The Metropolitan
Corporate Counsel®

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Volume 12, No. 7 July 2004

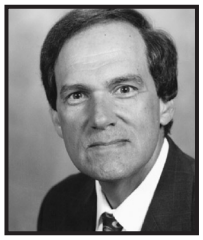
Book Review

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

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 II of this interview will appear in the August issue of* The Metropolitan Corporate Counsel.

Barry M. Epstein

Stuart J. Glick



Jeffrey J. Greenbaum

Mark S. Olinsky

Editor: Would each of you gentlemen give our readers something of your background and how you came to Sills Cummis?

Epstein: I joined the firm in 1976 after having served my clerkship with Judge Edward Gauklin in the Appellate Division and practicing as a trial lawyer defending companies in mass tort litigation. The firm was five years old then and looking to expand. In time I became chairman of the litigation department and co-chairman of the firm.

Greenbaum: I came to the firm in 1977 following a clerkship under Judge Frederick B. Lacey of the U.S. District Court of New Jersey and several years as an Assistant U.S. Attorney. Since that time my career has revolved around complex litigation, particularly in the defense of class actions. In addition, I have been involved in the American Bar Association's Section of Litigation and have served as co-chair of its Class Actions and Derivative Suits Committee. I also serve as the Section of Litigation's Liaison to the U.S. Supreme Court Advisory Committee working on proposed revisions to the Federal Rules of Civil Procedure (FRCP), and, as a result, am familiar with the current discussions on electronic discovery.

Glick: Following service with the Department of Justice in Washington and a stint with another firm, I had the opportunity to become a partner at Sills Cummis. Most of my time is spent handling complex commercial and bankruptcy litigation. My interest in computers and cyberspace derives from my undergraduate years, during which time I worked with a computer consulting company designing systems for a variety of financial institutions.

Olinsky: I started in 1981 with a large firm in New York. In 1986 I became an Assistant U.S. Attorney in New Jersey and went on to join Sills Cummis in 1990. I am engaged in a complex business litigation practice. Every business dispute is really a story. Since today's business is conducted electronically, a familiarity with electronics – and e-discovery – is essential to learn and then tell the story of the case in a compelling way to the judge and jury.

Editor: The four of you are managing editors of a Sills Cummis publication entitled *E-Discovery: A Guide For Corporate Counsel.* For starters, what is the origin of this project?

Epstein: We regularly assess the challenge of e-discovery. In our national and complex litigation practice, we confront e-discovery in cases involving massive amounts of documents, both in electronic and paper formats. We also counsel corporate clients who are dealing with Sarbanes-Oxley and other regulatory issues. As a result, everyone in the firm was sensitive to the issues. In writing our book we had the advantage of Jeff Greenbaum's insights as liaison to the committee considering revisions of the FRCP. Several lawyers have both extensive e-discovery experience and strong technical backgrounds. We felt that we were in a particularly good position to assist our clients, which is what this book is meant to do.

Editor: Why did the firm bring this book out now? What makes it timely?

Olinsky: Well, I think electronic communication is something that keeps corporate executives, and particularly general counsel, awake at night because it occurs at a level of informality that was not present when communication was in hard-copy form. That informality translates, at times, to a lack of foresight, and it certainly makes the control of sensitive corporate information by senior

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.

management difficult. The issue is timely because electronic communication is a wonderful tool, but also a Pandora's box, and senior management is very concerned about regaining control over the way in which sensitive information is now communicated.

Greenbaum: There are a number of things going on simultaneously in this area. The local courts are developing rules of their own, and there may be differences from one jurisdiction to another. There are rule changes being recommended by the Civil Rules Advisory Committee. The ABA Section of Litigation is recommending changes to the ABA House of Delegates to the Civil Discovery Standards to incorporate electronic discovery. All of this is very confusing and makes the issuance of a book on the subject very timely.

Glick: It is very common for senior management to be complacent where the company *has* a document management and retention program. The house may not be in order, however, even where such a program is in place but the right combination of people is not in charge of it. Our book is meant to highlight the issues and encourage policy coordination so that, for example, senior management, the management information systems staff and the people in charge of storage of documents are all working from the same page.

