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Burr & Forman's R. Rhett Owens suggests some proactive steps that attorneys can take to reduce the risk associated with mismanagement of electronically stored information.

"You Have How Many Emails?": A Practical Approach to Responding To Requests for the Production of Electronically Stored Information

BY R. RHETT OWENS

Dealing with requests for the production of electronically stored information ("ESI") is no longer an "emerging" issue in the world of commercial litigation; it is a fully emerged reality that attorneys must effectively handle if they want to avoid the significant logistical and financial burdens that can result from mismanagement of a client's ESI.

R. Rhett Owens is an associate at Burr & Forman LLP in Birmingham, Ala., and is a member of the firm's General Commercial Litigation practice group. While his practice focuses primarily on the representation of corporate clients in various litigation matters, Rhett also represents governmental clients in cases involving alleged constitutional violations by governmental employees. In addition, Rhett is a member of the firm's ESI Discovery and Data Management Group and has experience handling requests for the production of electronic evidence, including defining, locating, and producing discoverable electronic information, retaining third-party ESI vendors, and administering the production of electronic documents.

The question then becomes, from a practical perspective, what should an attorney do when confronted with requests for the production of ESI? Obviously, while every attorney will deal with such requests in his or her unique way, here are some proactive steps that attorneys can take to reduce the risk associated with mismanagement of ESI

1. Document Your Client's ESI

At the very least, a standard request for production of ESI will require the location and production of emails, voice mails, and text messages that are, or were, maintained by individuals involved in the litigation.

However, if that same request is made by a (relatively) technologically knowledgeable attorney, the scope and breadth of ESI requested is likely to increase dramatically. The staggering variety of potentially discoverable ESI requires an attorney to understand two critical facts: (1) how their client stores ESI and (2) what types of ESI their client can readily produce.

A client's retention and storage of electronic information is determined first by its information technology (IT) infrastructure and, second, by the individual stor-

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age preferences of those individuals involved in the litigation or, the custodians.

An attorney can determine the essential characteristics of a client's IT infrastructure by asking a few pointed questions, beginning with, ''How long is a custodian's ESI kept in 'reasonably accessible' form?''

Stated differently, if a custodian had to produce an email tomorrow that was two years old, would the client's IT infrastructure allow that custodian to do so? Is a client's ESI ever converted to non-accessible form for purposes of storing it on back-up tapes, or some other disaster recovery system? If so, when does this conversion occur? If not, is the client's ESI ever permanently deleted? If the ESI is deleted, is it erased consistent with the client's information retention policies?

The answers to these questions are critical as they inform the attorney's analysis of one of the only bedrock principles in the rapidly-evolving realm of ESI jurisprudence: the distinction between accessible and inaccessible data.

The Accessibility Analysis. Under FRCP 26(b)(2)(b) ''[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.''

The time and expense associated with retrieving and readying ESI for review and production is determined largely by whether that ESI is ''accessible or inaccessible,'' an analysis that turns in large part on ''the media on which [the ESI] is stored.'' *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38, 42 (D. Mass. 2007) (citing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003)).

In *Zubulake*, U.S. District Judge Shira Scheindlin broke ESI down into five categories, listed in order in her opinion from most to least accessible: (1) active online data (hard drives, for example); (2) near-line data (typically, robotic storage devices such as optical disks); (3) offline storage/archives (removable optical disks or magnetic tape media which can be labeled and stored in a shelf or rack); (4) backup tapes (devices like tape recorders that read data from and write it onto a tape;. . .sequential access devices which are typically not organized for retrieval of individual documents or files); and (5) erased, fragmented or damaged data (such data can only be accessed after significant processing). *BeneFirst LLC*, 245 F.R.D at 42 (citing *Zubulake* at 318-19).

Of these types of electronic media, the first three were generally held to be accessible, or ''stored in a readily usable format,'' while the last two were generally held to be inaccessible, or ''not readily usable.'' *Zubulake* at 319-20.

Note, however, that the ''party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.'' FRCP 26(b)(2)(B).

Under FRCP 26, a court may order the production of ''inaccessible'' information upon a showing of ''good cause,'' an inquiry turning on a number of factors including: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources. *See* Advisory Committee Notes to 2006 Amendment of FRCP 26(b)(2).

A Hypothetical. To explain how the distinction between ''accessible'' and ''inaccessible'' ESI might work, let's look at a very brief, relatively uncomplicated example.

Assume that you determine that your client stores emails sent and received by its custodians for a two-year period. These emails include those kept in a custodian's inbox, as well as archive folders that the custodian maintains in his or her email system and elsewhere on his or her computer's hard drive.

After two years, the emails contained in the custodian's email system are transferred onto back-up tapes, a process that reduces the email's contents to binary code, and are moved to an offsite storage facility.

Armed with this basic understanding of how your client stores and maintains ESI, and absent a showing of ''good cause'' by the requesting party, you wield a powerful weapon in responding to opposing counsel's requests for production of ESI. Consistent with Rule 26, you will be able to limit the production of ESI to emails stored in a custodian's inbox and elsewhere in a custodian's individually maintained archive folders.

