EFFICIENCY IN LITIGATION: ELECTRONIC DISCOVERY

By Barb Dawson and Jason Vanacour

As appeared in the Spring 2007 Issue of the ABA's Section of Litigation Pretrial Practice and Procedure Newsletter

Efficiency in litigation is enhanced when an action plan is in place before issues arise. With recent rule changes and judicial decisions that have raised the stakes for companies and their counsel regarding electronic discovery, planning for potential litigation has become essential. Pre-claim procedures are important to position a company to promptly and appropriately respond when a notice of a claim is received. Such procedures allow for front line recipients of such a claim to understand what should – and should not – be done as next steps. Similarly, advance planning regarding claim investigation is likely to streamline the process and avoid unnecessary steps. Finally, consideration of the many e-discovery issues that arise after a complaint is filed also can minimize cost and complications. This article outlines considerations that can increase efficiency for counsel and their clients when responding to triggering events in the e-discovery world.

I. Heightened Discovery Obligations

Although the new amendments to the federal rules addressing electronic discovery do not create new obligations to preserve evidence, they also have heightened the obligation and provided guidance for preservation of documents in day-to-day operations. The analysis of whether a party has taken appropriate steps to preserve electronic evidence, and whether it could be subject to sanctions for failure to do so, is a reasonableness analysis that takes into account the day-to-day operation of a company's electronic information system. [i]As a result, the new federal rules have, in essence, had an effect on companies that are not currently in litigation or even have notice of a claim against them. Further, because electronically stored information ("ESI") is much more volatile than hard copy documents, action must be taken much earlier in the process to ensure that ESI is not inadvertently deleted or altered.

To accommodate for this obligation and unique nature of ESI, it is important to understand that a company will be operating in one of three phases at all times during its existence and may actually be operating in more than one phase at the same time. The three phases are (I) prior to receipt of notice of a claim—the day-to-day operation of a company; (II) the company has received notice of a claim—preservation obligations triggered; and (III) litigation has been filed against the company—the rules of civil procedure will govern. This article focuses on Phases II and III, but it is important to remember that what happens in Phase 1 will dictate how effective a company will be in Phases II and III. In particular, it is important that a company has a reasonable document retention policy that is broadly communicated and implemented. The terms of, and compliance with, that policy is what Courts will examine when determining whether a party should be sanctioned for the destruction of documents in Phase I.[ii]

II. Trigger Event: Notice of a Claim Received (Phase II)

A. Pre-Claim Procedures

A company should be vigilant to ensure that there are mechanisms in place for reporting and reviewing possible claims, such as sexual harassment in the work place.[iii] Receipt of notice of a claim prompts action as the duty to preserve "known relevant evidence" will arise at this time.[iv] At a minimum, the company should have: (1) a procedure in place to determine if notice has been given; and (2) a stop gap plan to rely upon while determining if it needs to move forward with a formal investigation and to retain outside counsel.[v]

A pre-claim procedure need not be complicated. It simply requires an up-the-chain-of-command reporting mechanism for employees suited to the particular company's structure and reporting procedures for managers or supervisors that will prompt appropriate steps to preserve evidence.[vi] Consultation with counsel is an important step in the reporting procedure to ensure that appropriate investigations are undertaken at the direction of counsel. [vii]

Temporary "stop gap" measures also are important after notice is received. The preliminary litigation hold is key to ensure that documents are preserved in an unaltered state. While preservation is critical at this juncture, documents may not need to be gathered at this time. [viii] In some circumstances, the preliminary litigation hold may even include specific instructions indicating that the individual employees should not undertake the task of gathering the documents, and in the event gathering is necessary, the employees will receive further correspondence outlining the gathering procedure.

This "stop gap" notice should go to key players and to the company's information technology department ("IT") to preserve critical systems and backup data. [i] Such notice is an important preliminary step to avoid the destruction of significant data. If the claim further develops, and additional relevant persons and documents are identified, a broader, more comprehensive preservation notice should be timely issued to ensure coverage of all main players and databases.

B. Potential Claim Investigations

1. Knowing the Key Players

The first step in the post-notice investigation should be contact with the key individuals with substantive knowledge relating to the claim.[x] This is imperative because these persons likely will be in possession of the pertinent documentation or will know who is. Information from the key players will help the IT department help comply with preservation obligations. In interviewing key players, the focus should include identifying other individuals who may have knowledge regarding potentially relevant documents.

