



International e-Discovery

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*FW moderates a discussion on international e-discovery between principal **Kelli Brooks**, partner **Torsten Duwenhorst** and managing director **Darren Pauling** at KPMG Forensic.*



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FW: Could you provide an overview of the key international e-discovery issues that companies are currently facing? What are some of the main themes that have developed in recent years?

Pauling: International e-discovery faces a set of unique challenges, in addition to the issues of traditional e-discovery. Data protections laws, data consent requirements, cultural considerations, data transfer laws and logistics are all factors that will impact a cross-border multijurisdictional e-discovery project. Considerations may include subsidiaries and parent companies, jurisdictional issues such as Swiss banking laws, the 'legal' location of documents, disclosure obligations of different jurisdictions, privacy and confidentiality obligations, the physical, logical and legal location of documents, trade unions and work councils, and localised traditions and personal considerations. On a recent matter we were made aware that it was most common for individuals to have mistresses, and it was a requirement to ensure such personal communications were not included in any preservation exercise.

Brooks: In recent years, there has been an ever increasing need or demand for e-discovery that reaches beyond just a single jurisdiction and is, instead, truly global. In the past, companies were often able to address a matter by simply conducting evidence preservation, collection, processing, review and production in one location or country. Today it is quite commonplace that e-discovery spans multiple countries or often multiple continents. The geographic breadth of e-discovery has necessitated global coordination and consistency with respect to not only technologies but also overall processes. The global nature of e-discovery increases its complexity for many reasons. Companies must now be much more cognizant about variations in legal requirements, data privacy nuances, state secret issues, language and cultural differences. It is also quite common for companies to involve multiple law firms in a single matter when local counsel is desired in foreign jurisdictions. With so many variants, the need for upfront project planning is more important than ever. And, of course, oftentimes e-discovery arises in times of crisis when the luxury of time is nonexistent. Fast-paced decision making does not always lend itself to the kind of careful, strategic and methodical planning that companies need or desire. Finding a harmony between imminent deadlines and the need for global coordination and consistency is one of the biggest challenges companies struggle to address.

Duwenhorst: We have seen significant changes in the legal landscape in certain parts of the world, especially Asia. Implementation or enforcement of existing data privacy laws has led to a change in the way companies now have to collect, process and host data. To further the situation, we have seen a big geographical shift with regards to where data is created and housed – away from traditional jurisdictions in the US and Europe and towards Asia, mainly China, Hong Kong and Singapore. With ever increasing investments in Asia, more and more data is stored in countries where data can no longer leave the jurisdiction. However, most of the in-house forensic and e-discovery teams are still based in the US or Europe, with small skeleton teams based in Asia. Remote access and data privacy regulation will prevent these teams from supporting their Asian counterparts, which leads to increased costs for teams flying out or partnering with a global e-discovery service provider. The increased demand has led to a shortage of trained and experienced forensic technology staff in the Asia-Pacific region as it has become increasingly challenging to retain staff. This is especially the case for companies with a small in-house team and limited budgets. Such companies often cannot provide staff with the opportunities for personal growth and exposure to state of the art technology.

FW: How much of a requirement is there for consistency in terms of technology and workflow across all countries involved in a case, to mitigate potential 'hand-off' problems?

Pauling: The importance of consistency across workflows of any e-discovery engagement goes greater than mitigating a 'hands-off' problem. Well-planned consistent workflows deliver efficiencies and cost savings through repeatability. Once designed and tested, these offer greater confidence that a uniform, reliable process is in place in each country. Furthermore, standardised workflows across countries increase the defensibility should the e-discovery process be challenged. It is vital to adopt the same workflows with the same kit and settings to help ensure conformity of an agreed process. Complex search terms and predictive coding workflows set in one country may not be able to be adopted in other locations if the same hardware and software is not in use. This can cause problems with the review and additional expenditure for the client and increased time lines to complete the work.



Brooks: Many clients operate globally and so do the law firms that represent them. As a result, clients increasingly require globally consistent technology platforms and consistent workflows across all countries. Having globally consistent technologies and workflows not only streamlines the logistical process of international e-discovery, thereby making it more cost effective, but it also reduces the risks associated with data hand-offs. Because e-discovery matters often have short timeframes and budget is always a concern, global consistency is becoming much more of a must-have.

