REPRINT

CD corporate disputes

MANAGING E-DISCOVERY IN COMMERCIAL DISPUTES

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Freeborn & Peters LLP is a full-service law firm, headquartered in Chicago, with international capabilities.

The firm is highly regarded for its ability to handle complex commercial disputes, where it draws on its extensive and sophisticated in-house e-discovery lab. It also serves clients in corporate law, real estate, bankruptcy and financial restructuring, and government and regulatory law. With more than 200 professionals assisting clients, Freeborn & Peters is an organisation that genuinely lives up to its core values of integrity, caring, effectiveness, teamwork, and commitment, and embodies these values through high standards of client service and responsive action.

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MINI-ROUNDTABLE

MANAGING E-DISCOVERY IN COMMERCIAL DISPUTES

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Todd Ohlms is a partner in the Litigation Practice Group and is co-leader of the Commercial Litigation Team. His practice involves advising and representing clients on their business-critical litigation matters. He has substantial experience in actions involving temporary restraining orders, preliminary injunctions and in the substantive areas of intellectual property, fiduciary litigation, securities and shareholder litigation, antitrust and trade regulation and complex/multi-jurisdictional disputes.

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As Director of Information and Litigation Technology, **Mike O'Brien** oversees the firm's entire information technology platform in addition to creating, implementing and managing the firm's litigation support strategy and solution set. He provides strategic direction for a portfolio of information technology projects based upon business objectives. Mr O'Brien oversees projects and programmes to implement comprehensive information technology solutions to business problems in a timely and cost-effective manner.

CD: In your opinion, how important is e-discovery when it comes to resolving commercial disputes? What are some of the typical technical issues and challenges that parties may encounter during the process?

Ohlms: Ninety-seven percent of business-related documents are electronically stored information (ESI) such as emails, Excel files or Word documents. As a result, ESI is often the evidence that plays the key role in how a commercial dispute is resolved. One could argue that besides identifying credible legal theories for offensive claims or defensive purposes, nothing is more important than properly handling e-discovery. Failure to conduct e-discovery with an awareness of these issues and with the help of a qualified legal technology adviser can result in your offensive case being decided not on its merits but on your preservation and collection efforts or unnecessarily increase your costs of defence.

O'Brien: Numerous technical issues can arise during the course of e-discovery. First, once litigation starts, the client and its legal counsel must preserve and collect ESI in a defensible manner. This includes issuing a litigation hold and identifying all ESI sources that may contain responsive documents. For relevant witnesses, the client needs to suspend its auto-deletion routines on its electronic systems such as email. Backup tapes should be identified and preserved as necessary, especially if relevant data only exists on backup tapes. During collection, it is important to preserve metadata, so that ESI and corresponding metadata may be imported into a review tool used to identify responsive documents. This process is fraught with many pitfalls, including deduplication and the identification of hidden information, such as hidden columns in a spreadsheet or hidden histories of revisions made to files.

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> *Todd J. Ohlms, Freeborn & Peters LLP*

CD: Could you provide an insight into the obligations and requirements related to e-discovery which are commonly placed on disputing parties?

Ohlms: Attorneys must balance the requirements of the applicable discovery rule, such as Rule 34(b) of the US Federal Rules of Civil Procedure, which requires a party to produce documents as they are kept in the ordinary course of business with other rules, such as Rule 26(b)(2)(B), which states that ESI need not be produced if the source is not reasonably accessible because of undue burden or costs. Preservation requirements are more important than production requirements. If you do not preserve ESI, you will not be able to supplement your production later if ordered to do so. So if you are going to take a strong position that something need not be produced because of cost or burden, you are well advised to ensure that the data is at least preserved in case you lose that argument.

O'Brien: Courts also routinely require parties to work with their opponents in performing iterative keyword searches in an effort to identify a reasonable pre-production set of ESI to be reviewed for privilege and responsiveness. Efficiencies in collection methodologies provides time to work with attorneys in performing iterative searches prior to engaging with opposing counsel. This allows several things. First, it helps to identify what search terms you want your opponents to use to search their ESI and it also helps you prepare to respond to your opponents' suggested search terms. The amended Federal Rules also provide a process for sampling ESI. We are also seeing courts require clients to preserve, collect and produce data from mobile devices and the cloud. After identifying the sources, it has become a challenge to collect all of this data, especially because experts are typically needed to extract data from the large number of mobile devices, operating systems and apps that are available.

CD: What options do clients have these days for getting help with their e-discovery obligations?

O'Brien: There are three main options a client has when dealing with electronic discovery in a dispute. First, a client can hire a vendor to collect, process and host the data for review. Vendors typically charge a per gigabyte fee for processing and hosting the dataset on a monthly basis. The second option is for the client to retain a law firm to process and host the data for review, using the same pricing model as a vendor. The third and least common option is for a law firm to process and host the data for review and only charge the client an hourly rate for the actual time spent processing the data. This model reduces the total processing cost and eliminates the hosting costs all together. In large cases that can go for years, the hosting costs alone can total millions of dollars.

