The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 12, No. 8 © 2004 The Metropolitan Corporate Counsel, Inc. August 2004

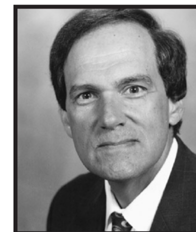
Book Review

E-Discovery: A Guide For Corporate Counsel – Sills Cummis' Contribution To The Discussion On Electronic Discovery – Part II

The Editor interviews ***Barry M. Epstein, Stuart J. Glick, Jeffrey J. Greenbaum*** *and* ***Mark S. Olinsky****, Members in the Newark office of Sills Cummis Epstein & Gross P.C. Part I of this interview appeared in the July issue of* The Metropolitan Corporate Counsel.

Barry M. Epstein

Stuart J. Glick


Jeffrey J. Greenbaum

Mark S. Olinsky

Editor: How do you determine what documentation is relevant?

Epstein: The first step is to learn as much as possible about the allegations in the Complaint and determine what they mean for the company. What are the issues? Who are the people involved? What sort of documentation is in hand, and where is it? Stored on a laptop? On a home computer? Voicemail may be relevant. It is important for the company to take affirmative steps. It is not sufficient – or even practical – to suspend the company's automatic deletion policy. Someone with the appropriate authority, and experience and knowledge sufficient to determine the question of relevance, must assume control over the document management and retention program and move the relevant information into formats accessible to the parties. This reduces the company's potential costs and serves to avoid an accusation of having manipulated the information to avoid disclosure.

Olinsky: Planning is absolutely crucial in this regard. If the company has planned for electronic discovery by having a document management and retention program in place, when it is accused of having done something to the potential evidence in the case, there can be a defense even where the process has *not* been perfect. It is possible for the company to say, for example, that it thought about e-discovery in advance of any litigation, that it developed a policy with respect to the preservation of documentation – perhaps with the guidance of outside experts – that it acted in good faith in adhering to its policy once litigation was threatened, and that its actions were in strict conformity with that policy which, of course, existed prior to any threat of litigation. In these circumstances, the company can try to avoid an adverse inference or the imposition of sanctions.

Editor: Please tell us about "spoliation of evidence." Does it arise if the destruction is unintentional?

Greenbaum: The situation is very unclear at the moment. An executive with the best of intentions may be unable – through no fault of his own – to communicate with the right people down the line, and documents meant to be preserved are lost. At a time when, because of technology, we are simply swamped with information, the destruction of documents proceeds almost with a life of its own. Two years later it appears that documents critical to the case have been destroyed, and the company finds itself facing a sanctions motion. The pressure to settle the case – irrespective of the merits – may become irresistible at this point. In the Second Circuit today the company can be charged with spoliation – resulting in sanctions – even where it is clear that the destruction has been unintentional.

There has been, accordingly, a strong plea directed to the Advisory Committee to come up with some protection against a charge of spoliation for unintentional destruction. The corporate community argues that, if the destruction is unintentional and the company has otherwise acted in good faith and taken reasonable steps, there should be no sanctions. Good faith and reasonable steps require a factual showing. At the other extreme there are those who argue for an objective standard.

Please email the interviewees at bepstein@sillscummis.com, sglick@sillscummis.com, jgreenbaum@sillscummis.com and molinsky@sillscummis.com with questions about this interview.

If you would like a copy of the book, please email Mr. Epstein.

The debate continues.

Glick: One of the primary reasons we wrote the book is to alert corporate counsel to the issue of unintentional destruction. An awareness of this issue will encourage, we believe, proactive efforts on the part of corporate counsel to establish programs that will obviate the problem.

Epstein: Corporations may be on either side of a litigation. The tools one party may use on offense may also be used by its adversary in defending the case. If the plaintiff company makes a request for e-discovery, it is certain that a similar request will be coming its way from the defendant. If the plaintiff company decides to sue, it must make certain that it has retained the documents that will be subject to its adversary's discovery. If it has not, under certain circumstances the inferences are going to be running against it. The point, of course, is that not only must every corporation have a document management and retention program, but the pre-litigation analysis must include both cost and potential vulnerability stemming from e-discovery.

Editor: Please tell us how a respondent can best insure it does not disclose information that is privileged. What are the consequences of such a disclosure?

