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The FRCP Alarm Clock Has Rung; Now What?

A Quick Guide to Seeing the Advantages of Not Hitting the e-Discovery Readiness 'Snooze Button'

By Sam Panarella

The magical e-discovery alarm clock known as Dec. 1, 2006, meant to wake people in the legal and business worlds up has rung — and it's time to stop hitting the snooze button and address e-discovery readiness.

Indeed, the much-discussed amendments to the Federal Rules of Civil Procedure ("FRCP") are in place and, much as on the morning after the supposedly cataclysmic Y2K bug not so long ago, many people are wondering whether all the anxiety leading up to the Dec. 1 e-discovery wake-up call was justified.

In light of these questions and the fair degree of uncertainty that followed implementation of the amended rules, many companies opted for inaction, choosing to take a wait-and-see approach concerning the impact the amended rules might have on them.

PROBING THE FIELD

In a recent survey conducted by the Association for Information and Image Management ("AIIM"), only 41% of responding organizations reported that they have a formal program in place to address litigation readiness and electronic information. And 55% of organizations responded that they would "somewhat disagree" or "strongly disagree" with the following statement: "In the event of a lawsuit, we have clear policies and

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procedures in place outlining what to do relative to electronic information," according to the special report, *New e-Discovery Rules: The Good, The Bad & The Ugly*, by AIIM president John F. Mancini.

Yet, while the true impact of the amended rules won't be defined until the courts have begun to develop a solid body of case law around them, for people and companies unprepared to respond to electronic discovery, the cost could be astronomically high.

ELUCIDATING THE NEED FOR READINESS

The amended FRCP create several clear-cut and significant changes governing how parties to a lawsuit must conduct discovery of electronically stored information ("ESI"). These changes include:

- The expansion of discoverable data to include things like instant messaging, sound recordings, proprietary database files and information stored on a personal digital assistant ("PDA");
- The requirement that parties meet and discuss the discovery of ESI early in the litigation process; and
- A dramatically increased burden on counsel to understand its client's (or company's) IT infrastructure and electronic-data repositories.

Given these changes, a company unprepared or ill prepared when a lawsuit hits puts itself at a severe disadvantage in discussions with the opposition about e-discovery.

GETTING PSYCHED,

GETTING READY

As elementary as it might seem, the first place to start is to assess the company's current e-discovery practices — from the people, processes and technologies used to identify potential custodians and responsive data, to the form in which relevant data will be produced to the other side. It sounds simple, but the beginning of response is a crucial phase of the litigation process. Whether a company is in the midst of a litigation matter, or is anticipating being sued in the near or distant future, a litigation-readiness assessment can provide the principals

who will be handling the matter with a starting point from which to improve the company's overall e-discovery response processes. This assessment can help a company identify the gaps in its process and provide tangible and actionable recommendations to fill those gaps. Detection during this review of other possible problems, such as deficits in the company's overall business-process plan and designation of staff or outside experts to handle specific matters, could also be a boon to the company.

To be truly litigation-ready, a company must take an active, organized approach to improving its e-discovery response processes by assessing current practices and developing a baseline from which to identify opportunities for improvement. Once this assessment is finished and the baseline has been established, the company will be in a much better position to develop, document and implement a litigation-response plan that will enable the company to conduct e-discovery in a consistent, repeatable and defensible manner that lowers overall costs, decreases cycle times, and mitigates business and legal risks.

Step One

The first step in a litigation-readiness assessment is to determine which e-discovery lifecycle areas to assess, including:

- Evidence identification;
- Evidence preservation;
- Records management;
- Evidence collection;
- Evidence review;
- Evidence processing; and
- Evidence production.

Step Two

The second step is to ask the right questions, such as:

- How well is the current process working?
- Does it meet the company's overall needs, including impact on downstream process elements?
- What elements are deficient or missing?

