

Winning from the Beginning: International Electronic Discovery in Commercial Litigation and the Home Field Advantage of American Corporations

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Abstract: As technology is increasingly integrated into every aspect of the commercial environment, the amount of data generated from each transaction multiplies. Electronic discovery (eDiscovery) represents the collision of data and the law; in this paper, the powerful influence of the American judicial system is explored as it relates to the pursuit of digitally native file types for use in matters of litigation that transcend international borders. Home of the Silicon Valley, the world's biggest software companies, and the creative epicenter of social media technologies, America has also emerged as an early leader in establishing eDiscovery practices that are shaping the way the world manages electronically stored information (ESI). For business managers, eDiscovery represents the highest spike in litigation costs in decades and as such corporate litigants recognize the substantial financial risks of international electronic discovery. With each new filing, the very nature of commercial litigation has evolved into a complex battle of digital file types compounded by mountains of ESI. With constitutional safeguards, statute-based protections, and a leading position in developing the software and standards that are defining international electronic discovery, as a legal forum America offers a host of home field advantages for commercial litigation.

1. Introduction

America is the world's foremost leader in developing electronic discovery (eDiscovery) protocols and procedures. Generally American corporations encounter international electronic discovery in two primary ways: those requests of foreign litigants via American courts or those production requests of the corporation against a foreign litigant. Either way, American corporations have the home field advantage when litigating matters of international electronic discovery.

Imagine that a multinational enterprise (MNE) oil company has an American business unit that is organized as a corporation. The America corporation is involved with a complex transaction involving the extraction of oil products from the African nation of Chad¹. The American company works with a boutique Chadanian oil engineering company and has aided in the co-development of thousands of .CAD files. These files become the matter of litigation between the companies when it is alleged that the Chadanian company made unauthorized modifications to the files which resulted in a degradation of product quality that has cost the MNE in excess of \$40 million U.S. dollars in additional refinement costs. Upon oral request, the Chadanian company denied the production request for the files and has created a matter of international electronic discovery for the American corporation.

In America, the prevailing currency of the courts demonstrates that "...the discovery of electronic records should be a cooperative process, where litigants are expected to be candid and forthcoming, even

¹ ChadNow: Chad's Information Storehouse, http://www.chadnow.com/chad_economy/oil_in_chad.php (last visited June 5, 2012). Petroleum exploration began in the 1970s. Oil was discovered in the Lake Chad basin and the Doba basin. Initially, Exxon, Chevron, Conoco, and Shell collaborated in oil exploration in Chad. Since then, there have been numerous withdrawals, and today the consortium is made up of ExxonMobil, Petronas, and ChevronTexaco. Exploitation activities were delayed during the civil war, which began in 1979, and final preparations for extraction did not begin until the 1990s.

in an adversarial court system like the U.S.”² The forthcoming process has created an environment where American courts essentially declare that if it is digital then it is discoverable.

In America, corporations enjoy special status as persons under the 14th Amendment of the Constitution which further solidifies the American court system as a preferred destination for procuring international electronic discovery judgments. As early as 1886 in *County of Santa Clara v. Southern Pacific Rail Co.*, 118 U.S. 394, American corporations have been carving out distinctive privileges and avenues of justice via the American courts. An MNE is an organization comprised of multiple entities of incorporation located throughout the global marketplace and most often includes at least one American corporation in the hierarchy.

Today’s business environment demands a global presence and the evolving interest of international electronic discovery is providing the tools for American corporations to gain home field advantage in this global economy. With case law mounting, Federal Rules of Civil Procedure in place, and a Judiciary increasingly adept in handling volumes of digital archives, America is quickly emerging as the springboard of modern international electronic discovery .

Business managers are quickly realizing that eDiscovery represents the highest spike in litigation costs in decades. This paper explores the emergence of international electronic discovery, best practices therein, and the many advantages that America offers as a preferred forum of commercial litigation in the pursuit of electronically stored information (ESI) within matters of litigation that transcend international borders.

2. Background

2.1 The State of eDiscovery

Electronic Discovery (eDiscovery is defined as, “relevant evidence in a court case that resides in electronic form. It includes all types of electronic files, including Web pages, e-mail correspondence, as well as database, word processing and spreadsheet files.”³

American case law with regard to eDiscovery was forever changed with the 2003 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, (Sanctions against an employer for its failure to preserve backup tapes containing potentially relevant e-mail correspondence.) decision. The *Zubulake* decision thrust the issues of electronic documentation into the purview of the court and has since established what is called the “Zubulake Duty”⁴ with regard to preserving electronically stored information (ESI). Next, the American courts took a monumental lead in eDiscovery with the 2006 Revised Federal Rules of Civil Procedure (FRCP) which specifically enumerate electronically stored information in Rules 16, 26, 34, and 37. As the Committee Notes of the FRCP Rule 16 demonstrate these amendments were “...designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur.”⁵

In the wake of such judicial developments an American organization, the Sedona Conference, has emerged as a predominant force having been instrumental in establishing procedures for eDiscovery. In December 2011, they published, *The Sedona Conference International Principles on Discovery, Disclosure & Data Protection*. This work is rapidly emerging as a globally referenced source for dealing with matters of electronic discovery, yet continues to follow the forthcoming model prevalent among American courts.

