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NEW INDUSTRY PARTNERSHIP

BNA's *Digital Discovery and E-Evidence* and Applied Discovery® are pleased to announce the formation of our industry partnership. The combination of our collective e-discovery expertise will provide the readers of *Digital Discovery and E-Evidence* with an unparalleled collection of information and resources. As part of our partnership, BNA and Applied Discovery® will be sponsoring a conference in September 2008 focusing on E-discovery as Enterprise. As a lead-in to the conference, Applied Discovery® will be authoring a regular column featuring some of the topics, speakers, and issues that will be showcased at the conference. Our first article, below, is an overview of things to come. We look forward to seeing you at the conference this fall in Washington, D.C.

E-Discovery: 2008 State of the Industry

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When e-discovery emerged onto the legal scene in the early part of the decade with *Zubulake*, *Morgan Stanley*, and the proposed amendments to the Federal Rules, no one knew exactly where it was going to take us. Many thought e-discovery was a passing fad and that after awhile we would all be able to go back to our business. What we have learned, however, is that as new technologies affect the way corporations do business, the issues that surround e-discovery have become more—not less—complicated.

What we have also learned is that e-discovery is an enterprise issue. No longer is it just confined to the general counsel's office. Even given all of that, we still don't

know exactly where we will end up. There are, however, some current truisms that can help lawyers ease the burden of e-discovery, for the better we understand our industry right now, the better able we will be to plan for the future.

The Federal Rules. The Amendments to the Federal Rules of Civil Procedure that address electronically stored information have now been in effect for over a year. While many corporations still feel unprepared, the unleashing of the rules has not been the maelstrom that many predicted.

On the other hand, it's no Y2K. That is to say, while the advent of the amended Federal Rules was not necessarily an emergency, it wasn't a dress rehearsal either. Parties need to be aware of the Rules and how they impact their business. What was expected was a melee in the judicial system but what really happened was even better—the Rules prompted a change in the behavior of many parties before they even came to court.

One of the goals of the amendments was to encourage parties to handle their e-discovery struggles outside the courts where they belong before the issues turn into a true dispute. Many in the industry were just waiting for attorneys to appear in court unprepared only to be pounced upon by judges ready to make an example of them. And although judges are still seeing parties come to court unprepared to discuss discovery issues and further unprepared for the changes in technology that lie ahead, we aren't seeing many reported cases of heavy sanctions. This suggests that the rules are having their proposed effect.

Of course there have been some significant exceptions resulting in sanctions and adverse rulings, but the amendments to the Federal Rules have prompted many in the industry—both law firms and corporate legal departments—to take steps to get up to speed on the critical issues and begin to apply the spirit of the Rules to their practice.

Meet and Confer. First and foremost, corporations must get organized and make sure they are prepared for the Rule 26(f) conference and for properly producing information. The courts are requiring that parties come to court prepared to disclose what they have and to work with their adversaries on these issues. When parties come to the table without an agreement, courts are sending them back to “work it out.”

Acting reasonably and in good faith is the standard; parties that cannot or are not willing to do either are the ones that are still getting into trouble. The proliferation of CLEs, case summary alerts, and other educational programs has no doubt helped in that regard, so staying on top of the e-discovery issues can be a key strategy for long-term success.

E-Discovery as Enterprise Endeavor. Because preparing for e-discovery can be overwhelming, the issues of information management and litigation readiness have moved up the corporate hierarchy as companies see e-discovery as the end-game of an enterprise approach. E-discovery, is, after all, document management and it should be treated as such.

Depending on the corporation, the costs of organizing information for e-discovery can be substantial, so getting the C-level involved is crucial for knowledge sharing, budget and implementation. Corporations that

have started to look at information for what it is—a business asset—and manage the lifecycle of that asset in a meaningful way, achieve better business practices throughout the process.

For corporations that are constantly in litigation, a proactive archiving and/or repository system allows for better organization and more efficiencies when certain information has to be culled for litigation or regulatory review. In the repository model, information is collected once, processed once, and reviewed once. This not only costs less, but leads to less business interruption.

A repository or other solution cannot work in a vacuum, however. These systems must be coordinated with other business units and programs in a unified way. Corporations involved in this type of coordination are definitely ahead of the game.

Relationships Between In-House and Outside Counsel. One of the more unfortunate trends in e-discovery is the dramatic shift in the relationship between in-house and outside counsel. Although it didn't start with the Qualcomm case, the deterioration in relations between counsel exemplified by that case is a disturbing trend.

Under Federal Rule of Civil Procedure 26(g), an attorney or party must certify that disclosures and discovery have been produced after reasonable inquiry. Sanctions for violating this provision are mandatory. While the focus of the rule is reasonableness, one could argue that e-discovery requires a heightened investigation because information is stored—literally—everywhere.

