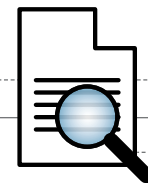


- 1** Should You Trust Your Employees to Preserve + Produce Discovery?
E-Discovery
Dari Craven Bargy 269.383.5877
- 2** E-Discovery Vendor Selection Pitfalls
E-Discovery
Marcella Stewart 269.383.5824
- 3** The Burdens of E-Discovery:
Is a Solution on the Horizon?
E-Discovery
B. Jay Yelton III 269.383.5819
- 4** Duty to Preserve Evidence:
In-House Counsel At Risk
E-Discovery
Kenneth J. Treece 269.383.5810

Should You Trust Your Employees to **PRESERVE + PRODUCE** Discovery?



Identifying and preserving relevant data is a constant and enduring struggle. Failure could be disastrous.

Meeting the basic duty to preserve documentary evidence is a challenge for most organizations. Since the Amendments to the Federal Rules of Civil Procedure took effect in 2006, most well-advised business organizations started routinely issuing written litigation hold notices to their employees and other relevant document custodians at the outset of litigation or potential litigation. Too often, the task ends here.

In addition to issuing a timely written litigation hold notice, the current or prospective litigant, together with counsel, must also diligently oversee the execution of the litigation hold in good faith. Under evolving jurisprudence, the good faith execution of a litigation hold may require more than simply turning off an e-mail auto-delete feature or stopping the recycling of back-up tapes. It requires proactively managing and preserving data – which often involves the cooperation of employees.

In a January 2010 opinion, Judge Shira Scheindlin, author of the landmark *Zubulake* decision, warned that organizations should not delegate preservation and collection efforts to employees who are ill-equipped to effectively manage the process. *Pension Comm. of Univ. of Montreal Pension Plan v Banc of America Securities (Montreal Pension)*.

In *Montreal Pension*, Judge Scheindlin determined certain plaintiffs had committed gross negligence by placing too much reliance on their employees to identify, preserve, and collect electronic data. These employees had no experience conducting searches, received no instructions concerning how to identify relevant data, and were not supervised during the collection process. Employees also failed to follow up on supplemental requests for documents and did not seek assistance in collecting or preserving documents. These and numerous other deficiencies in the plaintiffs' approach to discovery cumulatively resulted in adverse jury instructions, monetary sanctions and, for certain plaintiffs, an order to conduct further discovery at the plaintiffs' own expense.



Montreal Pension set the stage for a host of other opinions in 2010 criticizing corporate defendants' customary reliance on their employees for document retention and collection. Indeed, employees familiar with the subject matter of the litigation are the most logical sources for preserving and producing the most relevant data. After all, they are presumably the most knowledgeable with respect to the content and location of their own documents. Nevertheless, employers who allow their employees to make their own determinations on the substantive and technical adequacy of their preservation and collection efforts are significantly exposed to greater risk in litigation.

While courts do not expect perfection, both litigants and their counsel must conform to higher standards when conducting discovery. As more courts take Judge Scheindlin's lead, sanctions will be increasingly harsh and litigants will be forced to turn to new methods of preserving and collecting electronic data. Most organizations will find meeting these heightened preservation and collection standards increasingly daunting. Organizations need to develop proactive data management practices by implementing a Litigation Readiness Plan.

A Litigation Readiness Plan Typically Includes

- An updated and accurate inventory and understanding of an organization's data sources
- Policies and procedures requiring immediate, consistent, and documented discovery preservation and collection steps

The plan should also include employee training so that designated personnel know how to identify where potentially relevant data is located and understand how to preserve and produce that data in a timely fashion.

Without training, organizations will inevitably experience inconsistent execution among different employees, incur substantially higher discovery costs in collecting and producing data, and assume additional and avoidable discovery-related litigation risk.

Give us a call if you'd like help developing a Litigation Readiness Plan for your organization.

E-Discovery
Dari Craven Bargy 269.383.5877

E-Discovery Vendor Selection **PITFALLS**



Selection of e-discovery vendors is an important component to a reasonable and defensible discovery plan.

Thousands of new vendors have sprung up, seemingly overnight, purporting to offer a wide range of services, including forensics, processing, coding, production, and more. A skilled, responsive vendor can be an invaluable resource for processing and mining large amounts of data. But a sloppy vendor or a bad fit can sink a project (or the budget).

Common Pitfalls in Navigating the Vendor Selection Process

RELIANCE ON A SINGLE VENDOR'S PRICING

Vendor estimates vary widely – sometimes by tens of thousands of dollars for the same project. Submit requests for proposals (RFPs) to a minimum of three vendors, compare their responses, and negotiate costs to get the best price for your client.

COMPARING APPLES + ORANGES

Vendors may use very different pricing structures (price per page, per gigabyte, per hour) and different methods for estimating data size. It is important to carefully evaluate RFPs in order to develop an apples-to-apples cost comparison. Incorporate assumptions about the data size expected, how much data will be reduced by de-duplication and culling, and how much data will be increased as zip files and other containers are opened. Also require the vendor to offer pricing based on consistent factors such as data size rather than less predictable factors such as page counts.

