Clicking With New E-Discovery Rules

The Interview with David Walton, a member of Cozen O’Connor’s labor and employment practice group and electronic discovery disputes practice area, who works out of the firm’s West Conshohocken, Pennsylvania office. Two multinational companies, as national counsel to develop e-discovery and electronic records retention policy programs.

Editor: Why did Cozen ORCINORI initially create its E-Discovery Task Force, how long ago did this happen, and has it evolved to respond to new amendments to the Federal Rules of Civil Procedure, which went into effect Dec. 1, 2006, relating to electronically stored information?

Walton: In order to best serve our clients, we created an internal E-Discovery Task Force with the mission of providing in-house training to all Cozen ORCINORI lawyers regarding updated regulations and e-discovery issues in general. Under the leadership of Tom Jones, a litigator with extensive experience in e-discovery issues, our team has become armed with the know-how and expertise to understand these rules – which raise the bar for what will be expected of companies – and fulfill their obligations.

The task force brings together lawyers with strong e-discovery backgrounds from several of our disciplines, including commercial litigation, insurance coverage and litigation, and employment law. This provides a strong, broad-reaching foundation for us to deal with and resolve our clients’ e-discovery issues.

In light of the new rules and ongoing case law updates, we are constantly developing resources, including e-discovery, the new regulations, providing guidance for compli-

ance, and addressing new opportunities for garnering e-discovery issues.

Editor: What amendments have been made in relation to electronically stored information?

Walton: The amendments themselves cover six key areas including discovery conferences, forms production, discovery via accessible and inaccessible sources, inadvertent disclosure of electronically stored information (ESI), Safe Harbor for legal hold notices, and sanctions.

Under these changes, gone are the days when ESI was considered to be the same as documents. Producing electronic documents by printing them is not the same as producing the documents in their true, electronic form. Electronic documents have embedded data that is simply not captured by a paper copy. The new rules recognize this and create new standards for collecting information in its electronic form.

The amendments also require that trial courts, at the very beginning of the case – disclose potential sources of ESI to opposing counsel. This means that counsel must identify and preserve potentially relevant ESI at the earliest stages of the case. Since the new rules allow judges to sign-off on agreements between counsel, trial counsel should try to work with their adversaries in order to develop a plan for preserving and producing ESI in a way that controls costs for both of their clients

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without – of course – sacrificing any strategic advantage.

Editor: What evidence needs to be preserved and when?

Walton: As soon as you have reasonable notice of possible litigation, potentially relevant hardcopy documents and ESI should be preserved. The duty to preserve such information is much broader than the duty to produce, so companies and their counsel would be well advised to ensure they have appropriate policies and protocols in place to comply with obligations.

Failure to meet these requirements can result in sanctions including fines, attorney fees, cost of production, adverse inferences, and striking of pleadings or having certain facts deemed admitted.

Companies should be formulating their strategies now for preserving electronic information before their hands are tied and they are forced to settle a lawsuit because the cost associated with discovery alone makes the case too expensive to defend. With new rules, when the other side sues, you can rest assured that it will be actively pursuing your ESI.

Editor: What is your approach to managing the new e-discovery process?

Walton: Clients should adopt comprehensive document retention policies, addressing creation, storage, use, retention and purging of documents and ESI. Once they are in place, companies should train employees on how to comply. Ideally, organizations would benefit from counsel-

ing employees regarding the proper use of e-mail and the best practices in creating documents. The next best step is to develop and adopt protocols for saving information, issuing litigation holds, and collecting and producing information.

Editor: When is it appropriate to destroy information? How can your document retention policy protect you, and what should it incorporate?

Walton: In general, if ESI documents are purged in the normal business operations before the duty to preserve arises, then it is unlikely that a court will find that the purging was improper or illegal. A comprehen-
sive document retention policy is key in showing that a particular document or ESI was destroyed as part of normal business operations and done so in good faith. Thus, companies must identify that their document retention policies:

• are in writing, simple to comply with, realistic, and apply to all company locations;

• cover all applicable legal require-

ments for that organization (due to the myriad of laws with document retention requirements, companies need to confirm they get the right advice to comply with all record-keeping obligations);

• protect all sources of documents and ESI;

• cover all electronic devices and hard-

ware;

• address the relationship between electronic and paper records;

• provide for the issuance of litigation holds and the suspension of destruction of information on notice of a potential claim or lawsuit; and

• offer a monitoring system to ensure compliance.