Duwenhorst: Hand-off issues can be mitigated by identifying global service providers that can support the entire e-discovery lifecycle in all jurisdictions. As e-discovery projects are usually fluid and tend to evolve beyond the original scope and jurisdictions, it is prudent right at the beginning to identify service providers able to provide support on a global level to avoid having to work with different service providers with most likely different standards, tools and methodologies.

FW: In your opinion, how pressing is the need to integrate service provider teams, as well as technology, directly into a client's infrastructure?

Pauling: The need to integrate services provider teams and technology into the client's infrastructure depends on the size of the job, the turnaround required and the internal capability of the client to respond to an e-discovery request. In some cases, a large client will have excellent systems in which case a hybrid approach can be taken. The need to also integrate service provider teams will also depend on the capability of the client to respond to an e-discovery request. On one hand, internal IT teams can be quite territorial about their systems and may push back against external consultants performing collections when this is something they see as straightforward. On the other hand, IT systems administrators have generally not had exposure to forensic or legal discovery processes and an incorrect or incomplete collection can lead to later time delays and increased review costs.

Brooks: Whether the teams and the technology need to be integrated behind a client's firewall really depends on the situation and the client's level of comfort. For example, there may be data privacy reasons which necessitate a service provider team to be onsite in a remote location where the client does not have IT resources with the proper skillset to perform the evidence collection or processing that is required. Additionally, there may be strategic reasons why a client would not want data to enter a foreign jurisdiction. In those types of situations, the client may require that the data stays at the client site and, as a result, the seamless integration of the service provider team and the client's IT or business teams becomes absolutely critical. Regardless of whether

deep integration directly into a client's infrastructure is required, what is certainly always required is effective and timely communication between the service provider and the client at all times. International e-discovery is complex and fluid. Responding to the inevitable twists and turns of a project requires proactive communication at all times.

Duwenhorst: Integrating a third party service provider also holds additional benefits. It allows for teams to get to know each other to understand communication channels, to improve efficiency and assign responsibilities across teams. It allows for aligning workflows, adopt best practices and familiarise the external party with the business culture.

FW: To what extent can response times be improved by making mobile processing and review platforms available in countries with no e-discovery teams?

Pauling: Where data is permitted to leave the country, the time and effort to deploy personnel, mobile processing and platforms should be assessed against whether data can be collected in country quickly and expatriated to a location with robust processing infrastructure. On larger jobs in countries where no e-discovery teams exist, or clients who do not want sensitive data to be sent off-site, putting 'in country' infrastructure in place with the client will involve more time and cost upfront, but can save time over the course of the job. The e-discovery provider should consider whether the resources have the appropriate language skills and ability to adapt to working in another culture and country. We are currently trialling prototype mobile infrastructure that can be used on small to medium sized jobs to rapidly deploy processing and review platforms onsite in country.

Brooks: Mobile processing and review platforms can simplify the logistics of international e-discovery in countries with no e-discovery teams. However, unless there are data privacy or other restrictions related to data movement, having the processing and review performed in-country is not always a requirement. From a technology standpoint, movement of data is fairly straightforward. In countries where the client does not have an e-discovery team, data can be collected and then transferred to another location for processing and review. Clients often do face data privacy or other strategic reasons which limit their willingness or ability to transfer data across borders or into other jurisdictions. In those situations, having mobile processing and review capabilities which can be brought directly to the client's location is extremely helpful in streamlining the overall e-discovery project, reducing the risk of data movement and keeping project costs in check.

Duwenhorst: Increasing limitation of data transfers due to restrictions will require a different approach to deploying any mobile solution, as well as general e-discovery data centre deployment. Instead of utilising a centralised database in one country, a spoke and hub system is a more likely scenario. A small number of regional databases will hold data collected and processed in country or offshore. Deployment of mobile platforms, whether for processing and hosting or for processing alone will require immediate attention at the onset of any global e-discovery project. In many countries customs will not allow forensic teams to introduce mobile computing solutions into the country without requesting purchase invoices for import tax reasons. Without such documentation, equipment will be impounded and only released when the team leaves the country or an import tax has been paid. Also, a business licence for e-discovery related services might be required and essentially prohibit any work from being executed locally.