2. Locating the Relevant Documents

Consultation with the IT department also will provide early – and invaluable – information. IT can assist in: mapping the flow of documentation throughout the company's system; identifying the location of the relevant information identified above; and preserving any active reasonably assessable documents (i.e., 1st tier information). IT also will be able to identify back-up policies and procedures and assist in the preservation of information that is not reasonably accessible (i.e., 2nd tier information) as the rules require.[xi]

3. Confirming Adequacy of Litigation Hold

Once a company has confirmed the identity of the key players and the location of relevant data, the preliminary litigation hold or notice should be reviewed to ensure it is sufficiently comprehensive. By this point, more details are

likely known about the claim and the hold should be reviewed to confirm that it: includes an adequate description of the nature of the claim; identifies key players with substantive knowledge; provides detailed information relating to the preservation and potential collection of information; and identifies the individual(s) who have the authority to lift the hold.[xii]

In addition to the written preservation order, key players (including IT personnel in charge of the deletion of data) should be personally contacted to ensure compliance with the order.[xiii] As it is important that all employees understand and follow the written orders, individualized follow up may be necessary, at least with key players.

The focus at this stage is not only to satisfy the reasonableness test of Rule 37 but also to ensure that important evidence truly is being preserved. If a complaint has not been filed as of yet, there may be no formal duty to move forward with gathering the relevant documents that have been preserved and incurring the associated costs.[xiv] Nevertheless, if a company is unable to locate relevant evidence that it has reason to believe exists on its system, this is the right time to consult a forensics expert as it will be in no position to defend a claim without the preservation of its evidence.

4. Safe Harbor

Rule 37(f) of the newly adopted amendments sets forth a good faith standard when reviewing the culpability of a company for the destruction of documents relevant to litigation. Although the Rule focuses on the good faith operation of an "electronic information system," this section is essentially an inquiry into whether the company took good faith efforts to preserve relevant evidence once it had notice of the claim. Accordingly, to seek protection under the new "safe harbor," a company likely will be judged on the totality of its response once it has received notice of a claim.[xv]

Once the company determines it has notice of a claim, or if it has a question about notice, it should seriously consider retaining outside counsel to assist in pre-litigation steps. Although the involvement of outside counsel will not relieve the company of liability for data destruction,[xvi] it could aid in showing that the company took reasonable steps to ensure preservation. [xvii]

III. Trigger Event: Litigation Instituted (Phase III)

Once litigation has been instituted, a company will want to take additional steps to ensure that it can comply with its disclosure and discovery obligations. Gathering, reviewing, and producing ESI come into play in light of these obligations. In addition to the common law duties that existed prior to the filing of litigation, a company will need to consider the new amendments to the federal rules that now govern the discovery of ESI and how they affect the gathering and production of ESI.

A. Gathering of the Evidence

Once litigation has been filed and disclosure obligations have been triggered, the company will have to undertake the gathering of relevant ESI. [xviii] While common sense and "reasonableness" may have dictated the gathering of documents at an earlier point, the filing of the complaint certainly should heighten this obligation. This gathering must be conducted in a sound manner to ensure that the ESI ultimately will be admitted during trial. To avoid problems later in the litigation, a company will want to devise a discovery protocol as early in the litigation as possible. To avoid countless hours of discovery disputes and save money, this protocol should be a collaborative effort between the parties when practicable. [xx] An efficiency-enhancing protocol should address, at a minimum, the following issues:

1. Form of Production

This component is essential and will dictate many of the decisions that follow, including the review of the documentation. The federal rules' default is production in the form that documents are kept in the ordinary course of business or in a reasonably usable format, [xxi] but the parties are free to agree to production in any format. [xxii]

2. Privilege Issues

The federal rules provide for the parties to agree as to certain privilege waiver issues and document their agreement in the court's case management order. [xxiii] Options at this stage should be explored. A company's big picture regarding litigation is important here. For example, currently there is the possibility that the inadvertent production of documents in one jurisdiction may waive privilege in another jurisdiction. [xxiv] Therefore, although a party may have an order protecting the privilege in a particular case, such an agreement may not afford it full protection when documents are relevant to litigation in more than one jurisdiction or in litigation with third parties. [xxv]

3. Location of Documents

Although a party may have identified what it believes to be the key players and location of documents up front, it also should consider discussing these issues with opposing counsel at an early point in the litigation. Although this approach may seem onerous (and indeed may be onerous), it will shed light on whether the preservation efforts need to be altered to comply with obligations. To facilitate this process, the parties may agree on some early discovery, such as: exchanging document retention policies; deposing IT personnel to map the location of relevant ESI; and using interrogatories to identify key players and locations of documents.

B. Reviewing the Documents for Production

Finally, it is important to discuss the company's system capabilities with the IT department before review of documentation begins. A party may not have the specific software necessary to support the review and will want to use a third-party vendor. For example, a party that utilizes Microsoft Outlook may not be able to process a review of communications produced by the opposing party if the other side utilizes Lotus Notes. In some instances, there should be discussions about using one vendor with the capability of making individually accessed databases for each party to save time and costs.

