

## The Rules Are Changing: e-Discovery Now Formalized

Attention risk managers: does the term e-discovery ring any bells? It should. Discovery refers to the evidence gathering stage of a trial and, as in most aspects of modern life, discovery now has a significant digital component; thus, e-discovery. New federal rules enacted in December 2006 and expected to be followed quickly by similar amendments in state courts are formalizing requirements for producing electronic data and documents. This is potentially a complex and costly undertaking. As the costs of e-discovery may well be part of the “reasonable and necessary costs associated with the investigation, negotiation, defense and settlement” of insured matters, risk managers may have a critical role to play in this new world.

### The e-Discovery Game Accelerates

While parties to lawsuits have long been able to seek discovery of email and other electronically stored data, the amendments may *significantly accelerate* this process. To address these changes, companies and their legal counsel may need to consider, in advance of any actual litigation, how they might best respond to e-discovery requests. Once litigation starts, the need is immediate. Companies must be able to determine where electronic data is stored, how it can best be produced, and what kind of electronic evidence may be relevant.

Some of the rule changes require that parties to federal litigation address e-discovery at their initial discovery planning conference; that is, shortly after the start of the case and their initial response. Since a complex organization creates millions of email messages every day, a thorough e-discovery strategy can be critical in managing the litigation. The more decisions that can be made in advance (including the selection of vendors) – the better. Getting e-discovery wrong can prove fatal.

*Black’s Law Dictionary* defines *discovery* in a general sense as the ascertainment of that which was previously unknown, the disclosure or coming to light of what was previously hidden. In practice, discovery includes pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in preparing for trial. Under Federal Rules of Civil Procedure (and in states which have adopted similar rules) discovery tools include: depositions based on oral and written questions, written interrogatories, production of documents or objects, permission to enter upon land or other property, physical and mental examinations, and requests for admission.

### “May I Remind You of Our Document Retention Program...”

In order to produce documents (electronic or otherwise), you must first retain them. The question of document retention, or the lack thereof, has been pivotal in several high-profile cases, including the one which led to the demise of Arthur Andersen in 2002.

Companies and their counsel may now need to make decisions within days – if not hours – of first becoming aware of litigation in order to comply with likely e-discovery requests. Furthermore, with a global workforce and cross-border litigation, this rapid response in initial e-discovery may need to be implemented internationally. In high-stakes litigation, even for large financial institutions and other global giants, this is not quite business as usual.

### Rising Stakes

While the new rules provide some relief in situations where there is an undue burden or cost associated with producing the requested electronic information, this will require a highly fact-specific determination by the courts and therefore is hard to predict or rely upon.

Two decisions pre-dating the new rules are instructive:

- In **Coleman Holdings v. Morgan Stanley**, (a Willis Top 10 Court Award or Settlement from 2005), we learned just how costly a failure in e-discovery could be when a \$1.5 billion judgment was imposed in response to the failure to produce potentially relevant backup tapes (after the court had been told that the tapes did not exist).
- In **Zubulake v. UBS Warburg**, widely seen as a wake-up call to attorneys on the topic of e-discovery, the court focused, in part, on whether or not sanctions should be imposed on defendants for failing to produce evidence during the discovery process. This decision highlights some of the costs of failure resulting from adverse judgments and potential sanctions.

Even more instructive is the first case decided since the new rules took effect:

- In **re NTL, Inc. Securities Litigation**, the court awarded sanctions against the defendant including an adverse inference instruction (telling the jury to assume the worst), attorney's fees and costs in a Directors & Officers (D&O) case.

Getting it wrong is clearly not an option.

## What Is a Risk Manager To Do?

While a company's counsel is busy responding to requests for document retention and e-discovery, risk managers should consider the fact that those reasonable and necessary costs that are ultimately part of the investigation and defense of a claim could be covered as loss under a D&O, Errors & Omissions, Fiduciary and/or Employment Practices Liability policy. Such policies may well require that the costs be "previously agreed to in writing by the insurer." (The notification requirement may even apply to deductibles or self-insured-retentions: your money.) This requires early coordination with one's insurance carriers. It might behoove large, complex firms, where the expectation of some form of litigation is never far from mind, to craft some relief from this requirement with their insurers.

When e-discovery is imminent or underway, review of your e-discovery strategy and budget with your insurers will serve to smooth the claims process and avoid future headaches. Several major insurance carriers have designated e-discovery specialists within their claims departments – another clear sign that times have changed.

E-discovery is covered at a federal level by the Federal Rules of Civil Procedure. Below are some highlights to the rule amendments that were passed in December 2006.

Changes to Rule 26, on general discovery provisions, now require the parties to litigation to discuss as soon as practicable any issues relating to the preservation of discoverable information and to develop a proposed discovery plan, including the form(s) in which the information should be produced. However, an exception to this rule provides that a party needn't provide e-discovery from sources that are not reasonably accessible because of undue burden or cost.

Amendments to Rule 34, on production, now specifically allow any party to litigation to request the production of any electronically stored information, including sound recordings, images and other data or data compilations stored in any medium.

Rule 37, on sanctions for failure to make or cooperate in discovery, provides that where e-discovery requests are not met and information is lost due to routine, good faith operation of an electronic information system, the court may not impose sanctions unless there are exceptional circumstances.

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