I. Introduction

A. The lawyer's perspective

This paper does not contain a technical discussion of either technology or the law. Rather, it is written from the perspective of a lawyer and of a law firm that has acknowledged the legal obligation to disclose electronic documents on one hand, has acknowledged the limitations of its conventional litigation resources on the other, and has attempted to close the gap between the two. That work is in progress. Set out below are some of the lessons learned along the way.

B. Sooner or later, e-discovery must be tackled

There is a gap between the obligation to disclose electronic documents and the ability to comply with that obligation. The gap may vary from case to case and across classes of litigation. It is today a costly and challenging problem in certain types of complex commercial litigation. As the use of electronic communication in all aspects of everyday life grows each day, the impact on the practice of law will surely grow with it. If electronic discovery has not yet become significant to a motor vehicle accident claim, it soon will be. Eventually, lawyers and the firms who practice virtually every type of litigation will be faced with the challenges of discovery of electronic documents.

C. Bridging the gap

The challenge of achieving discovery of electronic documents brings with it a host of practical issues, issues that can addressed by:

1. coming to an understanding the nature, if not the detail, of electronic documents;
2. acknowledging that the nature of electronic communication must be accounted for in document discovery;
3. identifying the parties who have a stake in the process of disclosure and identifying the interests of each; and
4. committing the necessary financial, physical and human resources required to solve the problem.

Beyond achieving compliance with the legal disclosure obligation, there is a further benefit inherent in the solution; it will provide a tool that can be used proactively to advance the interests of clients.
II. Do not start from scratch

It appears that the full impact of the challenge of electronic discovery has been slower to reach this jurisdiction than others. We have much to learn from other jurisdictions, the American and British systems being the most convenient and pertinent. There are a number of sources to turn to for guidance. Much has been written, and there will always be somebody who will explain it to you for a fee. Two publications that provide for helpful overviews are: *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (July 2005 Version), The Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production (see this and other publications by the Sedona Conference, *A Process of Illumination: The Practical Guide to Electronic Discovery*, Mack, M. and Deniston, M. Discovery Centre for Excellence, 2004

III. Understanding the nature of electronic documents

A. Communication for human consumption

In order to narrow this discussion, this paper focuses on discovery of electronic communications (“documents”) created for the purpose of personal communication, that is, for communication between human beings. This can be contrasted with what must be a vast amount of electronic communication (much of it carried on the same systems that carry email, web traffic and telephony) between machinery. With that distinction in mind, it is the difference between paper and electronic documents that lawyers should understand.

B. Digital communication

To achieve electronic communication, information—be it a series words in a conventional language, a series of numbers, or an image—is translated through the use of a code into a mathematical language, a series of ones and zeros. It is then transmitted electronically, and very likely stored at both ends of the transmission. On receipt, or after being recalled from electronic storage, the information is translated back again. In this sense, modern electronic communication is analogous to the telegraph system, but with a far greater capacity.

The differences between paper and electronic documents have been described in this way by the Sedona Group (at pages 4-6):

1. "Volume and duplicability"

There are far more electronic documents than paper documents, and they can be created, and duplicated, over and over again, far more easily. The truth of this is demonstrated in virtually any e-mail in-basket.

2. "Persistence"

The existence of a paper document is dependent almost entirely on the physical integrity and location of the piece of paper. As a practical matter,
they can be destroyed or lost, and often are. In contrast, electronic documents generally remain in existence even after the "delete" button is hit, and can be difficult to get rid of.

3. "Dynamic, changeable content"

Electronic documents can be created to allow the content to be changed over time, often automatically. For example, systems that monitor the performance of machinery can automatically generate 'real-time' reports. The "Arrivals" and "Departures" screens at every airport are another example.

4. Metadata

Metadata is described by the Sedona Group as "... information about the document or file that is recorded by the computer to assist the computer and often the user in storing and retrieving the file at a later date ..." (at 5). From the lawyer's perspective, the significance is that electronic documents contain a great deal of information in addition to the primary communication that was translated into digital format for transmission or storage. That information may or may not have to be disclosed in the course of discovery, but it exists.

5. "Environment-dependence and obsolescence"

A search of a hard-drive may turn up a data file generated by a database program containing a series of numbers. However, the information contained in that series of numbers is lost until they are placed back into the proper context, the 'environment,' of the database program. 'Obsolescence' is a related concept. Computer programs become obsolete and are replaced, which can make it difficult to recreate the context within which old data can be viewed with meaning.

6. "Dispersion and searchability"

The physical existence of paper documents tends to limit their movement. It also means that they have to be stored in a physical location, often in an organized way. As a result, a party searching for a document for the purpose of discovery can usually identify a finite number of locations, conduct a physical search and say with confidence the resulting disclosure is complete. In contrast, electronic documents can be copied and delivered to many places instantaneously and with great ease. Potentially, a document will exist in many places—servers, local hard-drives, back-up tapes, hand-held devices, etc.—simultaneously.

