Litigation in the Age of eDiscovery

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It is hard to imagine managing a business today without relying to some degree on information technology. Whether you are working with spreadsheets on a PC, emails on smartphones, Cloud computing or Internet-based applications, our professional lives are both easier and more complicated because of technology.

In the legal world, the data shared on these devices falls into the classification of electronically stored information ("ESI") and is routinely the target of discovery during litigation. The exchange of ESI in litigation is often referred to as "eDiscovery." eDiscovery is the process of seeking, locating, securing and searching ESI for the purpose of using it as evidence in a civil or criminal proceeding. This article addresses the management of ESI and explains how landlords, tenants and brokers can avoid severe sanctions for failing to preserve evidence (i.e., spoliation), as well as proactive steps companies can take to avoid the imposition of harsh sanctions associated with the failure to preserve evidence when litigation exists or is reasonably anticipated or contemplated.

Do not think your company is too small or the case is not big enough. eDiscovery is happening in all litigation to some extent. It is essential to ensure that your attorney is well versed in eDiscovery. And with technological advances being what they are, you may very well find yourself needing to hire or contract with an eDiscovery specialist.

FOLLOW THE FEDERAL RULES…
The Federal Rules of Civil Procedure ("FRCP") and Federal Rules of Evidence ("FRE") govern litigation in federal courts. (The local rules for each U.S. District Court should also be reviewed.) Many states have either adopted or mirror the FRCP and FRE to include those that apply to ESI. FRCP 16 establishes what is expected of the parties and their attorneys in litigating claims. Courts will often order the parties to attend a pretrial conference to discuss the substantive legal issues, the process of exchanging ESI and the possibility of facilitating settlement in accordance with FRCP 26(f). FRCP 26 also provides a framework for making disclosures and establishes a timeline for doing so. Note, FRCP 26(b)(2)(B) provides procedures for shifting the cost of ESI production under certain circumstances to the requesting party. For example, when the subject matter of the litigation directly involves data stored on a computer hard drive, the court may permit the party seeking the data, at its own cost, to obtain a "mirror image" of their opponents' hard drive. FRCP 33(d) provides that business records created or kept in an electronic format may be produced in lieu of providing a written response to interrogatories. Significantly, FRCP 34 addresses the production of ESI, including the production of metadata (i.e., data about data), and requires a party to make a reasonable search of all sources reasonably likely to contain responsive documents. It is crucial that Counsel know and follows the federal rules governing eDiscovery. (See Best Practices & Principles for Addressing Electronic Document Production located at the following site. https://thesedonaconference.org/publication/The%20Sedona%20Principles)

Depending on the case, the search for ESI may involve the recovery and review of thousands and in some case millions of electronically stored documents. Fortunately, comprehensive document management tools such as Concordance, Ringtail and CaseLogistix, among others, are available to assist with the assemblage and review of large volumes of documents. Our firm has a designated eDiscovery Project Manager who is responsible for the scanning, loading and management of ESI. Once the ESI has been uploaded and the basic information for each document has been identified (e.g., author, date, subject matter), an attorney may search and review the documents for privilege, content and relevance more efficiently. While expensive, the capabilities of such case management software make its benefits worth the cost in complex litigation.

THOU SHALT NOT SPOLIATE!

The term spoliation refers to the intentional, reckless or negligent withholding, hiding, altering or destroying of evidence relevant to a legal proceeding. Spoliation occurs when an individual or company violates its legal duty to preserve relevant evidence prior to or after the commencement of litigation when that party knows or should have known that the evidence will be relevant to the litigation.

Trial judges are vested with the inherent power to administer justice in their courtrooms. Since the destruction of evidence inhibits the court's ability to administer justice, the court may sanction litigants and nonlitigants. Every state has established rules to prevent the spoliation of evidence, and some states have even recognized the tort of spoliation in its own right. While there is no hard-and- fast rule, sanctions can be severe. Courts may assess attorney's fees and costs against the offending party and instruct the jury that it may infer that the spoliated evidence would have been damaging to the spoliator and helpful to the party seeking the evidence. The jury may attach any weight and significance deemed appropriate to such conduct. Courts may also refuse to allow a party's expert to testify, making the case more difficult to prove or, in extreme, cases dismiss the claim or defense outright. Courts will look to a variety of factors in determining which sanctions to impose, including: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence, (2) whether the prejudice could be cured, (3) the practical importance of the evidence, (4) whether the party that destroyed the evidence acted in bad faith and (5) the potential for abuse of expert testimony about the evidence. The court's decision will often follow a motion and a hearing on the issue.