Another tool that has become increasingly important to American corporations involved in matters of electronic discovery is 18 U.S.C. Chapter 121 (§ 2701–2712), the Stored Wire and Electronic

² FTI Journal E-Discovery Developments, <http://www.ftijournal.com/article/E-discovery-Developments-Rewriting-the-Rules-on-Records-Management> (last viewed June 5, 2012)

³ PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,2542,t=e-discovery&i=58505,00.asp (last visited June 5, 2012).

⁴ Ralph Losey’s e-Discovery Team: Duties, <http://e-discoveryteam.com/zubu-duty/>, (last visited June 5, 2012). *Zubulake v. UBS Warburg*, 229 F.R.D. 422, imposes a new discovery responsibility upon attorneys, a duty to supervise e-discovery by speaking directly with their client’s IT personnel, and understand what they say.

⁵ United States Courts: Federal Rules of Civil Procedure, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf> (last visited June 5, 2012)

Communications and Transactional Records Access Act (“SECTRA”), in which voluntary and compelled disclosure of “stored wire and electronic communications” is facilitated. The spirit of this law denotes a prohibition against the unauthorized access and/or exceeding authorization of access wherein a user “...obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage.”⁶

In short, America has put procedures in place to encourage voluntary forthcoming eDiscovery practices, but will extend the long arm of the federal law if you try to take electronically stored information. With American judges quick to rule in favor of motions for production of electronic discovery, such a judgment can quickly gain international traction. Within the 50 signatory countries of the Hague Convention⁷ for example, a judgment for production from an American court can become very persuasive authority.

2.2 Defining International Electronic Discovery:

eDiscovery is not the same as international electronic discovery. At its core, these two practices share what is sought in discovery (electronically stored information). Beyond that, they are continents apart, literally. International electronic discovery is the pursuit of digitally native file types for use in matters of litigation that transcends international borders. American corporations are generally concerned with two classifications of international electronic discovery: inbound and outbound.

Inbound electronic discovery includes all requests for production of ESI from foreign litigants. Inbound electronic discovery can come in the form of a judgment for production from an American court or can come from a foreign court. MNE’s are especially subject to inbound production requests from foreign courts. The most common tools for inbound international electronic discovery from foreign litigants is 28 U.S.C. §1782 and the Hague Convention which collectively cover international requests for electronic information held by American businesses.

Outbound electronic discovery includes all electronic discovery efforts that extend beyond the borders of America. The most common tools for this are domestic judgments requiring production, foreign judgments requiring production, the Hague Convention, intellectual property laws, and depending on the nature of the request, American corporations can use 15 C.F.R. 774, the Commerce Control Act as a shield against certain types of discovery requests from foreign courts.

It is important not to consolidate eDiscovery with international electronic discovery. While they may be similar in nature, they are as distinct as domestic house cats and lions respectfully. “The US practice of allowing wide, mutual discovery with tough penalties on non-cooperative litigants and their lawyers is unknown in the rest of the world. Beyond that, many nations have strict privacy and data protection laws that prohibit disclosure of information that is sought in US litigation. The result is that litigants and lawyers increasingly face conflicts of laws at a time when a shrinking world produces more transnational litigation.”⁸

2.3 Multinational Enterprise and Data Storage Technology Developments

Multination Enterprises (MNE) are a special kind of corporation as they combine multiple entities of incorporation located throughout the global marketplace and most often include at least one American corporation in the business unit hierarchy. MNE’s are especially subject to a diverse global framework of laws, but are equally subject to a litany of international electronic discovery practices. Through their corporate structure MNE’s are organized in such a way that generally affords them access to the most diverse conflict of laws variability, yet puts them at constant risk of defending against foreign claims. MNE’s store a vast amount of data and continually leverage cutting-edge data storage technologies.

To best leverage their ever-growing business intelligence (BI) demands, MNE’s resort to a myriad of diverse data storage solutions which include data warehousing and cloud storage solutions. “The Cisco Visual Networking Index Forecast demonstrates Business IP (internet protocol) traffic will grow at a compounded annual growth rate of 22 percent from 2011 to 2016. Global IP traffic has increased eightfold over the past 5 years, and will increase threefold over the next 5 years. Annual global IP traffic

⁶ 18 U.S.C. Chapter 121 § 2701

⁷ Hague Convention, http://www.hcch.net/index_en.php?act=conventions.status&cid=82, (last visited June 5, 2012).

⁸ ACEDS International E-Discovery Conference and Exposition. <http://www.allconferences.com/conferences/2012/20120209171945/>. (last visited June 5, 2012).

will surpass the zettabyte threshold (1.3 zettabytes) by the end of 2016. In 2016, global IP traffic will reach 1.3 zettabytes per year or 109.5 exabytes per month.”⁹

To accommodate this growth, MNE’s are increasingly embracing cloud storage solutions. Cloud storage solutions are as diverse in their global topography as the number of entities that comprise MNE’s. Google for example has data warehouses throughout America, Finland, Hong Kong, Belgium, Singapore, and Taiwan.¹⁰ As a data center innovator, “Google has designed a "one-to-many" failover system... . . . That means if there's a failure in one location, the load is distributed to many data centers.”¹¹ This facilitates Google storing user’s data anywhere in the world and metrics such as “how often a person uses e-mail, mail volume, and location of the user”¹² determine the where in the world they stores user data to ensure optimization. Today, MNE’s store data all over the world, setting a global stage for international electronic discovery.