SURPRISES

As data is processed and sampled, it is likely that assumptions which form the basis of the budget will need to be reevaluated. Sometimes a collection will contain numerous zip files that, when unzipped, double the expected data size. Sometimes the collection includes large database files that image to thousands of pages each. The key is to manage surprises by requiring regular reporting and communication and setting clear expectations that the vendor is expected to identify and inform you of anything unusual. Make sure your potential vendors understand these obligations and are prepared to offer regular reports and budget projections so you can keep your projects on time and within budget.



MISUNDERSTANDING

Beware of vendor techno-speak. Insist a vendor explain its process and methodology in layman's terms. Make sure you understand all components of the vendor's response to the RFP and statement of work *before* work begins. Discuss the entire lifecycle of the project and incorporate all phases into your budget. A vendor may consider a project in limited terms and only estimate costs for a particular phase of a project, such as collection or data processing. You, however, need estimates for review, production, privilege logs, etc., all the way through data disposition at the conclusion of the matter.

DEFENSIBILITY

Your vendor may become a key witness if you are ever called to defend your discovery plan. Be sure the vendor is ready, willing, and able to document and defend its methodology through reports, affidavits, and testimony as necessary. Ask your vendor to provide names of staff with testimonial experience and whether the vendor's techniques and previous work have held up to court challenges. Request that the vendor provide transcripts of previous testimony and resumes or curriculum vitae. Meet the individual(s) who are potential witnesses and ask yourself – "Is this someone I would trust to defend my discovery plan?"

Have questions or need some help? The Miller Canfield Electronic Discovery + Records Management (ED+RM) team has worked with many e-discovery vendors on large and small scale projects. We have identified and navigated the common vendor pitfalls and crafted RFPs and contracts that set clear deliverables, preserve the evidentiary quality of discovery documents, and avoid budget-busting surprises.

E-Discovery
Marcella Stewart 269.383.5824

The Burdens of E-DISCOVERY: IS A SOLUTION ON THE HORIZON?

The term “e-discovery” often sends a shudder down the spine of IT managers and in-house counsel, not to mention outside litigation counsel. This concern is well-founded, as *The Wall Street Journal* and *ABA Journal* both recently reported that e-discovery sanctions for lawyers have reached an all time high and companies have been hit with massive sanctions for e-discovery violations. Notwithstanding the risk and cost of sanctions, simply responding to e-discovery requests in the course of litigation can be a huge burden.

E-discovery refers to the preservation, collection, review, and production of electronically stored information (ESI) in the course of litigation. Almost two years ago, the Seventh Circuit E-Discovery Committee met for the first time in an effort to stem the tide of rising burdens and costs associated with e-discovery. This resulted in the Seventh Circuit E-Discovery Pilot Program in October 2009 and the issuance of the program’s “Statement of Purpose and Preparation of Principles.”

The principles cover three areas: (i) general discovery principles, (ii) early case assessment principles, and (iii) education principles. All of these principles were incorporated into a Standing Order Relating to the Discovery of ESI, which has been applicable for cases pending before 13 judges in the U.S. District Court for the Northern District of Illinois.

GENERAL DISCOVERY PRINCIPLES

The general discovery principles reflect the objectives of Rule 1 of the Federal Rules of Civil Procedure (the Federal Rules), which encourages the “just, speedy, and inexpensive determination of every action.” To meet these goals, the principles seek increased cooperation between counsel and more rigorous application of the proportionality standard set forth in Federal Rule 26(b)(2)(C).

EARLY CASE ASSESSMENT PRINCIPLES

The early case assessment principles provide more concrete guidelines for addressing the discovery issues that typically come before the courts in the form of motions for sanctions. These principles require the parties to meet and confer and specifically address

discovery of ESI. Prior to the initial status conference, the principles require the parties to discuss:

- (1) The identification of relevant and discoverable ESI
- (2) The scope of discoverable ESI to be preserved by the parties
- (3) The formats for preservation and production of ESI
- (4) The potential for conducting discovery in phases or stages as a method for reducing costs and burden
- (5) The procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence

If any of these issues cannot be resolved, the parties must present the issue to the court.

EDUCATION PRINCIPLES

The education principles acknowledge the overall impact of discovery of ESI on the litigation process. Due to this impact, the principles require all judges, counsel, and parties to familiarize themselves with “the fundamentals of discovery of ESI.” This means being familiar with the e-discovery provisions of the Federal Rules and the Advisory Committee Report on the 2006 Amendments to the Federal Rules and The Sedona Conference publications and those of other e-discovery organizations.

