

# Mapping the Minefield of Electronic Discovery

By JASON STORIPAN



**T**echnology, while being of great benefit to an employer is also a potential legal minefield because of the amount of information retained in electronic form and how easy it to change such materials. Under the Federal Rules of Civil Procedure (Federal Rules) and the New Jersey Court Rules (NJ Rules) prior to September of 2006, it was unclear what electronically stored material was discoverable. However, amendments to both sets of Rules have been adopted to address such issues. The amendments will require employers to take additional steps prior to and during litigation to maintain their electronically stored materials. As a result, a myriad of problems may arise for an employer. The best way for an employer to avoid many of these pitfalls is to be prepared for such issues.

The Federal Rules now require counsel for both parties to a lawsuit to discuss issues of electronically stored materials early in a lawsuit. In New Jersey, such a meeting is to occur before the initial pre-trial conference. At this meeting, the attorneys are to discuss and agree upon issues of electronically stored materials, including preservation and production. Moreover, the Federal Rules require an attorney to meet with his client and discuss the client's data retention systems. The point of this meeting is for counsel to understand what types of data retention systems the client utilizes, who has knowledge of the data management systems, and what procedures are employed for management of electronic materials.

On the other hand, the NJ Rules create a more hands off approach for the courts during the early stages of litigation. Under the NJ Rules, there is no requirement for the attorneys to meet prior to serving requests for discovery. Further, the attorney propounding the request may request the format that the materials should be produced in. If the responding party objects, she must do so within 35 days of receipt of the request. If the requested material is "not reasonably accessible because of undue burden or

cost" the responding party may designate the material as such, and not provide the information at that time. The requesting party may seek relief from the court by showing show good cause for the production of the materials at issue.

However, even before a lawsuit is filed, an employer should meet with its attorney and the IT staff, preferably at the same meeting. Meeting with everyone at once allows the attorney to ask any questions directly to the person who may best answer the questions about electronically stored materials. Also, the attorney may be able to provide advice to the IT staff on how best to prepare for a lawsuit and maintaining electronically stored materials should the employer receive a summons. Consequently, if counsel has met with everyone prior to litigation being initiated, the litigation hold letter can be drafted with the correct information in mind and sent to the right people from the start. A litigation hold letter is a letter sent by counsel to the company instructing how to and what to preserve. Having met with a client prior to a lawsuit would help speed up the process and avoid relevant information from being destroyed due to delay or misidentification of materials.

As can be seen, preparation is important because of the deadlines proscribed in the Rules. Also, such preparation is important because the duty to preserve electronic materials begins when a party reasonably anticipates litigation, not once litigation begins. This is especially relevant to an employer because litigation is a possibility whenever a Human Resources problem arises. Early preparation will help the attorney representing the employer be prepared to meet the discovery deadlines and avoid the issue of spoliation of evidence. Spoliation is a term used to describe the destruction of evidence. In the past, the empty head pure of heart defense may have succeeded in avoiding sanctions for electronic materials inadvertently destroyed. Such an excuse will not provide safety anymore to counsel or client. Hence, once litigation is reasonably anticipated, the routine document retention

policy must be suspended. Subsequent to the initiation of the litigation, counsel should send a litigation hold letter and instruct what materials must be maintained. Failure to properly maintain electronically stored materials could lead to a variety of sanctions by the court.

Moreover, both sets of amendments to the Rules allow a party to request the form in which electronic material will be produced. Of particular relevance is the issue of native file format. A native file is a file in its original format, namely, the form in which it was created. Such a statement seems harmless, but the danger lurks behind the scenes in hidden data referred to as metadata. Metadata, as one of my legal writing professors called it, is data about data. Generally, metadata is embedded in an electronic document and allows a person to see what changes were made, who made such changes, and so forth. Hence, a party could review the file and see if a document has been altered or if the author originally was going to write something different. The problem with native files is that anytime the file is opened or used in any way, the metadata changes. Hence, an employer must be aware of how to preserve native files and avoid inadvertent spoliation, or even possible intentional spoliation by an employee.

Granted, such advice is applicable to other areas of the law. However, employment law is an area of the law that the increases in the use of technology in the business world increases the risks of a lawsuit. As any employer is aware, technology has changed the workplace, and its use can create a host of problems in the workplace that can lead to litigation. The new Rules on electronic discovery potentially can lead to even more problems for the unprepared employer. In this instance, the best way for the employer to prepare is to plan as if it is already are involved in litigation and meet with its counsel. ■

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