2.4 Jurisdictional Considerations

Understanding a corporation’s residence or domicile when considering where international electronic discovery will lead is paramount. Due to its somewhat recent emergence, there are few established customary international laws that facilitate international electronic discovery. By virtue of their nationality corporations often incur obligations under national laws.

A common obligation that directly impacts international electronic discovery is blocking statutes. “Blocking statutes are laws enacted in one jurisdiction to obstruct the local (extra jurisdictional) application of a law enacted in another jurisdiction.”¹³ The nature of blocking statutes is that they prevent the disclosure of certain kinds of information from being leaked from its country of origin. Many countries have these statutes including America and most countries use national security as their veil in passing such laws. Many countries enacted blocking statutes as a result of the United States Federal Maritime Commission’s investigation of anticompetitive practices of international shipping conferences in the 1960s.¹⁴ Encountering blocking statutes during international electronic discovery can stifle discovery efforts and can have a significant cost impact for litigants.

Another jurisdictional concern is the legal duty regarding the practice of maintaining ESI. While some argue the Zubulake Duty has a global application¹⁵ most countries throughout the world have not adopted this precept. Moreover, with the costs of international electronic discovery skyrocketing, particular consideration should be given to the likelihood of a court awarding costs for collecting and processing ESI.¹⁶

⁹ Cisco Visual Networking Index: Forecast and Methodology.

http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-481360_ns827_Networking_Solutions_White_Paper.html. (last visited June 7, 2012).

¹⁰ Google : Data Centers. <http://www.google.com/about/datacenters/locations/index.html#> (last visited June 7, 2012).

¹¹ CNET http://news.cnet.com/8301-11386_3-57433973-76/hitch-a-ride-through-googles-cloud/. (last visited June 7, 2012)

¹² *id.*

¹³ Business Dictionary: Blocking Statute. <http://www.businessdictionary.com/definition/blocking-statute.html>. (last visited June 7, 2012).

¹⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 442, cmt. background 4 (citing to the following statutes: Great Britain: The Shipping and Commercial Documents Act, 1964, c. 87; Federal Republic of Germany: Federal Maritime Shipping Act of May 24, 1965, Art. 11, [1965] Bundesgesetzblatt pt. II 833, 835; France: Law No. 68-678 of July 26, 1968 Relating to the Transmission of Documents and Information to Foreign Authorities in the Area of Maritime Trade, [1968] Jour.Off. 7267, [1968] B.L.D. 438..

¹⁵ LinkedIn: International Electronic Discovery Group. <http://www.linkedin.com/groups/Does-Zubulake-Duty-have-global-4399864.S.107858343>. (last visited June 7, 2012)

¹⁶ Fast Memory Erase, LLC v. Spansion, Inc, 2010 WL 5093945, United States District Court, N.D. Texas, Dallas Division. (Texas, 2010)

3. Winning from the Beginning

3.1 Pepper Picking

“The truth is, no jury can possibly hold more than five to nine documents in their head at a time.”¹⁷ This brings us to the starting point of “pepper picking” which is rooted in TABASCO Sauce. Since the 1800’s the pepper farmers of Avery Island, Louisiana have been picking peppers by hand when they reach the perfect shade of deep red and are at their juiciest.¹⁸ “When in doubt, pickers can gauge the color by comparing it to a small wooden dowel, “le petit bâton rouge,” painted the preferred hue of TABASCO red.”¹⁹ This process has been repeated religiously for over 140 years and ensures that only the best peppers are picked. It is with this same level of precision that litigators should select the target of their discovery.

Electronic discovery often involves mountains of data; when considering various software file types, technical documents, communications, and other digital mediums a request for production could return millions of files. “With preparation and the right technology, the document review and production process can be easier and more efficient than procedures used in the “paper world”. Counsel can streamline discovery response, minimize its impact upon ongoing business operations, reduce costs of review and production, and gain a strategic advantage in the process.”²⁰

The objective, much like pepper picking is to know what you are going after. Overbroad electronic discovery requests have been met with a negative response in American courts.²¹ Courts throughout the world will be more inclined to entertain international electronic discovery requests when motions are brought with reasonable particularity. A reasonable particularity should guide early eDiscovery motions and the scope of files should be narrowly defined for trial. Just like the time honored pepper picking traditions of TABASCO, litigators should be highly selective with their discovery and should only hand pick those files that are perfect for trial.

