice in this new field of eDiscovery and make purchasing decisions in this marketplace, and what should matter to the service providers who support them and sell these services and tools, is how to do eDiscovery *well*.

We Need to Ask the Right Questions

We have not yet established a clear set of criteria to measure the efficacy of eDiscovery tools, techniques, workflows and platforms. But to evaluate them based on whether they meet the baseline compliance requirements, the thresholds of defensibility and reasonableness articulated in the case law, is not good enough.

By comparison, the question is not whether the car you are buying has four wheels and an engine—that merely makes it a car. More important questions for a purchaser are: How well does this car handle? How big is the engine? How fast does it go? How good is the gas mileage? What features and accessories does it include? These kinds of questions are not consistently asked nor articulated often enough in the field of eDiscovery. When shopping for a new car, there is a sticker on the window, listing different capabilities and qualities for the buyer to evaluate. EDiscovery products and services cannot be so easily shopped.

We know how to ask how much a discovery process costs. We know how to ask whether it will satisfy the law. Rarely do we ask, beyond this, how well the process, tool or technology will perform. In the fast-moving marketplace for these new types of hybrid legal/technical services, we don't even know the right kinds of questions to ask. We are getting better at eDiscovery over time, by trial and error and through the benefits of experience, but service providers and legal practitioners would be well-served to have a more stable set of criteria and metrics according to which various approaches to eDiscovery could be evaluated, classified, graded and compared.

David L. Stanton *is a partner in Pillsbury Winthrop Shaw Pittman's national Litigation Practice, where he advises public and private companies about compliance, investigations and litigation, focusing on information issues and registered entities. For a complete list of his publications and speaking engagements, please visit his Pillsbury Bio Page.*