

New Rules for e-Evidence: The Case For The Defense

By Sonya L. Sigler

More than a few attorneys have so far managed to stave off the fateful day when they truly will have to address electronic evidence. Either they have been fortunate or smart in their selection of cases, or someone else has taken care of these issues for them. Or maybe they and opposing counsel have quietly decided that there was really nothing very interesting in those e-mails and that the paper documents will be adequate.

However, that fateful day is arriving quickly as proposed changes to the Federal Rules of Civil Procedure come closer to final approval. (See, www.uscourts.gov/rules/newrules6.html. See also, "U.S. Judicial Conference Approves FRCP e-Discovery Amendments" in the October issue of *e-Discovery Law & Strategy*.) Although these new rules are not in effect yet, some courts and practitioners are being guided by the proposed changes.

Many defense attorneys feel condemned to the role of Sisyphus, eternally pushing a rock up a mountain. They believe the burden of the new rules adds rocks to push. One of the broadest-reaching implications of the new rules is to make the process for reviewing electronic data much more transparent.

Let's examine implications and strategies concerning these proposed changes, particularly for counsel representing organizations that hold large amounts of electronically stored information.

EARLY DISCUSSION OF ELECTRONIC EVIDENCE

Proposed rule 26(f) makes explicit the requirement for both sides to address e-discovery issues early in the process. Both sides must develop a

good understanding at this early stage of what electronically stored information exists, where it is stored, how much there is and whether any of it is not reasonably accessible. When this requirement is coupled with increasing quantities of electronic data, attorneys must quickly develop a strong command of electronic-discovery issues that will be a crucial component of their case strategy.

BEFORE THE CASE BEGINS

The defendant who can respond quickly and intelligently to discovery requests will have a significant strategic advantage. It is vital to prepare long before any subpoena arrives by proactively managing information assets: It's important for the organization to understand what information it holds, and to implement policies for deleting any that needn't be kept for regulatory or business reasons. Proactively managing electronically stored information can decrease the amount of data subject to discovery. If an organization has historically kept much of its data without any systematic retention policy, then going through the discovery process will likely be a very painful, expensive and time-consuming process.

Legal (in-house and outside counsel), information-technology and business teams must learn to work more closely together to effectively manage all electronically stored information. None of the information-management, document-retention or compliance obligations can be met solely by any one group in an organization, because no one group has the requisite expertise. Business executives own the information; in-house counsel, sometimes with assistance from outside counsel, must formulate legal strategy and advise the executives; and IT staff are

the guardians and operators of the systems that house the data. These groups will need to establish a close working relationship to put any document-retention or compliance policies into practical effect.

MEET AND CONFER

The single most significant implication of the proposed rules once the case begins is that both sides will need to understand, far earlier than is the current practice, what potential electronic evidence may exist, where it is, how much there is, and which custodian's data is where, and on what computer or backup media. Additionally, proposed rule 26(b)(2)(B) recognizes the difference between information that is "reasonably accessible" and that which is not, due to undue burden or cost of retrieval. Under this rule, the respondent is responsible for knowing where this hard-to-access data is, and will have to explain why the "burden or cost" makes it not reasonably accessible.

To gain the early insight required to hold fruitful discussions regarding electronically stored information, both sides may need to depend on more sophisticated tools than have typically been deployed to date. *Zubulake* set a precedent of using statistical sampling of backup tapes to determine whether they might hold relevant e-mail messages that would justify their wider restoration. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003). Counsel's knowledge of these and other more advanced e-discovery techniques will play an increasingly important role in understanding what data you have and what it means.

Whatever both sides agree to at the meet-and-confer sessions needs to be manageable. For corporate clients,

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cost pressures will play an increasing role in selection of vendors and methodologies. Costs are already high and the 2005 *Fullbright & Jaworski Second Annual Litigation Trends Survey* reports that controlling costs is general counsel's number-one concern. Knowing what you have — and where it is — is the first step toward being able to more closely control discovery expenses.

