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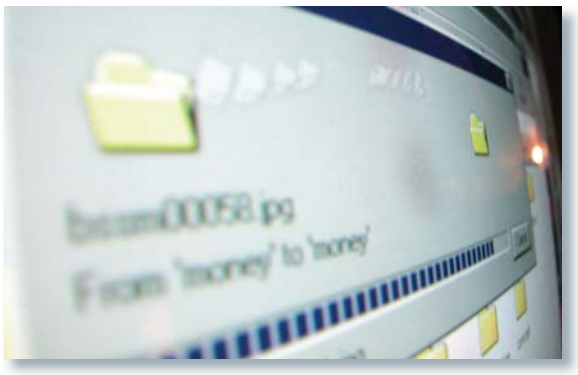
E-Discovery Issues

When your company intends to pursue a claim against a debtor that has filed for bankruptcy protection, your company should pay particular attention to retaining not only its paper trail relating to the claim, but also all of its *electronic* data relating to the claim. This principle applies in all situations involving potential litigation. Once your company reasonably anticipates litigation (and the filing of a claim in bankruptcy should be considered anticipated litigation), it must suspend its routine document retention/destruction policy and institute a "litigation hold" to ensure preservation of documents relevant to the dispute.[1] Those relevant documents include paper and electronic sources.

The proliferation of electronically-stored information ("ESI") during the past two decades has brought a sea of change to the scope and volume of litigants' discovery obligations. There is more to collect, review and produce than when documents were stored on paper, microfilm or microfiche. In addition, because ESI is often dynamic (because documents are often revised), there may be numerous versions of an electronic document. In 2006, the Federal Rules of Civil Procedure, which govern the scope of discovery in federal cases, including bankruptcy cases, were amended to clarify litigants' obligations regarding the preservation and production of ESI. This article explains what ESI is, a litigant's obligation to preserve ESI, who pays for producing ESI and some of the risks regarding waiver of attorney-client privilege when producing ESI.

As soon as you recognize that your company will need to pursue payment from another entity, compile a list of all sources of ESI.



What Is ESI?

ESI is an evolving term that refers to all manner of information that is stored or transmitted electronically. Several differences exist between hard-copy documents and ESI. Most companies have a greater volume of ESI than paper; ESI is dynamic, insofar as data can be electronically modified (for instance, in the updating and/or overwriting of spreadsheets); and ESI can be incomprehensible when separated from the system that generated it because proprietary software may be required to review data.

A company's ESI is generally located in different devices, including the following: computer systems (hardware, primary operating systems; major software, customized or proprietary software); networks; data storage systems and electronic storage/archives; email systems/email addresses not on system (e.g., Yahoo accounts); servers; laptops; computers lost/returned; backup devices (backup tapes/zip drives, location of backup); and computers not on system, but containing relevant ESI (home desktops, laptops, PDAs).

Know Your Universe of ESI

As soon as you recognize that your company will need to pursue payment from another entity (even before

that other entity files for bankruptcy), compile a list of all sources of ESI. Among other things, identify the employees at your company who are involved with the delinquent account. Then determine which types of ESI those individuals may have. Email is the most common place to start.

In addition, make sure that the company tracks all network and non-network emails. If certain employees transact company business using a non-company domain address on a stand-alone computer, a paper trail should be generated or those emails should be sent to the company's network.

Have familiarity with your company's backup systems (such as backup tapes). Do not allow the backup system to write over older data.

Also, be certain that your company documents the dates of system-wide crashes, changes to your computer system, virus attacks and any other events that may compromise your ability to retrieve ESI.

Talk to Counsel About Your Preservation Obligations

Preserving ESI for litigation can be complicated, since ESI is likely stored on numerous devices, may still be necessary to conduct business and may be subject to routine deletion as part of your company's IT maintenance. In addition, many litigation situations are unique. Thus, your company should discuss its preservation obligations with counsel early in the process. Understanding your company's preservation obligations at the beginning of the process can save money and time by avoiding the need to recreate documents later in the case from backup systems (which can be costly).

Safe Harbor Provision

Once a company decides to pursue litigation, it is required to preserve evidence, including ESI. However, companies often delete ESI in the ordinary course of business for a number of reasons, including the need to limit the amount of storage space used for ESI. In litigation, such routine destruction of ESI could be construed as "spoliation" of evidence. The spoiler of evidence can be subject to sanctions, including court rulings finding against the spoiler.

In order to address the impractical requirement that your company cease performing routine IT maintenance, the federal discovery rules provide a limited "safe harbor" to protect parties that destroy relevant ESI pursuant routine, good faith operations of an electronic information system in the absence of extraordinary circumstances.

