

E-Discovery Update

When I sit down to write these columns, I try to find topics that are relevant and interesting from my perspective as a reasonably tech savvy non-litigator. As I was preparing to do a recent podcast for a national telecommunications publication, I was asked to revisit a presentation that I'd done several years before on E-Discovery, and I was stunned to discover how many cases, from across the country, have been decided since the beginning of the year on issues related to this very hot topic. The preparation also gave me the chance to add a new word to my vocabulary—"spoliation," so be warned if we're ever playing Super Scrabble! But I digress...

Given this very current experience, I'd like to review where we are currently on matters related to E-Discovery, from the perspective of the defendant, and not from the perspective of either the plaintiff or defendant attorney, but rather as the corporate counsel who advises entities on issues related to documentation, maintenance and storage. And, of course, the avoidance of "spoliation."

Since amendments to the Federal Rules of Civil Procedure became effective in December, 2006, much has been written by litigators on how these changes affect the business of electronic information maintenance. What has not changed since that time is that litigants continue to have an iron-clad obligation to possess significantly more than a passing understanding and familiarity with their computer and network environments, and the capacity of these environments for electronic data storage. This requires ongoing and

specific education by and between the IT/telecommunications and legal groups so that each has sufficient knowledge to understand and manage the continuing evolution of obligations with respect to electronically stored information (“ESI”).

There are a number of important determinations that have been made since the E-Discovery rules were first implemented. Some are a reiteration of the original rules and obligations, and others are refinements of initial components.

First, and most importantly, before litigation hits, it’s imperative that an entity develop, maintain and continuously refine an ESI policy. The policy must include a detailed list of what data will be retained, the duration that such information will be held, and in what formats, and at what locations (if appropriate), it will be held. The policy must not be vague and overly broad, but sufficiently specific to be enforceable, and changes to the policy must be carefully documented. Finally, the policy must also contain information describing the extraordinary steps that will be taken when the enterprise becomes aware that litigation is pending.

Although I’m not sure that “highlight” is the appropriate word, perhaps the most dramatic decision regarding ESI came in the case of Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Secs., LLC, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010) (Amended Order). Judge Shira Scheindlin’s opinion, which addresses the issues of parties’ preservation obligations and spoliation in great detail, includes specific attention to levels of culpability for parties that fail to meet discovery obligations, required burdens of proof, and as well as the appropriate remedies upon

a finding of spoliation. But the case's headline should be that the case defined actions (or inactions) which can lead to a finding of gross negligence when discovery obligations are not met.

According to the opinion, a finding of gross negligence will occur when a) the duty to preserve has attached and b) a litigation hold has been issued. Once these steps have been taken, all key players must be identified (including both current and former employees) and verification must be made that reflects that electronic and paper records of these individuals have been preserved. Additionally, the deletion of emails generated by or received from these individuals must cease, and records of former employees that are in the possession, custody or control of another party must be preserved. Finally, backup tapes, when they are the sole source of relevant information, or when they relate to key players if relevant information maintained by those isn't obtainable from other readily accessible sources, must also be preserved.

Looking ahead, an amendment to Rule 26 is being considered by the Supreme Court which will limit the existing rules on work product protection. Although the amendments won't be a "done deal" until December 1st of this year, the proposed amendment, as it stands currently would "apply work-product protection to the discovery of draft reports by testifying expert witnesses, and with three important exceptions, communications between those witnesses and retaining counsel." The exceptions allow for the discovery of communications between attorney and expert regarding "(1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the

expert considered informing [the] opinion; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.”

What’s behind this proposed change is fascinating—particularly for a non-litigator. According to the Electronic Discovery Law Journal (www.ediscoverylaw.com), there has been evidence of attorneys and experts taking “elaborate steps to avoid creating any discoverable record, including...the retention of two experts: “one for consultation to do the work and develop the opinion, and one to provide the testimony.” This amendment recognizes the undue influence that an attorney can have on an expert’s opinion, particularly when the initial expert’s opinion has been successfully undiscoverable.

Finally, on the spoliation front, in the case of Rimkus Consulting Group, Inc. v. Cammarata, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010), the court found that defendants had indeed participated in intentional spoliation of evidence, including failing to preserve relevant ESI, manually deleting ESI, and destroying or giving away laptops containing relevant ESI, among other things. The outcome of the case was a mixed bag: the court declined to order terminating sanctions but ordered an adverse inference instruction and defendants were required to pay plaintiff’s attorneys fees and costs.

The issue of the management of ESI is critical, not only to the involved attorneys, but to litigants as well. A carefully crafted, and strictly followed policy is the best way to avoid unnecessary missteps during litigation. And “spoliation” remains a great Scrabble word. Now I just need a sufficiently large letter tray...