The novelty of selectivity of eDiscovery is a unique opportunity for American corporations. No other nation in the world has a more developed eDiscovery support network. As recent American news headlines touted, “Venture capitalists were active in the e-discovery field this week, with FTV Capital pouring \$32 million into Catalyst Repository Systems, and Sequoia Capital hiring former Clearwell Systems CEO Aaref Hilaly.”²² In fact, as Forbes notes, “In 2012, however, more vendors than ever will be able to offer compelling, integrated platforms that can manage most or all of the eDiscovery lifecycle. This means companies can finally begin to take control of eDiscovery without having to purchase multiple tools from diverse providers.”²³

Noting the emphasis on corporations, Forbes further highlights, “2012 will see *corporations* – if not creating innovative best practices – getting better at managing eDiscovery as a process. One way companies will do this is by being able to quantify eDiscovery spending. Metrics will emerge, such as average spent per document; these metrics will feed Early Case Assessment (ECA) and intelligent legal decision-making.”²⁴

These developments, further demonstrate the stronghold America has in creating a home field advantage for corporations that face the complexities of international electronic discovery litigation.

¹⁷ Ralph Losey, *Secrets of Search – Part III*, (Dec. 30, 2011), <http://e-discoveryteam.com/2011/12/29/secrets-of-search-part-iii/>

¹⁸ TABASCO: How We Make Original Red Sauce. <http://www.tabasco.com/tabasco-products/how-its-made/making-original-tabasco-sauce/> (last visited June 7, 2012)

¹⁹ *Id.*

²⁰ LexisNexis, *Whitepaper: Electronic Discovery Best Practices*, (2007)

²¹ *Pittman v. Horton*, 2001 Mont. Dist. LEXIS 3074 (Dist. Ct. Mont. 2001) Document demand seeking electronic discovery deemed overly broad as it failed to describe the items sought with reasonable particularity.

²² EDD Update. <http://www.eddupdate.com/2012/04/venture-capitalists-make-e-discovery-moves.html>. (last visited June 10, 2012)

²³ Forbes: eDiscovery Impact. <http://www.forbes.com/sites/barrymurphy/2011/12/15/how-will-ediscovery-impact-businesses-in-2012/>. (last visited June 10, 2012)

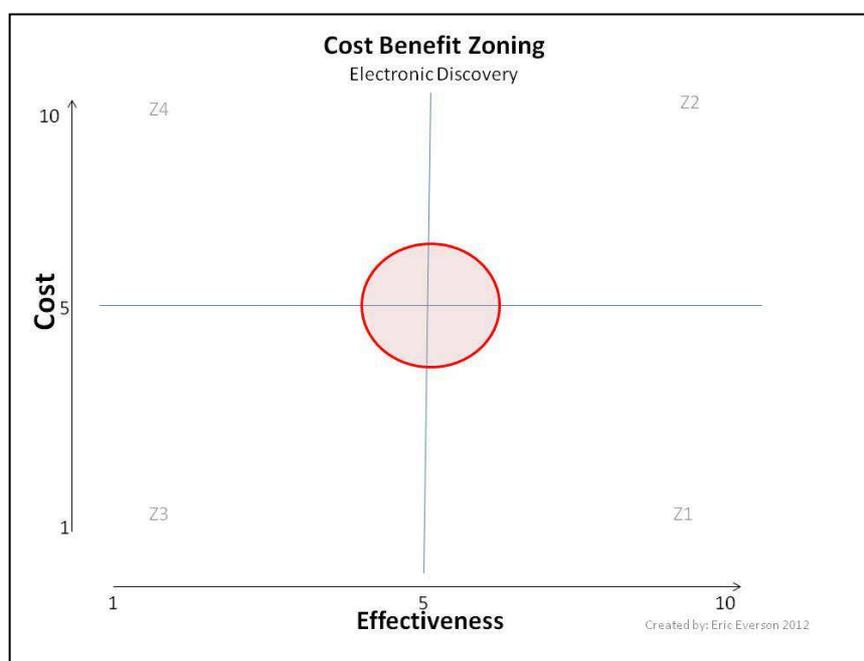
²⁴ *Id.*

3.2 Cost Benefit Analysis Zoning Framework

The costs associated with international electronic discovery can become litigation killers. One prevailing ECA model to manage the costs of international electronic discovery is the Cost Benefit Analysis (CBA) Zoning Model.

“At a high level, the CBA Zoning Model²⁵ allows the International Litigator to assess the cost against the efficiency of a particular item of discovery by assigning a numerical value (range: 1-10) to the cost as well as the efficiency and allows him to plot the projection so that it is placed within a Z quadrant respectively. The Z1 quadrant represents the best possible balance of low cost and high efficiency while the Z4 quadrant provides the opposite extreme. Figure 1 demonstrates the CBA Zoning Model and also identifies the red zone. Red zone discovery is the most risky regardless of the Z quadrant. Ultimately, all discovery that is projected as red zone discovery must become the decision of the International Litigator to pursue. Red zone discovery can exhaust valuable resources and generally carries minimal effectiveness in the course of litigation.”²⁶

Figure 1 CBA Zoning Model



Corporate litigants recognize the financial risks of international electronic discovery, yet America is yet again proving that advances in technology will reduce these costs. “The Cloud will continue to change cost dynamics of the industry, with prices for information storage and processing continuing to come down.”²⁷ As one recent report suggests, “Corporations and firms have flocked to cloud-based delivery models to reduce economic pressures and provide elastic scale across a wide range of business software.

