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The First Step To Meeting The E-Discovery Challenge? Have A Document Management Protocol In Place And Comply With It!

The Editor interviews James J. Shrager, Margaret Raymond-Flood, and Fernando M. Pinguelo, Partners at Norris McLaughlin & Marcus, P.A.

Editor: Would each of you tell our readers something about your professional experience?

Shrager: I am a graduate of Amherst College and Yale Law School, and I have been a commercial litigator for 40 years. Following a judicial clerkship, I went to work for Hanocho Weisman, which was one of the largest firms in New Jersey at the time. In 1999, I joined Norris McLaughlin & Marcus. One of the things that I have always enjoyed about my litigation practice is the opportunity to learn about new businesses and new industries. A good litigator makes it a point to understand the client's business, and I have found that process to be both challenging and rewarding.

Raymond-Flood: I graduated from Seton Hall Law School in 1991, and, following a judicial clerkship, engaged in insurance and environmental litigation work. I joined Norris McLaughlin's litigation department in 1995 and expanded my practice to include a variety of commercial litigation matters, including intellectual property. I find the learning experiences that litigation offers to be one of its principal attractions.

Pinguelo: In my 10 years as a trial lawyer, I've developed this simple yet effective belief: Be available to clients at all times and help them develop practical solutions to increasingly complicated disputes. My business litigation practice has expanded into the entertainment industry, and we have handled some high-profile entertainment cases and are becoming a known quantity in the enter-



James J. Shrager



Margaret Raymond-Flood



Fernando M. Pinguelo

tainment law field. My interest and expertise in electronic information is a natural result of my involvement in many complex lawsuits.

Editor: I understand the three of you are involved in a Norris McLaughlin interdisciplinary team called the Response to Electronic Discovery and Information – REDI – Group. What is the origin of this initiative?

Shrager: The initiative derives from what is nothing less than a sea change in commercial litigation. Document discovery has always been one of the principal issues in litigation, but prior to the advent of electronically stored information the volume of documents – which were paper, of course – was finite. And that information was not routinely destroyed. Today there is so much documentation that is stored electronically, that it is routine – and often necessary – for companies to periodically purge their data storage systems to free up space for new information. That has raised a whole new set of problems because the deleted information may be retrievable and available for use in a dispute.

Electronic discovery has changed the way in which we advise clients to prepare for litigation, and it has changed the cost of litigation – in some cases drastically. We

recognize that it is not sufficient for just trial lawyers to be knowledgeable in this area, and that our entire firm and our clients must understand the challenges that e-discovery poses on the practice of law and on our clients' businesses. That is the origin of the initiative we call the REDI Group.

Pinguelo: We regularly speak and write on the topic of e-discovery. In fact, just recently a judge who read one of our articles asked for permission to reproduce it so that he could circulate it among his colleagues on the bench. We have also been invited by the New Jersey Administrative Office of the Courts to lecture at this year's Judicial College on this topic. We will be presenting a three-hour seminar on the legal and practical aspects of e-discovery before the 450-plus judges that comprise New Jersey's judiciary. We strive to make a positive impact on this industry. By taking on this leadership role, our goal is to better serve our clients in this growing and complicated area.

Editor: What role has the plaintiffs' bar played in the development of e-discovery?

Shrager: The plaintiffs' bar is very aggressive in developing tactics to gain an advantage, and e-discovery is but one of its vehicles, albeit an important one. In New Jersey spoliation of evidence is not an independent cause of action, but if it does occur the court can impose sanctions which can affect the course of litigation. To this end, plaintiffs will seek discovery of a vast quantity of electronically stored information, analyze it to

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see if something is missing, and, assuming something is missing and irrespective of the reason, raise a cry of spoliation and seek sanctions. The inference, of course, is that the missing information is claimed to be the one thing the plaintiff needs to win the case. This kind of tactic represents a real challenge for those companies which are targets of the plaintiffs' bar.

Editor: Would you give us an overview of the REDI Group and its practice?

Raymond-Flood: We spearhead the group, but the entire firm is involved in one way or another. In addition to assisting our litigation colleagues in handling their e-discovery issues, we are also called in by our corporate colleagues to consult with clients on a variety of e-discovery issues. Since much of this work with the clients is preventative in nature, it is essential that all of the firm's attorneys be able to identify the e-discovery issues and bring us into the picture at as early as possible.

