



FEATURE



## Putting the IT in Litigation: The Increased Role of IT Professionals in Civil Litigation

[By Richard L. Moore, Esq.]

Last December, U.S. federal courts adopted new rules governing how parties in lawsuits handle the discovery, or pre-trial exchange, of electronically stored information (“ESI”). As a result, IT professionals will assume an increasingly important role throughout the course of litigation in helping to insure that their companies and their companies’ outside counsel are in compliance. This article will outline the increasingly important role IT professionals will play under these new rules.

### Meet and Confer Conference

One of the drivers behind adoption of the new rules was to try to avoid some of the problems that arose when litigants failed to address early in the case how they planned to handle discovery of ESI. Prior to the development of the new rules, numerous surveys and research projects concurred that many of the problems associated with electronic discovery could have been avoided if the parties had met early in the litigation to deal with the exchange of ESI. Issues such as the preservation of ESI, the format ESI would be produced in, the accessibility of ESI, and cost of production are all issues that have been the subject of heated disputes and are all issues that likely could have been avoided had the parties addressed them early in the case.

The rules now require that the parties “meet and confer” to discuss any issues relating to the disclosure or discovery of ESI soon after the case is filed. In fulfilling the obligation to address ESI issues at the meet and confer conference, attorneys must be able to intelligently discuss with their adversaries how the discovery of ESI will be handled. To be able to perform this task effectively, attorneys will have to rely extensively on their clients’ IT staffs to educate them on these issues. Because the IT staffs will likely

be burdened with fulfilling any promises made by the attorneys at these conferences, they have a vested interest in insuring that the attorneys are armed with complete and accurate information going into the meet and confer conference.

IT professionals can help make the process of educating outside counsel much more efficient by documenting some of this information long before the litigation fire drill has begun. For example, preparing and updating diagrams of the company’s information system architecture, identifying where potential sources of ESI are maintained, and documenting potentially outdated sources of ESI will help make preparing for the meet and confer conference a much more efficient and effective process.

The parties will also need to discuss early in the case the form in which ESI will be produced. Unlike paper discovery, ESI can be produced in a number of different formats including native format (the way it is maintained on the computer), as static electronic images (.PDF or .TIFF files), or as hardcopy documents. Because the actual production of ESI is often the greatest expense in electronic discovery, it is critical that outside counsel has an appreciation for the amount of data that is involved in

complying with discovery requests before he or she commits to producing ESI in a particular format. For example, the cost of producing 80 gigabytes of data in its native format is relatively small when compared to producing that same amount of information as .PDF or .TIFF files at 6 cents per page, which could cost over \$1 million. In addition to the cost, many other factors, including volume of data, type of data, and any technical restraints factor into determining what format to use in producing ESI, and IT professionals should be actively involved in helping to make that decision.

### Litigation Holds

One of the first tasks that will need to be performed once litigation is on the horizon will be to institute a litigation hold to prevent the inadvertent destruction of potentially relevant ESI. Prior to the adoption of the new federal rules, there were a number of high profile cases that involved companies destroying potentially relevant ESI and facing huge fines and other court imposed sanctions as the result. In one of the more infamous examples, *Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc.*, a 2005 case out of federal court in Florida, the defendant, Morgan Stanley, was found to have destroyed potentially relevant ESI. As a sanction for its actions, the Court gave the jury what is



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known as an adverse inference instruction. In other words, the judge instructed the jury to assume that the missing documents would have contained information that would be bad for Morgan Stanley's case. The jury eventually returned a \$1.45 billion verdict against Morgan Stanley, \$850 million of which was for punitive damages. In light of the potential for hefty sanctions for failing to preserve ESI, companies and their counsel would be justified in concluding that the safest course of action is to preserve all ESI once there is even a hint that litigation may be on the horizon. This, however, is rarely a practical approach. The amount of e-mail and other ESI spawning on even the smallest company's computer system must continue to be managed even with litigation pending.

In many of the cases involving the destruction of ESI, companies did not purposely destroy ESI they thought harmful to their case. Instead, the companies inadvertently destroyed potentially relevant ESI because they failed to stop routine maintenance operations that deleted the ESI. The new rules recognize the need for companies to continue these routine procedures and provides for a "safe harbor" for companies that inadvertently lose or destroy ESI as the result of such routine operations.