IV. The parties

A. The client

It is the client involved in litigation who must meet the legal obligation to disclose electronic documents, but who practically speaking cannot do it alone. Clients must look to their lawyers to ensure that the obligations are identified and then complied with. At the same time, the client's self-interest lies in achieving results while minimizing cost, direct and indirect.
B. The lawyers and their firms

Proper, complete discovery of electronic documents cannot be achieved unless and until the lawyers acting for parties in litigation, and the firms those lawyers work in, have come to terms with the challenge. They must acknowledge that ediscovery can present a significant challenge, that it must be met, and that the resources necessary to meet the challenge—time, personnel and money—must be committed to do so.

C. The adverse party

The adverse party has an interest in receiving complete disclosure of electronic documents in a manner that allows it to satisfy itself that the client has met its obligations.

D. The court

The court is concerned with ensuring that the course of justice is served in the process of discovery of electronic documents. Ultimately, a party can only be certain that it has met its obligations when a court says "yes."

E. The tech people

Electronic documents are stored electronically. In order to meet the obligation to disclose those documents, they have to be found and manipulated electronically. Inevitably, technical expertise will be required.

V. The resources required

A. Conventional resources will not suffice

Electronic documents are found in complex electronic systems. Those systems can be reliably searched, and documents found and 'captured' for disclosure, only with electronic tools—both hardware and software—in the hands of people who collectively understand all of the elements. Conventionally trained lawyers and staff are not necessarily equipped to do this. Further resources are going to be required.

B. Acknowledge the challenge and make the commitment to meet it

The first step to meeting the challenge is to acknowledge that it is there to be met. In a large law firm, gaining acknowledgement can be a lawyer-by-lawyer, paralegal-by-paralegal exercise. Some practice areas have not yet seen the early warning signs. For some lawyers, technology will always remain a black box. For others, the financial cost is the concern.

C. Build the team

1. Hire a consultant

The challenge of electronic discovery is not new. Other jurisdictions have
faced this issue, and we have much to learn from them. An efficient way to gain that benefit is through the use of consultants.

2. Hire or train a Litigation Support Project Manager/Coordinator

ediscovery can be a big job. In practice, the ediscovery process crosses the boundary from legal to technical and back again, moment by moment. There is a place for a specialized, highly motivated paralegal, somebody with knowledge of the expectations of the legal system. Be prepared to pay the salary and the training costs to get the right person in place. Ideally, the Litigation Support Project Manager/Coordinator will be able to communicate effectively with a wide array of people: clients, adverse parties, IT Department personnel, third party service providers, and other personnel within the firm. It is particularly important that the Litigation Support Project Manager/Coordinator be somebody that has the confidence of the lawyers, the lawyers who will be effectively delegating to that person an element of professional judgment. Keep in mind that like all paralegal work, there is an opportunity for a Litigation Support Coordinator to bill for work that might otherwise be done by a lawyer.

3. Get the IT department on side

In considering the role of the firm’s IT Department, two important matters should be kept in mind. First, ediscovery is a demanding technological process. Consequently, the assistance of the IT Department is essential. The appointed IT person is required to communicate internally and, occasionally, with clients and with opposing parties (or their respective IT departments). Interpersonal skills are important, and should be kept in mind in identifying the IT person who will fill the role. The opportunity to communicate with the outside world can make the job that much more interesting for a member of a firm IT Department. Second, eDiscovery is not purely a "back-end" process, and the IT Department must be made to understand this. Avoid a situation where matters of law firm ediscovery practice are determined by IT Department preferences, budgeting and personnel decisions. Set the rules up front, and ensure the Litigation Support Project Manager/Coordinator oversees and signs off on "technical" changes at the back end.

4. Build in-house litigation support capability

The process of converting a collection of electronic documents into a format that can be reviewed, listed and disclosed is a time-consuming and labour intensive process. Third party service providers are often in a better position to deliver this service. At the same time, concerns about confidentiality, speed (for example, the need to provide a short supplemental list of documents on short notice), complexity, and quality assurance and control argue for some in-house capacity. A Litigation Support Project Manager/Coordinator may be able to fill this role, but greater efficiency can be obtained by ensuring that there are a number of people—paralegals, "word pro" personnel, etc.—trained in use of the technology and available on an as-needed basis.

D. Build the technological platform
1. Hardware

This is an area where advice should be obtained. A law firm's in-house IT Department will not necessarily have all of the expertise or the necessary insight into technological trends in ediscovery. Be prepared to spend some money on computer hardware, and then spend some more, at both the 'work-station' and at the 'system' level. The demands for upgrades will come from all those involved, from IT and litigation support personnel, and, importantly, from the lawyers who find they can and will use electronic document tools in a pro-active way.

