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BOOK REVIEW
THE BRAVE NEW WORLD OF ELECTRONIC DISCOVERY

A review of Electronic Discovery: Law and Practice
by Adam I. Cohen and David J. Lender
(Looseleaf) (Aspen Publishers, 2004)

Hon. John M. Facciola 1

[1] A young claims examiner who works for an insurance company is bored to tears. She can get access to the Internet through the computer on her desk, and she travels to her own email account. She has 200 of her closest friends on her "buddy" list, meaning that with a single key stroke she can send an email to all 200 of them. So she does and writes the following email to all of her buddies:

God, this job is boring. Right now, I am working on some rich doctor's case. He says he is disabled but the bosses tell us that we pay for three years and then find some reason not to pay. So I am looking for a reason not to pay this guy. It doesn't matter what I find. We'll stop paying and let him sue us. See you all soon. Isn't Britney Spears a hoot?

[2] Unbeknownst to our bored friend, one of her intimate buddies is a young lawyer. The lawyer's firm has just been retained by the doctor who is disabled because the doctor fears that his insurance company is hunting for a reason to stop paying him. The lawyer realizes that our friendly claims examiner is referring to her client. She also realizes that her firm may have a basis to start a class action of all this company's insureds who have had their entitlements challenged by this insurance company.

[3] Because the information systems within this insurance company are electronic, counsel for the doctor and the insurance company have walked through a door into cyberspace. Suddenly, they confront questions that did not even exist a few short years ago.

[4] For example, the information within a computer is dynamic and ever changing as the new version of a document replaces the older version. Paradoxically, the authors of the two versions may be unaware that the computer is saving what they think they are deleting because, rather than deleting it, the computer is simply moving the earlier version to another place within its memory. Thus, the authors have literally lost control of how long the information they created will live because a search engine can easily find what the two authors thought they had deleted.

[5] Indeed, they are probably unaware that a backup system may also be capturing what they thought they had deleted. Thus, the "delete" key on their computers is lying. Knowing this- and to keep from being overwhelmed by its own information- the insurance company may take specific acts to undo the computer's mindless retention of everything. It may electronically scrub the computer's memory to obliterate its contents. Can the insurance company continue to "scrub" without consequence? Does the doctor's lawyer immediately demand that the insurance company stop the scrubbing? How does one define what portion of the insurance company's network must be preserved?

[6] If a lawsuit starts, does the nature of the computer's retention of information in itself require a re-definition of what will be produced during discovery? Can the doctor demand that the information about how this insurance company has dealt with claims similar to his be produced in machine readable form? Can he insist that the insurance company's network hard drives be searched to see if particular words appear in them in some combination or order when that search is infinitely faster and more accurate than wading through the documents his opponent gives him in discovery? Assume that the data he needs are not instantly accessible but may be located by searching backup tapes or other repositories of information such as zip drives, CD-ROM's, or DVD's, but that the search of these devices is not something the insurance company ordinarily does. Can the doctor demand that these devices be searched? Can the insurance company demand that the doctor pay the cost of the search?

[7] This brave new world, that has such problems in it, is the world in which judges and lawyers must now live. Their unfamiliarity with this seemingly hostile environment is first cultural. Lawyers and judges are creatures of the book and the pen. Lawyers must sight read at a ferocious pace, and Dean Prosser got it right: in their lifetimes, lawyers write more than any novelist.2 It seems alien and strange to people trained in the glory of the word that the application of concepts like "metadata" or "residual" data, that focus on where information is rather than its content, defines and decides legal controversies. Indeed, the computer's electronic transmittal and retention of information are so different from the retention and transmittal of pieces of paper that it makes the law's focus on the authenticity, genuineness, and admissibility of pieces of paper seem quaint. What do notions of "authenticity", "best evidence", and "hearsay" have to do with network servers that retain gigabytes of data and transmit their contents from Tokyo to New York with a keystroke? The evidentiary and discovery concepts that we have used for centuries speak to the creation and retention of a perishable piece of paper. Using them to define the legal controversies that erupt because of the use of computers is like trying to rap to Mozart.

[8] The pace of technological change is also frightening. The PDA's and Blackberrys in our pockets and purses have more memory than the computers we bought a few years ago. It can be said that one of the greatest fears of most Americans is that their next technological purchase will be outdated as they carry it from the cashier to their cars. Lawyers and judges understandably fear that the principles they derive to apply to today's controversies will be so quickly overcome by technological change that they are writing on sand and that those principles are ephemeral. It was not that long ago when there was a serious controversy over whether the White House could be forced to maintain backup tapes of email traffic under a statute requiring the preservation of presidential records.3 Would any historian worthy of the name write a history of our involvement in Iraq without analyzing the e-mail traffic among Executive Branch officials?

