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Getting Ahead of Discovery: Early Case Assessment and ESI

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The Federal Rules of Civil Procedure (FRCP) relating to electronic discovery highlight the need for early analysis of the facts and details surrounding a complaint or claim. However, while lawyers agree that early case assessment is an important part of their trial preparation, often they fail to engage in it, even though lack of preparation or early analysis may get them into trouble during discovery or trial. This is particularly true in cases involving electronically stored information (ESI). The fact that such information is dynamic and can exist in many forms and in multiple locations means that the lawyer must have a firm grasp of the facts and circumstances of the case and the details of the client's information management systems before attempting to collect and segregate relevant electronic information. The resulting knowledge can go a long way toward preventing later mistakes down the road or unanticipated costs and significantly reduce the likelihood of sanctions for spoliation of evidence.

Early Case Assessment Defined

Early case assessment is not a new concept or legal strategy. It is a necessary part of case development and preparation that provides answers to many of the questions arising during the course of litigation, whether they are posed by the judge, opposing counsel or your client. An early understanding of the case is critical to understanding issues in advance or gathering additional information so that the issues can be addressed appropriately. This analysis goes far beyond looking at the facts alleged in the complaint or analyzing the case's strengths and weaknesses of the case. A thorough case assessment will enable counsel to develop a meaningful litigation plan and prepare a budget that includes a realistic assessment of the costs of preserving, collecting, processing, and producing electronically stored information. This budget will allow counsel and the client to discuss the potential outcome of the case versus the cost of prosecuting or defending the action.

A detailed plan will assist counsel and their clients in understanding their responsibilities in litigation, including the duty to preserve documents and to halt the execution of any automatic document destruction policies pertaining to that information. Moreover, counsel familiar with the facts of the case and the client's electronic information systems will be able to participate in a meaningful meet-and-confer with opposing counsel pursuant to FRCP 26(f) and provide an accurate initial disclosure statement as required by FRCP 26(a)(1).

The Duty to Preserve

One of the most important aspects of early case assessment is the determination of when a party's obligation to preserve evidence accrues. *See Zubulake v. UBS Warburg*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). This responsibility typically arises from a statute, industry regulation or the common law duty to prevent the spoliation of relevant evidence so it may be used at trial. It is also manifested in the court's inherent powers and the rules related to the imposition of sanctions for spoliation. *See* FRCP Rule 37.

The duty to preserve is "triggered" when a party or potential litigant knows or reasonably should know that the information may be relevant to pending or anticipated litigation. *Id.* For the plaintiff, the duty to preserve will arise prior to the filing of the lawsuit, when she begins collecting documents and other evidence to evaluate the prospects of litigation or hires litigation counsel. *See Hynix Semiconductor, Inc. v. Rambus, Inc.,* 2006 U.S. Dist. LEXIS 30690 (N.D. Cal. (2006). Failed negotiations may also trigger an obligation to preserve if it leads a party to conclude that it has no alternative but to commence litigation to protect or enforce its rights.

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In most cases, the defendant's duty to preserve will commence upon receipt of a summons or complaint. *See Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feeds*, 2007 U.S. Dist. LEXIS 15277, *9 (D.Colo. Mar. 2, 2007). Often, however, a defendant may anticipate litigation long before a complaint is served. For example, the defendant may receive a demand letter giving notice of potential claims. Similarly, a notice to preserve documents may be sufficient to trigger a preservation obligation. *See Reino De Espana v. Am. Bureau of Shipping*, 2007 U.S. Dist. LEXIS 5693, *15 (S.D.N.Y. Jan. 25, 2007). However, while litigation seems to be an ever-present threat for some corporations that may receive demand letters on a daily basis, the obligation to preserve evidence arises only when the potential party has notice of a specific and credible threat that litigation is likely to be commenced. *See Henkel Corp. v. Polyglass USA, Inc.*, 194 F.R.D. 454, 456 (E.D.N.Y. 2000). Moreover, a notice demanding preservation of documents not subject to discovery does not trigger a duty to preserve that information. *See Paul v. USIS*, 2007 U.S. Dist. LEXIS 68474 (D. Colo. Sept. 17, 2007).

