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Helping lawyers sort through e-discovery

Searching for a needle in a stack of needles

BY KELLY HARRIS
Law Times

The lawyers for two mid-sized companies enter into discovery on a claim, one side asks for relevant documents in both paper and electronic form. They include every e-mail, Word files, the contents of every laptop, web mail, and memory stick, cataloged and ready to read.

There are data tapes, desktop computers with 80-gigabyte hard drives, backup CDs, enough paper to climb the CN Tower and back, all to find the five to 200 relevant pieces of information to the claim. Threats of e-discovery can leave all sides of a case to scratch their heads, bullied to settle or spend an eternity reading everything from that great meatball recipe from the potluck to LOL messages to business plans and everything in-between.

Searching for a piece of evidence germane to a case can be like searching for a needle in a stack of needles, and completely derail any chance of finding justice. This has prompted the rise of a techno-savvy cottage industry seeking to help lawyers sort through the often massive undertakings.

"One party is asking the other party to go through this huge e-discovery exercise, collect every-

thing, review everything," says Susan Wortzman of Wortzman Nickle Professional Corp. "It's extremely expensive, it's almost holding it over their heads, 'You got to go through this exercise, you got to pay thousands of dollars, why don't you just settle the claim?' There is that threat of expense of e-discovery in some cases."

Susan Nickle, the other half of Wortzman Nickle, will be a panelist discussing record management at the inaugural Canadian Law and Technology Forum to be held Nov. 17 to 18 at the Metro Toronto Convention Centre.

The Wortzman Nickle Professional Corp. was created with the idea that they could help in-house counsel, but what they found were private firms struggling with the task of dealing with massive amounts of correspondence through e-discovery.

"We are being retained by law firms to bring us in to assist at the discovery stage to manage the e-discovery portion, our entire practice is focused on that," Wortzman says.

She adds that just 15 years ago discovery often meant only a box or two of information. Today with the massive amounts of potential evidence lawyers can spend months, even years, sorting out what is important



Susan Nickle, left, and Susan Wortzman of Wortzman Nickle Professional Corp. are retained by law firms to assist at the discovery stage to manage the e-discovery portion.



and what isn't.

In the story "Whittling Down the Haystack," in the October edition of *Canadian Lawyer In-House* magazine, Lloyd Rosler, the Toronto-based vice president of e-discovery services at KPMG Forensic, a subsidiary of KPMG LLP, said long gone are the days of boxes of paper files.

"When two sides are litigating and they're asked to present documents, 98 per cent of documents today are electronic," Rosler says. "It used to be you'd hand over 20 boxes [of paper], but now it's much more sophisticated and

complicated, and the amount of data is tremendous."

Wortzman Nickle works proactively on record management, to provide legal advice to organizations in planning for future litigation.

This can mean helping organizations with record management, setting up systems that comply with e-discovery and corporate obligations, and assisting in drafting plans for proper document retention.

When working with law firms, Wortzman Nickle uses electronic tools to narrow down the key

problem of e-discovery — volume. A company employing 20,000 people can see as many as two million e-mails a day pass through its server. Simply pairing the information down from a terabyte to a gigabyte may not be enough. And the volume problem becomes a legal strategy to seek a settlement.

Wortzman says before lawyers are faced with this issue they should have a proper game plan in place. By mapping out and agreeing to the ground rules early, lawyers can avoid the difficulties of dealing with an overwhelming amount of information.

"Preparation work, if that's in place you can really mitigate time and cost, whether you are in arbitration or litigation," Nickle says.

Of course if that doesn't work, or arrangements were not made in advance, Wortzman has a couple of suggestions.

"We are really advising clients to say if you feel you are being pushed to produce so much paper that is marginally relevant to the case what you should be doing is asking the court to shift a portion of those costs to the other party, then all of a sudden everyone seems quite reasonable," Wortzman says.

"If you say to the other party, if you want us to produce every-

thing it's going to take two years and . . . it's going to cost \$1.5 million and it's going to be this huge process and we are happy to do that, but we want you to pay 50 per cent.

"Suddenly the other side becomes very reasonable, comes to the table, and all of the sudden there is a real discussion, negotiation of what is relevant."

One other key is adhering to the guidelines set out through the Sedona Canada Principles on e-discovery. According to their web site, Sedona Canada seeks to create forward-looking principles and best practices recommendations for lawyers, courts, businesses, and others who regularly confront e-discovery issues in Canada.

The first meeting of the e-discovery working group was in May 2006 and earlier this year, they produced the Sedona Canada Principles in both English and French. The principles lay out the guidelines for e-discovery, including the acceptance that electronically stored information is discoverable and what cost obligations are on both parties.

