Electronic Discovery and Public Records

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Introduction

- Electronic discovery is, at its core, just discovery. And being discovery, it is fundamentally the process of locating, reviewing, and producing materials that are not privileged and that are reasonably likely to lead to evidence admissible at trial. Fed. R. Civ. P. 26(b)(1).
- But today, virtually every document on the planet is generated and stored in some kind of digital format.
- The practical effect of this is that plaintiffs and defendants alike are, perhaps unknowingly, sitting atop a mountain of invisible documents, many of which may well be discoverable in the event of litigation.

Introduction

- One of the most effective ways to arm oneself for the age of electronic discovery is to learn a few basic terms, guidelines and requirements.
- Departments involved in litigation are required to provide access to all records, whether in paper or electronic form (electronic stored information), or face stiff penalties.
- Electronic discovery presents potential challenges to public bodies in terms of public record searches.

Scope

- While public records requests may be used at any time, the primary focus of this portion of the seminar concerns the connection between public bodies and records and electronic discovery/litigation.

Definitions

- **Electronic discovery** is the process of obtaining, reviewing and producing digitally stored evidence in response to litigation or regulator requests.
- **Public record** is documentation of public decisions and transactions.

Nebraska Statutes

- Under Neb. Rev. Stat. § §84-712 to 84-712.09, the public has the right to access public records.
- Discovery is an additional way members of the public, involved in litigation, can access records of public body
- Therefore, it is important for public bodies (and private bodies as well) to establish and maintain a retention policy to handle the challenges of electronic discovery.

Electronic Discovery – Why Care?

- Over 97% of documents are electronic
- Vast majority will never become paper
- Estimates of daily e-mail counts range from 100 billion to 4 trillion!
- Discovery routinely includes electronic documents
- Bottom Line – Electronic data is admissible in evidence in the same manner as paper documents containing the same information

Another reason to care...

- Recently, Morgan Stanley fined $15,000,000 by SEC for improper records keeping
  - Fined $1.85 million in 2002 for similar reasons
- *Coleman Parent Holdings, Inc v. Morgan Stanley* (2005)
  - Improper destruction of emails led to partial summary judgment and $1.45 billion total award to claimant
- *Zubulake v. UBS Warburg, LLC* (2005)
  - Jury awarded $29 million to Laura Zubulake after receiving adverse inference instructions over destruction of hypothetical records, including emails, on back-up tapes
- Prudential Insurance fined $1,000,000 for destroying records during a class action suit

Litigation and Discovery

- Nearly every case likely implicates electronic discovery, thus every lawyer and every body involved in litigation has electronic obligations.
- As with any other kind of document, a party is obligated to retain and preserve electronic documents once it is given notice that those documents are relevant to litigation.
  - This obligation is not limited to the moment the action gets filed; rather, once any party learns it has or may have information relevant to the case, it is under a duty to protect that information from spoliation.

Litigation and Discovery

- Recent changes to federal discovery rules
  - Federal Rule 16 (b): Additional topics of discussion at pretrial conferences
    - "provisions for disclosure or discovery of electronically stored information"
    - "any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production"
      - So-called "claw back" provisions

Litigation and Discovery

- Federal Rule 26 (b)(2)(B): Scope of discovery and limitations
  - Parties need not produce electronically stored information this is “not reasonably accessible because of undue burden or cost”
  - Court can issue motion to compel
    - Court may determine scope of such “inaccessible” information production, and spread the cost between parties

Litigation and Discovery

- Federal Rule 26 (b)(5)(B)
  - “Clawback” provision
  - Intended to address costs of voluminous electronically stored documents (time to search v. value of case
  - Allows inadvertently produced privileged documents to be recalled from production

Litigation and Discovery

- Federal Rule 26 (f)
  - Discovery planning conference
  - Adds topics to be discussed at conference:
    - "issues related to preservation of discoverable information"
    - Issues regarding production of electronically stored information
    - Whether court should order that privileges can be asserted after production

Litigation and Discovery

- Federal Rule 33: Interrogatories
  - Parties may answer interrogatories by referring to electronically stored information
- Federal Rule 34:
  - General document production rule
  - Adds “electronically stored information” to the language of the rule

