TACKLING "E-DISCOVERY" UNDER A NEW SET OF RULES

Significant changes to the Federal Rules of Civil Procedure regarding document production recently went into effect in December 2006. The new Rules are designed to tackle—but do not resolve—complex technological and logistical issues surrounding electronic discovery, production and preservation. Because electronic information is voluminous and highly perishable, the new Rules require parties to "meet and confer" to resolve issues unique to electronic discovery early in litigation. The Rule 26(f) planning conference must now include discussion regarding:

1. Issues related to the disclosure or discovery of electronically stored information that may be unique to the parties involved, including the parties' storage methods and automatic deletion systems;

2. The format of production (e.g. TIF, PDF, native format, paper/hard copies);

3. The costs of production (including costs of imaging and recovery where applicable);

4. How dynamic electronic information will be preserved; and

5. How the parties will deal with inadvertent production and potential waiver of privilege issues. That is, where a case involves voluminous electronic document production will the parties or even the court respect a "clawback" agreement that permits the producing party to reassert a privilege even where the document was produced?

These issues are not easily resolved and require plenty of early planning and strategy, as illustrated by a few examples. For example, if documents are to be produced in their electronic form, must the parties also produce metadata? (Metadata is background information in a document or file. For example, metadata can trace the recipients and senders of e-mails. It can also pinpoint all changes that have been made to documents such as Word documents). By way of another example, how will the parties determine the format of production? That is, must documents be produced in native format rather than TIFs or PDFs? (Native documents are the documents in their changeable, "working form;" for example, an Excel spreadsheet produced in native will permit the opposing party to view or change formulas). If documents are produced in native format, how will the parties ensure the documents retain their originally-produced format? Other tough issues include addressing a time frame that is practical to preserve electronic documents considering any effect it will have on the parties' day-to-day business operations.

These are just a *few* of the many types of questions that must be addressed by both sides at the outset of litigation. For this reason, attorneys need the immediate cooperation and active assistance of a corporate client to identify the appropriate IT/IS personnel to educate the attorney about the computer system and to aid in determining whether a system of automatic deletion needs to be halted to avoid penalties down the road. The client should also aid the attorney in designating a "30(b) (6) person" in the IS/IT department who will ultimately certify that all electronic documents sought are being produced.

The new Federal Rules press parties to resolve these issues earlier rather than later to ensure electronic evidence is preserved. The new Rules and the rise of judicial awareness evidenced by the increasingly common award of sanctions related to "e-discovery" have one theme in common: the "empty head" defense of the technologically inept will be an invalid excuse in the face of a spoliation accusation.

The now infamous *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) case and other opinions sanctioning corporations and law firms provide a sobering view of the gravity of this issue. By way of introduction, the Court in *Zubulake* began its opinion by emphasizing the importance of good attorney-client communication, stating, "What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes 'just crossfire,' and there are usually casualties." *Zubulake* is one such casualty.

Zubulake involved a fairly routine, gender discrimination claim against an employer. Back-up documents, including relevant e-mails, were destroyed even though the company's attorney had asked the client and appropriate employees to produce and preserve all e-mails and relevant materials. The *Zubulake* Court imposed various monetary sanctions, penalties and costs, including costs of re-deposing several witnesses. Worse still, the Court drafted an adverse jury instruction advising that the jury could infer that the destroyed evidence would have been unfavorable to the employer!

Zubulake indicates unequivocally that a client must not only cease destroying or deleting e-mails and "e-documents" whenever there is a "possibility of litigation," but must take active, affirmative steps to ensure the same, including efforts to halt even automatic, unintentional deletion. To avoid a similarly disastrous "*Zubulake*-situation," it is critical for the client to aid the attorney in understanding a client's automatic deletion and backup systems. To do so, the client and attorney must consider all the places where relevant electronic data might be stored including e-mail servers, hard drives, loose files, backup tapes, laptops, floppy discs, CDs, directories, PDAs, cell phones, Blackberries, and even employees' home desktops, if necessary.

While the burden may seem onerous, *failing* to investigate these possible sources of electronic information can be costly. In *GTFM, Inc. v. Wal-mart Stores, Inc.,* Doc. 98CIV.7724(RPP), 2000 WL 1693615 (S.D.N.Y Nov. 9, 2000), Wal-Mart was penalized because a senior executive reported that sales data the plaintiff requested was unavailable. It was later discovered from an "IS" (Information Systems) employee that the information would have been available at the time the plaintiff's request had been made but had since been overwritten. The court imposed sanctions including all plaintiff's expenses and legal fees (to the tune of $110,000) caused by the inaccurate disclosure. The court also imposed an on-site inspection of the computer facilities at Wal-Mart's expense.

The moral of the story? "Beware!" While the new Federal Rules raise important questions about electronic discovery, they will leave to the parties the difficult and tricky work of tackling the logistics. Early attorney-client communication to ensure a thorough exploration of a client's computer systems is now more critical than ever.

By: Renee A. Eveland