This means that both in-house and outside counsel are responsible for making sure their obligations are met and if either side does not have the requisite expertise, they need to put their differences aside and ask for help. Success in this area can only be achieved when counsel remember that they are all on the same team.

It also used to be that discovery crossed all subject matter areas; an antitrust lawyer was just as qualified as an environmental lawyer to handle the discovery part of a case. Not anymore. This is reflected in the industry too. Over one-third of the AmLaw 100 firms have e-discovery practice groups. Firms that do not have this expertise have found themselves losing business as corporations look to consolidate their discovery efforts across cases with “national discovery counsel.”

These firms leverage their expertise and best practices to make the discovery process more efficient for them and their clients. But even those firms with practice groups in this area know that they cannot do it all and many choose to seek outside consultants to help with e-discovery so that they can focus on the legal aspects of the case.

Law firms must still, however, have someone at the firm responsible for an overall discovery strategy which requires comprehending the intersection between law and technology, knowing the right questions to ask, and understanding when it is time to seek outside advice. While there are those firms that would rather adhere solely to their substantive areas of law and not play in the e-discovery space, they would be wise to seek outside consultants if they do find themselves handling a large e-discovery matter.

Just as e-discovery has become an enterprise venture, it has also become a risk and compliance endeavor, and many corporations would be wise to treat it as such.

Outsourcing and Managed Review. Outsourcing is not new; corporations have always outsourced their legal work when they have not been able to handle it in-house. But due mostly to costs, corporations and some law firms are increasingly outsourcing some of the more traditional law firm duties. Outsourcing can be a great way for firms to offer specialized services that they may not have or would prefer not to provide. This allows firms to focus on other substantive issues of the case.

For example, some firms have made a decision to outsource all data collection as they just don't want to take on the responsibility of inadequate retrieval and the potentially subsequent need to testify. Others prefer to outsource data hosting to a third party that can provide high volume capacity and industry-specific security.

The area of review is where we have seen most of the outsourcing movement in e-discovery. E-discovery service providers are teaming up with staffing firms in unprecedented ways to provide unique pricing models and managed review. Staffing firms are able to leverage quality reviewer teams that are trained on one or more review platforms so there is no learning curve and those savings are passed on to the client.

Whether reviews are handled abroad, in places like India or the Philippines, or in more cost-effective U.S. locales, outsourced review will continue to grow in the coming years due to the sheer volume of information that businesses are creating. Although there may come a day when review will be entirely automated, due to concerns about privileged and confidential data and the overall expense of these nascent technologies, we are not quite there yet. Law firms that have traditionally relied on document collection, hosting, and review as a cornerstone of their business are going to have to become much more flexible and nimble as their clients continue to mandate outsourcing.

The Struggle for Preservation. One area that has not advanced over the past few years is the struggle corporations face with respect to preservation. While we have some direction from *Zubulake*, *Cache La Poudre Feeds*, *Treppel v. Biovail*, and the Sedona Conference, there still are not—and may never be—any bright lines with respect to what “triggers” the legal hold.

Some have advocated (and rightly so) for the emergence of a new standard: that legal holds must be judged under the proportionality standard of Federal Rule 26(b)(2)(C). Currently, legal holds are judged in hindsight according to what is reasonable, yet there is no clear opinion on what that means.

We have seen some advances in technology that can help manage and monitor legal holds but a reliance solely on technology does not go far enough. The stakes are too high. Just as e-discovery has become an enterprise venture, it has also become a risk and compliance endeavor, and many corporations would be wise to treat it as such.

Global E-Discovery and Privacy. Lastly, but certainly not finally, e-discovery has been traveling overseas to Europe, Asia, Australia and beyond, where data protection and privacy laws often conflict with our liberal discovery principles. And it has also traveled to India, where outsourcing has become popular, if not a little risky due to ethical considerations and concerns about data security. Nevertheless, the trend towards global e-discovery is only just now emerging. And as our world economy expands, so will complicated international issues.

Moreover, the focus on privacy abroad has also shone a light onto our own disconnected set of privacy laws here in the U.S., and we will see more attention paid to the connection between data privacy and data security, as corporations demand more secure data hosting from their outside counsel and service providers.

Where We've Been; Where We're Going. While many of these issues are still developing, one thing is certain: we have come a long way in a very short period of time. Only five short years ago the first *Zubulake* opinion was published, when many of us didn't even know what e-discovery was.

In that time we have seen dramatic changes in the way law, technology, and business interact. We are excited to explore these issues, to share more of our experiences in this column and at our conference in September, and to see what else is around the corner in the months ahead.