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COMPLEX LITIGATION & E - Discovery

Mechanisms That Help Reduce The Cost of Electronic Discovery

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No matter how vigilant, there is no way to fully insulate yourself from a potential lawsuit. It should come as no surprise that defending a lawsuit, even one where you are ultimately not liable, can be costly. Advancements in technology, including the ubiquitous use of e-mail, can significantly increase the cost of litigation. With all of the unavoidable expenses associated with litigation, in these economic times it is necessary to implement mechanisms that help curtail the cost of litigation, especially with regard to electronic discovery.

Relevant Court Rules Regarding Electronic Discovery

Courts have recognized the importance of technological advancements in litigation by implementing rules that require parties to produce electronic information in discovery. Indeed, both the Federal Rules of Civil Procedure (the "Federal Rules") and the New Jersey Rules of Court (the "NJ Rules") (collectively, the "court rules") require parties to produce their electronically stored information ('ESI") during litigation. Federal Rules 26(a)(1) and NJ Rules 4:18-1(a).

In federal actions, parties are required to disclose, among other things, documents and other objects within their possession that may be used to support their claims or defenses prior to receiving a discovery request. Federal Rules 26(a)(1)(A)(ii). As of December 1, 2006, the term "documents" has been expanded to include ESI among the type of information and documents produced in litigation. Similarly, the NJ Rules provide that a party may request ESI from its adversary. NJ Rules 4:18-1(a).

Although not formally defined in either set of the court rules, in practice it is understood that ESI includes information "created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software." "Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure," Kenneth J. Withers, *Northwestern Journal of Technology and Intellectual Property*, Vol.4 (2), 171, 173. Although the most commonly requested form of ESI is e-mail, the court rules require production of electronic data in formats other than e-mail.

The court rules have attempted to provide some limitations to the production requirements of electronic discovery, presumably in an effort to achieve fairness and balance. For example, in the context of a federal case, "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Federal Rules 26(b)(2)(B). However, even with limitations, the production of ESI can be very expensive and onerous.

Other Relevant Legal Requirements for Discovery

In New Jersey, once you are on notice of a potential claim against you, the law imposes a duty to preserve relevant documents. This is commonly referred to as a "litigation hold." *Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.,* 348 F.Supp.2d 332, 335 (D.N.J. 2004). It is important to comply with this requirement because the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as

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evidence in pending or reasonably foreseeable litigation" constitutes spoliation of evidence. A claim of spoliation carries the risk of serious sanctions, the possible imposition of attorneys' fees and costs, and even an adverse inference instruction by the court at trial to a jury "that the destroyed evidence might or would have been unfavorable to the position of the offending party." *Scott v. IBM Corp.,* 196 F.R.D. 233, 248-249 (D.N.J. 2000).

To help protect against the costs and burdens of electronic discovery, and the consequences of failing to adhere to the legal requirements for its production, parties should implement mechanisms that reduce these costs.

Mechanisms To Reduce the Cost of Electronic Discovery

Develop and Implement a Document Retention Policy: A party should not wait for a lawsuit to identify how to maintain electronic information. It is wise to develop and implement a document retention policy, with the assistance of counsel, before a lawsuit is filed.

The court rules contain a safe harbor provision for those that maintain a lawful policy that is implemented uniformly and that take the appropriate steps to preserve ESI when litigation is pending or reasonably foreseeable. The court rules acknowledge this by providing that absent exceptional circumstances, the court "may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good faith operation of an electronic information system." Federal Rules 37 (e).

With regard to the scope of a document retention policy, a party should consult with counsel for its preparation. In general, the time frame for retention of documents, including electronic documents, depends on the situation. For example, in the case of public employers, the New Jersey Department of State, Division of Archives and Records Management set forth various schedules. Private employers should use these schedules as a guideline when creating a document retention policy. In addition, counsel can assist with identifying state and federal regulations that may apply to your particular industry.

A document retention policy should also include the method for retention of ESI, including the length of time to retain ESI and the format. This becomes particularly important when considering deleting e-mails. Often, deleted e-mails are stored on backup tapes or in remote backup facilities. Backup tapes may be discoverable. *Zubulake v. USB Warburg LLC*, 217 F.R.D. 309, 317-318 (S.D.N.Y. 2003). More importantly, production of backup tapes can be very expensive.

In order to take advantage of the safe-harbor provision in the court rules, a party should consult with counsel to develop and implement a document retention policy that is tailored to the party's needs.

Designate an Individual or Department with the Operational Responsibilities: Litigation can be chaotic and disruptive. In order to diminish chaos and disruption with regard to retention and production of electronic documents, it is best to designate an individual or department to have the operational responsibility to maintain and retrieve this information.

Electronic information can sometimes be riddled with jargon and can also be technically challenging. It is wise, therefore, to designate who will be in charge of retaining the electronic documents and retrieving them if needed. Having a designated individual also makes the litigation process simpler for the attorneys and consultants who assist with the claims. It is best to deal with the individual who has the technical capability to address issues that may arise during litigation. A designee is also better suited to address issues prior to litigation, such as storing information in a location that is easily accessible, labeling information appropriately, and in the case of a business with multiple facilities, providing a uniform system and centralized location for handling electronic information and documents.

Retain a Consultant Early: In addition to being chaotic and disruptive, litigation is also lengthy and expensive. A party should retain a consultant early in the litigation to assist the entity and its designee with the issues that may arise during litigation.

The first order of business is to retain information and then to retrieve it. A consultant is often helpful in identifying formats, systems and methods to retrieve, copy and produce electronic information. A consultant is also necessary to ensure that during this effort, the integrity of the original data is preserved. A consultant is also very helpful in narrowing the scope of discovery early on in the litigation process. By identifying the type of information that may be relevant to the claims, a consultant can develop a matrix of searches to obtain information that reduces the amount of documents that would eventually be produced. Narrowing discovery is a direct cost-saving measure to the party producing it.

Another benefit of having a consultant involved early on is that the consultant can help diffuse potential conflicts with the adversary. It is often less stressful and adversarial to have consultants, rather than the parties, meet and confer about electronic discovery. Courts have also recognized the benefit of added neutrality. In certain complex cases, the court may appoint a discovery master to handle discovery production and disputes, which often involve issues related to electronic discovery.

Although there is added cost associated with retaining a consultant, it is often worth the expense in cost savings during litigation.

Electronic discovery, which is mandated by the court rules, can significantly increase the cost of litigation. To help curtail these costs, a party should take the following steps: (1) develop and implement a lawful document retention policy with the assistance of counsel; (2) designate an individual or department with the responsibility to maintain and retrieve electronic discovery; and (3) retain a consultant to assist with electronic discovery during litigation. Being proactive in the area of electronic discovery is very cost-effective. ■