

E-Discovery: Litigation's Latest Black Hole

Every so often, new words are added to the vocabulary of inside counsel. Some are benign. Some are not. "E-discovery" has supplanted "SOX" as the word currently keeping in-house counsel up at night. The names "Zubulake" and "Morgan Stanley" cause night sweats. If they don't, they should.

Over 80 percent of all corporate information is now stored electronically and over 90 percent of all new corporate information is created digitally. Up to 70

PATRICK J. LAMB
JULIE P. SHELTON

percent of all corporate information is contained in or attached to email. Not surprising, considering that just about every employee in

your company has a computer, voicemail is ubiquitous, blackberries are so common that "blackberry injuries" are now diagnosed, instant messaging is everywhere, and telecommuting via home computers is the norm. The volume of electronic data will only continue to grow. As a result, most lawsuits already involve electronic discovery issues to one degree or another, and issues grow in significance and consequence every day. Already, there are some very scary cases in which failure to preserve or produce electronic discovery resulted in severe sanctions and huge verdicts.

At ALM's recent 25th Legaltech Trade Show, the "buzz" was all about the amendments to the Federal Rules of Civil Procedure regarding electronically stored information ("ESI"), which take effect on December 1, 2006. The new Rules address relevance, discoverability, privilege and cost, and provide a helpful framework for dealing with ESI conferences to discuss e-discovery will be mandatory. Many states are adopting their own ESI rules, as well.

While the lawyers at the Conference talked about the Rules, a record number of vendors were set up outside the conference rooms, each displaying their version of salvation from the E-discovery blues. People in the field estimate over 5,000 vendors currently offer ESI services ranging from recovery to review, and everything in between. Unfortunately, few companies are capable of offering A to Z service, and different pricing structures make comparison-shopping difficult.

Following several large, highly publicized verdicts, law

firms and consultants have shifted into "fear factor" marketing, repeating the worst stories and advising "this work must be done or else". Toss in a little SOX ("if you don't do it, the board could face liability), and it is no wonder that electronic discovery is rapidly becoming a litigation black hole.

How Real Is The problem?

Real. Consider these cases:

- Equities trader Laura Zubulake won \$29 million in a gender discrimination lawsuit from her employer, UBS AG, which had deleted e-mails and said several computer backup tapes were missing. A federal judge in New York told jurors they could conclude the data had been destroyed because it contained damaging information.
- In a lawsuit over the sale of camping gear company Coleman, Morgan Stanley produced thousands of pages of documents during discovery but few e-mails. A Florida judge ruled the company "chose to hide its violations and coach witnesses." Last year, the jury imposed a \$1.57 billion judgment against the bank.
- A federal judge in Philadelphia will consider the "willful destruction of evidence" in an ongoing case in which Paramount Pictures is suing John Davis for offering to share a pirated copy of "Lemony Snicket's A Series of Unfortunate Events." Davis is accused of wiping evidence from his computer 16 days after learning of the suit, but he says he simply prepared the machine for a long-pending sale.
- In 2004, Magistrate Hedges fined Samsung \$560,000 for failing to change its e-mail retention policy after it was sued by Mosaid Technologies in Newark federal court for patent infringement. Because Samsung kept deleting e-mails, Hedges also ruled it had to pay for the experts brought in to search the computer files.

What Should You Do To Manage E-Discovery?

To effectively cope with ESI, in-house counsel must work closely with IT people, records management staff, HR, and, in some cases, corporate audit/security person-

nel. Assemble a team of people who can help you understand where the data is, how it is preserved, and who the principal custodians are.

A first step is to recognize the difference between retention and preservation of ESI. Retention refers to what ESI is kept and discarded in the normal course of business. Preservation refers to maintaining ESI during or in anticipation of litigation. One important step in managing ESI, is to have a well thought-out document retention policy and mandate compliance.

Once your company “reasonably anticipates litigation,” the duty to preserve documents, including ESI, attaches. When the duty arises, a “litigation hold” must be placed on all documents which “may be relevant” to the litigation. The notice to hold must be clear and defined, and written in a way to demonstrate later that it was done properly. It is safer to err on the side of an expansive interpretation of what should be held, lest you find your story on the front page of the *Wall Street Journal*.

Zubulake obligates counsel to be involved, educate the client, and follow up. It is not enough to just instruct the IT department to preserve the data. You must have a plan and a system in place to effectively manage the data. *Zubulake v. UBS Warburg*, 2004 U.S. Dist. LEXIS 13574, slip op. *60-*63 (SDNY July 2004). The *Zubulake* Court held that “counsel must not only issue the litigation hold at the outset of the case or when litigation is reasonably anticipated, **but periodically re-communicate the hold to keep it fresh**, communicate directly with key players and re-communicate it to them periodically.”

Once litigation and discovery begin, the question becomes what ESI must be collected, reviewed and produced. Amended Federal Rule 26 (f) directs the parties to “discuss any issues relating to preserving discoverable information” and directs the parties to develop a discovery plan. The discovery plan is an excellent tool for defining the scope of discovery, and agreeing on the format of production.

Because large volume equals big cost, it is imperative to collect as narrowly as possible to reduce the volume. There are several ways to do this effectively, and there is software available to help. Identify key document custodians. Eliminate duplicates and collapse emails. Limit the date range, and work with opposing counsel to agree on key words. Effective culling can significantly reduce the volume of material to be reviewed.

Choosing which software and which vendors to use is a high risk/high reward decision. Great emphasis should be placed on interviews with a number of vendors and the thorough examination of references is essential.

The scope and format of your production will determine whether it can be done in-house or you will need an outside vendor. If time is short, an outside service can get the production going faster than you can in-house. Other than the smallest of cases, use of a vendor to create the universe of documents and then review for responsiveness and privilege in-house is practical and virtually required. Using contract personnel to review documents is common, but it is prudent to have staff attorneys or mid-level associates manage and oversee their work. Sensitive, hot or potentially privileged documents should always be reviewed by relatively senior in-house or outside counsel.

What Is This Going To Cost?

This is a terribly critical question, not the least because the answer will dramatically influence the settlement value of the case, and everyone, including your adversary, knows it. The problem is that, unlike regular litigation where you can turn to your outside lawyer to provide a reliable estimate and where you have years of experience allowing you to develop a “gut feel” for litigation expense, there is no such outsider or history to conveniently rely on. Moreover, because different vendors price differently, it is hard to comparison shop. In most cases, the best information can be obtained from law firms who have investigated and analyzed various vendors for their other clients, and then tested their services in litigation. In other words, more than usual, experience counts.

Patrick J. Lamb and Julie P. Shelton are partners with Butler Rubin Saltarelli & Boyd LLP, a national litigation boutique located in Chicago. The views expressed are personal to the authors.