E-DISCOVERY: A PRACTICAL APPROACH TO NEW FEDERAL RULES

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INTRODUCTION

Changes to the Federal Rules of Civil Procedure, which became effective December 1, 2006, now require the parties and their attorneys to come to grips quickly with the discovery of "electronically stored information" ("ESI"). These new Federal Rules put a fine point on the need for law firms (and their business clients) to become familiar with and conversant about their clients' use of computers and other electronic devices where ESI is stored. Planning for and educating businesses before litigation arises, particularly the IT staffs and managers in large corporations, about the impact of these new litigation rules is no longer just a "good idea," but has become a necessity. Clients must understand that all data that is created and stored becomes possible evidence, and a plan should be in place to deal with such data before litigation arises.

In its report on new Rule changes, the Judicial Conference noted three specific characteristics unique to ESI:

* The volume of ESI vastly overshadows hard copy documents. Many computer systems store information in "terabytes," each of which represents the equivalent of 500 million typewritten pages of plain text.

* Unlike paper, computer information is dynamic. Merely turning a computer on and off can change the information, sometimes without the operator even knowing it.

* Some ESI can be incomprehensible when separated from the system that created it.

These characteristics of ESI mean that well established, standard practices followed by many companies for the past 40 years in responding to a federal lawsuit (including engaging in discovery) are no longer adequate. A failure to appreciate the scope of the obligation will greatly increase the cost of litigation, and in some situations result in problems that directly impact the outcome of litigation. Attorneys and companies ignore these new Federal Rules at their peril.

Since most employment cases arise under federal anti-discrimination or wage and hour laws, human resource professionals must become intimately familiar with the Company's computer systems, and how to search for relevant information and to "put on the breaks" when an EEOC charge is received. As will be discussed later, time is of the essence with "preservation" business. The duty to preserve arises when you are put on notice of a claim, even if the claim gets filed in state court.

I. SUMMARY OF NEW RULES

The new Federal Rules related to e-discovery specifically affect Rules 16, 26, 33, 34, 37 and 45. Key aspects of the changes to the Federal Rules include:

* Placing a substantial burden on parties to preserve all potentially discoverable ESI once litigation is "reasonably anticipated."

* Requiring attention to ESI early in the litigation at initial discovery conferences and in scheduling orders (rather than after the fact once discovery begins).

* Expressly permitting a requesting party to specify the format in which ESI is to be produced.

* Establishing a framework to resolve disputes over the format which ESI is to be produced.

* Creating a presumption that a company does not have to review or provide ESI that is not "reasonably accessible" unless ordered by the court for good cause. The key distinction here is between "collection" and "preservation" on the one hand, and "production" on the other.

* Establishing a process for asserting claims of privilege and work product protection after production.

* Creating a "safe harbor" against sanctions for a party unable to provide ESI as a result of honest mistakes.

II. DUTY TO MANAGE AND RETAIN ESI

Beyond educating companies about the "realities" of ESI as evidence under the Federal Rules, business clients must be educated about their obligations to "collect" and "preserve" data. The "duty to preserve" data, especially once litigation arises, can often be far broader than the obligation to produce information. This "duty to preserve" applies to all disputes, not just those which result in a federal lawsuit.

The need to manage ESI falls into two categories. Separate and apart from litigation, there are statutory, regulatory and other legal obligations that require

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companies to be able to manage and retain valuable information as an ongoing business matter. This means that organizations must retain certain information when:

1. A local, state or federal law regulation mandates the continued availability and accessibility of the information;

2. Internal organizational requirements, including policies and contracts or other record keeping requirements, mandate retention, such as records for tax purposes; or

3. The information is worthy of retention because it has other value to the organization.

The heart of a reasonable information record management approach must be consistent with the useful life of the information based on its inherent value. As a result, ESI and records should be retained only so long as they have value as defined by business needs or legal requirements. Thus, while some documents contain information which is deemed irreplaceable and should be retained indefinitely, other information and records that do not have continuing value can be destroyed or deleted when the organization, in its business judgment, determines that they are no longer needed, regardless of form. Of course, this destruction in the ordinary course is subject to suspension when litigation is actually or reasonably anticipated. Retaining unnecessary ESI has both direct and indirect costs beyond the cost of purchasing additional electronic storage capacity. Indirect costs can include the cost of the technical staff for obtaining such information, the costs of personnel to classify the information and the potential costs of outside attorneys having to review and exclude irrelevant electronic information in the discovery process. The legitimacy of managing information and records through document and information management policies that systematically destroy (as well as retain) information has long been recognized by lower courts, and in 2005 was acknowledged by the United States Supreme Court. Arthur Anderson LLP v. United States, 544 U.S. 696 (2005).