Perhaps most important is the simple notion that the use of cloud computing enables businesses to more completely focus on their core competency, whether that competency is practicing law, manufacturing or retail or finance, rather than on building and supporting IT infrastructure. Nowhere has this trend been truer than in eDiscovery, where both corporations and law firms have been scrambling to find better methods of controlling costs and risks.”²⁸

²⁵ International Electronic Discovery: The Art of War (2012) Everson

²⁶ Id

²⁷ Forbes: eDiscovery Impact. <http://www.forbes.com/sites/barrymurphy/2011/12/15/how-will-ediscovery-impact-businesses-in-2012/>. (last visited June 10, 2012)

²⁸ CaseCentral, [Blueprint for Cloud-Based eDiscovery](#), 2, (2012)

The emergence of cloud-based eDiscovery tools has reduced the costs of international electronic discovery greatly, by reducing the requirement of physical travel associated with the identification, preservation, and collection. As the eDiscovery vendor support network has identified, cloud-based eDiscovery practices are propelling the industry forward. Moreover, American vendors are leading the development of cloud-based eDiscovery tools which bodes well for American corporations facing international electronic discovery matters. Additionally in federal court, as a result of the mandatory Rule 26 (F)29 pretrial discovery conference, establishing a firm eDiscovery budget agreed to by both sides has become an emerging trend.

3.3 Honest Time

Despite the in-roads that the Hague Convention and the emergence of cloud-based eDiscovery tools promise, the process of international electronic discovery remains cumbersome. The greatest nemesis of international electronic discovery continues to be time. The lapse of time factors into every prospect of litigation and when dealing with matters of international electronic discovery, litigants are forced to accept *honest time*.

Honest time is a concept that encourages litigants to recognize the complexity of the Electronic Discovery Reference Model (EDRM) with respect to international electronic discovery and the inherent actual time constraints. “The Electronic Discovery Reference Model, launched in 2005 by independent consultants George Socha and Tom Gelbmann, provides a functional framework which can be used to divide up eDiscovery into more manageable processes and initiatives., launched in 2005 by independent consultants George Socha and Tom Gelbmann, provides a functional framework which can be used to divide up eDiscovery into more manageable processes and initiatives.”³⁰

When managing international electronic discovery, the Hague Convention continues to be one of the most predominant tools an American corporation has at its disposal. There is an increasing amount of case law that supports placing the burden on the party opposing the Hague Convention.³¹

Additionally, American courts are looking to good faith attempts in making proper perfection under the Hague Convention.³² Despite its strengths however, the time efficiencies of the Hague Convention remain highly scrutinized.³³ “The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (“Hague Convention”) provides for international service to be made through Central Authorities designated by the contracting States. Hague Convention art. 1, Nov. 15, 1965. Significantly, Article 10(a) of the Hague Convention states that “provided the State of destination does not object, the present Convention shall not interfere with (a) the freedom to send judicial documents, by postal channels, directly to persons abroad.””³⁴

The case law on the Hague Convention has yet to catch-up with the speed of technology regarding electronic service of process, however upon laying the proper foundations, the American courts have well accepted the use of email to effect service of process between business entities.³⁵ Though this adds favor to America as a forum of choice for corporations seeking discovery over an evasive adversary, it does little to reduce the discovery timeline.

Advances in technology offer refinement of current Hague Convention practices however without prevailing case law, a litigant must remain wary of the real-world time constraints that predispose international electronic discovery. Honest time suggests a maximized time variable when calculating an ECA timeline. An emerging phenomena in creating accurate discovery timelines is to make the assumption that your resources will be productive only 80% of the time.³⁶ “Build in time for unexpected

²⁹ United States Courts: Federal Rules of Civil Procedure, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20Rules/Civil%20Procedure.pdf> (last visited June 25, 2012)

³⁰ CaseCentral, [Blueprint for Cloud-Based eDiscovery](#). 2, (2012)

³¹ Knight v. Ford Motor Co., 615 A.2d 297, 300 (L. Div. 1992)

³² Koechli v. Bip Intern., Inc., 861 So.2d 501 (2003)

³³ American Bar Association: Section of International Law & Practice, Report on Survey of Experience of U.S. Lawyers with Hague Convention Letter of Request Procedures. (2003)

³⁴ In re Bernard L. Madoff Investment Securities, LLC, 418 B.R. 75, (2009)

³⁵ Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007, (2002)

³⁶ MindTools: Estimating Time Accurately. http://www.mindtools.com/pages/article/newPPM_01.htm. (last visited June 19, 2012)

events such as sickness, supply problems, equipment failure, accidents and emergencies, problem solving, and meetings.”³⁷

Honest time requires a practice of hedging one’s interests against the realistic events and response times that comprise the international electronic discovery landscape. Most importantly, honest time requires accuracy and whenever possible, slip³⁸ should be adjusted for accordingly. Accuracy is the primary objective in honest time.