Even if they adopt a comprehensive document retention policy, companies should be careful when they purge or destroy information. Businesses generally assume they are not responsible for purged information and to control the amount of information they are storing. On the other hand, companies with notice of a possible claim against must act swiftly and decisively to preserve all potentially relevant documents and ESI.

After the duty to preserve arises, companies should purge potentially relevant information, only if approved by the court. Always follow the rule – the duty to pre-

serve is broader than the duty to produce. This will be well advised to tread carefully in this area.

Editor: How should you coordinate establishing new systems and monitoring electronic information?

Walton: Your best bet is to work with sea-

soned outside counsel, who provide a tremendous amount of value in creating and implementing document retention systems. These consultants can work with you and your IT department to ensure the policy is tailored specifically to your company’s needs. It might be worth talking to your IT consultant about investing in sophisticated software which can help streamline collec-
tion search protocols and make data har-

vesting as painless as possible.

You should also consider setting up a records management department. This is a good way for companies, even those that are small, to minimize costs associated with documentation while ensuring employee compliance.

Once the policy is in place, it should be disseminated to all employees, who should be trained on complying with the policy and the proper protocols for creating e-discovery documents.

Editor: What are cost effective approaches for locating responsive and relevant data?

Walton: Once this training is finished, it’s vital to develop litigation protocols for pre-

paring, storing, and retrieving documents and producing potentially relevant documents in ESI. As you know, the key is to preserve early and broadly – because it is much cheaper to preserve, search and produce active data rather than recall data stored on backup tapes and other inactive sources.

With first-hand knowledge of the document retention policy and procedures, outside counsel can easily coordinate information gathering with a company, even after it’s in litigation and needs to be concerned about complying with new rules.

And, with new regulations, it’s now all counsel’s responsibility to understand the IT system and find responsive data. Rely-

ing on “I’m not the tech person, so I really don’t understand,” won’t work any more.

Editor: You touched on employee com-

pliance issues, as companies, at all levels of companies, are fulfilling their obligations under new document retention policies?

Walton: In addition to training, companies should monitor and audit compliance. We can all relate to the fact that employees generally keep too much information that is unnecessary. This results in clutter and it costs a company to incur greater expenses when having to search potential-

ly relevant ESI.

Besides E-Discovery, e-mail volume – an audit – when litigation holds are issued – an even greater problem. Companies must ensure all employees are acting appropriately to maintain important information. And, ensuring this ultimately avoids future headaches and sends the message to employees about the importance of best practices.

Certainly, the worst thing to do is adopt a document retention policy that is not fol-

lowed consistently. This will cause the policy to backfire and could put the client in the uncomfortable position of trying to explain its failure to comply with its own guidelines.

Editor: Do specific groups face more challenges than others?

Walton: We believe there are two groups facing the greatest challenges posed by the new rules. This includes insurers, who are confronted with a potentially high volume and range of claims from insureds. It is important for them to act now and put the right policies and protocols in place to comply with new obligations under federal rules.

Employers also face astronomical chal-

lenges, with dramatic changes to the way e-discovery will be handled in federal court according to most discrimination suits are filed. Employers will be held more accountable in recovering information, because a plaintiff in an employment case has very little ESI to preserve, search and disclose during discovery. So, being pre-

pared early on will put employers in the best position to preserve, search and produce relevant ESI in the most efficient manner when it suits a hit.

Editor: What are your overall goals for your e-discovery practice?

Walton: Whether taking the lead in de-

veloping new e-discovery frameworks or in-house programs – which could become the standard for compliance – we at Cozen O’Connor are committed to stay-

ing on the cutting edge of e-discovery issues. No matter what’s ahead on the e-

horizon, we’re prepared to provide trusted counsel.