Ohlms: The third model provides clients with tremendous benefits. For example, if your opponent

argues that producing a certain subset of ESI is too expensive or time consuming, you may be able to convince the courts to order your opponents to turn over their ESI to your internal e-discovery lab – with appropriate privilege protections – for processing, iterative searching, hosting and production. This model aligns the litigators with the client and prevents the creation of a 'profit centre' that would otherwise drive a wedge between the client and the law firm. It allows clients to make decisions about litigation on the merits rather than based on an economic analysis that prevents them from defending meritless litigation solely because of the costs associated with e-discovery.

CD: What can parties do to manage the e-discovery costs they face? Are there any state-of-the-art technologies available that can achieve an outcome while saving money and adding value?

O'Brien: First and foremost, it is imperative and to the benefit of both parties to agree to a limited set of custodians and collections. A seasoned e-discovery litigator will pursue and document data collections during a 'meet and confer' conference. Agreeing on custodians and search terms can drastically reduce the volume of the review and production. The biggest cost in litigation relates to attorney-review of client documents. For this reason there is a big push to cull as much data from the review set. With regards to litigation preparedness, the amount of potential ESI in litigation may be reduced drastically by implementing sound retention policies. On the discovery side, the review set may be decreased by several means, such as deduplication, date-range and key-term searches and technology-assisted review tools, each of which entails its own pitfalls and necessitates relevant expertise to handle in defensible ways.

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>
> *Michael T. O'Brien, Freeborn & Peters LLP*

Ohlms: Clients should also decide on a company-wide strategy for handling e-discovery. Regardless of which option a client uses to collect, process and host data, if they consistently use the same process,

they will be able to reduce costs associated with those efforts.

CD: Could you outline the process of taking and defending corporate-representative discovery depositions? What risks do such depositions bring as a dispute resolution mechanism?

Ohlms: Most jurisdictions have a rule that allows you to take a deposition of a corporation on designated topics. The party receiving the notice of the topics must designate a person or persons who can testify regarding those topics. This discovery tool helps to shape e-discovery efforts. In a recent example, an IT leader admitted that the company had destroyed thousands of backup tapes in violation of its contractual and statutory duties to preserve that ESI and after it reasonably anticipated litigation with another company. After those admissions, a case that was already strong had the added benefit of a spoliation 'Sword of Damocles' hanging over the opponent's head. Taking that deposition of your opponent involves very little risk to your case. Assuming that your client has expended the effort to develop a defensible document and data retention policy, has complied with it, has issued an appropriate and timely litigation hold and preserved responsive ESI, there should be very little risk to your client of being similarly deposed.

CD: To what extent have regulatory and legislative developments impacted the e-discovery process? For example, what steps should parties take to ensure they comply with industry archiving regulations approved by the likes of FINRA, SEC, MiFID and FSA?

Ohlms: Regulatory and legislative efforts routinely modify preservations requirements for various industries. Counsel should monitor any applicable regulatory agencies for modifications to their preservation requirements. Any such amendments to statutes or regulations on this subject must result in appropriate modifications to the client's data and document retention plans. Having a data retention plan that authorises the destruction of data prior to the time an applicable regulatory agency allows a client to destroy data will be used as evidence of bad faith. In addition, many regulatory preservation provisions not only mandate a minimum retention period, but also designate acceptable formats of storing the ESI – for example, write once, read many or 'WORM'. All of these considerations must be taken into account when drafting a client's original data and document retention plan and updating the plan on a regular basis. Clients should set a routine schedule for reviewing applicable statutory and regulatory requirements and updating their data and document retention policies if needed. Doing

so may help defeat any assertion of bad faith if an incongruity develops between the client's data retention plan and any applicable requirements.

CD: In your opinion, how important is it for parties to develop robust information-retention and information-deletion policies? How crucial do these then become when a dispute escalates to judicial proceedings?

O'Brien: Robust information-retention and information-deletion policies are crucial to a business to reduce costs while increasing success related to litigation. The less ESI a client retains, the less ESI attorneys must review in litigation. Clients who can more accurately identify their ESI landscape – such as knowing where all ESI is created and stored – will spend less on identifying and collecting relevant ESI for attorney review. Also crucial is the understanding of the difference between litigation hold and information retention and deletion policy. Should there be confusion, a client may be deleting ESI relevant to an ongoing case and could be accused of spoliation of evidence. Spoliation can lead to the court issuing an 'adverse inference' jury instruction.

CD: Looking ahead, what are your expectations for e-discovery in commercial disputes? Will its importance only increase as companies continue to produce and store vital information digitially?

Ohlms: E-discovery is always going to play a role in commercial disputes. Companies are continuing to reduce their reliance and storage of hardcopy documents. It is good practice, when closing a file, for the overwhelming majority of hardcopy documents to be imaged and stored electronically and the paper versions destroyed. Clients can be taught to manage their ESI with appropriate data and document retention plans, preservation plans, litigation holds and other tools. It will continue to be important to observe developments in case law as courts wrestle with issues such as proportionality, reasonable accessibility and the burden of e-discovery in large scale litigation. If a client has not decided upon a strategy for how it will handle its ESI and any resulting e-discovery, it should figure out who it is going to rely upon for help – an outside vendor or a law firm with native capabilities – and begin to work with those professionals immediately on creating a strategy and implementing it. CD