Arbitration has traditionally been thought of as a way to expedite claims and avoid the need for trial. E-discovery is changing all of that by injecting massive amounts of undertakings and bogging down the process, sometimes grinding it to a halt, leaving claimants and respondents to ask, why not go to court?

Tom Aldrich, senior consultant to the International Institute for Conflict Prevention and Resolution and the former chief litigation counsel for Baxter Health Care in Deerfield, Ill., says that e-discovery has become a tool to break claims, rather than settle them. He says the undertakings become "a battle of wills between attorneys, bring to a standstill the process and it is used as a threat.

"It's virtually emasculated the advantages which arbitration has historically had over litigation," Aldrich says. "In the U.S.,

and we are beginning to see it in Europe as well, corporate defendants and plaintiffs are saying, 'If we are going to have to do all this we might as well be in court.'"

The conflict prevention and resolution centre is looking to do for arbitration what the Sedona Principles hope to achieve in Canada. The idea is to create rules and guidelines to remove e-discovery as a threat and come to an agreement before the start of arbitration so not to bog down the process.

"What the CPR is trying to do, through both our arbitration committee and our e-discovery committee, is to put some rationale back into the process," Aldrich says. "By putting some

rules in place, some guidelines in place that can enable the parties and the arbitrators to access in advance what is important and what is not, and see if we can eliminate the gamesmanship from the process and get back to using arbitration for its historical advantage.

"Where again it is quicker, again it is cheaper, and we balance the needs of the parties for that information with the tremendous burden in terms of time, in terms of cost, to try and achieve a better result."

In 1996, Supreme Court of Canada Justice Rosalie Abella made the observation that, "with all these profound changes in how we travel, live, govern, and think, none of which would

have been possible without fundamental experimentation and reform, we still conduct trial almost exactly the same way we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?"

The remarks have been somewhat of a rallying cry for innovation in Canadian courtrooms and justice systems and cited by justice reform working groups as part of a need for innovation in Canada's legal processes. Managing those changes have been something that Abella's contemporaries are now charged with, and Nickle allows that many of

those on the bench have taken their role in stride.

"There are certainly some judges that are leading the charge to get other members of the judiciary and counsel to be more cognizant of e-discovery issues," Nickle says. "There are some real leaders in the judiciary in that regard."

Wortzman allows that, "some of the judges are amazingly techno-savvy and the courtrooms are amazingly techno-savvy and in other cases there is a real learning curve for counsel and the bench for how to manage electronic evidence."

As a result, continuing legal education programs on e-discovery are popping up across Canada, Nickle says. **LT**

Sedona Canada Principles in both languages

In 2006, a group of lawyers, judges, and technology experts met to discuss e-discovery as part of the Sedona Conference working group on e-discovery. They produced a set of principles and gauged feedback from the legal profession. Earlier this year Sedona Canada produced a list of principles on e-discovery in both English and French. The following is taken from that document. The complete document can be found at www.thesedonaconference.org.

Principle 1: Electronically stored information is discoverable.

Principle 2: In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account:

- (i) The nature and scope of the litigation, including the importance and complexity of the issues, interest, and amounts at stake;
- (ii) The relevance of the available electronically stored information;
- (iii) Its importance to the court's adjudication in a given case; and
- (iv) The costs, burden, and delay that may be imposed on the parties to deal with electronically stored information.

Principle 3: As soon as litigation is reasonably anticipated, parties must consider their obligation to take reasonable and good faith steps to preserve potentially relevant electronically stored information.

Principle 4: Counsel and parties should meet and confer as soon as practicable, and on an ongoing basis, regarding the identification, preservation, collection, review, and production of electronically stored information.

Principle 5: The parties should be prepared to produce relevant electronically stored information that is reasonably accessible in terms of cost and burden.

Principle 6: A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search

for or collect deleted or residual electronically stored information.

Principle 7: A party may satisfy its obligation to preserve, collect, review, and produce electronically stored information in good faith by using electronic tools and processes such as data sampling, searching, or by using selection criteria to collect potentially relevant electronically stored information.

Principle 8: Parties should agree as early as possible in the litigation process on the format in which electronically stored information will be produced. Parties should also agree on the format, content, and organization of information to be exchanged in any required list of documents as part of the discovery process.

Principle 9: During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets, and other confidential information relating to the production of electronic documents and data.

Principle 10: During the discovery process, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

Principle 11: Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review, or produce electronically stored information. The party in default may avoid sanctions if it demonstrates the failure was not intentional or reckless.

Principle 12: The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

— Kelly Harris