3.4 eDiscovery Team

The old days of sending over the Calvary to conduct extensive on-site discovery have passed. Today, with virtual office tools, international electronic discovery is a process that requires much fewer resources and less travel expense than ever before. Four key decisions must be weighed in consideration of the scope of one’s discovery: personnel (“the who”), the object of discovery (“the what”), the destination of the discovery (“the where”), the tools that are required for the discovery effort (“the how”).

i) The who

Electronic discovery personnel are paramount to success. The ability to identify the objects of discovery, navigate file types, exercise scalable software tools and a comprehensive understanding of the legal environment are central to the success of international electronic discovery.

ACEDS (Association of Certified eDiscovery Specialists) verifies knowledge and skill through the Certified E-Discovery Specialist (CEDS) certification, which is awarded to candidates who meet specified eligibility criteria and pass a rigorous examination that is administered at secure testing centers around the world.³⁹

Increasingly law firms throughout the world are looking for an industry recognized benchmark of training and ACEDS has emerged as a leader in this capacity. Most recently, ACEDS hosted the Crossing Borders: An International View of E-Discovery webinar⁴⁰. This webinar concentrated on Best practices for navigating cases with international discovery components successfully, without violating the requirements of the countries involved and the new Sedona Conference International Principles on Discovery, Disclosure, and Data Protection.⁴¹

“The era of globalization is colliding with the complexity of e-discovery. Lawyers today are responsible for litigation without borders and discovery without language barriers. Yet, the reality is that many practitioners and legal professionals find themselves struggling to implement efficient and cost-effective discovery practices in US-based litigation, let alone navigating the conflicting privacy and legal implications associated with other countries’ discovery laws.”⁴²

ACEDS is one of a number of viable electronic discovery training programs, most important is the ongoing training and professional development of the international electronic discovery team. As a home field advantage for American corporations, ACEDS is headquartered in Miami, Florida and offers the test at over 600 test centers. The CEDS certification was specifically designed to provide the necessary knowledge and leverage to corporations, law firms and government agencies in negotiating of the acquisition of consulting services and technology.⁴³

³⁷ Id.

³⁸ Project Management Docs: Risk Assessment Guide. (2012) While there are many methods for identifying risks, the Crawford Slip method is very common and effective. Each risk should be stated in a complete sentence which states the cause of the risk, the risk, and the affect that the risk has on the project (key words such as: “due to” or “because”).

³⁹ Association of Certified eDiscovery Specialists. <http://aceds.org/CEDS>. (last visited June 25, 2012.)

⁴⁰ Association of Certified eDiscovery Specialists. Crossing Borders: An International View of E-Discovery. <http://aceds.org/crossingborders>. (last visited June 25, 2012)

⁴¹ Id.

⁴² Id

⁴³ Association of Certified eDiscovery Specialists. <http://aceds.org/node/1400>. (last visited June 25, 2012).

ii) The what

As previously discussed (Pepper Picking), your eDiscovery team must know what you are going after. This requires a significant degree of technical proficiency and often requires advance knowledge of software, including a comfort level with the native filetypes that are the object of discovery. "...computer files are highly manipulable. A file can be mislabeled; its extension (a sort of suffix indicating the type of file) can be changed; it can actually be converted to a different **filetype** (just as a chat transcript can be captured as an image file, so can an image be inserted into a word-processing file and saved as such). Any of these manipulations could change a document's hash value."⁴⁴ "**Computer hash** is an encryption algorithm that forms the mathematical foundation of e-discovery. Hashing generates a unique alphanumeric value to identify a particular computer file, group of files, or even an entire hard drive."⁴⁵

Because of the technical proficiency required, electronic discovery team members are most likely to have a specialization with certain types of files. Such specializations may include .php, .html, .asp, or .cfm files whereas more ubiquitous filetypes associated with eDiscovery include .pst, .pdf, .docx, or .rar filetypes.

Depending on the nature of the discovery request, preserving and locating the right files for litigation may require a level of expertise or customized eDiscovery search software. As a recent New York Times article notes, "...we are moving to an age of quiet factories, with more robots and better software. It boosts American companies that make software and smart machines."⁴⁶ Additionally, the United States Bureau of Labor Statistics demonstrates that, "Employment of software developers is projected to grow 30 percent from 2010 to 2020, much faster than the average for all occupations."⁴⁷

Collectively, these indicators point to a technologically proficient workforce in America which creates significant advantages for American corporations in litigating technical matters.

iii) The where

By virtue of ever-improving software tools and the emergence of cloud computing the days of sending international discovery teams off to distant lands is likely numbered. With the continued development of virtual office management software and cloud-based data storage, data can be gathered from anywhere in the world.

Courts throughout the world area dealing with growing pains of international electronic discovery. "Since 2000 most key contemporaneous commercial documents are contained in Electronically Stored Information (ESI) – today over 90% of communications are recorded in that form phone records, texts, email, bank records, etc."⁴⁸ While cloud-based technology renders more data remotely accessible, the cloud-based environment introduces emerging issues of jurisdiction.⁴⁹

The principle concerns for international electronic discovery regarding physical location are rooted in where the data is exists in its native format as well as the procedural development of eDiscovery rules within a competent court of jurisdiction over the data. Some nations do not even recognize digital discovery.⁵⁰ This forces international electronic discovery teams to consider how the data will be legally recognized before it is actually ever identified in its native format.