Editor: What are the things that make it imperative that a company have a document management and retention program?

Epstein: Very often senior management is remote from a situation that threatens to turn into litigation. An appropriate document management and retention program can be a blessing in such circumstances, and its absence can be senior management's worst nightmare. It is the senior executives who bear the brunt of sanctions even if they are far removed from whatever went wrong. It is essential to understand what is permissible and what is not – what *must* be retained, what *may* be destroyed, and when – and this may vary from one industry to the next. Everyone understands that the random destruction of documents is not a good idea; not everyone understands that the appropriate organization of documents in anticipation of possible litigation is very often the difference between winning and losing in court.

Glick: Before the cyber age, there was an inherent document retention system. For example, every recipient of a memo would typically retain a copy of it in his or her file. That has been largely lost with today's electronic communication. Now, when a CEO sends an e-mail to his five direct reports, at a certain point in time the company's automatic deletion system kicks in and the communication is lost. There are enormous implications from this development. Having a policy in place, and one that has been properly implemented and administered, is absolutely crucial.

Editor: Please tell us about the evolving rules of electronic discovery. Are there inconsistencies as between the federal rules and those of the various states?

Greenbaum: At the moment there are not too many inconsistencies because only a few courts have addressed the issues that derive from electronic discovery. As a general matter, the courts have applied the traditional rules of discovery – those devised for hard-copy documentation – although there is an increasing recognition that this state of affairs is far from perfect. There are four federal courts and two state courts that have promulgated local rules that are directly applicable to electronic discovery. The primary focus of all of these rules is on early discovery planning – on the discussion of discovery issues at the beginning of the case – and where they seem to differ is *what* must be discussed at that time. The problem is that at the outset of the case it is very difficult to see how things are going to play out. Opposing counsel are not very familiar with the case and, as a result, reluctant to tie their hands. Other issues are: to what extent must back-up tapes be searched in producing documents; and is there any safe harbor from spoliation claims for inadvertent destruction of electronic documents. If these problems can be addressed in the revised Federal Rules of Civil Procedure, so as to provide some uniformity across at least the federal court system, we will have taken a big step forward.

Editor: You point out that non-party electronic discovery has not received a great deal of attention, although non-parties may possess information of great relevance to the parties. How is this discussion developing?

Olinsky: This is an interesting area. When I started practicing in the early 1980s the idea that everyone – parties and non-parties – was required to produce all of the available evidence was predominant. That is a very expensive proposition, but it has taken the emergence of electronic discovery to make people realize just how expensive such discovery can be. Electronic discovery is *not* an end in itself, but it provides access to so much information, at so many different levels, that it is possible to become totally caught up in the process. If the assumption is that litigants are entitled to all the evidence, then it follows that non-parties ought to bear at least some of the cost of discovery but that cost must be reasonable. There is not a great deal of law on this yet, but I believe that this issue is something that has to be addressed by the courts and that it involves drawing lines. What is fair to the litigants, to the non-litigants, to the process, and what is affordable: all of these interests must be balanced or the burden on non-parties – who have no direct stake in the litigation – will become overwhelming.

Epstein: In our book we attempt to describe in some detail the way requests for documents and subpoenas ought to be drafted in order to make them palatable to the courts. Given the very real cost issues, it is important to target specific information and to show reasonable restraint. We provide guidelines on careful draftsmanship to get counsel past the problem of demanding everything which may lead to a ruling that results in obtaining nothing.

Editor: When does the obligation to preserve documents in anticipation of litigation arise? Is it the threat of litigation? Service of a summons and complaint?

Epstein: The rules in place – which, of course, date to a time of paper discovery – require the preservation of potential relevant evidence. The trigger most often is the receipt of a complaint, but if a party is made aware that litigation is imminent or likely, the duty to preserve can arise even before the complaint is filed. For example, a written threat of litigation can trigger the duty to preserve documents that parties know or should know would be relevant to a probable future litigation.

Greenbaum: Of course, the large corporations are always faced with the threat of litigation. This challenge, I think, requires general counsel and the corporate law department to have a *program* in place, some up and running *system*, to enable them to assess potential litigation and take control of the e-discovery process at the earliest practical time.