Stated differently, in the majority of cases, you have foreclosed the ability of opposing counsel to seek information from your client's backup tapes, or other disaster recovery systems, and have limited the scope of your client's production to ''readily accessible'' ESI that can be retrieved, reviewed (within reason, as limited by volume) and produced with relatively little expense to the client.

The Preservation Analysis. Once an attorney has an understanding of how a client stores its ESI, his or her attention must turn to the issue of what ESI the custodians involved in the litigation have preserved.

Separate and apart from preservation measures put in place by the client, custodians can preserve their own ESI in a number of different ways. However, regardless of whether ESI is preserved in folders created and maintained by the custodian in his or her email system, saved to folders created and maintained elsewhere on the custodian's computer, copied onto an external hard drive, or saved on some other variety of storage medium, it is the custodian who will best be able to answer how he or she preserves certain ESI.

The most effective way to acquire this information is to identify the custodians who have information relevant to the issues in the litigation and to issue them a litigation hold.

Timing the Litigation Hold. Under FRCP 37, a litigation hold should be distributed either at the time the lawsuit is filed, or earlier depending on whether there is evidence (think pre-complaint demand letter, threats to institute legal action, informal request for preservation of documents, etc.) demonstrating that your client should have ''reasonably anticipated'' the filing of the lawsuit. *See* Committee Notes to 2008 Amendment to FRCP 37(f).

In addition, as part of the issuance of the litigation hold, the committee notes to the 2008 amendments to

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FRCP 37(f) clearly suggest that the party issuing the litigation hold should intervene ''in the routine operation of an information system.'' *Id*.

Thus, if your client's IT infrastructure is programmed to permanently delete emails 30 days after they are manually deleted by a custodian, this automatic function should be suspended in connection with the issuance of the litigation hold.

Additional Aspects of the Hold. Notwithstanding the rule-based requirements of a legally sound litigation hold, the litigation hold also gives an attorney the opportunity to introduce its recipients to the process of locating and producing ESI. Therefore, the litigation hold should describe the nature of the litigation and instruct its recipients to immediately begin preserving all potentially relevant information, including ESI.

Further, it should be assumed that only the most technologically proficient custodians will have an understanding of the numerous sources of ESI they might use on a daily basis. Thus, the litigation hold should provide guidance by describing the sources of potentially relevant and discoverable ESI that a custodian might utilize in the scope of his or her employment.

The litigation hold should also serve to open a direct line of communication between the custodian, the client's legal team, if applicable, and you, the outside counsel.

Finally, aside from assisting in the critical task of accurately cataloging your client's ESI, a litigation hold distributed at the earliest possible sign of impending litigation will also serve as a critical piece of evidence to support your argument in opposition to a requesting party's position that ''good cause'' exists for the production of inaccessible ESI, should that issue arise during the litigation.

2. Be Aggressive With Search Terms

Once an attorney understands his client's IT infrastructure and has a grasp on the number of custodians from whom potentially relevant ESI will be gathered, he or she must turn to the issue of developing search terms to identify potentially relevant ESI from the broader universe of irrelevant ESI.

Courts Urge Caution. The trend in federal courts with respect to the development and implementation of search terms is, to put it mildly, a cautious one requiring the producing party not only to develop search terms, but to also be prepared to explain how and why the terms were developed and, in some cases, to solicit expert assistance to aid in the search terms' development and implementation. *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260, 262 (D. Md. 2008) (''Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.''); *see also U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (''Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.'').

Collaboration Encouraged. At the very least, federal courts seem to favor collaboration between the producing and requesting party with respect to the development of search terms. *See In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (''[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process.'').

Need for Precision. This spirit of cooperation notwithstanding, from a producing party's perspective it is vitally important to ensure that search terms are narrowly tailored to identify ESI relevant to the disputed issues in the litigation. This is because the expense associated with retrieving, restoring, and readying ESI for review, while significant, pales in comparison to the expense associated with attorney review of the ESI in advance of production.

Therefore, because search terms determine the number of ''items'' (individual emails, text messages, voice mails, etc.) that will be reviewed, the development of precise search terms is essential to reducing the logistical and financial burdens associated with the discovery and production of ESI.

Thus, while collaboration with opposing counsel will likely be required in formulating search terms to identify potentially relevant ESI, it is critical for a responding attorney to take the first shot at identifying critical disputed issues in the litigation and developing a limited set of search terms that will produce a manageable amount of responsive ESI.

Moreover, make sure that you have a firm understanding of the amount of ESI generated by a set of search terms prior to loading ESI into a review platform, as the majority of the expense associated with production of ESI is incurred at this stage of the process.

3. Utilize the Power of Privilege

The attorney-client privilege and work product doctrine can play an important role in electronic discovery. As with traditional discovery, the attorney responding to an ESI request can reduce the scope of production by withholding privileged material. However, with ESI, the process for determining which documents are subject to an applicable privilege is much easier than with traditional production.

For example, an ***initial inference*** of privilege can be attached to ESI that is sent and received by members of a client's in-house legal team, regardless of whether that individual was the primary recipient or is simply copied on the communication. The same inference of privilege can also be applied to ESI exchanged between a client and its outside counsel in previous litigation.