A. Heightened Duty to Preserve

Courts have made it clear that organizations must take steps to preserve certain information if it is "relevant" to actual or reasonably anticipated litigation, or subpoenas or government investigators' requests, regardless of whether it meets any of the preceding criteria or even constitutes a formal "record" of the organization. If, and only if, information does not meet the criteria requiring retention or preservation, may it be destroyed. In some cases, it must be destroyed.[1]

B. Trigger for Duty to Preserve Evidence

The duty to preserve potentially relevant evidence will often attach before formal legal proceedings begin. In the Fourth Circuit, the duty to preserve material evidence exists where "a party reasonably should know that the evidence may be relevant to anticipated litigation." Evans v. Medtronic, Inc., 2005 U.S. Dist. LEXIS 38405 (W.D. Va. Dec. 27, 2005) (citing Silvestri v. General Motors, 271 F.3d 583, 591 (4th Cir. 2001)). This duty extends even to situations where the party does not own or control the evidence if the party anticipates the possible destruction of evidence. In these cases there is a duty to give the opposing party notice of access to the evidence before it is destroyed.

It is important to keep in mind that the "duty to preserve" applies to all potentially relevant information, whether it is accessible or whether it is "reasonable" to produce it. While a party may not be required to produce ESI that is overly burdensome in the absence of compelling circumstances, it does not mean that the court will not find the Company "breached" its duty if it did not preserve the information in the first instance.

C. Legal Hold

Once the "duty to preserve" is triggered by litigation or other legal process, the normal course of information and record retention should be suspended – a "legal hold must be implemented." The timing and scope of the legal hold must be informed by legal judgment and tailored to the requirements of the case. In most cases, the "hold" should apply only for the life of the litigation, investigation or audit.

The obligation to "preserve evidence" does not require that all ESI be frozen. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (organizations need not preserve "every shred of paper, every email and electronic document and every back up tape"); Wiginton v. Ellis, 2003 U.S. Dist. LEXIS 19128, *4 (N.D. Ill. Oct. 27, 2003) ("a party does not have to go to "extraordinary measures" to preserve all potential evidence … and does not have to preserve every single scrap of paper in its business"). The scope of what it is necessary to preserve will vary widely between and even within organizations depending on the nature of the claim and the information at issue.

1. Backup Tapes. In certain circumstances, implementing a legal hold will require a change to the organization's backup procedures for business continuation or disaster recovery. The legal hold will address what actions, if any, are taken to suspend recycling of disaster recovery backup tapes, either on a temporary or ongoing basis, pending further litigation developments.

2. Auto-Delete/Janitor Utilities. The legal hold procedures may require the suspension of certain automatic deletion programs and processes that continuously delete information without intervention (such as an email janitor program). Suspension may be required when the organization knows that the program or process will lead to the loss of relevant records or other relevant information that is not otherwise preserved or available.

D. Scope of Duty – Type of Case and Practical Considerations

The actual duty to "produce" ESI is the same as with any other request pursuant to the Federal Rules. The information has to be produced if "the burden and expense of the proposed discovery outweighs its likely benefit." This requires, among other things, that the "amount in controversy" or the significance of the liti-

gation be taken into account. Fed. R. Civ. P. 26(b)(2). In order to take advantage of the opportunity to minimize the burden and expense of producing ESI, counsel must become familiar with the factors that a court will consider in resolving a motion to compel or allocating the costs of such discovery where required. It is essential that the attorneys have accurate knowledge of the information system used by the client, its capabilities and the cost associated to produce specific information.

III. RULES 26 AND 16 – EARLY DISCLOSURE AND DISCUSSION

Rule 26(f) provides that the parties must confer "to discuss any issues relating to preserving discoverable information" before the Rule 16 scheduling conference. The parties are specifically required to discuss "any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced." This mandated early focus is part of the Rules 16(b)(5) and (6) which provides that the Scheduling Order may include "provisions for disclosure or discovery of ESI" and "any agreements that the parties reached for asserting claims of privilege or a protection as trial-preparation material after production."

