

Lipson | Neilson

COLE, SELTZER, GARIN, P.C.
Attorneys and Counselors at Law

Ediscovery – an Overview, Costs and Implications by Joseph A. Starr, Esq

On December 1, 2006, the Federal Rules of Civil Procedure (FRCP) -- the court rules that govern professional liability litigation -- were amended to address the discovery of electronically stored information (ESI). Typically, states amend their court rules to conform to the FRCP. Most industry experts anticipate that these amendments will have a profound impact upon the cost of defending professional liability claims.

The Sedona Conference¹ estimates that at least 93 percent of all documents are first generated in a digital format. A company with 1,000 employees will likely produce as many as 100,000 e-mails every business day. In today's world, ESI includes voicemail, e-mail/deleted e-mail, website "foot prints", instant messages and "cookies" stored on computers, cell phones, PDA's and MP3 players. ESI also includes "metadata". Metadata is data about data, i.e., who created a document, who edited it when changes were made to it and what changes were made to the document. Metadata has the potential to be a "smoking gun" in each litigated case.

The amended FRCP require both insureds and attorneys for the insureds to take all reasonable steps necessary to preserve ESI once they become aware of the potential for litigation. The failure to implement measures for ESI preservation could result in severe monetary sanctions to the insured and/or their attorneys.

The costs associated with the discovery of ESI can be staggering. According to the Chicago law firm of Vedder, Price, Kauffman & Kammholz, the cost of retrieving and reviewing e-mail can be as much as \$2.00 per message. This includes hiring information technology experts to retrieve the ESI and having attorneys (or other legal professionals) review each e-mail. In *Quinby v. WestLB A.G.* (New York, 2006), the defendant paid \$226,266.60 to restore and search inaccessible e-mails of only six former employees. In *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.* (Louisiana, 2002), the plaintiff requested e-mails from more than 700 employees and the estimated cost to the company exceeded \$6.2 million to restore 93 back up tapes over the course of six months. The cost and difficulty of producing ESI has led – and will lead – to some attorneys using e-discovery to their tactical advantage. Shrewd attorneys know that aggressive and comprehensive ESI discovery requests place financial and manpower burdens upon insureds. This strategy may lead to early, overvalued settlements.

What can a company (insured) do to combat the increased cost of ESI discovery? First, every company should create a formal, written plan for implementing a "litigation hold" to prevent the automatic destruction of ESI when an organization reasonably anticipates litigation. Second, insureds should explore the possibility of installing computer programs that make ESI easy to produce with their information technology department or vendor. Finally, corporations, companies, etc should conduct regular training and/or send regular reminders to its employees about the proper use of business related e-mail, i.e., the formality necessary in each work e-mail.

¹ See, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, "The Sedona Conference" (Jan. 2004), available at http://www.thosedonaconference.org/publications_html