Early case analysis will play a major role in determining what information is relevant and should be preserved, irrespective of whether the information must later produced in litigation. A party sending a demand or preservation letter must be familiar enough with the facts of the case to specify sufficient facts to put the opposing party on reasonable notice of what information should be preserved. When a party takes an early lead in fact gathering and uses those facts and documents to state a demand for preservation, the opposing party will be hard pressed to ignore the request. However, the demand must be specific, as the blanket assertions often contained in boilerplate preservation notices may be overly broad and thus totally ineffective. *See Turner v. Resort Condominiums Int'l, LLC*, 2006 U.S. Dist. LEXIS 48561, *15 (S.D. Ind. 2006)(court held that plaintiff's pre-suit letter in pregnancy and sex discrimination case went "well beyond" defendant's legal obligation to avoid deliberate destruction of evidence).

The Litigation Hold

Once a party has identified its preservation duty, it must take reasonable steps to halt the destruction of potentially relevant information that would otherwise be altered, deleted, or destroyed. Early preparation can pay big dividends for both lawyers and clients. To effectively and efficiently implement a litigation hold, counsel must discuss the facts of the complaint with the client to ascertain the potential witnesses, key custodians of ESI, and location of relevant evidence. This information should be compiled so it can be easily retrievable in an electronic database that counsel can update as additional facts come to light or new document custodians are identified. Remember, aside from the complaint and the opposing version of the facts, there may be another side of the story that has yet to be heard. These discoveries may require additional preservation efforts.

At the outset of the case, it is also important to develop a detailed time line. This time line will not only assist in determining the location of relevant documents, but may also identify when potential witnesses created or accessed those documents. More importantly, a time line will quickly identify witnesses who no longer work for the company or otherwise may be unavailable. However, unless the employee was recently terminated or separated from the company, that person's documents may have already been destroyed pursuant to the company's document retention policy. *See McKenna v. Nestle Purina Petcare Co.*, 2007 U.S. Dist. Lexis 70435 (S.D. Ohio Sept. 24, 2007) (court deferred finding of sanctions to further proceeding where plaintiff's employment records were destroyed consistent with defendant's document retention policy that emails deleted by employees be overwritten after 7 days and all documents related to a terminated employee be eliminated after 30 days).

Counsel defending a corporation should immediately coordinate with in-house counsel and records management personnel to make sure that a litigation hold is in place to halt the destruction of potentially relevant evidence. Failure to implement a litigation hold can ultimately lead to sanctions. *See Heng Chan v. Triple 8 Palace*, 2005 U.S. Dist. LEXIS 16520 (S.D.N.Y. 2005). The duty to preserve is not satisfied merely by issuing a litigation hold. The party and counsel have a continuing obligation to regularly monitor and audit the hold periodically to ensure compliance. *See In re Seroquel Products Liability Litig.*, 2007 U.S. Dist. LEXIS 61287, *11 (M.D. Fl. Aug. 21, 2007). This may be a manageable task for a small

corporate litigant, but can be a daunting task for a mid-level or multinational company with offices spread out across the country or the world. Even larger companies may need additional assistance in implementing and tracking holds, particularly if they are involved in multiple litigation involving the same key personnel or documents.

There are a variety of tools that companies can use to manage and automate the litigation hold process, including software solutions that manage multiple concurrent holds, identify custodians, potentially relevant business units and data sources. These solutions take much of the guess work out of the legal hold process as they work to identify custodians and notify them of their ongoing preservation responsibilities. In addition, notified employees may be required to acknowledge receipt of detailed litigation hold instructions and certify compliance. This certification can be a powerful weapon in defending against claims of spoliation for failure to notify employees of their legal hold obligations or failure to systematically suspend document destruction policies. *See Wingnut Films v. Katja Motion Pictures Corp.*, 2007 U.S. Dist. LEXIS (C.D. Cal. Sept. 18, 2007) (Court found that defendant did not suspend the automatic deletion of emails and "to this day" emails continued to be purged from every employee's email in-box every thirty days, and backup tapes continued to be recycled every week (for emails) or year (for other electronic documents)).