A. Understand Company Systems

These two rules, in combination, mean that producing parties will need to come to the scheduling conference prepared to discuss the steps already taken and those additional steps contemplated to be taken to preserve and produce information, and this means counsel must know and be familiar with their client's computer systems and how ESI is maintained. This requirement that ESI be discussed arose out of the concern that the failure to address these issues early and openly presented a trap for the unwary (often leading to sanctions), but also did a disservice to the interests of justice in an era when ESI is of ever-growing significance to the merits of all cases. As a result, even if your opponent is not asking the tough questions, it is possible that the court may.

B. Meet With Key Players and IT Staff

To be prepared to meet the obligations set forth in the new rules, prior to attending the Rule 16 conference or negotiating the terms of a discovery plan under Rule 26(f), counsel must become familiar with the technical aspects of the client's operation, including an identification of the computer systems currently used as well as legacy systems in use during the relevant time period. It must also know the availability of IT staff to explain and access these systems, and there must be a clear identification of the IT personnel responsible for working with outside counsel. Moreover, counsel must be familiar with the possible forms of producing ESI, the operation of the backup and routine destruction systems of the client's computer systems, and be able to clearly estimate the costs of identifying, retrieving and producing ESI.

In addition to these logistics, counsel must understand early on the substantive content of the systems used by their client - the specific locations of data maintained by the "key players," the relevance of medadata to the particular claims at hand, the motivation or demonstrated propensity of key players to delete or modify data, and the relative importance of specific pieces of information to the issues in the case. Notably, all of this knowledge is required in order to implement an effective litigation hold and satisfy the preservation obligation, which in many cases predates the actual filing of a lawsuit.

The consequences of insufficient early attention to these issues may be drastic and are the proverbial two-edged sword. If you do not know enough, you may unwittingly agree to exorbitant expensive production protocols and accept responsibility for searches that are unnecessary and expensive, or, on the other hand, you may be sanctioned later for not having addressed these issues adequately. Preliminary hearings are the primary place to avoid these pitfalls, and they take on greater importance under the new rules.

C. Where Do You Look? In Order to Collect, You Must Know Where to Look and What to Look For

Some lawyers fail to consider the wide range of devices used by most people that contain or may contain potentially relevant ESI. E-discovery goes far beyond email and word processing files on desktop computers in the office. ESI can potentially be stored on any of the following:

* Desktops
* Laptops
* Network servers
* Backup or disaster recovery systems
* Archive systems
* Storage media such as tapes, floppy disks, hard drives, zip drives, flash memory cards and memory sticks
* Personal digital assistants (PDAs)
* Handheld wireless devices (BlackBerrys, etc.)
* Mobile phones
* Paging devices
* Audio systems (including voicemail)

Undoubtedly as technology evolves, new devices will store ESI and, therefore, part of a company's duty to preserve and disclose. Just as the types of storage devices may vary, so do the types of potential ESI, which could include:

* Spreadsheets
* PowerPoint presentations and related documents
* Graphics
* Digital images
* Instant messages
* Audio, video and audio visual recordings
* Voicemail

D. Counsel's Role and Responsibility

Court decisions have made it clear that counsel now have definite duties to:

1. Actively monitor compliance with applicable discovery requirements;

2. Assist clients in locating and preserving relevant evidence in the client's computer system; and

3. Make sure the discoverable information is not lost.

These obligations are not satisfied by merely accepting the client's representation as to compliance. Counsel must oversee compliance and "become fully familiar with the client's data retention architecture." This means that courts now expect attorneys to speak with the IT personnel involved, and also be involved in communicating with key players in the litigation in order to make sure that they understand how ESI is maintained.

E. Litigation Hold Considerations

Once a company reasonably anticipates litigation or is sued, all routine document destruction processes should be suspended until a careful assessment is made of where all relevant information may be stored. A "litigation hold" must be put in place in order to ensure the preservation of potential evidence.

Examples of actions to be taken include:

1. A litigation hold memo signed by the president or other senior officer must be issued promptly. This memo must be proper in scope to include information from each potential "key player" and "data source" and be delivered to the appropriate individuals.

