

New Federal Rules of Civil Procedure

MBA 2007 Legal Issues/Regulatory Compliance Conference

New Orleans, Louisiana

May 9, 2007

LORD BISSELL  BROOK LLP
ATTORNEYS AT LAW

Why We Are Here

- Litigation in the US now often focuses on **mismanaged corporate information** through **e-discovery**
- **E-discovery readiness** -- without it, your e-discovery costs will be twice your legal fees through 2010 (Gartner)
- E-messaging overwhelms **records management** with volume and redundancy of unstructured data, just as consistent records management becomes critical
- Amendments to the Federal Rules of Civil Procedure are forcing lawyers to focus on Electronically Stored Information (ESI) early in disputes.
- ESI's more central role in litigation, and the increasing importance of e-document management, sets the stage for **your leadership**.

Preservation and “Spoliation”

- Failure to properly preserve is “spoliation”
- Duty triggered before lawsuit is filed
 - » When litigation is “reasonably anticipated”
 - Rambus, Inc. v. Infineon Techs. AG, 220 F.R.D. 264, 268-87 (E.D. Va. 2004)
- Some remedies:
 - » United States v. Philip Morris USA, Inc., 327 F. Supp.2d 21, 26 (D.D.C. 2004)
 - \$2.75 million sanction for failure of 11 employees to preserve email
 - » Coleman Holdings Inc. v. Morgan Stanley & Co., Inc., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005)
 - adverse inference instruction leading to \$1.45 billion initial verdict
 - » Arthur Andersen, LLC v. U.S., 544 U.S. 696 (2005)
 - possible criminal liability for improper document retention and destruction practices

Preservation and Disposal Suspension

- Litigation “hold” notice
- *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004):
 - » Notifies employees of dispute/litigation
 - » Suspends records retention policies, as appropriate
 - » Instructs key employees to:
 - preserve relevant records (and not delete); and
 - advise designee of responsive records
 - » Notice must be periodically re-issued
 - hold must be monitored

New Federal Rules of Civil Procedure

Revised Rule 26(b): although generally 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,” the trial court “may nonetheless order discovery from such sources if the requesting party shows good cause ...”

IMPACT: Need to prepare an Electronic Discovery Plan identifying what electronic information is “reasonably accessible” and will be produced, versus that information which is more difficult to access.

New Federal Rules: Rule 26(f)

- *“Discovery is slammed into overdrive”*
 - » At the first scheduling conference – typically, 30 days after lawsuit filed, the parties must discuss:
 - “any issues relating to preserving discoverable information”
 - “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”
- To adequately prepare for this discussion, counsel must familiarize themselves with their client’s document retention policy and electronic storage and management systems prior to the Rule 26 Conference.

New Federal Rules: Rule 26(f)

Significant Change--Identify what you will not produce

- » Responding Party must identify “**sources containing potentially responsive information that it is not searching nor producing.** The identification should, to the extent possible, **provide enough detail** to enable the requesting party to evaluate the **burdens and costs** of providing the discovery and the **likelihood of finding responsive information** on the identified sources” (Committee Notes 26(b)(2))
- » So IT needs to help the lawyers defensibly identify the **costs** associated with searching and producing any information that is to be claimed as “not reasonably accessible”
- » Relevant information still must be **preserved**, even if it is not **produced**

What Lawyers Generally Mean by Metadata

- The FRCP amendments are silent on “metadata”
- Committee Notes to Rule 26(f) recognize, however:

[C]omputer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information **describing the history, tracking, or management of an electronic file** (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. *Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference.*

- So lawyers need to consider whether metadata needs to be retained, disclosed, or produced under the circumstances or each case.

The Case-Specific Plan for the Rule 26(f) Conference

- Based on the standard Plan draft, the case-specific Plan commences with the initial internal Preservation Meetings, and addresses the same 4 issues:
 - 1. Sources:** Where can the relevant information be found?
 - 2. Accessibility:** Specific detailed and defensible distinctions between accessible and inaccessible documents (26(b)(2)), including costs
 - 3. Form:** What are the preferred form of production, arguments supporting that form, and possible alternatives?
 - 4. Metadata:** What metadata is relevant and should or should not be produced?

The Two E-Discovery Processes Within Organizations

- Disposal Suspension (**Hold**) Processes
 - » Non-privileged Preservation Plan
 - » IT processes and technology
 - » Organizational processes
- **26(f)** Readiness
 - » Privileged 26(f) Meeting Plan
 - » Tips and tactics for 26(f) meetings and beyond; make sure your trial counsel knows them!
- The Case-Specific Process Incorporates Both

Top 6 eDiscovery Process/Technology Needs

1. Defensible **searchability** through automated processes to the maximum extent cost-effective, with audit trails
2. Defensible, consistently-applied record and document **retention and destruction** policies, processes and technology, with audit trails
3. Procedures/technology for the **authentication** of eDocuments
4. Reliable **hold** processes and technology, with audit trails
5. **26(f)** readiness
 - » where the relevant information can likely be found
 - » how it can be produced, how quickly, and in what form
 - » clear, defensible distinctions between **accessible and inaccessible** documents (26(b)(2))
6. “Project management” software/processes to make sure proper steps are followed and documented

An “Email Archive” May Not Be What You Need, However

- The archiving industry developed primarily due to SEC requirements that broker-dealers and investment advisers archive ALL e-messages for several years, which include a requirement of WORM technology
- For the great majority of businesses that are not subject to those requirements, how much email do you need to keep, and for how long (in the absence of a litigation hold or record retention requirement, of course)?
 - » Filtering at the front end
 - » Retention periods (for non-records) consistent with business needs
- You may need to authenticate the email as the original
 - » Will non-“archive” processes and technology (such as “journaling” in Lotus Notes) give you sufficient bases for authentication?

A Word About Records Management from the Ghost of Arthur Andersen and Rule 37(f)

- AA records retention policy said client documents should be destroyed after an engagement concluded.
- Federal prosecutors said no partner or employee interviewed had ever known about or followed that policy.
- A “reminder email” concerning the policy was sent by AA counsel to AA’s Enron partners, and they began to destroy Enron documents.
- The Government’s case against AA was based in part on the fact that the policy had not been implemented by AA consistently.
- “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 the party’s electronic information systems.” Rule 37(f)

The Big Changes in Records Management Programs Now

- Your old record retention schedule was designed for a much smaller volume of more structured paper, based on regulatory requirements
- Can you expect all employees who touch messaging to comply with every regulatory time period solely through manual filing processes?
 - » The “5-second rule” is used by some as the test for a viable records management compliance program; if it takes more than 5 seconds to file/manage a document, employees may not do it.
- But the records management programs are changing:
 1. Simplification
 2. Integration with enterprise content management (ECM) strategy
 3. Training/audit/enforcement
 4. Technology for search/organization/de-duplication
 5. Hold processes and technology
 6. Technology and processes to assure authenticity of eRecords

Questions

Charlotte M. Bahin
Lord Bissell & Brook LLP
(202) 521-4106
cbahin@lordbissell.com