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Computer Forensics DOCKET SHEET

COURT ISSUES SPOILIATION

SANCTIONS FOR

'CRASHED' HARD DRIVE

In a case alleging civil-rights violations and infliction of emotional distress, the plaintiff sought to explore claims about the authorship of a harassing letter he received from a city employee. The court initially denied the plaintiff's request to compel inspection of the city's computers but ordered the defendant to preserve "everything." The city assured the court that it would abide by the preservation order, but after a subsequent court order for production of three of its employees' hard drives, the defendant acknowledged that it had destroyed one of them. The defendant explained that the hard drive in question had been inadvertently discarded after the user's laptop "crashed." However, at a hearing before the court the city indicated that it found the laptop, with no explanation other than that it "appeared." Unsatisfied with the city's explanation, the plaintiff

moved for terminating sanctions, monetary sanctions and default judgment. In turn, the defendant moved for clarification of the court's previous order to allow inspection or, in the alternative, for a protective order. The court found that the defendant had discarded the laptop with notice of its potential relevance, causing delay and additional expense to the plaintiff. While reserving judgment as to whether the defendant's actions warranted terminating sanctions, the court ordered monetary sanctions against the defendant in the amount of the plaintiff's attorney fees and traveling costs associated with bringing the motion. It also ordered the defendant to pay the plaintiff's expert's fees and to bear the cost of a court-appointed special master. The court declined to consider the defendant's motion for clarification, directing the defendant to seek direction from the special master. *Padgett v. City of Monte Sereno*, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007).

COURT ISSUES ADVERSE JURY INSTRUCTION WHERE PLAINTIFF DISPOSED OF EVIDENCE

In a gender-discrimination suit, the defendant brought a motion for sanctions against the plaintiff for spoliation of evidence, specifically seeking dismissal of the suit because the plaintiff disposed of her home computer after filing an Equal Employment Opportunity Commission claim against the defendant. The plaintiff's home computer contained evidence relating to her lawsuit against the defendant. The plaintiff claimed that she disposed of her computer after the hard drive crashed and her brother was unable to repair it. The court held that sanctions were appropriate because the computer contained evidence directly related to the plaintiff's claims and her efforts to mitigate her damages by finding another job after leaving defendant's company. The court determined that she disposed of the computer with a "culpable state of mind" and that an adverse-inference jury instruction at trial was proper. *Teague v. Target Corp.*, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007).



FRCP

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- Which areas are contributing the most to time, cost and risk?
- Are there any deficiencies related to how employees are trained or equipped?

THE DESTINATION

By asking the right questions across a spectrum of people, processes and technology, a picture

of litigation-readiness will emerge. The assessment that results from this process can provide the company with:

- A detailed understanding of current discovery practices;
- Documented and prioritized process-improvement workflows and process maps that optimize cost, time and risk; and
- Improved discovery-response practices that can be used

across all types of litigation the company faces.

The results can also be used to improve interdepartmental communication and provide metrics for measuring process improvements over time. It's a low-risk, high impact approach to getting prepared — now. And, in e-discovery as in most other walks of life, there's no time like now.



e-Discovery Docket

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COURT ORDERS NON-PARTY TO PRODUCE E-MAILS AT PLAINTIFF'S COST

In a case brought under the False Claims Act, the plaintiff subpoenaed e-mails from an accounting-services provider for the defendant, a non-

party to the suit. The non-party produced some e-mail records, but the plaintiff claimed that the production was incomplete and compelled the court to order the non-party to produce all the sought-after e-mail records. The non-party argued that it would be unduly burdensome and costly to retrieve and produce the e-mails at issue. Inferring that the non-party had already retrieved all of the

e-mails based on a statement contained in its briefing of the issue, the court held that the non-party had already assumed the costs of retrieval and should produce the sought after e-mails, with the plaintiff responsible for the costs of production. *United States v. Premera Blue Cross*, 2007 WL 852080 (S.D. Ohio Mar. 16, 2007).



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