2. A litigation support team should be formed to address the discovery issues, including a senior manager or executive, an HR representative, IT staff members and outside counsel which will meet regularly and maintain minutes of their operations. It is critically important that IT promptly suspend all routine steps to defrag, delete data, optimize disks, add new programs or do anything that might overwrite relevant information.

a. During initial information preservation meetings, consult with IT personnel to identify what is possible and what is not possible to do with the client's specific ESI and their system.

b. At the initial team meeting, IT personnel must determine the scope of potential relevant ESI, the specifics of preserving potential evidence, and implement specific plans and actions.

c. Anticipate potential problems such as retired hardware, obsolete software, personal storage devices and physical locations where storage devices may be kept by "pack rats." It is particularly important that when employees leave an organization during a time that a litigation hold is in effect, that their computers not be "refreshed" or "purged" without careful consideration by the team.

3. Avoid creating an evidentiary problem by jumping the gun. If your client or the client's IT staff takes a look at the evidence to see "how much trouble we're in," they will be changing the dates of last access at the very least. Relevant evidence should be preserved, not explored, at this point.

a. If there are work stations that should be unplugged and taken out of commission (or you can use Norton Ghost to replicate the existing drive and place the copy on a new drive and simply lock up the originals), do so.

b. At all times during the gathering of evidence and the computer forensic process, make sure a proper chain of custody is maintained. It is perfectly acceptable to FedEx computers/cell phones/other media storage devices and maintain a chain of custody using a standard form and FedEx tracking numbers.

4. The team must determine how ESI is to be preserved and who will be the final authority on preservation issues.

5. Each potential key player should be interviewed early regarding potential sources of relevant ESI, and then steps taken to make sure all relevant data is properly preserved.

a. Evidence tends not to be in a single place. Businesses have headquarters, but they also have branch offices. Backup and storage of data sometimes is outsourced to third parties. Find out who hosts their web sites. Do employees have laptops? Cell phones? PDAs? Do they work at home on their own computers? Do not forget digital media cards, digital cameras, voice mail, etc.

b. If there is a third party used for backup purposes, they need to be notified of the duty to preserve.

6. Following an agreement on preservation protocols, ensure that management and IT personnel are clear on their specific duties and responsibilities. All efforts to identify responsive information should be maintained in records that can be reconstructed (including the potential need for future affidavits to demonstrate good faith efforts on discovery issues).

7. Once a plan is developed, the ESI needs to be gathered, which can and should frequently involve the use of an outside vendor, especially in high stakes litigation.

8. Determine whether counsel or an outside vendor should take possession of certain information such as backup tapes or preserved images.

9. Quickly develop information that can be used as evidence to demonstrate the cost of accessing and recovering ESI that is contained on backup, legacy or other residual systems, and other arguments such as why such an effort is unreasonable under the circumstances of a particular case.

10. Litigation hold directives and associated information should periodically be reissued to ensure continued awareness of the requirements.

11. During production negotiations, consider alternatives to exhaustive requests and propose alternatives such as sampling or key word searches.

IV. THINGS YOU SHOULD KNOW ABOUT VENDORS

A. Know What You Need

It can be very important that you get a true forensic image, especially when you are potentially going to be in court. For this to occur, a "bit-by-bit" image must be used. A mere copy or a "ghost image" will not work. Specialized forensic software should be used as supplied by the vendor.

B. Know the Costs

Be sure you know the costs of forensic services so your client (and you) will not suffer sticker shock down the road. Most forensic groups charge a flat fee for imaging something in their lab; if the imaging is done on site, the cost goes up. In addition, if information has to be acquired off of servers, this frequently has to be done on a weekend to avoid business disruption. Expect to pay time and a half for weekend service.

Understand that once the data has been acquired, analysis is usually performed on an hourly rate. Make sure you have gotten good references on your forensic technologist. There are some that will give you an hourly rate of $200 and charge you for the time the search is running, even though the process is automated and they work on a different case. Reputable technologists will bill you only for the time they spend working on your case. The charge may be higher per hour but you end up spending less on the overall bill.

