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Key Answers To Your E-Discovery Questions

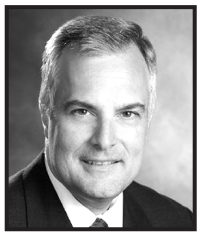
The Editor interviews ***Peter G. Verniero****, Co-Chair of the Corporate Internal Investigations and Business Crimes Practice Group of Sills Cummis & Gross, P.C.*

Editor: What prompted the members of the firm to write a book dealing with e-discovery?

Verniero: This is the third edition of our privately printed e-discovery book. I think the book was actually in the works before I joined the firm in 2004. Since joining the firm I have assisted in updating the book and am listed as a managing editor. What originally prompted the firm to write the book was a sense that e-discovery would become a significant issue, which showed great prescience.

Editor: Why is there a need for a logically organized document management and retention program for every company?

Verniero: Every company has a need for a document management policy. In this day and age there are so many documents being created electronically as well as paper documents with the real emphasis being on electronic documents. Literally thousands and thousands of electronic documents are being created in a single day at large companies, which over a year results in millions of documents. I saw one estimate not too long ago that says the federal government creates or receives something like 30 billion emails a year. There are many issues associated with managing, retaining and discarding electronic records. The primary policy framework for addressing these issues in the first instance should be a reasonable, coherent, comprehensive, document management policy – one that includes both paper documents and electronic records.



Peter G. Verniero

Editor: Why is it incumbent on all corporate counsel to review and understand the company's method of storage of its documents?

Verniero: It is incumbent on company counsel because company counsel are often seen as overseers of the document management system, particularly as it relates to litigation. The document management polices that I have worked on all share certain common elements. One is to satisfy business and operational needs of a company apart from litigation. Secondly, companies need document management and retention policies to satisfy the retention periods required by statute. Statutes require certain retention periods for particular documents. A document management policy should recognize and have schedules that reflect those periods. A document management policy should be designed to preserve documents for litigation. From that perspective it is helpful for in-house counsel to better understand the systems that are in place at his or her company to manage the storage and production of these documents.

Editor: What guidelines are there to provide a defense as to destruction of documents when no litigation is immediately in progress?

Verniero: I suggest that one guideline, many times a primary guideline, is the document management policy itself. The United States Supreme Court in the *Arthur Andersen* case stated very clearly that it is proper for companies to manage documents in accordance with a valid document retention policy under ordinary circumstances. That gives companies the right to maintain and ultimately discard documents so long as that action is associated with a reasonable document management plan, which does not run afoul of any statutory, litigation or investigatory requirement. If you want to persuade a court that you are managing documents in a reasonable fashion, one of your best defenses will be that you acted in accordance with a well thought-out, good faith document management policy.

Editor: Why should a document management and retention policy be reviewed and audited frequently?

Verniero: One should make sure that it is up to date with current case law and certain statutory enactments. There are some statutes in place that require certain retention periods for certain kinds of documents. As we know, statutes will change over time in terms of legislative amendments and case law and new decisions are being handed down particularly in the area of e-discovery. I think it is prudent for in-house counsel working with outside counsel to ensure that a company's document management policies are up to date so that if the need arises to defend under those policies, they will provide the best defense available.

Editor: What factors come into play when a proponent of discovery requests documents that are not readily accessible and would require extremely costly measures to retrieve?

Verniero: The text and comment of the

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federal rules dealing with electronic documents suggest many factors that a court would consider when determining whether inaccessible information is an undue burden and too costly to retrieve. Those factors include the specificity of a discovery request, the quantity of information available from other more easily accessed sources, the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources, the likelihood of finding relevant responsive information that cannot be obtained from other sources, assessments as to the importance of the case and the usefulness of the information sought. Overall party resources would be a factor – a large publicly traded company might be treated differently in the eyes of a court than a small family owned business, so parties' resources do come into play. And the importance of the issues at stake in the litigation is a factor that would need to be addressed.

Editor: When should a hold be placed on any destruction of documents? How can counsel know that there might be some potential litigation without being issued a complaint?