[9] Fortunately, there is a little light at the end of this dark technological tunnel. It is the publication of an excellent book by Adam I. Cohen and David J. Lender, entitled "Electronic Discovery: Law and Practice". Rather than discuss the unique problems created by the emergence of electronic information in the footnotes of a book about evidence or civil procedure, the authors insist that the courts' struggling with the flow of electronic information is worthy of independent analysis. They therefore provide a treatise that thoughtfully deals with each of the topics that has arisen in the cases and academic literature dealing with electronic information.

[10] They start with an explanation of how the computer's ability to preserve mountains of information requires counsel to demand its preservation or consider the obligation to preserve it as soon as litigation that may call for its production can be "reasonably anticipated". The authors then turn to the problems that arise when electronic information is not preserved despite an order to the contrary or the reasonable anticipation of litigation. Given this problem, called "spoliation", the authors then discuss the significance of a client's adoption of a policy regulating the retention and destruction of electronic information and whether such a policy will shield the client from the consequences of the destruction of electronic information.

[11] If the information is preserved, lawyers and judges have to grapple with its discovery and whether the costs of retrieval can be shifted from the producing party to the requesting party. The authors survey how courts have derived sophisticated principles of cost sharing and allocation without specific guidance from the Federal Rules of Civil Procedure. They also deal with the privilege issues that arise when, for example, counsel decides to permit opposing counsel access to electronic files but the client cannot possibly afford to have the lawyer review every file to determine if it contains privileged material. Other sections deal with whether an entire hard drive can be inspected by an opponent, incident to discovery, and how the work-product privilege applies when counsel creates a computerized litigation support system to try a case.

[12] In each area, the authors provide a study of how various legal problems flow from the technology and then survey the developing case law that resolves them. This is no mere listing of decisions but a valiant effort to understand how the courts have dealt with these issues and which decisions are most likely to be authoritative because of their reasonableness and comprehension of the realities the new technology creates.

[13] A particularly valuable section of the book, Chapter 9, is written by Virginia Llewellyn, who works for a company that provides electronic discovery services to lawyers. She describes the technology of using the computer to organize discovery in prose that is blessedly free of jargon. She points out that the effective use of the computer to gather and organize information, pursuant to a well thought-out plan, can save counsel great amounts of time and money. Electronic discovery is therefore a blessing, not a curse. Every lawyer and judge ever born has spent a good chunk of his or her life wading through a haystack of paper to find the needle of a relevant document. Ms. Llewellyn's point is that there is every reason to believe that the computer will achieve for these lawyers and judges the same gains in productivity that it has achieved in other parts of the economy by making the search for information better designed and more expeditious. Her well-supported argument should calm those lawyers who, confronted with the an electronic discovery problem, have a look in their eyes that is worthy of a deer looking into headlights.

[14] The book also nicely combines legal analysis with practical information. In it, the lawyer will find everything from a sample letter to opposing counsel, requesting the preservation of electronic information, to document requests shaped for electronic information, to questions to ask during the deposition of the opponent's system administrator so that the lawyer can effectively probe how her opponent actually creates and preserves its electronic information. Finally, the authors address how developments in the criminal arena and how the government's system of maintaining its electronic records may impact our notion of privacy in the creating of electronic information. They cannot be fairly accused of going too far afield. We can hope that the law pertaining to the discovery of electronic

information will develop not in a vacuum but in consonance with our society's attempt to take advantage of all the technology promises without surrendering the precious right to keep one's thoughts to oneself, even though it seems quaint in our society of spam and hacking to demand the right to be left alone, free from the voracious demands of others to get our attention and invade our thoughts.

[15] Perhaps the best news is that the book is in loose-leaf form, permitting us to hope that the authors have obligated themselves to keep readers promptly advised of developments in what has to be the most quickly developing area of the law. While I am afraid that means the authors won't get much sleep, the rest of us will. Thanks to them, we finally have an exceptional place to start our research and our thinking about the complicated issues we have created by the use of computers. Indeed, their comprehensive and well-organized analysis, combined with their practical and sage advice, is so useful that it would be foolish to start anywhere else.

1. United States Magistrate Judge, United States District Court for the District of Columbia.

2. William L. Prosser, English as She is Wrote, 7 J. Legal Ed. 155, 156 (1954).

3. Armstrong v. Bush, 924 F.2d 282 (D.C. Cir. 1991).