Understand that your forensic technology group is not going to be able to give you a precise projection of analysis time at the beginning of the project. After a day or two where they can size up the amount of data involved, they should be able to give a reasonable estimate in most cases. Always remember that the number one complaint about computer forensic and electronic evidence is that the costs spiral out of control.

C. Search Terms

Search terms should be developed with the assistance of your technology group, especially if it has a lawyer on its staff. The vendor will be better able to identify what key words make sense and which ones do not. For example, if you search for common names such as "Joe" or "John," you may get a ton of irrelevant information. Always make sure you give your consultant a copy of the pleadings.

D. Storage and Access

Depending on the size of the case, the law firm may be able to review the evidence themselves, particularly if there is a limited amount of data. On the other hand, where the data set is large or complex (and if you lack internal resources), it may be that you need to hire an electronic evidence company. There is an important dividing line between those that are computer forensic focused (preserving, acquiring, extracting and presenting evidentiary findings via expert witness testimony) and electronic evidence companies that generally manage the evidence once it has been extracted.

E. Sharing Information

If you are going to be collaborating with lawyers in different offices, you may need to have a data hosting company which can securely place the evidence on the Internet for review by authorized parties from any location.

V. PRODUCTION ISSUES

Under the new Federal Rules, there are several key issues for counsel to address when considering production.

A. Format Issues – Native, PDF, TIFF

Understand that if ESI is produced in a native format, the medadata is kept intact but there can be a problem if the recipient does not have the software with which to read the data as often happens with proprietary programs. Production of such information in TIFF Format (which essentially means that you have taken a picture of the evidence) which can happen often means that medadata (who authored a document, when it was created or last accessed) which accompanies a document or spreadsheet is lost.

1. Metadata. A key battleground will be the production of computer files typically used by companies to manipulate data such as spreadsheets. Producing spreadsheets in "native format" (i.e., an Excel spreadsheet produced as a .xls file) permits the receiving party to seek formulas and other information regarding preparation of the file and may include "hidden" columns that a reviewer of hard copy versions would not see. Production of the same spreadsheets as a .pdf or .tif file provides only a presentation version of the spreadsheet (a paper copy equivalent that is not capable of manipulation). See Williams v. Sprint, 230 F.R.D. 640, 652 (D. Kan. 2002) (finding that defendant must produce Excel spreadsheets without redacting medadata, unless the producing party timely objects to producing medadata, the parties agree that medadata is not to be produced or the producing party seeks a protective order to prevent disclosure).

2. Production Format. Rule 34 adds provisions specifically addressing the form in which ESI is to be produced. The requesting party under Rule 34(b) may specify the form(s) in which ESI is to be produced. The responding party shall "include an objection to the requesting form or forms for producing ESI, stating the reasons for the objection," and "if the objection is made to the requested form or forms of producing ESI - if no form was specified in the request - the responding must state the form or forms it intends to use."

3. Required Objections. Rule 34(b) therefore permits but does not require that the requesting party specify the form of ESI production in a Request for Documents under Rule 34. However, Rule 34 does require an objection by the producing party to any requested formats or if no format is stated, the producing party must specify the form that the producing party intends to use. As a result, prompt and careful review of all responses to document requests must be made in order to ensure that you understand the format that your opponent intends to use. If you want something different, you need to act promptly.

4. Default Provision. If the parties cannot agree, or if a form has not been specified by the court, then under Rule 34(b) the default form of production is either the form in which the information is maintained, or a form that is reasonably useable, which may mean searchable if the information if maintained in a searchable format.

5. Subpoena Obligations. Rule 45 relating to the obligation of third party recipients of a subpoena contain conforming changes that essentially incorporate into Rule 45 the definition of procedural principles discussed above.

B. Timing Issues

If you are dealing with massive amounts of data, consider whether you want to do a "rolling production" so you can demonstrate that you are attempting to cooperate fully and quickly. Because the process of data production in large cases can be incredibly time consuming, most judges are usually happy to work with a rolling production schedule so long as timetables are reasonable and met.

C. Privilege Concerns/Proprietary and Trade Secret Protections

The enormous volume of ESI presents a significant challenge in order to protect privileged information and to avoid the potential waiver of privilege through inadvertent disclosure. When the volume of material runs millions of pages, attorneys simply do not have the time to review the material on a page-by-page basis for privilege or confidential information. As a result, inadvertent production of privileged material has become particularly important.