2. Software

Specialized software is required, yet the obsolescence of the available software is certain. edocument management programs are generally designed with a view to being everything for everybody, yet more than one program will inevitably be required. This too is an area where advice should be obtained and money spent. Do so on the understanding that in the foreseeable future, you may dump it all and start again.

E. Build the electronic document management system

Building a team and putting the technological platform in place will give a law firm the bare tools to assist its clients to meet the obligation to disclose electronic documents. However, the limitations will become apparent at some point. The volume and technological complexity of electronic documents can put a firm on its heels very quickly. The need to become more systematic becomes self-evident.

1. Be systematic

The first step in conquering chaos and becoming efficient is to recognize that a broad-based systematic approach is required.

2. Set firm standards; Put the Litigation Support Project Manager/Coordinator in charge

There are many different ways—variables—by which electronic documentation can be characterized, organized, listed and disclosed. The combinations and permutations of conceivable sets of instructions to litigation support personnel on one hand and your clients on the other are overwhelming. Get some advice, and develop a set of firm standards for handling all aspects of the electronic discovery. Some examples are discussed below. Somebody should be appointed to oversee the creation and maintenance of the firm standards. An obvious candidate is the Litigation Support Project Manager/Coordinator, but legal input will be required going forward.

a. Create a finite list of document characteristics for the document database

Electronic documents are complicated. They have many characteristics, some of which may or may not be relevant—even in the Peruvian Guano sense—in any particular case.
Conventional information such as the "date" of the document is not necessarily straightforward; 'date created,' 'date edited,' 'date sent,' 'date received,' 'date read,' and 'date printed' are all potentially available. In order to keep the process of collecting and organizing electronic documents into a database manageable, some decision must be made about which of the many variables are to be assessed and tabulated. In practice, a finite list can and should be developed first. It can always be refined going forward.

b. Set the nomenclature

Consider the many different descriptions for different document types: "email," "e-email," "E-mail," "fax," "facsimile," "fax cover," "letter," "correspondence," "note," "spreadsheet," "table," etc. The utility of an electronic database of documents can be impaired unless the nomenclature is used deliberately and systematically at each point in the process of collecting, organizing and disclosing electronic documents.

c. Create standards for data presentation for internal use and for disclosure

Once a document database is captured and usefully organized, it can be manipulated for particular use. Standard templates for both printed and electronic representations can be created for both internal review purposes and for the purpose of document disclosure. There is a technical element to the creation of the templates, but input from lawyers is helpful, if not necessary, to ensure both functionality and legal sufficiency of the end product.

d. Create sets of standard instructions and checklists

A number of parties will require assistance or instructions in the process of electronic discovery. A library of standard instructions and checklists can be invaluable. There are a number of players who can benefit.

i. The lawyer

A standard, finite set of instructions and a checklist will be of great assistance to the lawyer who comes asking for assistance when met with an obligation to disclose electronic documents.

ii. The client

Counsel will often provide written instructions to a client explaining the nature of the obligation to disclose documents and providing guidance on the classes of documents that should be collected. A set of standard provisions dealing with electronic document disclosure can be invaluable.

iii. The adversary

The principles of electronic discovery apply equally to the adverse party. A set of standardized terms for inclusions in letters demanding discovery should be prepared.
iv. The litigation support department or third party service provider

Instructions must be given to the people who do the detailed, sometimes tedious work in preparing a document database. Those people will not necessarily have any ability to exercise any judgment. A third party service provider may well be using employees or contractors who should be exercising only a very limited discretion. Experience demonstrates that this is an area where a failure to communicate clearly and precisely can create real problems. The fault often lies with the lawyer giving the instructions. A standard set of instructions with a manageable checklist of options should be prepared. This imposes a certain amount of discipline and precision on the lawyer giving the instructions. It will also tend to standardize the work at the Litigation Support desk and allow the firm to become more efficient.

3. Quality Assurance, Quality Control, and Ensuring Compliance

Ultimately, the lawyer’s job is to ensure that the client meets its legal obligation to disclose documents. That necessarily entails some level of review of the work product before it is sent to the opposing party. Traditionally, the lawyer would manually review the classes of potentially relevant documents, the exercise of locating those documents, the documents actually located, and a draft list. A full manual review is simply not possible in the course of discovery of electronic documents, in part because of their elusive, electronic existence and in part because of the volume. How then does a lawyer assure a client, the adversary, and the court that the obligation has been met?