Litigation and Discovery

- Federal Rule 34 (b): Procedure of Discovery
  - Document requests “may specify the form or forms in which electronically stored information is to be produced”
  - Opposing party may object and suggest alternative form
  - Court may ultimately decide
  - If no form specified, producing party may produce in current form or in other usable form

Litigation and Discovery

- Recent changes to state discovery rules
  - Adopted June 4, 2008
  - Effective June 18, 2008
  - Makes changes to state rules that are essentially similar to federal rules

Litigation and Discovery

- Because of the obligation on parties to a lawsuit, many corporations and public bodies require that the agency have a document retention policy in place.
- Such a policy should allow the agency to:
  - Define what data exists;
  - Determine what among it is relevant to the actual or potential claim or defense;
  - Locate the data and preserve it;
  - Review it;
  - And in the case of actual litigation, produce it where required.

Litigation and Discovery

- Neb. Rev. Stat. §§ 84-1201 to 84-1228 is the Records Management Act
  - Provides Secretary of State is State Records Administrator
    - Authority to establish and administer:
      - Records management program and records retention program
      - Program for selection and preservation of essential state and local records
      - Establish and maintain system for preservation of essential state and local records
      - Establish and maintain central microfilm agency for state and local records

Litigation and Discovery

- Secretary of State has established regulations for records retention and disposition for state and local governments and agencies in Nebraska
- Local Agencies General Records Schedule #24
  - General guidelines for records common to most local government agencies
  - http://www.sos.ne.gov/records-management/retention_schedules.html

Litigation and Discovery

- 24-1-36: Communications/Correspondence
  - 24-1-36-1: Communications not related to local government transactions or activities
    - Dispose of at will
  - 24-1-36-2: Communications that may be of a professional interest, but not pertaining directly to the function of the agency (casual phone call)
    - Dispose of at sender's/recipient's discretion
  - 24-1-36-3: Communications containing information related to the operations of the agency, but does not have long-term significance or policy implications
    - Dispose of after 2 years

Litigation and Discovery

- Public records requests may be used as litigation strategy prior to or in conjunction with litigation discovery
- Where public records maintained in electronic format, they must be produced electronically
  - No basis to convert electronic documents to hard copy for production purposes

Litigation and Discovery

- "Litigation Hold"
  - A suspension of a public or private body's document retention/destruction policies for those documents that may be relevant to a lawsuit that has been actually filed.
    - Series of cases in *Zubalake v. UBS Warburg LLC* in which Judge Scheindlin found duty to preserve arises "once a party *reasonably anticipates* litigation"
  - Ensures that relevant data is not destroyed and that key employees are notified of document preservation requirements.
  - Even informal procedures for managing print or electronic documents, such as recycling e-mail backup tapes, must change when a body is sued, or even threatened with suit.

Litigation and Discovery

- Litigation Hold Steps
  - Meet with attorney and familiarize him/her with retention policy
  - Arrange for IT personnel to prepare to assist with litigation hold and document production
  - Ensure all employees understand litigation hold, and periodically check on compliance
  - Segregate data or machines holding data
  - Document steps taken to enforce litigation hold

Litigation and Discovery

- Spoliation (*McNeel v. Union Pacific R. Co.*, 276 Neb. 143 (2008):
  - the intentional destruction of evidence
  - the intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator
    - The rationale of the rule is that intentional destruction amounts to an admission by conduct of the weakness of one's own case;
    - The inference does not arise where destruction was a matter of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct.
  - In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction.

Litigation and Discovery

- Notable Spoliation Violations
  - *Leon v. IDX Systems Corp*, 464 F.3d 951 (9th Cir. 2006)
    - Case dismissed as sanction for party using hard-drive wiping program to erase 2,200 files
  - *E*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582 (D.Minn. 2005)
    - Adverse inference as sanction for erasing hard drives and backup tapes
  - *3M Innovative Properties Co. v. Tomar Electronics*, 2006 WL 2670038 (D.Minn. 2006)
    - Adverse inference and establishment of certain facts as sanction for destruction of e-mails because of no litigation hold
  - *Z4 Technologies, Inc. v. Microsoft Corp.*, 2006 WL 2401099 (E.D. Tex. 2006)
    - Enhanced damages as sanction for failure to produce important e-mail
  - *Optowave Co. Ltd. v. Nikitin*, 2006 WL 3231422 (M.D. Fla. 2006)
    - Adverse inference for reformatting hard drives, erasing files and e-mails, after notice of litigation
  - *Ridge Chrysler Jeep, LLC v. Daimler Chrysler Services North America LLC*, 2006 WL 2808158 (N.D. Ill. 2006)
    - Dismissal of case as sanction for willful destruction of records
  - *Consolidated Aluminum Corp. v. ALCOA, Inc.*, 2006 WL 2583308 (M.D. La. 2006)
    - Adverse inference as sanction for failure to suspend automatic e-mail deletion program after litigation hold in place

