

## LITIGATION READINESS

### Lessening the Impact of the New Federal E-Discovery Rules

by Dan Billings, Esq. & Michael J. Lightfoot, Esq.

In the October 2007 Newsbriefs, Past President George Bellas argued that changes to the Federal Rules of Civil Procedure pertaining to electronic discovery “adds to the nightmare of small firm practitioners who are at a disadvantage in federal court”. While we acknowledge the impact of the new federal rules, counsel for corporations will get ahead of the “nightmare” by introducing the need to prepare for litigation. To successfully compete, a local law practitioner can lessen the disadvantages for their clients by implementing a framework that assists their clients in becoming “**litigation ready.**”

The Federal Rules of Civil Procedure §26, which took effect in December 2006, amends the Court’s rules to focus on electronic discovery of documents and other information from opposing parties. Although a limit has been enacted to the extent of discoverability of “reasonably accessible” electronically stored information (“ESI”), if a party shows good cause for needing the material, courts may order the party to produce virtually any electronic materials. This includes email, cell phone and text messages, in addition to traditional business documentation. Therefore, there is an emerging need for corporate counsel to lead their client companies to prepare, in advance, for litigation and investigations, as courts mandate under ESI rules in federal (and many state cases). In other words, a client must become “litigation ready.”

As the digital age continues with more information and more regulation, new discovery rules will continue to come down the pipeline. The goal of litigation readiness is to create a “frame-

work” for the client company that will integrate a reliable information retention model into the company’s operations, so that it is instantly available for use when needed in a “litigation event”.

A litigation readiness framework will keep your client ahead of the curve and get rid of the disadvantages that face a small firm practitioner in federal court, as well as lessening the nightmares that are sure to follow with the enactment of more definite electronic discovery rules in the state courts of Illinois.

A properly implemented litigation readiness framework will make the ESI deliverable to the requesting party much easier and far less costly for the client, and will assist the client in its control (and analysis) of their own ESI, even if litigation is not an immediate concern. With the explosion of data contained on an ever-growing number of systems and devices, practitioners must provide their clients with the means to aid in the creation and implementation of a litigation readiness framework.

**To be successful, a framework that is the ultimate assurance of litigation readiness supports the discovery and preservation of all enterprise content and manages its lifecycle, in accordance with regulatory requirements, and in a cost-effective manner.**

One way to begin is by creating a policy for your client company’s email services, network, and web use, if your client does not already have one. Another way to help your clients is by providing an experienced, infor-

mation technology-trained attorney to work with your client, so the client has someone able to address the intricacies of their individual business. This individual can be an important liaison between outside counsel and the business structure of the client company; providing someone who can follow the current court cases mandating procedures, where the data will be properly preserved, collected, analyzed, and reported.

As Mr. Bellas said, compliance with the new federal rules will require coordination within the company and rapid communication with opposing counsel. Creation of the litigation readiness framework requires “integration” between the Chief Legal Officer, Chief Information Officer, the Chief Financial Officer, auditors and the Information Technology department of the client company to be successful.

If your client has an existing records retention policy, the trained information technology attorney would be able to review and optimize the client’s record retention program, making it operational under the current statutory and regulatory guidelines. No matter the current policy used by a client, the ever-changing landscape of electronic discovery and the creation of ESI mandates constant review of the framework, and assurance that a policy and its associated rules are being followed consistently.

Each policy also must be able to be utilized in an operational manner by a client. Central to a policy must be an

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effective archival system that employs effective procedures in their maintenance of the electronically stored information on a day-to-day basis. This would include deleting records in a timely manner and making the information easier to recognize and access if litigation arises.

These procedures become extremely important because under the Rule, once a party reasonably anticipates litigation, it must suspend its "routine document retention policy" and put in place a "litigation hold" to insure the preservation of relevant documents.

To further lessen the risks associated with electronic discovery, clients must be knowledgeable of what may be relevant to the case at hand and where that information can be located. If a client can easily access the materials and provide it to the opposing side, because they have, in advance, implemented a framework for litigation readiness, clients will no longer be disadvantaged with identifying, acquiring and processing the ESI material. So, your client will

save the hours and costs to hire staff to find this material. Instead, a client will be able to spend its energy understanding and analyzing the litigation impact of its electronically stored information, and concentrating on requiring opposing parties to identify and deliver their ESI.

By reducing the impact and cost of litigation, you are providing your client with less of a nightmare and more of a dream. However, one must constantly continue this dialogue. A policy needs to adapt to its environment and counsel must understand the evolution of technology and be able to aid in the training of personnel who will comply and monitor the policy to ensure it is being followed.

Gone are the days that a client (and its counsel) could hide its head in the sand. From monetary sanctions to criminal violations, a client and its counsel could be at risk for mishandling electronic discoveries. Besides the obvious damage to one's reputation, counsel cannot afford to treat the new Rules as a poltergeist.

By preparing your clients and provid-

ing them the services necessary to become "litigation ready," the nightmares associated with electronic discovery can be defecated and lessen the disadvantages of a small firm practitioner in E-discovery.

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