New Jersey Law Journal

VOL. 208 - NO 7 MONDAY, MAY 21, 2012 ESTABLISHED 1878

COMPLEX LITIGATION & *E-Discovery*

Collecting Electronically Stored Information

A practical guide to state and federal e-discovery laws

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All discovery is now e-discovery, because 95 percent of records are created and stored electronically," Judge Shira Scheindlin stated at the ARMA International 2006 Conference & Expo. Consequently, attorneys must be comfortable guiding clients through the e-discovery process, and, in particular, the collection of electronically stored information (ESI).

There are several phases to e-discovery: information management; identification of potential sources of relevant information (necessary to issue an effective litigation hold); preservation and collection; processing, review and analysis; production; and presentation. See Electronic Discovery Reference Model (EDRM) for a basic framework of the phases of e-discovery, available online at www.edrm.net. This article focuses on best practices for ESI collection, guiding clients through the ESI collection process and dealing with "unduly burdensome" requests for ESI.

Initially, all litigation matters require that a "litigation hold" letter be sent to the client and adversary explaining the preservation requirement and the consequences of the failure to preserve ESI. It is also critical to revisit the litigation hold with the client throughout the representation to ensure all appropriate individuals have received the notice and that appropriate measures have been implemented to preserve ESI. *I-Med Pharma v. Biomatrix,* No. 03-3677 (D.N.J. Dec. 9, 2011) (Debevoise, J.), highlights the dangers of carelessness and inattention in e-discovery and provides a set of common-sense standards for proceeding with ESI discovery searches and review.

E-Discovery Collection Laws

In New Jersey, the laws governing ESI collection, obligations and best practices largely mirror the federal rules. See New Jersey Court Rules:

- 1:9-2, subpoenas;
- 4:10-2(a), scope of discovery;
- 4:10-2(f), claims ESI is not reasonably accessible;
- 4:10-2(g), limitations on frequency of discovery;
- 4:17-4(d), option to produce business records, including ESI, in response to interrogatories;
- 4:18-1, production of documents and ESI); and
- 4:23-6, failure to make discovery; sanctions.

In addition, Rule 4:5B-2 provides that in most cases, the designated pretrial judge may or on a party's request conduct a case management conference if it appears the conference will, among other things, address issues relating to discovery of electronically stored information.

The Federal Rules of Civil Procedure (FRCP) prescribe the procedure for obtaining discovery, including e-discovery in the federal courts.

- FRCP 16, pretrial conferences, scheduling, management);
- FRCP 26(f), discovery, duty of disclosure;
- FRCP 33, interrogatories, options to produce business records;
- FRCP 34, production of documents, ESI;

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- FRCP 37(f), failure to make disclosures, ESI and good faith; and
- FRCP 45(d), subpoena practice.

Rule 34 permits a party to serve on any other party a request for production of ESI within the scope of FRCP 26(b). Specifically, FRCP 34(b)(2)(E) authorizes parties to apply discovery request procedures to require any party to produce ESI. Yet, the rules provide little guidance for conducting or collecting e-discovery once a request for ESI has been made. FRCP 34 states, in pertinent part:

> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request; (ii) If a request does not specify a form for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and (iii) A party need not produce the same [ESI] in more than one form.

Notably, the rule does not specify a method for collection of ESI. Thus, parties have discretion to determine the best, most effective and economical means of ESI collection — depending on the nature of the e-discovery requested. "The Sedona Principles wisely state … the producing party … is in the best position to determine the method by which they will collect documents." *Ford Motor Co. v. Edgewood Properties*, 257 F.R.D. 418, 427 (D.N.J. 2009).

In the absence of specific rules regarding collection methodology, courts and practitioners have come to rely on the Sedona Principles and commentaries as the leading authority on electronic document retrieval. See "The Sedona Principles, Best Practices, Recommendations, and Principles for Addressing Electronic Discovery Production," (The Sedona Conference Working Group, Jan. 2004), available online at www.thesedonaconference.org.

There are several general guidelines derived from these principles to consider when determining which collection method is best-suited for your client. ESI "should be collected in a manner that is comprehensive, maintains its content integrity, and preserves its form." EDRM Guide, §15:11. In addition, metadata should be collected and maintained. As stated by the court in *Ford*, the producing party ordinarily must take into account the need for metadata to make otherwise unintelligible documents understandable. Further, attorneys should be mindful to preserve "chain of custody," and be cognizant that authentication is frequently required. Finally, Sedona Principle 10 suggests that "reasonable procedures" be used to protect privileges. See *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 234 (D.Md. 2005).