In the event a party has been unable to obtain a joint protocol with opposing counsel and it anticipates that spoliation will be an issue, it may want to send a letter to the opposing party documenting its preservation efforts. [xxvi] That way, the opposing party has the opportunity to address the issue and may either pass on the opportunity or take a position that at least will identify potential issues (and eliminate others). This step also allows the parties to involve the court if necessary before any spoliation issue may develop.

IV. Conclusion

While the new rules and expectations regarding electronic discovery may appear to present potential pitfalls, they also provide good opportunities to coordinate the orderly progression of discovery. What is reasonable is case specific, but the combination of strong internal pre-claim procedures, claim investigation steps and litigation strategy can make electronic discovery not only reasonable but also relatively efficient.

Barbara J. Dawson* is a commercial litigation partner, and Jason Vanacour* is a litigation associate, at Snell & Wilmer L.L.P.'s Phoenix, Arizona office. Barb is a member of the ABA Section of Litigation Leadership and can be reached at bdawson@swlaw.com. Jason is a member of the Section of Litigation Pre-Trial Practice and Discovery Committee and Electronic Discovery Subcommittee and can be reached at jvanacour@swlaw.com.

i *See* Fed. R. Civ. P. 37(f)

ii *See Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (stating that to determine whether to issue an adverse jury instruction for failure to preserve evidence a court should consider such things as whether a company's "document retention policy is reasonable considering the facts and circumstances surrounding the relevant documents" and "whether the document retention policy was instituted in bad faith.")

iii In the event that a corporation has policies and procedures in place for ensuring that all documents are preserved, a company may not be held liable for the independent actions of one employee. *See In re Adelphi Comm. Corp.*, 327 B.R. 175, 180 (Bankr. S.D.N.Y. 2005).

iv S*ee Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)(*"Zubulake IV"*)

v *Id.* at 218.

vi Because whether notice has been given to a corporation is dependent on the specific facts of each case, it is important to make sure that your company has procedures in place to alleviate as much of the uncertainty as possible. *See Arthur Anderson, LLP*, 544 U.S. 696, 699-704 (2005); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001).

vii Although there is no case law requiring that the legal department be involved at this juncture, it is wise to utilize the legal department not only for its expertise, but for the protections afforded by the attorney/client and work product doctrines. *See Baran v. Walsh Construction Co.*, 2007 U.S. Dist. LEXIS 953 (N.D. Ill. Jan. 4, 2007).

viii The obligation to gather, review and produce documents is triggered by the Rules of Civil Procedure. Because no suit is pending at this time, there is no law or rule compelling gathering (as opposed to preserving) of the responsive information at this junction. This assumes, however, that the company has no other obligation to gather and produce these documents, such as being under government investigation.

ix *See Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*"Zubulake V"*).

x *See id.* at 434-35.

xi "[C]ounsel must become familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the 'key players' in the litigation, in order to understand how they stored information." *Zubulake V*, 229 F.R.D. *at* 432.

xii *See* The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production (Sedona Conference Working Group Series July 2005).

xiii *See Zubulake IV*, 220 F.R.D. at 432 ("[a] party's discovery obligations do not end with the implementation of a 'litigation hold' -- to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents.")

xiv The amendments to the federal rules discuss issues relating to the production of ESI. Prior to the filing of the lawsuit, however, the disclosure obligations in the federal rules are inapplicable.

xv *See* Fed. R. Civ. P. 37.

xvi *See Zubulake V*, 229 F.R.D. at 433-34 (stating that both the company and outside counsel have an independent duty to ensure that relevant documents are preserved upon notice of claim).

xvii The Advisory Committee Notes support that a company's effort to pose a litigation hold should be considered in determining if a company acted in good faith. *See* Report of the Advisory Committee on the Federal Rules of Civil Procedure to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, at 125-29 (May 27 2005; rev. ed. July 25, 2005), available at www.uscourts.gov.

xviii *See* Fed. R. Civ. P. 26.

xix *See State v. Cook*, 149 Ohio App. 3d 422, 777 N.E.2d 882 (2002)(stating that a forensically sound process of creating a mirror image of a computer produces an accurate result and is sufficient to authenticate the results of the process).

xx *See* Fed. R. Civ. P. 26(f)
xxi *See* Fed. R. Civ. P. 34(b)(ii) ("if a request does not specify the form or forms of production for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usuable").
xxii *Id.*
xxiii *See* Fed. R. Civ. P. 26(f)(4) (parties should discuss "any issues relating to claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.").
xxiv *See* Report on the Advisory Committee on Evidence Rules, dated May 15, 2006 available at http://www.uscourts.gov/rules/Reports/EV05-2006.pdf. (last visited March 8, 2007).
xxv *Id.*
xxvi *See Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (D.N.Y. 2004)(refusing to impose sanctions where failure to preserve was not intentional).

Barabara Dawson
602.382.6235
bdawson@swlaw.com

Jason Vanacour
602.382.6369
jvanacour@swlaw.com

Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, Arizona 85004-2202