In one instance, a court found that the opposing party willfully destroyed evidence and continued to destroy evidence after the court's order on spoliation was issued. As a result, the court ordered payment of attorney's fees in excess of $400,000, payment of the costs of the forensic computer examiner, payment of the Special Master's time and gave a "spoliation charge" to the jury at trial. Perhaps more significantly, the court found that one of the opposing party's attorneys also illegally removed documents from a discovery room, thus thwarting discovery efforts. The jury returned a $2.5 million verdict and awarded injunctive relief to the clients, while the offending attorney was subjected to disciplinary action by the State Bar.

Note that sanctions may be imposed even if the spoliation of evidence occurred before the legal action was commenced. This may occur when a potential litigant knew or reasonably should have known that the evidence might be relevant to a possible legal action.

AVOIDING ESI HEADACHES

eDiscovery should be managed as a business process, not as an afterthought. Both sides in any litigation

are looking for “the smoking gun.” You need to make sure you do not divulge your own privileged information while at the same time ensuring that you can find that “needle in a haystack” in the opposing party’s documents.

There are a number of actions that businesses should take to preserve relevant evidence when litigation is known or contemplated. The following steps have been developed to address the concerns raised by ESI and eDiscovery. (See The Sedona Conference “Jumpstart Outline”: Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Request for Production, March 2011 Version.)

1. Develop a written Document Retention Policy. The policy should address paper files as well as ESI. A good policy will balance the need to preserve ESI for business and legal purposes while limiting the amount of electronic clutter on servers and inboxes that can be expensive to store for prolonged periods of time. The policy should address network servers, e-mail servers, hard drives and non- company–owned servers where ESI may be stored. Personnel should be provided with a copy of the policy and required to read and understand it. Keep in mind that the policy itself may be requested in discovery by opposing counsel.

2. eDiscovery is broader than you think. Your company’s social media posts, along with those of your employees may also be subject to a hold. Even text messages and the data retained by smartphone apps are now being used in the courtroom to prove or disprove where someone was on a certain date. Slip-and-fall or similar claims against a retailer and/or a property management company may be rebuffed based on apps and technology such as Fitbit that can prove a claimant was actively engaged in exercise and therefore may not be entitled to a settlement. Nearly everything we do these days is tracked by someone or something.

3. Identify key custodians of potentially relevant information. This may change from matter to matter and case to case, but certain individuals should be designated as key custodians to ensure that appropriate documents are preserved in accordance with the company’s Document Retention Policy. Custodians typically include management-level and IT personnel; however, third-party vendors may also be identified as key custodians.

4. Contact experienced litigation counsel whenever litigation is contemplated. While this seems like a no-brainer, it is important to recognize that not all counsel are created equal and the attorney who did an excellent job of negotiating your lease may not be up to speed on the nuanced obligations imposed by FRCP 26. Litigation counsel will cause a “legal hold” to be issued and will interview key custodians to insure that the Document Retention Policy is in effect and that the appropriate documents are being preserved. Note that several jurisdictions have found that legal counsel’s directive to “preserve all documents” and nothing more does not meet the obligations imposed by FRCP 26. Typically, legal counsel will need to be proactive and collect all potentially relevant documents for preservation.

5. Consider using protective orders and confidentiality agreements to limit disclosures. Once litigation is initiated, parties will each request and produce documents including ESI, to the opposing party or parties. Protective orders and confidentiality agreements are valuable tools to limit disclosure of embarrassing personal information, trade secrets and financial information, among other documents. Counsel can agree on the scope of the protective order and/or confidentiality agreement and present a joint motion to the court to insure compliance under penalty of contempt.

Conclusion

The time to develop a comprehensive ESI management policy is before you need it. Experienced litigation counsel should be contacted when litigation is known or reasonably contemplated. Immediate steps should be taken to meet with key custodians in person to explain how they must handle the legal hold and what steps must be taken to ensure that the letter of the law is followed. It is recommended that your plan be in writing and that the interview process be documented and signed by those involved. Several courts have held that it is insufficient for counsel to simply instruct their clients not to destroy documents; the attorneys must be able to demonstrate that they have undertaken specific efforts to preserve documents, including ESI.

Sometimes even the best efforts and intentions will still result in a finding that spoliation occurred when ESI has been inadvertently lost or destroyed. While the potential impact of such a finding cannot be ignored, remember that courts will closely scrutinize the conduct of the spoliator and their counsel. Accordingly, evidence of good faith and reasonable attempts to comply with your duty to preserve evidence, including a well-planned and fully distributed litigation hold, may provide a valid defense. If not a complete defense, such a litigation hold may at least reduce the severity and overall impact of the spoliation sanctions. Litigation headaches in the age of ESI can be avoided if you follow a prescription for proper ESI handling and preservation prior to and during the eDiscovery process.

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