Data Gathering and Collection

One of the biggest payoffs for a party's early efforts comes when it is time to gather, collect and search potentially responsive information. While a party may not actually collect the data until it receives a discovery request, the information related to the case received while investigating and analyzing the claims and defenses available in litigation should enable the party to prepare a plan to efficiently gather data. For example, key custodian and information locations have already been identified which will enable a technical team – whether the party uses internal information technology (IT) resources or uses an outside service provider – to determine the file types that will need to be collected and processed. In most instances, company employees will have access to standard business software, including email, work processing, spreadsheet, and presentation applications.

The method used to gather electronic data may depend greatly on the type of document and the custodian. Regardless, counsel must ensure that the data collection protocol protects the authenticity of the electronic information and preserves the chain of custody. On the other hand, a party that fails to develop a reasonable data-gathering plan may incur additional time and costs later in the litigation. *See, e.g., In re Livent, Inc. Noteholders Sec. Litig.*, 2002 U.S. Dist. LEXIS 26446 (S.D.N.Y. 2002)(defendant ordered to provide written explanation of all steps taken to locate responsive email messages).

The Initial Scheduling Conference

The FRCP provide for an initial scheduling conference with the court under Rule 16, at which a discovery schedule would be set. Rule 26(f) provides that the parties must meet in advance of the Rule 16 conference to discuss, among other things, discovery issues, after which meeting the parties will exchange initial disclosures under Rule 26(a)(1).

Rule 26(f) expressly provides that the parties shall discuss issues related to electronically stored information at their Rule 26(f) meeting. While the particular issues that might be discussed depend on the specifics of the case, the rule and advisory committee notes suggest issues that the parties may wish to discuss:

1. the scope on ESI production;
2. the form in which ESI will be produced (i.e., native format, static image, paper);
3. issues related preservation of discoverable information during the litigation, keeping in mind the need for the parties to continue routine business operations;
4. issues related to ESI that a party claims will be unreasonably burdensome to produce; and

5. issues related to the assertion of privilege, including procedures for assertion of privilege after production.

Additionally, federal district courts are making special rules and protocols enumerating specific ESI issues that the parties should negotiate, and setting forth default procedures to be utilized where the parties can not reach agreement. *See e.g.*, District of Delaware Default Standards for Discovery of Electronic Information, District of Kansas Guidelines for Discovery of Electronically Stored Information, and Northern District of Ohio Default Standards for Discovery of Electronically Stored Information.

Given that each client's information systems will be unique, counsel should talk with the client to prepare a list of ESI issues particular to the needs of the client and the circumstances of the case. Try to anticipate the production issues, cost and burdens issues, document preservation issues and privilege issues on which you may need an agreement or ruling, and raise them at the Rule 26(f) meeting and the Rule 16 Conference, being prepared to back up your positions with detailed technical information related to the operation of your client's computer system.

There is no limit to the specific ESI issues that might be productively raised beginning at the Rule 26(f) meeting. A clue of the shape of things to come is the "Suggested Protocol for Discovery of Electronically Stored Information" developed by a joint bench bar committee in the District of Maryland. (*See* www.mdd.uscourts.gov.) It is one of the most comprehensive attempts to apply the procedures under the federal rules to the realities of ESI in litigation, and will likely be cited by courts in other federal districts. *See, e.g., O'Bar v. Lowe's Home Centers, Inc.*, 2007 U.S. Dist LEXIS 32497 (W.D. N.C., May 2, 2007) (applying Maryland Protocol generally to discovery issues in employment discrimination class action).

Consistent with the FRCP objective of requiring counsel to confront ESI issues early in the litigation, the Maryland Protocol develops a long list of possible ESI topics appropriate for discussion in the Rule 16 conference. Additional topics suggested in the Maryland Protocol are:

1. the anticipated objections to production of ESI;
2. paper versus electronic production;
3. whether metadata is requested, and if so, the volume and cost issues;
4. the terms of a written document preservation order on agreed items to be entered by the court;
5. testing or sampling procedures;
6. methods for bates-stamping or labeling the produced ESI.
7. issue related to redacted ESI;
8. the details related to the information systems maintained by the parties;
9. cost-sharing issues;
10. search methodologies for retrieving responsive ESI (i.e. agreement upon search terms;)
11. preliminary depositions of information systems personnel, and limits on their scope;
12. the need for multi-stage ESI production as a means to control costs; and
13. the need for and protective or confidentiality orders.