Strategically, American courts recognize electronic documents, ESI, and even at the state court level generally follow the federal precedents on handling matters of eDiscovery. This creates unprecedented opportunity for American-based corporations to obtain legal recognition over the digital documents that are subject to litigation.

iv) The how

⁴⁴ US v. Farlow, 2012 WL 1957990, (2012)

⁴⁵ Ralph Losey's e-Discovery Team: Hash. <http://e-discoveryteam.com/computer-hash-5f0266c4c326b9a1ef9e39cb78c352dc/>. (last visited June 25, 2012)

⁴⁶ New York Times. <http://www.nytimes.com/2012/04/10/opinion/brooks-the-two-economies.html>. (last visited June 25, 2012).

⁴⁷ United States Bureau of Labor Statistics. <http://www.bls.gov/ooh/computer-and-information-technology/software-developers.htm#tab-1>. (last visited June 25, 2012).

⁴⁸ United Kingdom: Earles v. Barclays Bank PLC, 2009 EWHC 2500 (Merchantile)

⁴⁹ Electronic Discovery and the Data Center Dilemma. <http://www.scribd.com/doc/96371432/Whitepaper-Electronic-Discovery-eDiscovery-and-the-Data-Center-Dilemma>. (last visited June 26, 2012).

⁵⁰ Tech Republic: What Makes Cybercrime Laws so Hard to Enforce?

<http://www.techrepublic.com/blog/security/what-makes-cybercrime-laws-so-difficult-to-enforce/4997>. (last visited June 26, 2012).

The tools that facilitate eDiscovery are wide ranging. In a recent comprehensive eDiscovery software market survey, 33 companies were identified as eDiscovery software providers.⁵¹ Deciding on which tool best facilitates a litigator's eDiscovery needs will likely be determined on a case-by-case basis. Considerations for selecting the appropriate eDiscovery software solution should be guided by the demands of the case, the usability of the software for the specific case, and by the cost of the software.

Some eDiscovery software is better at handling massive amounts of data while others may stand out for other reasons such as their ability to organize meta data. Naturally these software solutions range from \$100 to thousands of dollars, depending on the software requirements of the law firm.

What places American corporations at a distinctive advantage is that of the 33 eDiscovery software providers identified⁵² only three are based outside of America. More important to international electronic discovery practitioners, every eDiscovery software solution is targeted to the American justice system.

4. The Rising Costs of International Electronic Discovery

4.1 Retrieval Costs: Variable Technology Uptake

It has been said that "Justice goes to the highest bidder."⁵³ It should likewise be acknowledged that eDiscovery represents the highest spike in litigation costs in decades. These costs are often being driven by the expense of third-party eDiscovery consultants and high eDiscovery software prices. Another significant source of costs is the result of the Variable Technology Uptake phenomena.

Variable Technology Uptake recognizes that the state of technology differs from country-to-country.⁵⁴ Companies like Microsoft launch new releases of their software with as many as six versions at a time⁵⁵ and hardware availability is as diverse as the automobile industry on the global market. In essence, the computer environment that exists in one nation may be starkly different than what exists in another; this contributes to Variable Technology Uptake and is a cost that must be factored into international electronic discovery.

It is not uncommon to find much older software being actively used to conduct business throughout the world. Small businesses are especially slow to upgrade their technology.⁵⁶ As a result, the practice of international electronic discovery is often met with the need to hire de-supported software specialists when encountered with data in native format on a legacy machine. "Software companies routinely discontinue support for old products, requiring clients to upgrade or go without support."⁵⁷

De-supported software causes for significant cost increases in eDiscovery as by nature de-supported software is rarely forward compatible with the current version of the software. In worst case scenarios this can require locating and implementing a previously discarded technology to conduct proper eDiscovery within the legacy machine. Properly handling ESI in native format can be a very delicate and often expensive process.

The costs in this area can be mitigated by stipulating to authenticity between the parties. Variable Technology Uptake is a much less costly issue in America as Microsoft is an American corporation and America offers a vast workforce of skilled de-supported software specialists. This allows American corporations to bring in technology consultants at rates much lower than those in other countries creating another distinct edge in litigation.

⁵¹ eDiscovery Journal. Are the Winners and Losers in The eDiscovery Software Market Already Determined? <http://ediscoveryjournal.com/2012/05/are-the-winners-and-losers-in-the-ediscovery-software-market-already-determined/>. (last visited June 26, 2012)

⁵² Id.

⁵³ Chicago Tribune. http://articles.chicagotribune.com/2011-11-21/news/ct-edit-judge-1121-bd-20111121_1_loyd-karmeier-campaign-office-lawyers. (last visited June 26, 2012)

⁵⁴ Engadget: Windows Store. <http://www.engadget.com/2012/04/18/windows-store-slowly-going-global/>. (last visited June 26, 2012).