Accordingly, an attorney must identify which members of the client's legal team were involved in the events giving rise to the litigation and should immediately segregate ESI sent and received by these individuals.

In addition, the attorney should obtain from the client a list of litigation matters in which the client has been involved over a reasonable period of time and a list of all outside counsel that have represented the client in these matters. All ESI sent and received by outside counsel in these matters should be segregated. Bear in mind that the most effective way to segregate this ESI, especially when dealing with a client that has retained a significant number of outside counsel, is to locate emails sent and received from certain domain addresses, i.e. @burr.com, as opposed to certain individuals, i.e. rrowens@burr.com.

Caution! The highlighting of the term ''initial inference'' above relates to a cautionary note. There is case law holding that the attorney-client privilege does not extend to communications in which the attorney, including members of a client's in-house legal team, is not giving legal advice. *See In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007) (''Business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client.'') (quoting *In re CFS-Related Securities Fraud Litigation*, 223 F.R.D. 631 (N.D. Okla. 2004)).

This rule makes sense, as a client could potentially cloak all of its ESI in the attorney-client privilege simply by copying members of the client's legal team on every single electronic communication. Thus, the attorney should be prepared to review all ESI segregated by virtue of the above-described procedures and develop a general description of the privileged nature of the ESI, bearing in mind two important advantages which weigh in favor of the privileged designation.

First, the inclusion within an email string of a single privileged communication will extend the attorney-client privilege to all non-privileged communications within that string. *See Davis v. Corrections, USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009) (interpreting *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981) to mean that ''even though one e-mail is not privileged, a second e-mail which forwards that prior e-mail to counsel might be privileged in its entirety. In this respect, the forwarded material is similar to prior conversations or documents that are quoted verbatim in a letter to a party's attorney.'').

And second, when legal and non-legal considerations are both included within a particular communication, an argument can be made that the communication is privileged. *See In re Vioxx*, 501 F. Supp. 2d at 798 (''The test for the application of the attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance.'').

4. Consider a Clawback

The characteristic of ESI that distinguishes it most from traditional discovery is the significant amount of ESI that is sent and received by your client's employees on a daily basis and the absolutely staggering amount of this information that can be stored over time on machines your client's employees use all day, every day in the course of their employment.

In short, even the most innocuous of requests for the production of ESI can potentially obligate a responding attorney to locate, identify, and eventually produce hundreds of thousands of individual electronic items. In situations like these, the responding attorney might consider the possibility of entering into a ''clawback'' agreement with opposing counsel.

How They Work. Clawback agreements essentially ''undo'' a document production and allow for the return of documents that a party belatedly determines are protected by the attorney-client privilege or work product immunity. *Rajala v. McGuire Woods LLP*, No. 08–2638–CM–DJW, 2010 BL 166815, at *6 (D. Kan. July 22, 2010); *see also Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (''many parties to document-intensive litigation enter into so-called 'clawback' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents.'')

Clawback agreements are not only endorsed in the committee notes to the 2006 Amendments to Federal Rule of Civil Procedure 26(f), but Federal Rule of Evidence 502(d) and (e), enacted in 2008, essentially nullify the traditional test employed by courts to determine whether a party's production of privileged material was ''inadvertent'' (and thus subject to reclamation) by enforcing agreements between parties to provide for the reclaiming of privileged material regardless of whether its production was inadvertent.

Considerations. As with all matters ESI, the responding attorney, and his or her client, must make critical choices in considering whether to enter into a clawback agreement.

In some situations, it is clear that the requesting party is using ESI as leverage to drive potential settlement by increasing the logistical and financial burdens associated with your client reviewing and producing relevant ESI.

Under these circumstances, a clawback agreement might create a tactical advantage for the responding party as it will allow for the production of ESI while significantly reducing the expense associated with reviewing it for relevance to the issues in the litigation. This is especially true in light of the fact that the client can use electronic means to segregate those items to which an initial inference of privilege applies.

Also, in proposing a clawback, the responding attorney assumes the role of the ''adult in the room,'' and presents himself or herself to the other side (and to the court) as the party interested in moving the litigation forward by proactively dealing with potentially troublesome discovery issues. That the responding attorney will likely be able to compel the requesting attorney to accept the clawback agreement (after all, the requesting party is getting exactly what it requested), while at the same time transferring the burden associated with reviewing a substantial volume of ESI are collateral, if not significant, benefits.

Burden Eased? Be warned, however, that the logistical burden associated with large volumes of ESI is not what it once was. With the continued development of increasingly sophisticated search techniques, a party that receives, for example, half a million electronic items will likely to be able to run targeted searches of that information to identify relevant information.

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Although the requesting party will have to shoulder this expense, the possibility that the smoking gun exists within the information produced does exist.

Conclusion

Like all aspects of commercial litigation, responding to requests for the production of ESI requires organization and thoughtful consideration of how certain decisions will play out over the course of the litigation. That caveat aside, by taking certain proactive steps to understand a client's IT infrastructure and by utilizing those parts of the Federal Rules that recognize, and attempt to accommodate, the cumbersome process of producing ESI, the responding attorney should be able to effectively and efficiently handle these requests.