FW: With data arriving from a variety of sources in international e-discovery cases, how important is it to have native language capabilities across jurisdictions?

Pauling: The ability to interpret documents and determine relevance to a matter is central to any discovery matter. This should include both the ability to handle the documents through the technical processing, keyword search and review platform in addition to having resources fluent in the native language to perform the review. A scoping of an international e-discovery engagement should include gathering an understanding of the native languages that will be found across the jurisdictions involved, and where these are likely to occur in the dataset. This would include understanding both the native languages, and more technically, the alphabets in use and encoding that can be expected to be encountered in non-English documents. Consideration should also be given to the development and execution of keyword searching in each language, not only translating from English but helping to ensure that meaning is maintained and alternate local language keywords are considered.

Brooks: Native language capabilities can be extremely helpful for international e-discovery matters. Not only does the existence of native language capability help with accurately assessing the content of the data, it also helps with important stages of the process including custodian interviews, conversations and planning efforts with IT personnel at the client site, and conversations with counsel – in-house and law firm. Moreover, when applying keyword filters or any type of analytics to a data set, there is a need to not only focus on just a given

word, but the meaning of that word in the overall context. Without native language capabilities on the team, the context of a word or word phrase can often be lost or not accurately understood. Language barriers are certainly not insurmountable, but removing those barriers through native language capabilities is definitely quite helpful.

Duwenhorst: Challenges with native language document review in the Chinese or Asian language context can occur on both a technical and staff level. In countries like China, including Hong Kong and Singapore, we do not find a mature third party document review market. Outsourcing work to providers, in India or Europe, for example, will create challenges from a capability and timing perspective. With more and more data and documents being created in Asia, the Chinese, Japanese or Korean content in documents has significantly increased. At the same time, we do not see that same change in the structure of review teams where most of the native English reviewers either don't read or write characters. Software platforms, in general, are accurate when it comes to simple keyword searches but might not be accurate when it comes to concept analytics and predictive coding.

FW: Could you outline the benefits of advanced analytics and visualization technologies in international e-discovery processes? How do they allow parties to make more informed decisions, reduce the overall number of documents required to review, and help parties to avoid incurring fines or legal damages?

Pauling: Advanced analytics and visualisations technologies in international e-discovery are used in a similar way to traditional e-discovery. During the early case assessment (ECA) stage of an e-discovery case, visualisation can give a rapid, easy to understand view of a dataset landscape. This may include where email volumes are higher, which custodians have the most volume and the quantity of communication between parties. Early analytics can also enable the priority review of document batches that are likely to be of importance to the front end of a matter. If 'smoking gun' documents can be located earlier in the discovery process, this can lead to better decision-making earlier and save costs.

Brooks: Advanced analytics and visualisation technologies can be extremely useful in all e-discovery matters, including those that involve an international component. In traditional litigation matters where keywords may be used to filter or at least prioritise data, advanced analytics technologies can be used to help validate the efficacy of the selected keywords. Performing such validation before data is moved forward and made available for reviewers

can be extremely helpful in either removing irrelevant data altogether, thereby avoiding review time and associated costs, or prioritising data so that the data with the highest likelihood of being relevant is put in front of the reviewers first. In investigation matters where fraudulent behaviour is suspected, finding the 'smoking gun' documents can be much easier because analytics can showcase content even when 'code words' or other types of cover-up efforts have been used by the perpetrators of the potential fraud. Moreover, advance analytics can be used to reveal communication patterns or interactions between persons that might not otherwise be expected, suspected or evident. Finding the most important data more quickly enables the company to review fewer documents, focus on the most important documents and get to the crux of the issue more quickly, more accurately and less expensively.

Duwenhorst: We see great benefits in using data analytics as it allows us to introduce structured data sources from, for example, ERP, HR, finance or other related enterprise databases to the e-discovery exercise. By using these data sources, we can correlate reported suspicious financial transactions to entities or individuals. This allows excluding other non-related entities in a first review, thereby significantly reducing costs and time. Further, it allows quantification of a confirmed transaction, which has a direct impact on potential fines, and the potential reduction thereof by US regulators.

