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Dealing with e-discovery

Get your ducks lined up before you're in court for the hearing. **Interviewed by Curt Harler**

When it comes to computers and the legal world, things are happening at warp speed. It seems that every week there is new precedent set when it comes to e-discovery. What must corporations keep? Who can see what? Who are the relevant actors?

If attorneys are challenged to keep up with case law, what's a business owner to do? We turned to Dyan M. House, an attorney with the Dallas law firm of Munck Carter, P.C., to help point us in the right direction.

"E-discovery is a hot topic right now, and it affects everyone in business today," she says.

There has been a significant number of cases dealing with e-discovery issues, especially since the Federal Rules of Civil Procedure were amended to address issues with electronically stored information (ESI). Those rules went into effect on December 1, 2006.

Smart Business talked to House to find out what businesses need to know about e-discovery.

What is the scope of changes in e-discovery?

In many ways, the issues we are facing with e-discovery are not that different from those involved in discovery of paper documents and other tangible items. However, given the amount of ESI that is created on a daily basis, these issues are compounded. Every day, billions of e-mails are sent and numerous documents and other files are created.

ESI can be found on a broad range of devices and in various media, including live e-mail systems, archive e-mail systems, computer systems (including legacy systems), portable backup media, USB keychain drives, network servers, home directories, shared files, backup tapes/disaster recovery tapes, phones, PDAs and more.

There was a New York case on employment law that set the framework for e-discovery. What does it say?

Zubulake v. UBS Warburg, LLC is generally considered the first definitive case on



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issues in e-discovery. In 2003 and 2004, the Southern District of New York issued a series of opinions that addressed the scope of a party's duty to preserve electronic evidence during the course of litigation, a lawyer's duty to monitor his or her clients' compliance with electronic data preservation and production and imposition of sanctions for destruction of electronic evidence. The Zubulake court set forth an analysis for deciding disputes regarding the scope and cost of the discovery of ESI. The analysis includes considering the availability of evidence sought from other sources, the extent to which the requests are tailored to obtain relevant information and the importance of issues at stake in the litigation.

The Zubulake and Qualcomm cases both addressed sanctions. What did the courts say?

The Zubulake court noted that the severe sanction of an adverse inference instruction may be imposed when the party seeking the sanction can show that:

1) the party having control over the evidence had an obligation to preserve the evidence at the time it was destroyed; 2) that the evidence was destroyed with a culpable state of mind; and 3) that the destroyed evidence was relevant to the party's claim or defense. Because the court determined that the employer willfully deleted e-mails, the court granted the plaintiff's request for sanctions, ordering the defendant to pay costs of re-deposing witnesses with respect to issues raised by the destruction of evidence.

Qualcomm Inc. v. Broadcom Corp. is much discussed because of the egregious nature of the discovery violations and severity of the sanctions. The fact that Qualcomm's attorneys accepted unsubstantiated assurances that prior searches for relevant documents were sufficient and they ignored numerous warning signs that the document search and production were inadequate, more than 46,000 relevant documents were not produced. Therefore, the court imposed an \$8.5 million sanction on Qualcomm and referred the matter to the State Bar of California for investigation.

When am I under 'reasonable anticipation of litigation,' and what does this require of my company?

'Reasonable anticipation of litigation' is determined when an organization's relevant people anticipate litigation. When a party is under a 'reasonable anticipation of litigation,' the party's duty to preserve evidence is triggered. This also means that the company's routine document retention/destruction policy should be suspended and a 'litigation hold' should be issued to ensure that relevant documents are preserved. Determining when there is a reasonable anticipation of litigation is a fact-dependent analysis. At the absolute latest, a party's notice of the filing of a lawsuit is the trigger. <<

DYAN M. HOUSE is a member of the Intellectual Property Section of Munck Carter, P.C. where she concentrates her practice in the areas of trademark, copyright and licensing. House provides counsel to a variety of businesses including restaurants, retail, engineering firms, software companies and nonprofit organizations on the transactional side as well as preparing for and handling litigation. Reach her at (972) 628-3638 or dhouse@munckcarter.com.