⁵⁵ PC World: Windows 7 to Ship In Six Different Versions. http://www.pcworld.com/article/158861/windows_7_to_ship_in_six_different_versions.html. (last visited June 26, 2012)

⁵⁶ SmallBizTechnology. <http://smallbiztechnology.com/archive/2011/10/are-you-ready-to-upgrade-your-old-slow-and-unstable-network.html/>. (last visited June 26, 2012)

⁵⁷ CNET News: Oracle's "de-support" Deadline Draws Ire. http://news.cnet.com/Oracles-de-support-deadline-draws-ire/2100-1011_3-965293.html. (last visited June 26, 2012).

4.2 Time Costs

In matters of international electronic discovery, time costs. Time costs incur both currency and opportunity. The American Justice system recognizes the importance of efficiency.⁵⁸ Time, respective of the currency and opportunity costs is a critical element of international electronic discovery. Often a legal analysis involving international electronic discovery hinges not on whether something is discoverable, but rather how long it will take to obtain it.

The international electronic discovery process can become highly complex when encountered with subtleties of the Hague Convention or various blocking statutes that exist throughout the world. Delays are standard in matters of international electronic discovery. Very few countries operate with the same eDiscovery efficiency as America.

“The US is generally thought of as being “ahead” of the UK in terms of its approach to electronic disclosure.”⁵⁹ Throughout the world, non-American corporations place less focus on getting and keeping their data in order.⁶⁰ This is a result of the lack of a globally accepted Zubulake Duty across world courts. With regard to eDiscovery, there are less formalized duties in respect to legal holds and no civil court sanctions beyond costs penalties between parties in other judicial systems.⁶¹ As a result, American corporations are increasingly investing in data preservation and likewise pressuring global counterparts to do the same. Likewise, increasingly regulators throughout the world are pushing for heightened standards in ESI preservation.

While industry and regulation push nations deeper into ESI preservation standardization, there have been a number of international electronic discovery cases that have resulted in orders for disclosure which imposed significant and unanticipated costs on those who owned the documents.⁶² With an international environment of eDiscovery slowly moving forward, it is important to recognize the delays and costs that are associated with it.

As a benefit, American corporations are held to the Zubulake Duty standard of ESI preservation. Compliance with this duty facilitates rapid discovery between corporate adversaries within the American courts and further establishes the American courts as the preferred forum for litigating matters of international electronic discovery. Alternatively, understanding the breadth of delays so common in international electronic discovery places significant pressure on litigation opponents to settle early and save big.

5. Conclusion

In conclusion, with case law mounting, the Federal Rules of Civil Procedure in place, and a Judiciary increasingly adept in handling volumes of digital archives, it is easy to see how America is quickly emerging as the springboard of modern international electronic discovery. One of the central models that differentiates America is an open discovery approach. For corporations of any size, this positions America as a hot spot for matters of litigation.

Santa Clara sets in motion a stronghold for corporations in American jurisprudence; the embrace of technology by the American court system in establishing global benchmarks for electronic discovery has continued this advantage. Not surprisingly, rising numbers of newly registered corporations has become a recurring media topic.⁶³ As the internet has flattened global commerce, setting international sales at the fingertips of billions, America continues to emerge as the premier registration destination for growing corporations throughout the world.

By virtue of registering in America, an American corporation is granted benefits including personhood recognition under the Constitution and a growing foundation of electronic discovery laws and practices aimed at resolving matters of litigation efficiently. Cloud computing technologies continue to enable the speed and efficiency of global commerce just as the focused development of electronic

⁵⁸ *Algonquin Power Income Fund v. Christine Falls of New York, Inc.* 2009 WL 4884470.

⁵⁹ Chris Dale. UK eDisclosure Turning Point: The Corporate Focus on Cost-Effective Collection and Processing of E-Mail and Electronic Documents for Litigation and Regulatory Purposes. (2009) Guidance Software: Whitepaper.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ The Business Journals. http://www.facebook.com/note.php?note_id=270466909798. (last visited July 18, 2012)

discovery law fuels the resolution of disputes that arise therein. This is not the practice of tomorrow, this is the reality of today.

Global transactions happen in an instant and recur billions of times in a given day; thus the efficiency of modern electronic discovery has created significant home field advantage for American corporations facing matters of international litigation.

References

15 CFR §774

Asia eDiscovery Exchange: <http://www.asiaediscovery.com/edhk2012/index.html>

Banco Nacional de Cuba v. Chase Manhattan Bank

Bolger v. Youngs Drug Products Corp

Citizens United v. Federal Elections Comm'n

County of Santa Clara v. Southern Pac. R Co

Exon-Florio (50 USCA App. §2170)

Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2512, 18 USC § 2701

Fast Memory Erase, LLC v. Spansion, Inc.

Kellogg Brown & Root Intern., Inc. v. Altanmia Commercial Marketing Co. W.L.L.

Martino v. Wal-Mart Stores, Inc.

Race Tires America, Inc. v. Hoosier Racing Tire Corp.

United States v. Forrester

Yusuf Ahmed Alghanim & Sons, W.L.L. v Toys "R" Us, Inc

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