Examples of Electronic Stored Information That May Be Subject to Disclosure During Discovery

- System output
- System data (user log-on information, web sites visited, user passwords, documents printed)
- Photos
- Maps
- Movies
- Emails and their attachments
- Web pages, old and new
- Videos
- Floppy disks
- CDs
- Audiotape
- Videotape
- iPods

Electronic Stored Information Special Data Considerations

- Deleted data is not necessarily deleted
- Embedded data (draft language, editorial comments, e.g. Track Changes data)
- Metadata (data about the history, tracking or management of an electronic file, e.g. email wrapper)
- End user search tools that create store of documents accessed (Google Desktop search)

Electronic Stored Information: Not Reasonably Accessible but Must be Produced Nonetheless

- If the court orders electronic stored information that is not reasonably accessible to be produced, agencies may have to rely on:
  - Backup tapes
  - Systems administrators
  - Local LAN team to help sort through archives
  - Computer forensics consultants

A Word About Computer Forensics

- Sample estimate to retrieve electronic version of one Word document
  - Forensics looks for metadata of a document
  - Saved in fragments on hard drive, so must "image" entire hard drive
  - May cost in excess of $20,000 to retrieve one document

Ignorance is no longer acceptable

- "Ignorance of IT is simply no longer an acceptable cover for mistakes in most federal courts."
  www.ralphlosey.wordpress.com/zubu-duty/
- Courts reject attorney excuses of "computer illiteracy" as "frankly ludicrous."
  Martin v. Northwestern Mutual Life Insurance Company, 2006 WL 148991 (M.D. Fla. Jan. 19, 2006)
- "Attorneys can no longer blame their knowledge gap on lack of guidance from the courts…E-discovery conduct has been sanctioned in all 12 federal jurisdictions."
  www.abanet.org/lpm/lpt/articles/tch02052.html

Most Common E-Discovery Abuses or Errors

- Failing to place holds on destruction routines when litigation expected
- Failing to notify court of e-discovery problems
- Failing to provide accurate records
- Failing to fully respond to discovery requests with all requested records
- “Purposeful sluggishness” in responding
- Fabricated evidence

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Possible Solutions/Strategies

- Each public body should implement a formal record retention and disposal policy that is in compliance with Nebraska state law and regulations
  - Make sure to include procedures for retention of e-mails
    - E-mail messages are temporary communications which are non-vital and may be discarded routinely. However, depending on the content of the e-mail, it may be considered public record
    - Accordingly, employees have the same responsibilities for e-mail messages as they do for any other public record and must distinguish between records and non-record information
  - For example, include a provision that states e-mail use within the public body shall be used for official business only
  - Users should take note that information generated on e-mail may be a public record subject to public inspection

Possible Solutions/Strategies

- Train staff
  - Alert staff to obligations and if possible combine document retention training with business writing training
  - Educate employees on general discovery duties in litigation
  - Identify a records custodian for each unit
- Note: Recent decisions have indicated that even companies in continuous litigation are not required to keep every shred of paper, every e-mail or electronic document and every backup tape

Conclusion

- The move from paper to electronic discovery has decentralized discoverable material and the persons who control it. Control over access and knowledge is often in the hands of the user instead under the authority of a central agency.
- The use of technology, especially e-mail and the Internet, has changed the legal discovery environment. Most organizations do not have the systems and policies in place to deal effectively with e-discovery.
- The volumes and costs associated with meeting e-discovery requests are rising.
- Both public and private bodies must recognize that there is a business value in organizing their information and data. Bodies that fail to respond run the risk of seeing more of their cases decided on questions of process rather than merit.

Questions/Comments?

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