The Maryland Protocol anticipates that client representatives will participate in the Rule 16 conference, and that this might include in-house information systems personnel.

Planning for the Rule 26(f) Meeting

This expansive view of the Rule 16 conference will increase significantly the amount of preparation needed, both in terms of direct work with the client and discussion with opposing counsel. The Maryland Protocol anticipates extensive preparation, and sets forth specific "meet-and-confer" requirements in advance of the Rule 16 conference.

The Maryland Protocol assumes that the parties will exchange certain information before the Rule 26 meeting, so that it will be useful. It also requires that counsel will confer by telephone in advance of the Rule 26(f) meeting to discuss whether such information exchange is necessary.

The Maryland Protocol suggests that a request for information might include information related to computer network design, types of databases, database dictionaries, information related to access to the system, the ESI document retention policy, organizational chart for information systems personnel, backup and systems recovery routines, including tape rotation and destruction/overwrite policies. The Maryland Protocol assumes that any reasonable request for information before the Rule 26(f) meeting should not be denied.

The parties should also discuss the scope of production of ESI. Counsel should also discuss who will participate in the 26(f) meeting. There is a preference toward inclusion of the person who has been designated as "ESI Coordinator," responsible to know the party's ESI system particulars and capabilities.

Topics for the Rule 26(f) Meeting
The Rule 26(f) meeting must cover the issues to be discussed at the Rule 16 conference, including the scope and form of ESI production, how to deal with metadata, preservation of ESI during the pendency of the lawsuit (including the negotiation of a preservation order to be submitted to the court), arrangements related to post-production assertion of privileges, methods of bates-stamping or otherwise marking documents, discussion of the nature of the information systems used, search methodologies to be used, whether to attempt a staged or multi-tiered discovery, whether to using a sampling procedure, etc.

Particular attention should be paid to any assertion that ESI is not reasonably accessible because of undue burden or cost, so that any such issues can be sharpened for presentation to the court, complete with technical information about issues and cost, at the Rule 16 conference. There may be instances where potentially relevant information is difficult to identify or preserve either because a party does not retain the sought after ESI as part of its normal business operation or because it is not reasonably accessible. *See Convolve, Inc. v. Compaq Computer Corp.*, 2004 U.S. Dist. LEXIS 16164 (S.D.N.Y, 2004) (court rejected request that defendant preserve "wave forms" in a tangible state when preservation would have required "heroic efforts"). Since preservation of potentially inaccessible ESI may be a costly endeavor, the parties should seek immediate court intervention should they fail to amicably resolve the issue, particularly if the ESI sought is ephemeral or transitory in nature. The early resolution of such issues is a great benefit to the party against whom production is sought.

Identifying Burdensomeness Issues
Beyond the duties to preserve documents triggered by the "reasonable anticipation of litigation", discussed above, the period prior to the Rule 26(f) meeting is a time for serious education concerning the client's computer systems, back-up and destruction procedures, procedures, the location of all possible ESI, and the early anticipation of issues related to the burdensomeness of production of certain ESI.

In employment litigation, where the burdens related to document production do not fall evenly between the parties, corporate parties should view the Rule 26 and Rule 16 sessions as opportunities to address with specificity their concerns related to the costs and burdens of ESI preservation and production, bearing in mind the cost benefit balancing under Rule 26(b)(2)(C). This will require a detailed knowledge of the operation of the client's computer system and the issues related to production of the data. Assertion of vague generalities about the terrible burdens and costs of production will not be sufficient to obtain relief from the court. *See Best Buy Stores, L.P. v. Developers*, 2007 U.S. Dist. LEXIS 7580 (D. Minn. Feb. 1, 2007) (Court rejected defendants' conclusory statements that compliance with electronic discovery obligations is cost prohibitive). It is to the entity's advantage to involve a technical systems person extensively and bring her to the Rule 16 conference.

Counsel for the employment plaintiff should be listening carefully to the costs and burdens claimed by the corporate defendant, and respond by limiting requests for ESI to reduce the costs and burdens, making it more likely that production will be ordered. An employment plaintiff must learn in detail about the defendant's computer system, and may need to involve his own technical person, in order to intelligently participate in this conversation. Consider seeking some kind of early disclosure – a deposition, interrogatories, or informal communication with the adversary's MIS person -- to learn more.

