

Justice Department in 'Full-Court Press' to Tackle E-Discovery

Author: Channing Turner

Publication: MainJustice.com

Date: August 19, 2011

The discovery process used to be a great deal easier for the Justice Department.

Attorneys would sift through volumes of material to determine what should be turned over to the opposing side.

But new technology means that less and less is done on paper and that's presented challenges for DOJ officials, who are struggling with ways to manage electronic evidence, such as e-mails and text messages. It's led to accusations that the government has deliberately withheld evidence and even public admonishments by federal judges.

"I want the court to know that we're frustrated too," an Assistant U.S. Attorney in Alabama, Stephen Feaga, told a magistrate judge in Montgomery, Ala., in March during a high-profile public corruption prosecution of lobbying related to bingo gambling. "This is a case where there was more electronic discovery and transmission of data than any case I've ever seen ... and it created unique problems for us, starting with discovery."

Particularly during the discovery phase of litigation, modern attorneys commonly need to sort through millions of emails with attached documents or text message logs with metadata – information telling when or where the log was created, for example – all while withholding privileged information and complying with complex legal rules.

In response, the government in recent years has made a "full-court press" developing so-called e-discovery skills to close the competency gap, said Sarah Michaels Montgomery, senior litigation counsel for e-discovery in the Associate Attorney General's office.

Montgomery chairs the department's recently established Civil E-Discovery Committee, a team of legal and technical experts who coordinate e-discovery training and assistance across the department's civil litigation groups. She also regularly teaches e-discovery courses at the department's National Advocacy Center in South Carolina.

"It's a real challenge," Montgomery said. "We've done a series of initiatives in the last two years ... but the law continues to develop in ways that are very unsettling for large organizations and law firms because the United States [government] doesn't turn on a dime, and to the extent that the law does change, it is very frustrating for the government."

While the Federal Rules of Civil Procedure were amended back in 2006 to deal with e-discovery in civil cases, Montgomery said the government waited for the e-discovery field to develop a bit before starting to educate attorneys and standardize software.

"The challenge is the case law, not the rules," she said. "It takes some time for things to develop in a way that government can respond ... and we need to be careful before building infrastructures with taxpayer money."

But government has taken the plunge. Last year, the department requested about \$5 million to strengthen its cadre of tech-savvy lawyers in the Civil and Environmental and National Resources divisions, as well as establish an e-discovery team in the Executive Office for U.S. Attorneys.

And a May 2011 U.S. Attorney bulletin introduction written by Associate Attorney General Thomas Perrelli outlined efforts to establish e-discovery training programs, best practices and designated resource liaisons for each U.S. Attorney's office.

And that's just the civil side. Andrew D. Goldsmith, National Criminal Discovery Coordinator for the DOJ, said establishing e-discovery procedures for criminal matters is even more critical because no rules exist to guide criminal attorneys.

That void has created an opportunity for the department to lead, Goldsmith said, by helping to develop an unprecedented protocol for dealing with electronically stored information, or ESI, in criminal cases. Goldsmith added that he and others from the department presented a draft of the protocol at the 2011 9th Circuit Judicial Conference in Carlsbad, Calif., this week.

"I can't emphasize enough how groundbreaking this effort is," Goldsmith said. "We're really trying to demystify things and try to make sure the ESI tsunami ... doesn't overrun the system.

"We're being extremely proactive," he added.

But Charles A. Intriago, founder the Association of Certified E-Discovery Specialists and a former prosecutor in the U.S. Attorney's office for the District of Southern Florida, said the department is playing catch-up to the private sector, which he said better anticipated the increasing use of ESI.

"The DOJ is behind the eight ball," Intriago said. "There's no element in the Justice Department that doesn't have to face e-discovery. It's a very costly operation, and the government is outmanned and outgunned."

Several high-profile cases illustrate the DOJ's struggles with e-discovery. In June, attorneys for the aerospace giant Honeywell International brought misconduct allegations against the DOJ in an ongoing false claims suit, accusing the department of failing to turn over some 120,000 documents, including some that could have aided the company's defense.

District Judge Richard W. Roberts appointed a federal magistrate judge to supervise DOJ compliance with discovery obligations in the case last week, and still could impose monetary sanctions on the government.

In another recent case, the DOJ's Public Integrity Section encountered problems with discovery in the corruption prosecution of several Alabama state lawmakers. Misconduct allegations culminated in April at an explosive hearing before Magistrate Judge Wallace Capel Jr., who said he would consider sanctioning DOJ attorneys after they failed to turn over emails in an acceptable software format.

But others say the DOJ's struggles are right in line with the broader legal community.

"The surprising thing isn't that people screw it up; the surprising thing is that people get it right at all," said consultant George Socha, co-founder of the Electronic Discovery Reference Mode, which develops

guidelines and standards for e-discovery. "I don't think the DOJ is any better or any worse off than anyone else out there. They're all still trying to figure it out."

Even the largest law firms can only find a few dozen lawyers with e-discovery expertise, Socha said, meaning everyone in the field is understaffed and struggling to deal with demand for electronic document management.

"And judges, for the most part, don't know anything about electronic discovery," he said. "By the time it gets to them, both parties are whining and complaining about the other side, and as a judge, you just don't want to hear this anymore."

Both Goldsmith and Montgomery said the department has been working with judges through the Federal Judicial Center to improve understanding of e-discovery.

But even establishing e-discovery rules and procedures isn't a panacea, said Michele Lange, director of Discovery Project Management at the legal consulting group Kroll Ontrack Inc.

Part of the current confusion on the civil side comes from a purposeful ambiguity that was written into the rules to allow for advances in technology, Lange said, adding that rule makers don't want to handicap the system by getting too specific.

"Technology moves at light speed while rule-making moves at the speed of a tortoise," Lange said. "It's evolving faster than the litigants can keep up, faster than the judges can keep up ... and certainly faster than the government can keep up. And that's why having a solid expert in your corner is really critical."