Creation of a thoughtful and comprehensive collection plan to capture relevant information in a defensible manner coupled with careful execution is critical. "The exigencies of litigation, governmental inquiries and internal investigations generally require that ESI and its associated metadata should be collected in a manner that is legally defensible, proportionate, efficient, auditable, and targeted." See EDRM, Collection Guide, available online at www.edrm.net.

Methods of ESI Collection

The following collection methods have been considered by the Sedona Conference Working Group and the courts: employee manual collection; information technology-assisted collection; collection by a third-party vendor; and the hybrid approach. There are four steps in the collection process, regardless of which methodology is chosen: (1) developing an appropriate collection strategy; (2) preparing the collection plan; (3) selecting a method of collection; and (4) executing the collection plan.

Employee manual collection is rudimentary but cost-effective. With this approach, employers ask employees who are likely to possess or control relevant ESI to locate and collect it. Nevertheless, this approach is generally disfavored, because it may not be considered a diligent effort to collect responsive documents or to preserve metadata. For example, in *Mirbeau of Geneva Lake v. City of Lake Geneva*, 2009 WL 3347101 (E.D. Wis. 2009), having individual defendants review their e-mails to search for responsive documents did not meet the level of diligence required for fair discovery process.

The second approach involves the use of collection software that does not alter metadata in responsive documents. This approach is specifically addressed in The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, Practice Point I, which states "[i]n many settings involving electronically stored information, reliance solely on a manual search process for the purpose of finding responsive documents may be infeasible or unwarranted. In such cases, the use of automated search methods should be viewed as reasonable, valuable, and even necessary."

Additionally, Sedona Principle 11 approves the use of "data sampling, searching, or the use of selection criterion" as a means to narrow an otherwise unruly volume of information. This method of collection can be effective if a client has a diligent, proficient and trustworthy information technology staff who can correctly and efficiently employ such technology.

The third approach, employing outside assistance, is the safest, although potentially the most costly approach to collection. An outside vendor is seen by the courts and an adversary as an independent and neutral third party, trustworthy because of its neutrality and its expertise in the field of information technology. Such a vendor will likely already have in place established procedures, maintain comprehensive documentation and be prepared to testify as to the methodology and defensibility of the process. Last, a client may use a hybrid approach by employing any or all of the above methods, depending on its needs and cost concerns.

Cost Shifting Under the "Unduly Burdensome" Analysis

Aside from choosing the correct collection method, another approach to reducing ESI costs is to argue that your adversary's e-discovery requests are "unduly burdensome," and, as a result, the scope of the requests should be narrowed and/or the cost of collection should be shifted, in whole or in part, to the adversary. Discovery of ESI as provided in Rule 34 is specifically limited by Rule 26(b)(2)(B), which provides, in pertinent part:

> A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Briefly stated, Rule 26(b)(2)(C) allows the court on motion or sua sponte to limit the frequency or extent of discovery based on several factors, including the duplicative nature of the discovery sought and the burden or expense of the proposed discovery. See *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 319-20 (S.D.N.Y. 2003), which lists five categories of ESI, in order of most accessible to least accessible, as follows: (1) active online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.

The strategy to seek cost shifting should be considered when ESI is relatively inaccessible and collection would impose an undue burden of expense on the responding party. *Wachtel v. Health Net*, 239 F.R.D. 81, 91 n. 23 (D.N.J. 2006). To determine if cost shifting is appropriate, courts consider the factors set forth in Rule 26(b)(2)(B) and *Zubulake*, including: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

Dangers of Collection Failures

Sanctions motions resulting from a client's deficient collection efforts can create expensive and time-consuming satellite litigation. Such deficiencies include, but are not limited to, altering metadata (thereby affecting retrieval and creation information), deficient chain of custody, spoliation, lack of custodian involvement, failure to adhere to industry standards, and vulnerability of the information technology staff assigned to oversee and supervise the collection. See EDRM Guide, § 15:13. For example, in *Wachtel v. Health Net*, 2006 WL 3538935 (D.N.J. Dec. 6, 2006), employee-conducted searches managed to exclude inculpatory documents that were highly germane to the plaintiffs' requests.

Collection of ESI is an area where the appropriate method used by the client will depend on various factors, including cost control, the type of e-discovery at issue, the complexity and number of the client's systems, the number of potential custodians (including the so-called "Cloud"), and responsive information at issue. Ideally, the parties will work out e-discovery disputes in the FRCP 26(f) conference. Where parties are unable to agree on the scope of e-discovery, arguments can be made that requests are unduly burdensome and should be denied and/or that costs should be shifted. Inadequate collection which results in satellite litigation and sanctions should be avoided at all costs. Setting forth clear and comprehensive collection plans at the outset of litigation will save you and your client time and money. ■