HOW WILL YOUR INFORMATION TECHNOLOGY PRACTICES FARE ON THE WITNESS STAND IN FEDERAL COURT?

(Evaluating your company's electronic document preservation, collection and production procedures under the new Federal e-discovery rules)

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Why Discovery Of Electronically Stored Information Matters?

Coleman Holdings v. *Morgan Stanley*

Failure to search for back-up tapes ➔
adverse inference ➔
$1.5 billion in damages.

Preservation, Collection and Production of Electronically Stored Information (“ESI”)

Distinguished by:

- Exponentially greater volume than physical documents;
- Dynamic nature;
- Dependence upon the proper hardware and software environment to be useful;
- Multiplicity of forms;
- Often hidden nature (*e.g.*, metadata);
- Persistence; and
- Difficulty of review.

All of these factors influence cost.

December 2006 FRCP Amendments

- Changes include:
  - Distinction between ESI and “document” in the Federal Rules.
  - Requirement for litigants to address ESI at an early meet and confer. Rule 26(f).
  - Requirement to respond to discovery requests by listing potentially relevant ESI sources that were not searched because of undue burden or cost. Challenge procedure. Rule 26(b)(2)(B).
  - Some protection from sanctions under the Federal Rules of Civil Procedure for destruction of information due to “the routine, good-faith operation of an electronic information system.” Rule 37(f).

December 2006 FRCP Amendments

- Changes cont.:
  - Rule 34 revisions concerning ESI form:
    - Right to requesting specific form and to object to requested form.
    - Obligation to identify the form in which ESI will be produced.
    - Obligation to produce ESI in requested form, native form or forms that are “reasonably usable.”
    - Protection against production of same ESI in multiple forms.
  - Clarification of right to request “testing” and “sampling” of ESI under Rule 34.

What Hasn’t Changed

- Reasonableness and fair play still remain the underlying guidelines for retention, destruction, collection and discovery of information.

Primary Issues For Our Mock Evidentiary Hearing Today:

1. Designation and discovery of “inaccessible” information under Rule 26(b)(2)(B).

2. Inadvertent destruction of ESI through operation of a computer system and the Rule 37(f) safe harbor.

Rule 26(b)(2)(B)

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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Good Cause for Discovery of “Inaccessible” Information

Rule 26(b)(2) Committee Note considerations:

- The specificity of the 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 on more easily accessed sources;
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- Predictions as to the importance and usefulness of the further information;
- The importance of the issues at stake in the litigation; and
- The parties' resources.

Early Cases Addressing Accessibility Under Amended Rule 26(b)(2)(B)

- *Ameriwood Industries, Inc.*, v. *Liberman*, 2006 WL 3825291 (E.D.Mo. 2006)
  - In former employee trade secret case, plaintiff moved to compel former employee defendants to produce ESI, including deleted files from hard drives. Defendants provided cost evidence to show inaccessibility but the court found good cause for production as the discovery sought related directly to the plaintiff's claims and an email produced from a third party supported plaintiff's contention that not all responsive material had been produced. Court set up procedure for forensic analysis by plaintiff's expert which has since been followed in other cases.
- *Ameriwood Industries, Inc.*, v. *Liberman*, 2007 WL 496716 (E.D.Mo. 2007)
  - Defendants this time moved to compel production of documents relating to plaintiff's OEM television stand business. The majority of this information was kept electronically. The court found that the information was not reasonably accessible because the request was unduly burdensome in view of the hundreds of thousands of relevant files. In deciding whether to nevertheless compel production for good cause, the court applied the committee note factors. The court found the requests not narrowly tailored to defendants' defenses and denied defendants' motion for lack of good cause.

Early Cases Addressing Accessibility Under Amended Rule 26(b)(2)(B)

- *Semsroth* v. *City of Wichita*, 2006 WL 3913444 (D.Kan. 2006)
  - Court denied request to shift costs of restoration and search of email from single back-up tape, finding that the tape was not inaccessible for undue burden or cost. The court, however, limited the scope of the search on the back-up tape.
- *Best Buy Stores, L.P.* v. *Developers Diversified Realty Corp.*, 2007 WL 333987 (D.Minn. 2007)
  - Affirming magistrate's grant of plaintiff's motion to compel discovery of ESI designated as "not reasonably accessible." The court found defendant's prior conclusory statements insufficient to establish inaccessiblity and rejected the defendant's belated attempt to provide evidence of cost and burden to push back the previously ordered compliance date.

Safe Harbor For ESI Destruction?

Rule 37(f) - Electronically Stored Information.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

Safe Harbor For ESI Destruction?