MANAGING THE CASE

Attorneys will be required to make early and potentially far-reaching decisions about how electronic discovery will be conducted. To most effectively safeguard client interests, attorneys need to be informed about the issues. Some of the questions to be faced early include:

- Which custodians' data should be produced?
- For what date ranges?
- What de-duplication methods, if any, should be used?
- What culling technology or methodology will be used to reduce the volume of irrelevant data?
- What search methodologies, if any, should be used?
- In which form or forms is the data to be produced? and
- How will vendors be chosen to assist in the collection, review and production of data?

If the plaintiff is more knowledgeable about various technology options, he or she may be in a position to argue successfully for broader discovery. It is important for the defense to be fully armed to rebut these arguments. Lawyers will have to become aware, at least on a general level, about current trends in e-discovery technology and how it can help them with discovery responses.

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The most important factor in determining discovery strategy is knowing which facts the data support. If you have reason to believe that your position is very strong, it could help to investigate potentially relevant data from non-obvious custodians that support the defense. On the other hand, if the position is less clearly tenable, it may be wise to discourage casting too wide a net for non-obvious custodians. At the same time, there is little advantage to the defense in aggressively culling non-damaging, non-responsive documents. You may prefer to put that burden on the plaintiff's side as far as reasonably possible.

EVOLVING CASE STRATEGY

What you find in the data may change case strategy dramatically, and the earlier you can get insight into the data, the better you can manage your case. The insight that you gain can strengthen your hand as you negotiate with the other side. A stronger position may allow you to take a harder line in negotiations, while discovery of damaging data or facts may make an early settlement look a lot more appealing.

The new rules provide for giving the plaintiff earlier and fuller insight into potential evidence. This will tend to give the plaintiff more time to review the data than has historically been the case. The traditional approach of waiting until the last moment, and then dumping as much data as possible on the opposing side will change, because a production schedule will be agreed to earlier in the process.

With more time, and with the availability of more sophisticated tools than ever before, the opportunity increases for the plaintiff to discover facts that are harmful to the defense. Thus, defense attorneys may be more motivated to quickly and fully understand exactly what is in the data to optimize their case strategy.

MORE SOPHISTICATED TOOLS

Corporate clients are starting to realize the importance of a consistent and defensible approach to the management of electronic data that may

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some day be evidence in a case. Such clients are typically quite savvy about technology and, increasingly, are taking an active part not only in managing their data policies, but in determining what e-discovery vendor should be used on their cases. Willing or otherwise, these clients' attorneys will have to consider more sophisticated e-discovery solutions.

A simple keyword search of a database of imaged documents will no longer be an adequate solution. Neither will so-called "concept" searches and such techniques that categorize documents on the basis of statistical similarities. Such approaches fail to detect large numbers of documents that can in some way damage the responding party.

Keyword searches can miss important documents unless they contain a chosen keyword. Categorization is a

broad-brush approach that can miss significant content that is overshadowed by the bulk of otherwise innocuous or irrelevant text in the same document. Either approach can allow the inadvertent and unnecessary production, for example, of documents that contain inappropriate sexual comments or derogatory remarks about customers that could prove very damaging.

More of increasingly sophisticated solutions are available that combine statistical, linguistic and other techniques to provide unprecedented insight into evidentiary data. To supplement these, analytical techniques can look beyond the detail of individual documents to reveal broader patterns that can highlight such factors as gaps in communications indicating incomplete production, or to help limit the scope of production to relevant custodians.

It will be ever-more important for the producing party to fully understand the nature of the data that

is being handed over, or risk being the victim of a plaintiff with more insight into the data, more sophisticated tools and more time to use them.

A PERFECT STORM?

A confluence of factors is throwing an ever-brightening spotlight on electronic discovery. More cases feature — and hinge on — larger volumes of electronic evidence that are impossible to fully review using currently accepted techniques. With the proposed rules changes all but certain to go into effect next year, both sides must encourage their clients to be prepared to address all e-discovery issues early and often. With more sophisticated technology continually available, both parties will have more time with their own data and, for plaintiffs, with the produced data set. Case strategy is bound to change with this increased insight into the data.

Start preparing your clients now.

