

April 2007

legal update



underberg & kessler LLP

New Federal Rules Concerning Electronic Data

By Paul V. Nunes, Esq.

Companies doing business within the United States and its territories must now do a better job of keeping track of all "electronically stored information." Effective December 1, 2006, the United States Supreme Court's administrative arm amended the Federal Rules of Civil Procedure - the rules that govern all litigation in federal courts. All parties involved in federal litigation are now required to produce "electronically stored information" to the opposing party much earlier in their litigation in an attempt to reduce disputes over discovery. Discovery is that phase of a case where parties disclose information to the other side that could be used as evidence at trial.

These newly enacted rules now make it more important than ever for businesses to know what information they have stored electronically, where to store it and how to recover or restore the data. This includes emails, instant messages, e-calendars, voicemails, graphics, photos and drawings, and any other forms of electronic documents. This would include data stored on not just desktop computers, but laptops, PDAs, smart-phones and Blackberries™.

Knowledge regarding storage and recovery of this data will be critical because under the newly enacted rules lawyers are required to provide information about where their clients' data is stored early in the litigation. A party that fails to keep inventory of the data or copies over and/or obliterates data after litigation has been commenced could be committing "electronic shredding of evidence." (Remember ENRON?) Companies can still discard documents and purge their electronic archives of data if they are not relevant to the pending or expected litigation. However, this process should be closely monitored.

The new rules do not alter how data should be recorded and retained. Instead, the rules require that companies understand their system for storing electronic information so that it can be more easily found and produced. The rules also describe guidelines on how companies can seek exemptions from providing data that is not "reasonably accessible".

The court in *Zubulake v. Ubs Warburg LLC (IV)* (decided before the enactment of the new rules) offers this caution to its litigants: “once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to insure the preservation of relevant documents. . . . As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the litigation hold.”

The Court crafted one exception to this general rule. “If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of ‘key players’ to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. . . . this exception applies to all backup tapes.” Accordingly, identifying who the “key players” are in the existing or threatened litigation must be done as soon as possible.

Failure to comply with the new rules can lead to sanctions and an instruction from the court to a jury that it is permitted to infer that the lost electronically stored information would have been unfavorable to your case. In other words, failure to handle your “electronically stored information” could prove fatal to your claim or defense in litigation.

With that said, I offer the following checklist:

1. If you receive a “litigation hold” letter from your counsel, take it very seriously. You should be prepared to implement a “litigation hold” to prevent the destruction of relevant electronically stored information when litigation is initiated, eminent or expected.
2. Speak to technology personnel to determine your system’s architecture.
3. Determine the reality of system backups (not the theoretical backup procedures).
4. Determine the location of relevant electronically stored information.
5. Supervise and insure the preservation of relevant information.
6. Identify inaccessible electronically stored information.
7. Identify and speak to “key players” in the litigation to determine the existence of electronically stored information and communicate the duty to them to preserve electronically stored information.
8. Periodically remind your staff and employees of their obligation to preserve electronically stored information.
9. Prevent the destruction of relevant backup tapes.

For more information on how the new amendments to the Federal Rules of Civil Procedure on discovery could impact your business, please contact your Underberg & Kessler attorney.