The new rules provide that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system." To take advantage of this safe harbor, the company must act in "good faith," which may require that it "intervene to suspend certain features of the routine operation of an information system to prevent the loss of information subject to preservation." IT professionals

must work with outside counsel to identify the group of data custodians that will likely have responsive ESI and stop the operation of routine maintenance functions with respect to those individuals.



IT professionals can also help by developing methodologies to institute targeted litigation holds prior to litigation. Such pre-litigation planning will help insure that precious time is not wasted trying to determine how to institute a litigation hold in the chaos of litigation. Such pre-planning will also allow for the opportunity to test the methodologies to make sure that they protect the targeted data as intended.

#### **Locating Sources of ESI**

Cases that dealt with electronic discovery issues prior to the adoption of the new rules made it clear that counsel had the burden of insuring that their clients have searched for all relevant ESI in response to discovery requests. This is another area where IT professionals will play a critical role. Outside counsel will need to fully understand where potentially relevant ESI is stored on their clients' IT systems. An attorney will need to know every nook and electronic cranny where ESI may be kept.

Recent articles have discussed the growing concern with the proliferation of "Shadow IT" and the nightmares such systems can create in litigation. Shadow IT refers to pockets of information technology within a company that operate outside the company's

IT department. If such systems are not accounted for, companies run the risk of finding out too late that they failed to preserve and produce potentially relevant sources of ESI. IT professionals can help avoid such a scenario by inventorying all potential sources of ESI and periodically doing audits to insure that no shadow areas of ESI storage exist.

#### **Data Collection**

Another area where the IT professional will need to provide guidance will be in the collection of relevant ESI. Unlike paper documents, electronic documents contain two levels of potentially relevant information. Obviously, there is the information that is seen by the user, i.e., the words in the word processing document. With ESI, however, there is also information that is not normally viewed by the user, but is used by the computer to manage the data. This data about the data is often referred to as metadata and has become a hot topic in a number of high profile cases. As the result of the potential relevance of metadata, it is important that when ESI is collected it is collected in a manner that will not alter or destroy the underlying metadata. IT professionals need to play a key role in the collection process to insure that forensically sound methods are used to collect the ESI.

#### **Readily Accessible Data**

Another issue that the new rules attempt to address is the cost of electronic discovery. In a number of pre-rule cases, the cost of production became enormous because it involved attempting to recover data from back-up tapes or other sources that were not readily accessible. In addition to back-up tapes, such inaccessible data may also include legacy data from outdated



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software or storage media or data created by proprietary systems that would require purchasing expensive licensing agreements or software in order to access the information.

The new rules attempt to address this issue by creating a two-tiered system for discovery of ESI. The first tier involves the production of relevant ESI that is readily accessible. The party producing the ESI would also specify what other sources of potentially relevant ESI it is neither searching nor producing because it is not readily accessible. To the extent the requesting party is interested in pursuing the inaccessible sources of ESI, they can petition the court, which will have to determine if the ESI will be produced and, if so, who will bear the cost of producing the inaccessible ESI.

IT professionals can play a crucial role in helping outside counsel determine what sources of ESI are readily accessible and which are not. Importantly, IT professionals will not only have to be able to educate outside counsel on why some sources of ESI are not readily accessible, but may also have to educate a judge on these same issues if the requesting party seeks to challenge the producing party's position.

IT professionals can be of tremendous assistance to their companies in developing and managing electronic document retention policies. Such policies may help avoid disputes about inaccessible ESI being an issue in the first place. While companies have an obligation to maintain potentially relevant sources of ESI once litigation is on the horizon, they may be able to avoid some of the pain associated with this requirement

by limiting the amount of outdated data that it maintains.

**Conclusion**

With the changes to the federal rules regarding civil discovery, IT professionals will play an increasingly important role in insuring that their companies and their companies' attorneys are in compliance with their obligations regarding electronic discovery. By being actively involved at the beginning of litigation and even before, IT professionals can limit the pain that they and their companies have to endure in producing electronic information.

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