New Jersey Law Journal

VOL. CLXXXI – NO. 11 – INDEX 1030 SEPTEMBER 12, 2005 ESTABLISHED 1878

LAW OFFICE TECHNOLOGY

Meeting E-Discovery Challenges

With the stakes so high, e-discovery is one of the most important issues facing in-house and outside counsel

By Beth S. Rose

The hard facts about electronic data are sobering. More than 90 percent of business documents are electronic, although only 30 percent of this data is ever printed. The average U.S. worker sends or receives between 60 and 200 e-mails daily. In 2001 and 2002, North American business e-mail traffic was in the trillions. The sources of electronic data seem to multiply daily and are no longer limited to e-mail and network servers, hard drives and backup tapes. Electronic data may also reside on laptops, pagers, disks, CDs, DVDs, USB devices, PDAs and cell phones. And don't forget about voicemail and instant messaging.

Recent developments in the case law, changes to local rules, and the proposed amendments to the Federal Rules of Civil Procedure make clear that discovery of electronic data is reasonably foreseeable, and an integral part of today's litigation landscape.

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Missteps in e-discovery — even inadvertent ones — can have significant consequences for a litigant, as judges exhibit their willingness to sanction those who fail to comply with their e-discovery obligations. Because the stakes are so high, e-discovery is one of the biggest challenges facing in-house and outside counsel. Practical steps to meet these challenges in a cost effective way are set forth below.

Dedicated In-House Team

Assemble a dedicated multidisciplinary in-house e-discovery team. The team should consist of representatives from the law department, the IT group and selected business units. Make this team responsible for the development and implementation of a comprehensive document retention and e-discovery program, including a protocol for the collection and retrieval of electronic data. Designate a team member(s) to be responsible for monitoring relevant changes in the case law, emerging discovery rules and software tools which facilitate e-discovery, and for reporting them to the group. Have the team review its program at sensible intervals to assess the lessons learned and identify areas of improvement.

Understanding the company's technology is essential to developing a streamlined approach. Have the IT representative educate the team about the layout of the system. Where is e-data stored? How often is the system backed up? How often are back-up tapes recycled? How do back-up tapes store information and how difficult is the information to access? Armed with this information, the team will be better able to develop a workable document retention program and e-discovery protocol.

Proper planning is critical to putting the company in the best position to respond to anticipated and unanticipated e-discovery issues. It ensures readiness and consistency in the company's approach to e-discovery requests. There are cost efficiencies as well; there is no need to start from scratch (or panic) every time a request for electronic data is received.

Document Retention Program

An important task for the team is to develop, review or update the company's document retention program. In the past, document retention policies have focused solely on the retention of hard copy documents. Today's program must address the review, retention and distribution of hard copy *and* electronic business data. To be successful, the document retention program must have the support of top management and be an integral part of your company's regular business practices. Don't set yourself up for failure! The policy must make sense within the confines of your business. Establish a reasonable retention schedule that company employees can follow. A company's failure to follow its own document retention polices will be front and center of an e-discovery dispute.

Take the necessary steps to insure that your employees understand the nature and scope of the program and why it is important to follow. Roll out your program with a training session, followed by regular communications and enforcement. Annual audits may be helpful as well. Don't let your program become stale. Review and update it regularly. Make it a part of the fabric of your business environment.

If structured and implemented correctly, a document retention program should help reduce e-discovery costs by narrowing the volume of information to be searched, and streamlining the review of relevant information. A document retention program can also help companies avoid risks of sanctions for spoliation and facilitate compliance with court rules concerning discovery of electronic data.

Litigation Hold Procedures

The document retention program should include litigation hold procedures, which suspend normal document retention practices in the event of litigation (investigations, etc). As set forth in *Zubulake v. UBS Warburg, LLC*, the duty to preserve hard copy and electronic data arises at the time the litigation was reasonably anticipated, which may be well before a complaint is served.

Circulate a "litigation hold" memo to all employees with relevant information. When it comes to identifying custodians, err on the side of being over-inclusive. Identify the litigation and provide a brief description of its subject matter. Communicate to employees that the duty to preserve hard copy and electronic data must continue until they are told to stop. Define with specificity what is meant by hard copy and electronic data. Provide explicit instructions of how auto delete functions and the recycling of backup tapes will be handled. Explain the implications of failing to preserve this information, including the imposition of penalties or sanctions on both the company and/or individual employees.

Develop an approach to deal with duplicate documents (i.e. identical reports received by multiple employees). Provide guidance about how to address hard copy and electronic data of departing employees. Ask employees to identify other individuals who should receive the litigation hold. Explain the next steps, including future meetings with an outside vendor, in-house IT staff, in-house counsel or outside counsel to collect data.

The litigation hold should make employees accountable. The *Zubulake* court made clear that it is not enough to send out a litigation hold to your employees without appropriate follow up. A company must take affirmative steps to monitor compliance. Consider having employees certify that they have received the litigation hold and will comply with it. A sample certification might read, "I have received and reviewed the litigation hold notice concerning preservation of materials relating to the ABC litigation. I certify that I will comply with the directions given in the notice." Employees sign and date the certification and return it to a designated member of the in-house e-discovery team.

Take reasonable steps to avoid a permanent "litigation hold." Notify your employees when the litigation hold is over so that normal document retention practices can resume.

Collection and Processing Protocol

Review the written protocol developed by the in-house team and customize it (if necessary) to your case. The protocol should include a plan for identifying relevant custodians, and sources of electronic data, as well as a strategy for collecting/retrieving it. Combine the collection of hard copy and electronic data to minimize interruption to your business.

Approaches to collecting e-data are varied and range from making a mirror image of the entire system to the use of word searches and other forensic tools to cull out relevant electronic data which is then copied to an electronic litigation folder or other secure location. The second approach is far more cost effective, as it reduces the universe of electronic data that needs to be reviewed. If you use word searches, run a pilot test to assess the adequacy of the selected search terms. Whatever approach is selected, make sure appropriate software tools are used that preserve the integrity of the electronic data and its accompanying meta data. An increasing number of courts require parties to produce electronic data in an electronically searchable format.

Following collection, import the electronic data into a litigation support database or post it on a secure Web site for processing and review. Prereview processing identifies duplicates (deduping) and extracts other nonbusiness data. Outside counsel can then review the data for production purposes (relevance, confidential, privilege, redactions).

Determine who will coordinate the collection of electronic data. What role should your in-house IT department, a vendor or inside/outside counsel play? The size of your IT department and technical capabilities of the company will likely dictate your approach. For most companies, there are practical and legal reasons to engage a vendor to coordinate at least some portion of the collection process. A vendor can work with the IT department and with employees to run searches and collect e-data, and then provide a certification or testimony to the court if the protocol is challenged.

Make your employees accountable. Consider use of an employee compliance certification to ensure that each employee has provided all the relevant information. Follow up with employees at appropriate intervals. Whatever you do, don't let your employees wing it!

Keep Your Eye on the Ball

The costs associated with electronic discovery are not insignificant. Generally, the producing party will bear the cost of hard copy and electronic document production. *Zubulake* teaches that one does not even engage in a cost-shifting analysis unless the data is stored in an inaccessible format, so be prepared to pay for the lion's share of the effort. While a cost-efficient approach is sensible, cutting corners is not. Planning ahead is the best defense to today's e-discovery challenges. ■