Verniero: This question comes up often. Unfortunately, there is no precise answer. It really is a facts and circumstances test in my view. The basic standard is that when a party receives notice of litigation or governmental investigation or likely potential litigation or investigation that the party reasonably anticipates, then documents should be preserved. The question of what constitutes notice is also imprecise. Notice in its most concrete form is the filing of a lawsuit or the issuance of a government subpoena requesting documents. In those circumstances, the company is clearly on notice that there is an investigation or a litigation. But you also have a duty to preserve information when an investigation or litigation has not yet commenced but is reasonably anticipated. Again, the word "reasonable" is operative. It's not just any possibility – it has to be a *reasonable* threat of litigation or that litigation is *reasonably* likely. What are some of the things that might give you notice of that? It could be pre-litigation correspondence such as an angry letter from an adversary that suggests very clearly that parties may commence litigation. There could be early warning signs putting you on notice ranging from the filing of a complaint to things that are less concrete, such as telephone conversations, emails, or letters that might reasonably suggest that litigation is around the corner.

Editor: Why is a failure to preserve data either before or during litigation, even when data is inadvertently destroyed, subject to such a severe penalty in most instances? Can spoliation be mitigated through use of the safe harbor provision of rule 37?

Verniero: Courts view the availability of relevant information as fundamental to the legal process. Therefore, anyone who breaches a duty to preserve evidence will invite a court either to order sanctions against the violator or to be receptive to such sanctions. Sanctions, however, are not always severe. Sanctions are less severe as a general rule if the loss of documents is inadvertent, if the parties were acting in good faith, but nonetheless some documents got lost. There is a safe harbor under the federal rules that, absent exceptional circumstances, allows courts to impose no sanctions if the loss of documents is due to routine good faith operation of an existing electronic information system. As an example, many times computer systems are upgraded, different computers are added to the network, different programs are added and through inadvertence, through no malicious intent, sometimes documents get lost in the process. That would be an example of a good faith loss that probably would not result in serious sanctions unless other circumstances were present. There are rules, there are exceptions to the rules and then there are exceptions to the exceptions, which makes it at once an interesting but sometimes unpredictable course in determining e-discovery issues. The safe harbor is just that: it is a safe harbor; its depth will differ and its width will differ depending on each case.

Editor: Why is it important that a proponent seeking inaccessible evidence frame his request in precise search terms and explain why the evidence is relevant and likely to be found?

Verniero: Courts are wary of fishing expeditions and particularly in the electronic discovery area where, as I mentioned at the outset, there are literally millions of documents in existence. Before a court will order such an extreme level of production, it would want a better sense of exactly what a party is seeking and why. It is not enough to go into court and say we want every email that has ever been produced by this company. That is just simply too broad and too vast and too costly, particularly if you have to go to backup tapes or backup systems to retrieve that kind of information. If a proponent goes to the court stating that it has a specific time frame in mind, a specific number of custodians of the records in mind, a specific subject matter in mind, and agrees to limit production requests with some reasonable boundaries, that party improves his/her chances that a court will agree that the production is proper. Conversely, when a proponent goes in with unlimited, untethered document requests, it is less likely to get a court to agree with that request.

Editor: What are some recent notable cases involving e-discovery that our readers should be aware of?

Verniero: Earlier this year, in January 2008, *Qualcomm vs. Broadcom* was decided. This case caught everyone's attention because the lawyers were sanctioned by the magistrate judge who referred them to the state's ethics authorities for possible ethical sanctions. That case underscores the fact that more and more of these e-discovery issues are falling on the shoulders of not only the in-house counsel but also outside counsel. It goes back to one of your earlier questions about why counsel should be familiar with a company's email retrieval system. Now, does that mean every lawyer has to become an expert on the intricacies of electronically stored information? No, lawyers can rely on experts and others to help them work through the technological aspects of e-discovery. What the courts seem to be saying is that lawyers cannot be blind to the basic concepts of how documents are searched, preserved and ultimately produced. Lawyers have to have a basic understanding of these various processes in order to discharge their good faith obligations to represent a client and make representations to the court regarding e-discovery.

Editor: How can our readers obtain copies of the volume in which so much of this wisdom is contained?

Verniero: Any in-house counsel interested in receiving the book should contact Marcia Jeffers at mjeffers@sillscummis.com.