

E-Discovery Issues Heating Up On A Global Basis

The Editor interviews *Mary Mack*, Corporate Technology Counsel, Fios Inc.

Editor: Why are international issues around e-discovery becoming such a hot issue?

Mack: Globalization is resulting in the long tentacles of the American courts reaching across the world. As a result, both foreign companies and the courts are paying attention to electronic discovery. For example, England, Australia and Canada have promulgated new rules around electronic discovery. Just like when the 2006 amendments to the Federal Rules of Civil Procedure went into effect in the U.S., the new foreign rules around electronic discovery are accelerating actions that need to be taken. In the European Union (EU), we are beginning to see expanded enforcement in the antitrust area and insider trading activities. It's difficult to do this without electronic discovery. Similarly, in product liability or patent litigation, one product can have components from 25 different countries with design, marketing and other critical evidence located across the world. It is challenging to navigate and manage e-discovery when you have parent companies based overseas or U.S.-based companies with foreign subsidiaries. More and more companies with global operations are finding themselves enmeshed in e-discovery that requires a greater understanding of the issues and laws from a global perspective.

Editor: How does e-discovery in the U.S. compare to e-discovery in foreign jurisdictions?

Mack: It is different in a fundamental way. The U.S. has the most liberal discovery procedures and customs in general. Other countries are much more parsimonious about what is discoverable and whether or not there is pre-trial discovery. The biggest contrast would be regarding email. In the United States, it would be a rare person who would believe his or her emails were private. In many other countries, emails are treated as private, and they may indeed be protected by law. The British call electronic discovery "e-disclosure."

Editor: What about the differences in privacy laws?

Mack: Privacy laws abroad are much stricter than here in the U.S. In the EU, there is the EU Data Protection Directive (Data Directive) that establishes the regulatory framework for personal data. Laws adopted in accordance with the Data Directive vary, so each EU country has its own privacy twists. EU law treats privacy as a fundamental right, whereas, in the United States, we do not have strict privacy laws. We tend to look to the courts to enforce privacy, and the U.S. Supreme Court has not definitively carved out the level of privacy the Europeans take for granted.

In one recent case, a French bank, Société Générale, was loath to look at



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the email of their trader Jérôme Kerviel. Even though he was about to bring down the whole company, they were still afraid of the French privacy laws. That is the big difference between the U.S. and EU countries. In the United States, there is the underlying assumption that just about anything can and should be produced when requested in electronic discovery.

Editor: Is a foreign company or an overseas subsidiary of a U.S. company subject to e-discovery by a U.S. court?

Mack: Yes. There is still very little case law about how U.S. judges should treat foreign parties who fail to produce. In *Enron v. J.P. Morgan*, the court held that a possible violation of the French blocking statute did not prevent e-discovery. The blocking statutes are enacted, in part, by countries with a purpose of thwarting U.S. discovery obligations. The U.S. courts aren't as comfortable with blocking statutes as they might be with privacy statutes and disclosures of state secrets.

U.S. judges tend to take the position that if evidence is in a party's custody or control, then it can be produced unless the party has offered a very compelling reason why it should not be. The courts have sometimes used fairness (comity) as a balancing test. If the foreign party doesn't have to produce, the U.S. party should not have to. If the foreign party is unwilling to produce because it may be criminally prosecuted in its home country, a court may deem it fair to shift the burden of proof, create an adverse inference or otherwise balance the scales.

As international e-discovery gathers momentum, the Federal Judicial Conference will most likely address the issues around blocking statutes and privacy laws, spelling out rules as it did with respect to electronically stored information (ESI) that is not reasonably accessible or procedures around privileged material. Some safe harbor protections would be welcome as well.

Editor: Are there any efforts being made by organizations, like the Lawyers for Civil Justice, that are

seeking to level the litigation playing field for American companies?

Mack: The Sedona Conference has working groups around international issues. They have a specific one for Canada (Working Group 7). They are examining the issues generally from a global perspective (Working Group 6). Carole Basri, my co-editor of the treatise, *eDiscovery for Corporate Counsel*, published by Thomson Reuters, and I are speaking at the ABA Section on International Law in Brussels in September. The New York State Bar is also taking its international committee over to Stockholm. This will continue the nascent process of global cross-pollination of ideas, concerns and solutions.

There are also initiatives taking place in London and Canada around e-disclosure. A global community of people are educating themselves, much like the U.S. attorneys and judges did in the years running up to the 2006 FRCP amendments. More has been done in the UK and Canada than elsewhere outside the U.S., but the processes and procedures are much more mature in the U.S. The Lawyers for Civil Justice will undoubtedly weigh in.

I continue to think that e-discovery originating elsewhere in the world will not be as burdensome as it is in the U.S. The U.S. has always been more liberal in terms of discovery, even when we were just dealing with paper. Blocking statutes and privacy laws will continue to play a role.

Editor: Are there best practices global companies should be considering in order to be in compliance with U.S. e-discovery laws?

Mack: Global companies need to understand their risk exposure driven by the types of litigation giving rise to e-discovery requests and the ESI they may be compelled to produce, particularly email. If the risk is high, then the assessment moves to what their current policies, practices and resources support well and what needs revising or augmenting. The short list of best practices includes:

1. Assess the organization's risk profile and current policies, practices and resources;
2. Educate, cross-functionally and internationally, the following areas: risk management, compliance, information governance, the attorneys, litigation support, IT and records management;
3. Make sure the content map and discovery response plan take into account the international aspects;
4. Make sure the technology acquisition, information governance, compliance and risk management functions incorporate the international e-discovery compliance requirements;
5. Assess and engage the appropriate law firms and service providers that possess the legal, technical and cultural understanding of international e-discovery best practices before they are needed (providers should be "Safe Harbor Certified").

Editor: Are there technologies or services being developed that will help address the complex international e-discovery issues?

Mack: Yes. Technology continues to advance to help address international e-discovery issues, particularly in the areas of identification, legal hold management, preservation, search and review. Here at Fios, we have a readiness consulting service called ESI Content Mapping to help identify, map and track how potentially relevant ESI is stored, retained and disposed of during the regular course of business. For example, a company's payroll data is stored in New Jersey, its U.S. email is stored in New York and Georgia, and its extra-territorial email is located in Ireland and Japan. Each storage location is managed with different retention and data privacy policies. Understanding the requirements and storage locations governing this ESI is critical when discovery is initiated.

With an ESI Content Map, this information is mapped and tracked to the most prevalent legal issues faced by the organization. Your IT and records management staff is able to make storage and preservation decisions that are in line with the organization's legal compliance requirements. Privacy laws and accessibility can be proactively incorporated into this process. This is critical because, under the FRCP in the U.S., 99 days does not give you a whole lot of time to prepare for a "meet and confer" discovery conference. The unprepared company loses its lever to reduce risk and cost.

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Editor: Are there reference sources that would be helpful to our readers who are interested in international e-discovery?

Mack: Fios' webcasts are a good source. My book, *A Process of Illumination: The Practical Guide to Electronic Discovery*, which was just updated and re-released in July, offers a basic overview of the e-discovery process. The Sedona Conference is another great source of information (www.sedonaconference.org). The Thomson Reuters treatise that Carole and I have stewarded covers the international aspect from a corporate counsel perspective in Chapter 20. Information on all of these can be found on Fios' website at www.fiosinc.com.

Please email the interviewee at mmack@fiosinc.com with questions about this interview.

Her blog is soundevidence.discoveryresources.org.