Managing Discovery Of Electronically Stored Information Under Proposed Amendments To Federal Rules Of Civil Procedure

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Consider the following scenario. Your personal care products company is sued for falsely advertising the benefits of a new shampoo, but receives a request for documents covering any marketing campaign over the last fifteen years. Your IT department does a test run to see how many electronic files are conceivably implicated by this request and finds that the search generates more than 100,000 “hits” or documents. It will also require searching files of dozens of employees who are no longer with the company. You find this situation untenable and unnecessary. It will take months to sort through the documents, require hiring an outside law firm and vendor to manage the process, cost hundreds of thousands of dollars, and require time and input from employees who should be focused on the company’s business needs. You contact the attorney for the party suing you, but he refuses to budge, modify or negotiate about the request. Instead, he insists that you respond fully and completely or otherwise spend time making a motion to the court.

Companies and their attorneys will likely tell you that they have experienced at least some, if not all, of the difficulties presented in the above scenario. Electronic documents, such as e-mails, Word documents and Excel files are commonplace in most office environments – making business more efficient and advanced. But in the world of litigation, these technologies create significant challenges for companies that are also trying to keep their focus on furthering their mission, maximizing profits, and controlling the bottom line.

The issues with managing electronic discovery and curtailing discovery abuses are now being addressed. In June 2013, the Judicial Conference Committee on Rules of Practice and Procedure (the “Committee”) proposed amendments to the Federal Rules of Civil Procedure. The Committee’s report described three main goals: (i) to improve early and effective judicial case management; (2) to enhance the means of keeping discovery proportional to the action; and (3) to advance
cooperation. Each of these goals affects electronically stored information ("ESI").

Below we discuss the amendments to Rules 16, 26, and 37 that are most relevant to businesses tasked with managing ESI before or during litigation. We also offer insights into how law firms and other legal partners are working to help businesses be more cost efficient and productive in this arena.

**Preservation Of ESI**
The proposed amendments would provide guidance on the duty to preserve ESI. Specifically, Rule 16(b)(3)(B) would be amended to state that the pretrial order may now provide for preservation of ESI and Rule 26(f)(3)(C) would be amended to include ESI preservation as a required topic to the parties’ discovery plan.

**Scope Of Discovery**
One of the main areas the proposed amendments address deals with the scope of discovery and proportionality. As the Committee notes in its report, this concern stems from parties abusing discovery techniques and trying to drown an adversary in time-intensive and costly requests. Specifically, Rule 26(b)(1) currently allows discovery on any matter related to a party’s claims or defenses. As many attorneys and their clients can attest, this often means that a party will seek a wide range of information and request voluminous ESI. The proposed amendment to that rule would require that discovery now “must be proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

**Sanctionable Conduct**
The proposed amendments to Rule 37, which governs sanctions for failure to disclose or preserve discoverable information, are aimed at providing more protection to parties. If enacted, the amendments to Rule 37 would allow sanctions only if the court finds that the party’s actions “caused substantial prejudice in the litigation and were willful and in bad faith” or “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.” This standard would apply to both ESI and traditional data. Even if a party’s actions warrant sanctions, the proposed amendments would allow a court to decide not to impose sanctions and instead adopt other measures, such as allowing additional discovery or an adverse jury instruction, or ordering the party to restore data or pay expenses caused by its failure to preserve discoverable information.

The reason for raising the bar on what is considered sanctionable conduct is the increasing burden of preserving information for litigation and “to ensure that potential litigants who make reasonable efforts to satisfy their preservation responsibilities may do so with confidence that they will not be subjected to serious sanctions should information be lost despite those efforts.”

**What Does This All Mean For Your Company?**
First, these proposed amendments should shift the way companies think about ESI. Companies no longer have the luxury of treating ESI as a fringe issue. It is at the forefront of litigation concerns and must be managed and planned for with that in mind. Even though the proposed amendments to Rule 37 appear to make sanctions less likely, a company failing to take its duty to preserve ESI seriously does so at its peril.

Companies should make early, accurate and aggressive case assessment a priority. By analyzing the case and the universe of potentially implicated personnel and data, companies put themselves in a position to effectively manage discovery requests for ESI. Early case assessment provides a framework and can mean the difference between a well-managed defense strategy and a losing one.

Second, companies should consider how the scale of the case and Rule 26’s proposed proportionality standard affect how to invest in ESI management. For instance, if your company is sued for a simple breach of contract involving $100,000, it would not make sense to spend $50,000 on e-discovery to respond to expansive discovery requests. Assessing costs and budgeting for electronic discovery should be done as early as possible with various factors taken into consideration.

Third, companies should devote time and energy into finding a legal partner that is experienced at managing ESI-related issues and utilizing inventive technologies to help clients be efficient. This will be one of the most important decisions for a company that becomes involved in litigation that raises significant ESI issues. This is especially true when choosing a law firm to serve
as outside counsel. Engage outside counsel’s IT and discovery experts early and often. Some law firms have structured these departments so that there is a dedicated project manager assigned to follow the life of the case with the client. These discovery experts also should engage in data mapping early on as part of the case assessment and to come up with reasonable solutions for ESI management.

Fourth, another factor to consider in managing electronic discovery is the possibility of leveraging high quality document reviewers, contract attorneys, and outside vendors. This could present a less expensive option for document coding. Furthermore, some of these professionals might be particularly skilled to deal with unique issues in the case, such as privacy concerns.

Finally, make sure you evaluate and choose the right tool for the right job. When searching for electronic documents to produce to opposing counsel, the typical practice has been to run keyword searches and narrow the universe of potentially responsive data that way. But there is now a trend favoring predictive coding over keyword searches as more efficient and accurate. Predictive coding software allows the user to identify conceptually-related documents. This is likely going to be helpful in cases with large amounts of ESI. In other cases, predictive coding may not be the best fit. Companies should inform themselves about the specific options available for different types of cases. Advances in e-discovery technology are doing away with the one-size-fits-all proposition.