New Rules Regarding E-discovery

By Silka Maria Gonzalez, CISA, CISM, CPA, CISSP, CITP

In December 2006, new amendments to the US Federal Rules of Civil Procedure became effective regarding e-discovery. These rules affect not only parties to federal lawsuits, but also any business with electronic information that could be subpoenaed.

Amendments to the Federal Rules

The new rules specifically address electronically stored information (ESI). This will lead judges and parties to focus even more on the importance of ESI. The new rules emphasize that the discovery of ESI stands on equal footing with the discovery of paper documents. The rules include any type of information that is stored electronically.

The Financial Consequences of Noncompliance

ESI has always been important to businesses and lawsuits. For example:

- In 2004, a federal judge in Washington DC (USA) fined Philip Morris and its parent company US $2.75 million for failing to preserve electronic information (US v. Philip Morris)
- Also in 2004, a federal judge in New York (USA) instructed a jury to make an inference in favor of the plaintiff in an employment discrimination case because the defendant had failed to preserve electronic information. The result was a US $29 million verdict for the plaintiff (Zubulake v. UBS Warburg, LLC).

Preservation of ESI

The parties to a lawsuit have a legal responsibility to preserve relevant electronic information. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention or adjustments in the normal routine operations of its information systems are required. For example, a business may need to stop deleting certain e-mails or stop recycling certain backup tapes. The series of steps taken to stop the alteration and destruction of information relevant to a case is known as a "litigation hold."

As seen in the examples described previously, significant sanctions can be imposed if a party does not properly take steps to preserve ESI. On the other hand, if a party has taken proper steps to preserve relevant ESI, the new rules state that sanctions will not be imposed due to the loss of electronic information during the normal routine and good faith operations of electronic information systems. This is called the "safe harbor."

Early Discussions Regarding ESI and E-discovery

Early discussions regarding e-discovery are required by the new rules. The aim is to identify issues, avoid misunderstandings, expedite proper resolution of problems and reduce overall litigation costs.

The lawyers from both sides of the case need to become familiar with the information systems and electronic information of their own client and of the opposing party. The new rules state that each side will obtain information about the client's information systems and data before the initial discovery planning conference.

At the initial conference, the parties should discuss the following:

- The information systems infrastructure of both parties
- Location and sources of relevant electronic information
- Scope of electronic information requirements
- Time period of required information
- Accessibility of information
- Information retrieval formats
- Cost and effort to retrieve information
- Preservation of discoverable information
- Assertions of privileges and protection of litigation materials

Retrieving and Producing ESI

The new rules specifically require parties to include ESI in their initial disclosures of evidence they may use to support their claims or defenses.

During the discovery process, the parties must produce ESI that is relevant to the case, not privileged and reasonably accessible. The information must be provided in a reasonable, usable form and in the format requested by the opposing party.

Technical issues may arise. For example, the new rules indicate that a party may need to provide technical support so the electronic information can be used by the opposing party. Also, information provided in the original electronic format may provide metadata—details about the ESI—such as when it was last modified.

The new rules note that some ESI may not be reasonably accessible due to undue burden or cost. The parties should identify from the outset the categories of ESI that they believe are not reasonably accessible.

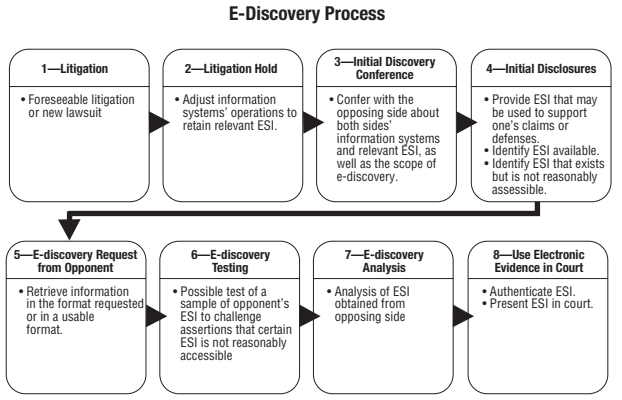
A party seeking the ESI may test a sample of such information to determine how burdensome it would be to retrieve it. A party may be able to challenge a claim that retrieval is not technically feasible. Also, a party may offer to pay for the cost of retrieval of such information.

Subpoenas to Third Parties

The parties involved in a case often subpoena records, including ESI, from third parties. The subpoena can designate the format of the requested ESI. Otherwise, the party served with the subpoena must provide the information in the format that it is normally maintained or a format that is reasonably usable. The responding party does not have to provide the ESI if it is not reasonably accessible unless the court orders such discovery for good cause. In the subpoena process, testing and sampling of the information are allowed.

An example process flow of the e-discovery process is provided in **figure 1**.

Figure 1—E-Discovery Process



The Business Challenge of E-discovery

Virtually all businesses now work with information systems and electronic information. It was this reality that led to the December 2006 amendments to the Federal Rules of Civil Procedure.

These new amendments impose obligations not only on businesses with active federal litigation, but also on businesses that face foreseeable litigation. The new amendments to the rules affect even businesses that merely receive a federal subpoena seeking electronic information.

In summary, businesses must consult with their information technology departments or with information systems consultants so they can comply with their obligation to make adjustments to their information systems to preserve electronic information needed for litigation or a subpoena. Also, when facing new litigation, company attorneys must prepare for the initial discovery conference by familiarizing themselves with all the locations where electronic information is stored in the company's information systems. They also need to assess the costs of retrieving information and identify information that exists but is not reasonably accessible.

Very early in litigation, a business will have to disclose all electronically stored information that it plans to use to support its claims or defenses. When faced with specific requests from an opponent, a business will need to determine whether it can retrieve and produce information in its original electronic format, and whether it will be able to produce information in a format that is usable by an opponent. Assessing the costs will be relevant to negotiations about what must be produced.

These new obligations raise more than legal issues. They also raise issues for information technology departments, which may have to make adjustments to their information systems to preserve electronically stored information. The new rules also raise issues for the business's bottom line.
The costs of complying, as well as the significant sanctions that courts may impose on those that fail to comply, with the new rules make e-discovery an important financial issue for all businesses.

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