FW: How can parties reduce the overall cost of international e-discovery? Is technology assisting in this regard?

Pauling: Parties should look to use a combination of the techniques that are used in traditional e-discovery together with the other responses discussed. It is important when faced with an international e-discovery matter to ensure that sufficient time is set aside to properly scope the exercise. This can provide greater benefits by ensuring that the entire project is targeted rather than a scattergun approach, especially at the initial collection phase. This should include a more targeted collection phase, analytics, date range filtering and use of keywords during early case assessment to help ensure that what will be searched is focused and to reduce the amount of documents to be searched.

Brooks: There are many ways to reduce the overall cost of international e-discovery and technology is a key component. Early in the process, if unnecessary data is eliminated, resultant cost savings occur. This initial aspect underscores the importance of information governance and retaining and collecting only data that is required to be retained and collected either based on legal, regulatory or

business needs. E-discovery and information governance are absolutely interconnected. Once data is collected, the use of technology to most quickly focus in on the relevant data can result in cost savings. Obviously, processing and reviewing only data that is likely to be relevant is one of the best ways to save time and money. Technology should be leveraged to make informed and accurate decisions about data content and categorisation of the data so that the time and associated costs of reviewers is focused on the relevant data only, or at least primarily.

Duwenhorst: The use of data analytics including visualisation, mapping of social networks and communication as part of early case assessment can help to significantly reduce cost. These techniques can provide the relevant information to quickly assess whether the initial assumptions and focus of the e-discovery project were correct. If not, the direction of the work can be changed without going through a large document review exercise which usually makes up the larger part of the budget. Real time analysis of social media to identify players and information available outside of the organisation are further critical to help reduce cost as they help to eliminate, initially, processing and review of custodian data sets.

FW: Is it prudent for parties to store the data they collect, preserve and process during e-discovery, so that it is easily accessible for any future matters that may arise?

Pauling: It is important to remember that often the data collected and initially used as the core basis to undertake the analysis has been collected in many cases from senior personnel. This is in effect a repeatable asset as the initial cost to preserve and process has been sunk in the initial collection and processing phase. This data as a repeatable asset may be required to defend future litigation cases and therefore the storage could be vital. If consideration is taken at the end of the case to preserve the data in a cost effective method that could allow future access with little expenditure, this should be explored. More often in the current litigation and e-disclosure world, we are seeing off line storage facilities being created whereby a 'process once and repeatable use' model are being adopted. The data sets can be supplemented and if appropriate a data retention destruction process adopted.

Brooks: Retention of data should first be determined by regulatory or legal requirements to help ensure that those requirements and obligations are met in their entirety. In addition to legal and regulatory requirements, there are also business needs that should be considered. Even in situations where there is no legal or regulatory mandate to retain data, if there is a likelihood that the data will be



potentially relevant in future matters, it can be helpful to retain not only the data but the review work product associated with it – for example, redactions and review comments. Retaining the data and the work product for re-use in future matters allows the client and its counsel to avoid re-work by leveraging the initial efforts in future matters, thereby increasing overall efficiency, lowering associated costs and reducing or even eliminating the risk of inconsistent treatment of the same data across multiple matters.

Duwenhorst: Data sets collected and prepared for e-discovery provide a great opportunity outside of the e-discovery space. Leveraging information extracted for enterprise reporting systems can be used for general data analytics purposes to create valuable insights into the organisation. It can help to create actionable intelligence to drive the growth, risk and cost agenda to increase competitiveness.

FW: Based on your experience, what policies and processes should companies put in place to assist matters if e-discovery is ever required?