Pinguelo: A common misconception is to think that e-discovery pertains to litigation alone. It does not. The court rules addressing e-discovery impact a business even before a lawsuit is filed. Our team crosses a number of disciplinary boundaries, and the REDI Group engages in an effort designed to enable our clients, through an effective use of technology and the appropriate consultants, to set up the most effective defensive structure possible to meet this challenge, whether driven by litigation threats or otherwise.

Editor: Please tell us about the counseling and litigation services that the group provides.

Raymond-Flood: One of the major e-discovery issues has to do with getting the client prepared. Only about seven to nine percent of all corporations have document retention protocols in place to deal with electronic discovery, an astonishingly small percentage in light of the severe sanctions that the rules and courts are imposing on businesses for poor document retention practices. We are educating our clients to appreciate the need to be proactive in addressing these issues, in lieu of reacting to a summons and complaint and looming discovery demands.

Shrager: A written document retention policy is the first step. And by document we mean to include anything that can be retrieved from the company's electronic files.

Pinguelo: In addition, it is not sufficient to develop a policy with the idea that, once drafted and adopted, the issue has been addressed. The rules impose an obligation on the company to periodically review all of its policies to ensure that they are consistent with its business model and are being followed by all levels of employees.

Raymond-Flood: When a client knows, or should know, that there is a reasonable potential for litigation – even prior to the filing of a complaint – it has an affirmative obligation to preserve its relevant documents, including those stored electronically. It is not enough for in-house counsel to be aware of that obligation. Human resources professionals, IT technicians, risk managers, and a variety of others, including, of course, senior management, need to be conscious of what is required; and that, we believe, entails reliance on procedures that have been carefully prepared, reviewed for compliance on an ongoing basis, and communicated throughout the organization.

Editor: How about industry-specific requirements, say, HIPAA, OSHA, the SEC, and so on?

Shrager: To consult appropriately with a client it is essential to understand the rules and the regulatory structure that govern its business. This is part of managing the risk to the client, and a well-prepared attorney will attend any pre-trial e-discovery conference knowing what the client has in its possession and what must be preserved, both in connection with the current litigation and with respect to the regulatory requirements specific to that client. For this reason, an interdisciplinary approach is essential, and we have organized the REDI Group as a major step forward in this regard.

Raymond-Flood: Understanding what is often a very complex system can be crucial to the case and to the costs involved. That means knowing what is reasonably accessible to the client, and what can only be accessed – if it can be accessed at all – through some heroic, and expensive, effort.

Editor: As a practical matter, how do you go about educating your clients?

Shrager: When we meet with in-house counsel we ask them to have a number of people who are not part of the company's legal team present. This usually includes IT technicians, risk management professionals, and the human resources staff. In light of the high volume of employment litigation today, the latter are often the first to suspect that litigation is on the horizon.

Editor: Are the recent amendments to the Federal Rules of Civil Procedure a step in the right direction or have the amendments actually confused the e-discovery discussion?

Shrager: On a whole, I think the amendments are helpful. They offer some specific "safe harbor" protections, for example, and that is important because information is going to be inadvertently destroyed; and businesses shouldn't be penalized if they act reasonably but information is nonetheless lost. I think the amendments constitute an intelligent response to a complex situation.

Pinguelo: The amendments and the interpretation given them from the bench are not in place to restrain businesses. If, for example, your business requires you to delete e-mails every 24 hours – and there is a business justification for such a requirement with protections in place – I think courts will understand that. Having a protocol in place, of course, is one of the principal ways in which a company can present its business justification to a court and avoid the charge that deleting e-mails was inappropriate.

Editor: What is the next wave of impact that most experts are not focusing on?

Shrager: I think that insurers are going to start requiring businesses to be prepared to meet the e-discovery challenge, and to demonstrate that preparation before they insure them.

Pinguelo: Given how dangerously casual e-mail communication can be, another trend that we are seeing is the elimination of e-mail as a means of communication on the part of some companies. Many of our financial-sector clients have significantly reduced employee dependence on e-mail as a mode of communication.

Editor: You recently held a seminar entitled "E-Discovery: Is Your Business Ready To Navigate Through The Minefield"? What were the highlights of the program?

Raymond-Flood: We addressed pre-litigation issues, including the various protocols that a company needs to have in place, the teams that should be designated, and the various litigation hold obligations imposed upon companies. Another segment of the program addressed post-litigation issues. The basic message, however, is pretty straightforward: Have a written document management protocol in place and make sure your employees comply with it.