Working with the Client in Advance of the Rule 26 and 16 Sessions
Counsel and client should build on their document preservation efforts related to the imposition of the litigation hold. Counsel should:

1. determine what kinds of ESI exist (email, attachments, word processing documents, spread sheets, voicemail, instant messages, back up materials, etc.);
2. determine where is it maintained (location of servers, back up media, laptops and other portable media, home computers, and hard copy files, etc.);
3. follow up on the dissemination of the litigation hold (to witnesses, to MIS personnel, to relevant third party vendors);
4. make parallel arrangements to see to it that metadata is preserved and not altered;
5. identify and prepare a person(s) who will act as the technical advisor in connection with the ESI, including the possibility of participating in the rule 26(f) meeting and Rule 16 conference in court;
6. learn how the data storage systems work;
7. learn how the back up storage systems work;
8. learn whether any relevant ESI was maintained on some system no longer in use, and if so determine where the ESI might now be;
9. learn the current and relevant past policies and practices re destruction and overwrite of ESI.

Initial Disclosures
The rules contemplate that initial disclosures will be made at the time of or after the Rule 26(f) meeting. Under Rule 26(a)(1)(A), a party must disclose, in addition to the names of witnesses, damages computations, and insurance agreements, "a description by category and location" of all documents, electronically stored information, and tangible things that the disclosing party "may use to support its claims or defenses, unless solely for impeachment." While parties have often simply produced the documents to meet the initial disclosure requirement, the existence of electronic documents even in smaller cases may make it more likely that a party will chose merely to describe the documents and their location and await receipt of a document request. The purpose of the rule is to permit the other party to frame its discovery requests, so that a general listing of categories of documents and their location is sufficient. *See 3M Company v. Kanbar*, 2007 U.S. Dist. LEXIS 45232 (N.D. Ca., June 14, 2007).

The opposing party must keep in mind that the initial disclosure is not a catalog of all the places where ESI might exist, but rather only such ESI as the producing party intends to use to "support its claims or defenses." The other party still needs to determine where other ESI might exist from which it would like discovery.

The sanction of preclusion under Rule 37 is the remedy if a party later seeks to use documents in support of its claims that were not revealed in the initial disclosures or at least in some supplement thereto.

Conclusion
The case for early and detailed preparation on ESI issues is best made anecdotally, by reference to the cases in which the failure to anticipate ESI problems results in serious problems down the line in the lawsuit, including sanctions motions. In even medium sized lawsuits the ESI issues are complicated enough that it is too easy for even careful lawyers to run into problems, which are often caused by faulty reliance on the client's explanation of its system capabilities.

Take a look at *In Re Seroquel Products Liability Litigation,* 2007 U.S. Dist. LEXIS 61287 (M.D. Fla. Aug. 21, 2007) where the court repeatedly chided Defendant's counsel for failure to meet and confer, inability to make ESI production deadlines, loss of email messages, failure to monitor ongoing document preservation, failure to produce accessible documents is usable for, and the like. The court cited defendant's failure "to investigate and understand its own records and documents and to prepare them for production". The court noted that defendant "has repeatedly relied on the sheer volume of documents produced as an accomplishment somehow justifying its shortcomings" but said it was not impressed, "especially since vast quantities were produced in a virtually unusable manner." In addition to its problems with the court, there can be no doubt that defendant's ESI discovery problems in that case resulted in huge expenses in document production and related fees for its attorney's time.

Succinctly stated, good litigation strategy requires early involvement in ESI issues and the willingness of counsel and client to anticipate and deal with issues related to ESI prior to the start of formal discovery. Early assessment will enable both counsel and the client to get a firm grasp on the identity, location and potential relevance of ESI. The "head start" will also enable counsel to have an educated discussion with opposing party about upcoming ESI productions and the ability and confidence to seek relief from the court if the parties cannot come to agreement, particularly where there are cost and burden issues related to preservation or production. Finally, it will reduce the likelihood of sanctions for unintended spoliation of ESI, and intelligently assess the ESI production capabilities and constraints so that the discovery deadlines that are agreed to are met.

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