Pauling: E-discovery readiness should form a component of any organisation's litigation readiness plan. A well designed litigation readiness plan should include clear data retention policies and instructions on procedures to undertake when issued with notices such as a preservation order or legal hold. A litigation readiness plan is of particular importance when facing an international e-discovery matter as it will outline legal requirements, foreign regulations and restrictions that apply in the corporation's jurisdictions. On a systems level, an organisation should aim for consistent systems and policies across their environment. Where multiple email systems and archiving systems are in place, collection from these disparate systems is not only more time-consuming, but also can store information in different ways, making de-duplication and culling more difficult across non-uniform data. Enforced document storage policies also make for easier collection. Too often companies may have a partially used document management system, with users also storing documents

on servers, local PCs and removable media, ensuring that collection can become more timely and complex. Some email archiving solutions and cloud-based email services have e-discovery backends built in. These platforms often allow targeted collections which can make preservation and collection more straightforward. Good information governance is the key to optimising the early identification, preservation and collection phases of the Electronic Discovery Reference Model (EDRM).

Brooks: Information governance and e-discovery are intrinsically related. Having a solid records retention policy in place, and enforced, is very important for all businesses and can certainly prove helpful when matters arise which require e-discovery. At the onset of a litigation or investigation, having a policy and process in place to communicate legal hold requirements across the organisation is also required. With respect to the remainder of the e-discovery cycle, collection, filtering, processing, review and production of electronic data, organisations need to have a repeatable and defensible process that meets their business needs and complies with applicable laws and regulations. Having a 'toolkit' of technologies is important and allows the company to assess and use the technologies that are the best fit for each particular matter. For example, in some projects where data volumes are small, predictive coding or technology assisted review capabilities may not be necessary. As another example, with investigative matters where the content of what may exist in the data is not fully known, technologies that include content analysis, data visualisation, social networking mapping and the like can prove incredibly helpful in revealing potentially problematic or fraudulent behaviour. It is important to always remember that technology options are not 'one size fits all'.

Duwenhorst: Companies need to truly understand and map their global IT infrastructure. Too often we find that what clients believe to be in place, whether it is IT infrastructure or IT policies, is in fact not the case, which results in increased cost, effort and time to preserve, collect and process data once e-discovery is triggered. A solid global records and information management system can help to reduce overall litigation cost and be integrated in early case assessment.



FW: How do you envisage the e-discovery landscape unfolding over the coming years? What technology solutions do you hope to see, to make the process even more efficient?

Pauling: One of the key drivers for the way the electronic landscape will develop in coming years is the continuing growth in data volumes. Furthermore, there is a perception in the legal community that e-discovery can be unwieldy and must remain proportionate. These reasons will act as drivers for improved efficiencies within the e-discovery process. Technology will increase the integration between the stages of the EDRM – identification, preservation, collection and processing, with each stage becoming less discrete. While in the early stages and incomplete, we are starting to see solutions that allow users to self-disclose and pull these directly into a processing platform. While Legal Process Outsourcing (LPO) is not a new concept in e-discovery, we will see continued growth as companies overcome security and confidentiality issues and firms look to drive cost savings. Internal processing centres are likely to be more commonplace where large organisations have their own internal LPO centres to handle first pass review on legal matters.

Brooks: We will almost certainly see continued enhancements in analytics and visualisation technologies which will be used through the early case assessment stage to improve the ability of attorneys to more quickly focus in on relevant documents earlier in the process. We will likely also see increased acceptance and usage of predictive coding and technology assisted review tools. As technology assisted review becomes more commonplace, e-discovery consultants will need to work with the

attorneys to increase 'trust' in the process. Whereas attorneys have traditionally viewed discovery as a process of humans reviewing boxes of documents looking for those documents that are relevant, the mindset will continue to shift and attorneys will increasingly become more confident in the technology assisted processes. In turn, the courts will also need to provide direction and clarity for narrower reviews including the categories of documents that will be discoverable. We will also see e-discovery increasingly encompassing other less traditional document sources such as audio and metadata. We will continue to see improved audio handling technologies and may very well see metadata retention regulations becoming commonplace.

Duwenhorst: We'll see further integration of data sources that traditionally were not part of the e-discovery process, as well as structured data from enterprise reporting systems such as ERP, HR and Vendor and Supplier databases. We'll also see the utilisation of external data sources such as social media, as individuals are, and already have, moved away from the classic internal communication channels such as email and instant messaging. This trend will further require companies to address bring your own device (BYOD) policies – and data privacy waiver agreements – as mobile devices are usually owned by staff and are not company property.

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