Limited Protection under Rule 37(f):

- Applies only to routine, good-faith operations
- Exclusion for “exceptional circumstances”
- Only protects against sanctions under the Federal Rules of Civil Procedure. Even if Rule 37(f) were applicable, sanctions could be imposed under:
  - Court’s inherent authority to manage litigation
  - Rules of professional conduct
  - Unreasonably and vexatiously multiplying proceedings under 28 U.S.C. § 1927.

Plan Now To Reduce Costs And Gain Leverage In Future Litigation

- Know what ESI sources you have - *e.g.*, databases, computer systems, servers, networks, legacy systems, archives, backup systems, removable storage media (tapes, discs, USB drives etc.), laptops, personal computers, internet data, personal electronic gadgets, voicemail systems, and third party information keepers.
- Know what type of information is kept where.
- Know the cost and burden of accessing your ESI sources.
- Have in place an information retention/destruction policy that addresses these sources and follow it. Consider the costs of keeping unneeded ESI. No company wants to pay its vendors and attorneys to process and review information that there was no legitimate business reason or legal obligation to retain.
- Make sure your information retention/destruction policy has provisions for litigation holds.

Once Faced With The Prospect Of Litigation

- Consider ESI early!
- Identify and evaluate potentially relevant sources of information.
- Appropriately tailor a litigation hold to the case and be able to justify it. It is unrealistic and likely undesirable to suspend all information destruction but err on side of over-inclusion. Just because it is held does not mean it will be reviewed or produced.
- Communicate and enforce the litigation hold. Routinely remind key players and check compliance. An adverse inference is likely far worse than bad documents.
- Consider who should handle collection and processing of ESI. Do you have expertise to collect and process all your sources of ESI? Do you want your employees taken away from other duties? Would you feel comfortable having someone from your IT department testify about preservation, collection and processing efforts? Is it worth it to outsource these efforts?
- Make the most of the required early meet and confer - If your counsel knows what you have and the associated costs and burdens, you may be able to avoid later disputes and significant discovery related expenses.

Further Information

- Sedona Conference Materials
  - Best Practice Guidelines & Commentary for Managing Information and Records in the Electronic Age – September 2005;
  - Best Practices for the selection of Electronic Discovery Vendors: Navigating the Vendor Proposal Process – July 2005;
  - Best Practices Recommendations & Principles for Addressing Electronic Document Production – July 2005.
  - http://www.thesedonaconference.org/publications_html
- ABA Civil Discovery Standards – Taskforce on Electronic Discovery (2004)
  - http://www.abanet.org/litigation/discoverystandards/

Advice from Judge Scheindlin

March 24, 2004 Interview with Judge Scheindlin, author of the Zubulake decisions.

Q: Assume for the moment that you decided to leave the bench tomorrow to become the general counsel of a Fortune 500 company. What are the first ten steps you would take to ensure that your company was prepared to comply with its discovery obligations with respect to electronic discovery?

A: I'm not sure the order is right, but here are ten steps I can think of.

1. I would be sure there is a well-thought-out records retention policy in place for business purposes that takes into account any statutory or regulatory obligations.
2. I would make sure that someone is really in charge of records retention and that she knows what she is doing. This person should probably not be the head of the IT department, but someone whose primary obligation is deciding what should be retained and how.
3. I would set up a records retention committee that meets regularly. The committee should include the general counsel -- that's me! -- a senior executive, the head of the IT department and the records retention manager. Minutes of these regular meetings should be kept and circulated among all the participants.
4. I would disseminate the records retention policy to all company employees, and then I would find a way to test them on whether they have understood and implemented the policy.

Advice from Judge Scheindlin

5. I would set up a response team every time there is a litigation-need to preserve documents.
6. I'd be sure to consult outside counsel regarding the retention policy, and especially for their response to anticipated or actual litigation.
7. I would probably retain an outside vendor, if the case warranted it, to assist in organizing any litigation holds. I am not saying I would do that for every case, but if the case is big enough to warrant the expense, I'd do it. The reason is: I think the employees may sometimes be too close to the situation and might tend to either over- or under-preserve.
8. I would encourage outside counsel to raise the cost of preservation issues with the court at the earliest possible time. I don't think I have to bear the burden of excessive costs without at least trying to get a ruling favorable to me.
9. I would educate myself in my role as general counsel about the company's records, available technology -- that is, my choices for storing records -- the accessibility of such stored records and what it's going to cost to do that kind of storage and what it's going to cost if I need to retrieve documents from that kind of storage.
10. Finally, I would be particularly careful to avoid the destruction of documents, once it's clear to me that a duty to preserve has attached, because I would certainly risk sanctions if documents are destroyed once I have a duty to preserve them.