1. Claw Back. Rules 16 and 26 are both designed to cause the attorneys to address this issue at the early stage. Rule 16 contemplates and appears to sanction the use of what has traditionally been known as a "claw back" arrangement whereby the parties agree to return to one another privileged material which is inadvertently produced.

2. Process. Rule 26(b)(5)(b) sets forth a specific procedure to be followed in the event of an inadvertent production:

> *If information is produced in discovery that is subject to a claim of privilege or protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.*

3. Legal Concerns. Another approach referred to as the "quick peek" faces an unknown future in the courts of the Fourth Circuit. A quick-peek scenario exists when the requesting party offers to pay for all of the extraction work, and the producing party is inclined to allow all of those expenses to be paid by the other party, but does not want to waive the privilege. The parties agree that the ESI will be turned over to the requesting party without review by the producing party. The requesting party will then identify those documents it is interested in and the producing party will conduct its privilege review of this more limited number of records.

The Fourth Circuit has taken a very hard line regarding the waiver of privilege, and has suggested that even the inadvertent disclosure of a single privileged document can easily result in the loss of the privilege as to the remaining similarly privileged documents. So even if these types of claw back or "quick peek" agreements can be agreed upon with opposing counsel, it will be important to have a specific conversation with the court on these issues at the pretrial stage.

It also bears noting that "claw back" provisions have little practical value when protecting proprietary or trade secret information which raises a whole separate issue.

4. Practice Pointer: Companies should take steps to reduce the likelihood that privileged or trade secret materials are commingled with general electronic business by using segregated servers for legal personnel electronic data or by creating a policy that minimizes the use of electronic communication systems by in-house legal personnel or establishes a labeling protocol for such documents that makes them easily identified by an electronic search engine. This is one area where internal planning in advance of litigation is the key to success.

D. Cost Considerations

In most cases where the plaintiff is an individual and the defendant is a company, the cost of collecting and producing ESI is going to fall disproportionately on the defendant if the data is "reasonably accessible." This can mean that in a standard employment case, the company may have to spend $15,000 to collect data and then store it for several years while the EEOC and federal courts work their magic. Monthly costs for this storage could easily run $300/month or more.

1. Accessibility. Accessibility is the key factor in production responsibilities. The courts are not unsympathetic to the staggering volume of ESI and the costs associated with producing it. These problems can be compounded when the data sought was created using outdated software or hardware, or because it was stored on a media (such as a disaster recovery tape) never intended for ready accessibility. The cost and burden of converting these items to readable form can often be unreasonably disproportionate to the significance of the information or the size of the case.

The new federal rules adopted the Zubulake rationale for producing in the

normal case only those documents that are "reasonably accessible." The new Rule 26(b)(2)(b) provides:

> *A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not "reasonably accessible" because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(c), the court may specify conditions of the discovery.*

This Rule does not include any discussion of what constitutes "inaccessible" evidence. Arguably, legacy data (data no longer being used in company operations), backup tapes (if used simply for disaster recovery purposes) and fragmented data post-deletion are all examples of inaccessible evidence. Zubulake, 220 F.R.D. at 218. Nevertheless, technology advances daily, and an ongoing familiarity with available search and retrievable technologies becomes increasingly critical.

2. Factors to be Considered. The factors to be taken into account in determining whether "good cause" has been shown to require production if it is not otherwise unreasonably accessible are similar to but not identical to those identified in Zubulake:

* The specificity of the discovery request.

* The quantity of information available from other, more easily accessible sources.

* The failure to produce relevant information that seems likely to have existed, but is no longer available from more easily accessible sources.

* The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.

* Predictions as to the importance and usefulness of the requested information.

* The importance of the issues at stake in the litigation.

* The parties' respective resources.

3. Preparation. In order to assert inaccessibility, the attorney for the company must be prepared to address each of these factors as the court may still order production of the materials. Specific technical and verified information will be needed to support any assertions of inaccessibility as the court will balance the cost of production versus the potential benefit of discovery.

End Note

[1] There is an increasing need to ensure the secure destruction of data, such as personal and financial records, after retention and preservation periods have expired. Fair and Accurate Credit Transactions Act of 2003 ("FACTA").

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