a. Know your client

In order to successfully find all electronic documents in the possession of the client, it will be necessary to gain a sufficient understanding of its electronic communication system. To achieve this, dialogue may have to occur at several different levels. Examples of the types of information that should be obtained are: identification of electronic communication and storage facilities (internal network, document servers, e-mail systems, extranets, PDA use, web mail, backup facilities, etc.); the rules or practices governing the use of the various parts of the system (e-mail access restrictions, remote access, system backup rules, automatic archiving and deletion, etc.); paper and electronic document retention policies.

b. Understand the tools

Except in the simplest possible cases, there is no practical manual means to ensure compliance. The documents exist in an electronic environment, and in order to locate, copy, organize, search, save and disclose them, electronic tools should be used. To find electronic documents, parts of electronic systems, primarily storage devices, must be searched using computer software akin to web search engines. Like "Google" and the search tools on "QL," instructions must be given to that software to enable it to conduct a search.
c. Stay involved in the process

Skill is required to properly construct a search for documents. The temptation may be to defer the entire process to somebody who is practiced in the use of these electronic search tools. There is a risk in this: see, for example, the discussion in a very recent article by Jason Krause in the April 2006 edition of ABA Journal, at page 24. Some legal input and common sense is required, and the lawyer should stay involved from the very start of the process.

d. Audit the work product

At some point, the firm Litigation Support department or a third party service provider will deliver up a database of electronic documents, ready it seems for internal use and for disclosure. This work product can and should be reviewed by the lawyer and audited with technical assistance.

Review the work to ensure that the core instructions have been followed. Miscommunication of instructions produces errors, and the fault may lie anywhere in the chain.

Electronic document management programs generally come equipped with tools to search the document databases and to produce reports that can serve a diagnostic, auditing role. Experience shows that it is important to conduct this type of search. ‘Glitches’ can and do occur. Do not be surprised to find that within a database of 20,000 e-mail messages, you find 1,000 with exactly the same date, and several hundred others that pre-date the commercial availability of the e-mail program being used by the client.

Third party service providers no doubt have quality assurance/quality control mechanisms in place, but given the professional obligations of counsel, law firms should consider additional auditing capacity, either in-house or through the use of a consultant.

F. Train the lawyers, train their assistants and paralegals

It is not safe to assume that just because the resources have been committed and a broad based electronic discovery system has been put in place, it will be used. The resistance to change will be surprising, and there will always be somebody who says that they were never told about the system. One method to break down resistance is through a training program. Begin by staging a demonstration at lunch hour (offer food to ensure attendance), ideally with an example from a current file within the office. Then offer more in-depth training. Demand will grow, particularly as the obvious flexibility and convenience of working with electronic databases becomes apparent.

VI. Beyond disclosure: Strategic management of electronic documents

A fully functioning electronic document management system will do much more than assist in document discovery. An organized document database is an asset that can be utilized to advance the interests of a
client. Vast collections of electronic data can amount to an unmanageable black hole or a gold mine of information. Lawyers are becoming comfortable with the reality of electronic documents and the tools available to manage them, and pro-active document management tools and strategies are developing as a result. Some examples are set out below.

A. Document review

Once captured and properly organized in a database, software tools allow documents to be read, information cross-referenced, notes made and the work product preserved and recalled later, all with relative ease, and all by computer. Access can be gained from remote locations. Clients, experts, even opposing counsel can be given access to some or all documents, remotely or on site.

B. Variable presentation of the information

Litigation support software will generally allow a viewer to sort, view and print documents in any number of ways without detracting from the integrity of the database. This allows the lawyer to sit at the computer and "play" with the information in the search for insight in a low-cost, almost instantaneous manner.

C. Discovery binders, key document binders, thematic presentations, exhibits

With competent search skills and a reliable database, it is a very straightforward matter to produce specialized sub-sets of documents for any number of purposes.

D. Integration of other evidence

Document management software will usually allow parties to include other materials, transcripts and pleadings for example, into the database.

E. Other litigation software

With some technical assistance, specialized litigation software can be integrated with the core document management databases.

F. Discovery practice

There is a self-evident flip-side of ensuring compliance with a client's obligation to disclose is met; ensuring that the adverse party provides adequate discovery. Coming to terms with the ediscovery will arm counsel for ensuring that proper disclosure is obtained. Sets of standard questions are available from a number of sources: see, for example, Mack and Deniston, at Appendix III.

VII. Summary

The challenges posed by electronic discovery are real. Some in this
jurisdiction have already faced them. Others soon will. The challenge must be met; the law will not allow otherwise. The first hurdle facing a firm in its effort to meet the challenge may be convincing its members of this reality. Thereafter, the priority is to put the right people in place, give them the right tools, and establish a systematic approach to electronic discovery. Experience demonstrates that the alternative can be chaos. Experience shows that if this is done properly, not only will the firm have a tool for ensuring compliance with the obligation to disclose electronic documents, it will have a tool that can be used proactively to advance the interests of its clients.