Prepping for E-Discovery Changes

In-House News:

Prepping for E-Discovery Changes
By Amy E. Wong

Starting Dec. 1, in-house counsel will have to contend with the new e-discovery procedural rules detailed in the Federal Rules of Civil Procedure.

Although the e-discovery rules aren't effective yet, businesses are already preparing by organizing their information systems. In three months, if a legal dispute arises, there will only be a short frame of time to organize countless emails, attachments, chat rooms, word processing files, spreadsheets, and presentations.

In today's corporate world, 93 percent of all business documents exist only in electronic databases. The growing reliance on electronic data storage has fueled complications as lawyers try to grapple with the barrage of information available to them.

Because of electronic information, what was once a simple routine litigation has evolved into a messy discovery horror. Established paper discovery rules were antiquated when applied to electronic discovery.

In recognition of the increasingly prohibitive costs of document review and the protection of privileged documents, the Supreme Court approved of the e-discovery amendments proposed by the Committee on Rules of Practice and

Procedure earlier this year.

The amendment requires corporations to disclose initial information without a formal discovery request.

It also holds corporations financially responsible for all their discovery requests, but excuses corporations if their discovery is not reasonably accessible due to extreme burden and cost. If this is the case, then the party will have to prove that the discovery request is unduly burdensome.

Furthermore, the information must be presented in a reasonably usable and presentable form.

Another major provision is the Proposed Rule of Evidence 502, regarding attorney-client privilege and work product. The provision states that a person waives his attorney-client privilege or work product protection if he voluntarily discloses a significant portion of that privileged or protected information. Also, if undisclosed information is pertinent and related to information that has already been disclosed, then the undisclosed information is also subject to waiver.

Attorney-client privilege or work product protection will withstand against Evidence 502 if the disclosure is made inadvertently, if the disclosure was unveiled by a government agency during an investigation by that agency, or if the disclosure itself is privileged or protected.

Additionally, the new rule also allows parties to retrieve information without waiving privilege if they mistakenly transferred privileged information to an outside party.

These new changes, especially the part that necessitates initial information disclosure, will affect approximately 90 percent of all U.S. corporations that are currently involved in some type of lawsuit.

Furthermore, it will have an even more debilitating affect on companies worth more than $1 billion who, as a Fullbright & Jaworski study reveals, contend with an average of 147 lawsuits each year.

Due to the number of cases and the sheer volume of electronic data at larger corporations, in-house counsel will either have to acquaint themselves with e-discovery or hire information technology professionals to find, retrieve, preserve, and convert data into a usable form.

Many argue that the need for an IT professional is necessary when ensuring compliance. Peter Garza, Founder and President of EvidentData, told *Messaging News*, "One of the biggest mistakes companies make is trying to handle an e-discovery case themselves. It takes a properly trained computer forensics expert to efficiently collect relevant data early in the investigatory and discovery processes in a manner that withstands legal and judicial scrutiny."

Garza continued, "Failure to have an expert assist with the management of the data collection process almost always results in substantial costs, sometimes in the hundreds of thousands of dollars, just to 'fix' discovery problems."

Others, however, assert that lawyers should familiarize themselves with things like backup data systems and unindexed electronic information.

Sharon Nelson, President of the information technology consultancy company Sensei Enterprises, told *The National Law Journal* that, "Case law is now mandating that attorneys understand their client's backup system, so they will understand what data is where and what steps must be taken to preserve evidence."

In any case, in-house counsel will need to collaborate with IT professionals, company executives, and outside counsel to create systems that will make their electronic data more accessible and comprehensible. If not, they run the risk of facing harsh sanctions.

Earlier this month, the defendants and counsel in the investment fraud case *Phoenix Four Inc. vs. Strategic Resources Corp*. were slapped with a sanction motion. They had to pay $45,162 in fees and costs because of "gross negligence"—more specifically, because of the tardy production of electronic documents.

Last year, Morgan Stanley and its counsel, Kirkland & Ellis, were punished for mishandling their backup tapes of electronic documents. As a result, the Florida jury granted Ronald Perelman $1.4 billion.

Recent cases such as these illustrate what happens when e-discovery demands are clumsily handled. These tough sanctions have caused many in-house attorneys to fret over their own ability to organize and comprehend seemingly unmanageable and incomprehensible information systems.

Despite the terror that now sweeps in-house counsel as they prepare for the Dec. 1 deadline, Mark Yanaco, a partner at Wright Robinson Osthimer & Tatum,

told *The National Law Journal*, "Courts know you're not going to have perfect execution of e-discovery, but you need to be able to demonstrate that you've approached it in good faith with a well-documented method as to how you got what you got."