Greenbaum: That is an area which is also causing a great many problems. With electronic discovery we are doing, many times over, the kind of examination that used to entail the hands-on review of documents in warehouses. Think about the cost to a company that must sift through every document it has to determine whether it is privileged. Even with the most elaborate review, privileged documents slip through and are produced to the other side. Are they lost forever? There are jurisdictions where an inadvertent disclosure constitutes a waiver of the privilege. The biggest fear is that, in such a case, not only has the company lost the document but, perhaps, waived the privilege with respect to an entire subject matter. The Advisory Committee is considering a rule under which a party can claim that production of a privileged document was inadvertent and apply to the court to get it back.

Another way of dealing with this issue is through the "quick peek." The parties agree – under a court authorization – on the documentation each wishes to review of the other. They further agree that what each conveys to the other does not constitute a waiver of privilege. Following the initial review, each tells the other what it thinks really matters, and on those items each party does a formal privilege review. That saves them from having to do such a review on all of the documents. I hasten to add, however, that third parties – not bound by the court-authorized agreement may then argue that the disclosure of privileged information *is* a waiver of the privilege as to them. These are muddy waters.

Epstein: We give this issue considerable attention in our book. There are jurisdictions where the disclosure of privileged documents, inadvertent or otherwise, waives the privilege, period. There are jurisdictions which permit the disclosing party to get it back, albeit with their feathers singed. There may be intensive inquiries as to how and why the disclosure was made, and whether the disclosure was the result of negligence. The point is that general counsel need to be conversant with the ways in which different jurisdictions address this issue. It is a matter that must be reviewed on a case-by-case basis.

Editor: What governs the shifting of costs between the parties on electronic discovery?

Epstein: The judge. And I am not being facetious. If a party asks for every document ever collected by its adversary on the outside chance that something of relevance to the case might surface, you may be sure that the judge is going to think about the cost of production and either deny the request altogether or require a substantial sharing of the cost. In New Jersey federal court, for example, you are required to have a discovery conference early on in the litigation. The discussion extends to e-discovery, and all counsel are expected to be knowledgeable about their client's entire information system. It is essential, therefore, that counsel know both what they have and what it is that they seek of their adversary's client. And with some particularity. The more detail at one's fingertips, the more narrow one's focus on what is needed for the case, the more likely it is that the judge is going to support the request *and* leave the cost of production with the party being asked to produce. The cost factor, together with consideration of reciprocal production is going to have a dramatic impact on the way in which we position ourselves in electronic discovery.

Glick: Cost shifting is an extremely complicated area, and we devote an entire chapter in our book to it. Another chapter deals with experts and the ways in which they can assist in e-discovery, not only in defining and securing relevant information in a cost-effective way, but in scanning for and retrieving privileged information. Court-appointed experts are also coming to the fore. They are neutrals, and disclosure to them of privileged information would not be deemed a waiver of the privilege, particularly when the order appointing them so provides. With the advent of technology, several new professions are coming into existence, and the general counsel community is well advised to understand something of their expertise and to call upon them in this increasingly technology-dependent profession of ours.

Editor: Is there anything you would like to add?

Olinsky: Technology is one of the major driving forces of this brave new world of ours, so the opportunities – and the obligations and risks – of electronic discovery are now an inevitable part of the practice of law. Because business is now conducted electronically, lawyers must develop an equal electronic capability. The challenge is there for lawyers to make e-discovery work for instead of against their clients.

Glick: We are used to partnering with our general counsel counterparts and with the members of the legal departments of our clients, so we are very sympathetic to the issues they face. This is yet another area in which corporate counsel and outside counsel must work together, proactively and on an ongoing basis even before litigation commences, to protect the companies they serve and their executives, who so often unfairly bear the brunt of court sanctions for things outside of their day-to day control.

Epstein: Many companies cannot afford to have a full-time general counsel, to say nothing of a legal department. Neither can they afford not to be in compliance with Sarbanes-Oxley. They are in a difficult position, and they are vulnerable in ways that no one thought about even a few years ago. With our book, we attempt to describe some of the problems they must confront today and, I hope, to provide them with a few insights on how to go about addressing those problems. Writing it has been a very worthwhile exercise.