"Routine operation" generally involves a process that is designed, programmed, implemented and operated to accommodate technical or business requirements, such as deletion of emails after a certain amount of time has elapsed in order to minimize the amount of server space required to store emails.

"Good faith" assumes that the party has a reasonable litigation hold and did not deliberately use its electronic/computer system's routine destruction functions.[2] In other words "if you know it will disappear and do nothing, that is not good faith … the line is conscious awareness that the system will destroy information."[3]

Thus, a party that is responsible for producing documents and ESI to its litigation opponent (the "producing party") must be careful to apply "litigation holds" to its routine processes. For example, a company should put in place or take steps to prevent the automatic deletion of emails including "possible relevant and discoverable emails."[4] As a general rule, (a) do not design a system to routinely destroy ESI for the purpose of avoiding production, (b) assess what ESI will reasonably be required in litigation after a preservation requirement arises and (c) undertake reasonable efforts to halt the automatic deletion of ESI once a preservation requirement arises.

Your company should discuss its ESI maintenance operations with its counsel early in a case. In some cases, your IT personnel will need to speak with your counsel to ensure that you are protecting all ESI.

Cost Shifting If Costs Are Burdensome

Federal law presumes that the party producing its documents (including ESI) will bear the costs of producing those documents to opposing counsel. Your company can shift those costs to the other side only upon a showing of undue burden or expense. Requests for production of ESI raise the stakes of cost shifting because the prevalence of ESI means that there is more information to gather, review and produce. In addition, the restoration of certain types of stored information (such as backup tapes) may be extremely costly. As such, a party to litigation does not necessarily need to produce ESI if the ESI is not reasonably accessible because of undue burden or cost. However, a court may compel production of such ESI while requiring that the party demanding the ESI pay for the process of retrieval. Cost shifting for production of ESI generally requires a two-step analysis: (a) is the ESI reasonably accessible, and (b) if not, then should the requesting party be required to pay for the production?

The question of whether it is appropriate to shift costs to the party requesting ESI looks at the following seven factors (in descending order of importance): (1) the extent to which the discovery requested is specifically tailored to ascertain relevant information; (2) the availability of information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total costs of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentives to do so; (6) the importance of the issues at stake; and (7) the relative benefits to the parties of obtaining the information sought.[5]

One way to preempt any controversy over production of potentially inaccessible ESI is to address the issue with your counsel early on in the case so that the lawyers, and the court if need be, can negotiate a reasonable compromise.

Effect of Inadvertent Disclosure of Information

The production of documents in litigation has always posed a risk of the inadvertent production of privileged or other protected information. ESI increases exponentially the risk that documents will be inadvertently produced because of the sheer volume of documents ESI generates. The Federal Rules provide procedures to allow a party to assert a claim of privilege or work product after a document has been produced. The producing party must notify the receiving party of the claim of privilege and the basis for the claim. The receiving party must either return, sequester or destroy the protected material or provide the material to the court under seal and ask the court to rule under privilege claim. The question of whether there has been a waiver of the privilege due to inadvertent production is generally left to the courts.

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One way around this issue of inadvertent waiver is to enter into an agreement with the other side that allows for the return of inadvertently produced ESI. Such an agreement is typically referred to as a "clawback" agreement.

Parties may also enter into an agreement to conduct a "quick peek" at the producing party's ESI, which allows a responding party to provide requested documents for an initial examination. After the initial examination, the requesting party asks for production of designated documents and the producing party only does a privilege review on those documents. However, a quick peek may be impractical given the volume of ESI, and thus a clawback agreement is generally more appropriate where voluminous ESI must be reviewed and/or produced.

The scope of ESI to produce, and the associated costs of review and production, vary from case to case. As such, your counsel can draft an agreement tailored to the specific case that should address these issues at the start of discovery.

Conclusion

Our reliance on ESI as a means of conducting business increases the complexity and often the cost of litigation. Once your company is aware that it may be in litigation with another party, speak to counsel so that you can initiate a "litigation hold" and preserve potential evidence in support of your potential case. ●

1. *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 218 (SDNY 2003).
2. Civil Rules Advisory Committee, minutes of the April meeting (DC meeting April 14-15, 2005), http://www.uscourts.gov/rules/minutes/CRACO404.pdf at 42.
3. *Disability Rights Counsel of Greater Washington v. Washington Metropolitan Transit Authority,* 242 F.R.D. 139, 146 (D.D.C. 2007).
4. *Id.*
5. *Zubalake v. UBS Warburg, LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003).

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