THE RESULTS OF PHASE 1

The Seventh Circuit issued a report in May 2010 regarding the perceived impact of the principles on e-discovery. The survey of both judges and practitioners revealed that, overall, the perception was that the principles “increased” or “greatly increased” both the level of attention paid to the e-discovery process and to the fairness of the discovery process itself. The program is now entering Phase 2, during which the geographic scope of the program will be extended to all federal cases in Illinois, Indiana, and Wisconsin and more data will be gathered regarding the program’s effectiveness.

If you have any questions about the Pilot Program or e-discovery in general, please give us a call.

E-Discovery
B. Jay Yelton III 269.383.5819

USA
MICHIGAN
Detroit
+1.313.963.6420
Ann Arbor
+1.734.663.2445
Grand Rapids
+1.616.454.8656
Kalamazoo
+1.269.381.7030

Lansing
+1.517.487.2070
Saginaw
+1.989.791.4646
Troy
+1.248.879.2000

ILLINOIS
Chicago
+1.312.460.4200

FLORIDA
Tampa
+1.813.314.2188

NEW YORK
New York
+1.212.704.4400

OHIO
Cincinnati
+1.614.203.7800

CANADA
Toronto
+1.416.599.7700
Windsor
+1.519.977.1555

CHINA
Shanghai
+86.21.6103.7000

MEXICO
Monterrey
+52.81.8335.0011

POLAND
Gdynia
+48.58.782.0050
Warsaw
+48.22.447.4300
Wroclaw
+48.71.337.6700



QUESTIONS,
COMMENTS AND
TO SIGN UP FOR
E-HOT POINTS:

silkworth@millerkanfield.com

millerkanfield.com

Duty to Preserve Evidence: In-House Counsel At Risk

When it comes to e-discovery sanctions, in-house counsel have largely been immune to sanctions.

As courts become increasingly knowledgeable about e-discovery and expectations regarding compliance rise, the risk to in-house counsel will increase. A case from a federal district court in Florida illustrates this point. In *Swofford v Eslinger*, the court used its inherent powers to sanction to impose a monetary fine on in-house counsel who had not even entered an appearance in the case.

Why? Because in-house counsel failed to comply with the duty to preserve evidence.

In *Swofford*, General Counsel for the Seminole County Sheriff's Department received multiple pre-suit letters from plaintiff's counsel requesting preservation of e-mails related to plaintiff's claims. General Counsel did not issue an adequate litigation hold and failed to follow up to ensure that any potentially relevant e-mails would be preserved. Not surprisingly, potentially relevant e-mails were destroyed and could not be recovered. The court found that General Counsel's insufficient actions to preserve the e-mails amounted to bad faith. The court went on to levy monetary sanctions against General Counsel.

As in *Swofford*, courts routinely find that a pre-suit event has triggered the duty to preserve. Failure to recognize the trigger or to adequately respond places in-house counsel at risk of having monetary sanctions imposed directly against them.

Given the recent trend of courts finding a pre-suit duty to preserve evidence, knowledge of common pre-suit triggering events by in-house counsel is essential.

A recent Duke Law Journal article compiled the results from 400+ discovery sanctions motions decided in federal courts prior to 2010.

In nearly 60% of the cases, sanctions in some form were awarded. The article noted an upward trend in both the number of sanctions motions filed and awards granted – especially in the last five years. And, while sanctions against counsel remain relatively rare, they were also on the rise. The most common ground for awarding sanctions? Failure to produce electronically stored information.

Common Triggering Events

DEMAND LETTERS

Often plaintiff's counsel will send a demand letter prior to filing suit in an effort to settle a claim. For example, in *Trask-Morton v Motel 6 Operating L.P.*, plaintiff's counsel sent a demand letter to defendant followed several months later by plaintiff's negligence complaint. The district court denied plaintiff's motion for discovery sanctions and plaintiff appealed. On appeal, the court determined that defendant's preservation obligation began upon receipt of plaintiff's demand letter. Sending the demand letter may also trigger the sender's duty to preserve.

KNOWLEDGE OF KEY CORPORATE PERSONNEL OR INSTITUTIONAL KNOWLEDGE

In *Broccoli v Echostar Communications Corp.*, complaints by plaintiff to key corporate players of grounds for a potential lawsuit triggered the corporation's duty to preserve. More generalized, widespread knowledge of a potential for a lawsuit may also trigger the duty to preserve. In *Zubulake v UBS Warburg, LLC*, the court determined that "everyone associated with" plaintiff recognized the likelihood of her filing a lawsuit, triggering the corporation's duty to preserve.

FILING AN EEOC CHARGE

In *Wiginton v Ellis*, plaintiff filed an EEOC charge against defendant prior to initiating her lawsuit. Plaintiff moved for sanctions for spoliation and the court found that defendant knew as early as the filing of the EEOC charge that electronic evidence would need to be preserved.

These are some of the prominent, recurring triggering events in recent case law. There is no guarantee that every court will rule the same way when confronted with a similar fact pattern. *Swofford* provides incentive to in-house counsel to recognize and address these situations as they arise.

E-Discovery
Kenneth J. Treece 269.383.5810