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Fulbright & Jaworski Attorneys Caution Against Over-Reaction to New Federal E-Discovery Rules

Latest Fulbright litigation trends survey shows that only 15% of U.S. in-house counsel are prepared to handle difficult e-discovery challenges; but impulse to save everything could raise litigation costs and still not insulate companies from liability; Fulbright's advice: "Don't save everything"

NEW YORK (January 2, 2007) – New federal electronic discovery rules, which went into effect just a few weeks ago, are certain to change the litigation playing field. But many companies' first impulse to "Save Everything" could prove a costly overreaction, according to **Robert D. Owen** and **Laurie A. Weiss**, national co-chairs of the E-Discovery and Information Management Group for international law firm **Fulbright & Jaworski L.L.P.**

"After seeing some of the onerous penalties that non-compliers have been hit with, one natural reaction among some corporations is to save everything," Mr. Owen said. "But hoarding every document and piece of communication in perpetuity is not what the new federal discovery rules require. Nor does it provide immunity from future prosecution and liability. The real problem is that excessive retention of documents and electronically stored information can create potentially astronomical review costs in litigation."

Mr. Owen cited the 2005 Arthur Anderson case, wherein the Supreme Court reversed the former accounting firm's criminal conviction for obstruction of justice in connection with the destruction of documents related to Enron. The Justices observed for the first time that corporate document retention policies serve legitimate purposes even when one purpose is to keep things out of the hands of adversaries and the government. Mr. Owen also noted another recent case, *Broccoli v. Echostar*, in which a court described a records retention policy of maintaining internal e-mails for 21 days as "a risky but arguably defensible business practice undeserving of sanctions."

"A well-crafted document retention policy can provide some protection against claims of spoliation, which is the intentional or in some cases negligent destruction of evidence," Mr. Owen added. "The courts have held that when there is a good faith document retention policy in place, a company will ordinarily not be held liable for destroying data absent actual intent to disrupt particular proceedings in which the data or documents might be material."

In other words, Mr. Owen concluded, “What is important is that companies start the new year off right by getting their retention policies tuned up and their electronic information houses in order in a way that serves their business and meets statutory and regulatory retention requirements and the new federal e-discovery procedural rules. This includes litigation hold procedures, and employee training, but it definitely does not mean universal retention.”

Many companies have a lot of catch-up to do on the e-discovery front. In its latest U.S. Litigation Trends Survey issued in October, Fulbright learned that only 15% of U.S. in-house counsel considered themselves well-prepared to handle difficult e-discovery challenges as part of a contested civil matter or regulatory investigation. A full one-fifth of companies reporting had not yet established either formal records retention or litigation hold policies. Two thirds of respondents said they had not yet conducted any employee training on retention and litigation hold protocols. (For full breakdown of survey findings, go to www.fulbright.com/litigationfindings.)

While the legal marketplace has lately been overrun with consultants and IT vendors promoting e-discovery services, Ms. Weiss cautions companies from engaging outside parties that could potentially jeopardize attorney-client privilege. Instead, she recommends that businesses form a steering committee composed of inside and outside counsel, along with internal IT specialists. “It’s especially important to have a strong compliance component to this group that is not only familiar with the federal rules, but also the vastly different state regulatory retention policies as well,” she said.

In civil litigation, electronic discovery issues must now be addressed in the first conference before a judge, when the case is pending in the federal courts (and some state courts, although the requirement is not yet uniform among the states). Not only does this require adversaries to hash out differences over data preservation and production in their first substantive meeting in court, but it makes it incumbent on them to have a detailed understanding of their internal data systems and litigation hold procedures. This is typically a complicated and timely undertaking, making a head start a wise move.

“We’re advising clients to prepare intensively for these conferences, and to know their IT facts cold,” said Mr. Owen, who also chairs Fulbright’s New York litigation practice. “By demonstrating their knowledge and defensibility of their client’s systems and procedures, effective and well informed litigators may well deter their client’s adversaries from seeking to mount e-discovery challenges. If you present weakly at that initial judicial conference, or try to affect an expertise you don’t have, both the other side and the judge will sense it and you’re off to the races.”

Ms. Weiss pointed out that until now, companies engaged in symmetrical litigation have been reluctant to push too hard on e-discovery issues for fear of an unwelcome push back.

That kind of tacit, “Don’t Ask, Don’t Tell,” understanding between parties is no longer acceptable under the new rules. Ms. Weiss explained: “If you think that some inaccessible sources of electronically stored information, such as back up tapes or instant messaging archives, are potentially responsive, you must affirmatively disclose their existence. This is not optional and it extends to the lawyers who sign discovery responses.”

Let us know if you would like to speak with Mr. Owen, Ms. Weiss or other members of Fulbright’s E-Discovery group on the new civil procedure rules and their effect on federal litigation.

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