Preparing For The "Meet And Confer" Under The New E-Discovery Rules

The Editor interviews ***Mary Mack, Esq.****, Technology Counsel, Fios Inc.*

Editor: Now that the amendments to the Federal Rules of Civil Procedure (www.uscourts.gov) have gone into effect, please share with our readers how they can best prepare for the e-discovery changes.

Mack: The intent of the new amendments is for cases to run smoother and focus on the merits rather than on the e-discovery process. With the new elements in the "meet and confer" conference requirement, counsel is now expected to understand the company's (or client's) information infrastructure in order to negotiate what material will be disclosed, how it will be produced and in what timeframe. If the party has concerns about preservation, costs or burden, this is the time that these arguments need to be raised.

The amendments also include a good faith and reasonableness "safe harbor" provision that may protect companies in the event potentially relevant evidence is not preserved due to unintentional conduct. The applicability of this provision will depend on the company's history of compliance as well as its ability to substantiate its retention policies.

Editor: What types of documents are now discoverable under Rule 26(a)?

Mack: Traditionally, discoverable information focused on "documents" and "data compilations," such as e-mails, word documents and spreadsheets. With the new rules allowing discovery of all electronically stored information, or ESI, we will see an increase in requests for various types of information. Requesting parties will be interested in seeing a company's email, databases, voicemail, instant messaging systems and other proprietary applications.

Since these systems may not have been addressed in the past, attorneys may be unfamiliar with how to treat them for preservation, production or cost-shifting purposes. For example, a voicemail record may not be something that can be readily turned over to opposing counsel. A company with an old voicemail system typically deletes messages when the system is full without maintaining a back up. It is hard to implement a legal hold on this type of older technology. In addition, converting older, proprietary files takes a considerable amount of time and money. With new Unified Messaging or Internet-based voice systems (VoIP), companies can now record and store voice messages on servers that can be readily accessed. With this newer technology, and under the new rules, it will be difficult to argue that the voicemails are inaccessible.

In order to be ready, companies of all sizes need to reassess their retention policies around ESI in light of their litigation risk profile. A collection process assessment that measures likelihood of request, maturity of process, persons responsible and retention policy/practice can create a framework for strategic decisions prior to the meet and confer. This early analysis can help counsel prepare defensible and persuasive ESI proposals appropriate for each matter.

Mary Mack

Editor: Are there concerns with requestors asking for files containing metadata?

Mack: Before the rules were amended, the responding party was able to control the format of the information handed over to the requestor. Back in the day, they could even produce a set of CDs containing the information in a particular format without any discernable organization. As software and practitioners became more sophisticated, information was turned over with load files that included more information and searchable fields, allowing information to be located more readily. Despite these advances, the decision on the data format was usually left to the discretion of the responding party in consultation with the requesting party.

Under the amended rules, a requesting party is now able to specify the format of the disclosed information, including the metadata. Responding parties need to ensure that the evidence preservation and collection process maintains the metadata and chain of custody associated with the ESI, or the produced evidence set may not be valid. In addition, if native files are produced, track changes and other hidden metadata will be viewable to the requesting party. Responding parties do still have the option to refuse or negotiate the requesting party's format, but the power has shifted.

Editor: How can Fios assist clients during this process?

Mack: We help counsel understand the corporate infrastructure and data storage systems. We examine the accessible and inaccessible files and the collection protocols. Given our experience, we can provide "readiness" assessments based on what has transpired in various circuits and state courts around the country. We help legal teams determine review strategies, as well as aid in the processing and production of evidence in a legally defensible manner. The ultimate strategy will depend on the facts and the risk profile of a litigant as determined by counsel. Our services are tailored to take those factors into account.

Editor: What steps can legal teams take to minimize challenges to the evidence production set?

Mack: Start at the beginning of the preservation process. If you are loading information into a content management system, understand what happens to the original metadata. There are some systems that alter the save date, which can create preservation problems that the company will need to explain. Instability in dates can increase cost as more files can fall within a particular date range. There may be special procedures to export both the files and the original metadata or other coding, adding cycle time.

Counsel may want to bring in a third party that can provide an objective voice to the assessment and evidence collection processes. For instance, we recently worked with a client that had implemented a new legal hold procedure for its email. We came in and examined their processes looking for potential weaknesses. After that review and a discussion with their team, we collaborated on a slightly different approach to their procedures. The new process saved them time and money and provided a better workflow for legal, IT and records management.

Editor: What steps should legal departments take to get ready for the new FRCP amendments?

Mack: Companies should take an inventory of the information assets they have, the parties responsible for those assets, and the company's retention policies and practices. They should then determine the ideal mode of production for the company's ESI. We provide a litigation readiness assessment that includes a series of questions for in-house counsel, outside counsel and the IT department to answer in order to obtain a true overview of the entire process.

We are then able to evaluate the costs, risks and time associated with the company's current practices. With this understanding, a company can then develop changes to enhance the effectiveness of their e-discovery practices. The next step is to document a formal litigation response plan, so that the litigators and those that support them know what needs to be done, regardless of who's managing the case.

With this foundation, counsel can then test the systems to make sure that they work properly and that there is a minimal risk of confidential or privileged ESI being disclosed. A company should not wait until it has to respond to an actual request for production to test its processes.

Editor: What review strategies can be implemented to ensure a valid document set is provided to the requesting party?

Mack: By implementing an early case assessment, a company will have a better understanding of the backup systems and the pertinent search terms for the request. During the meet and confer, counsel will be in a better position to negotiate date ranges and search terms with the other side. These qualifiers can be used to narrow down the discoverable data.

We have worked with clients early on in the discovery process, examining key custodians against search terms to help them develop strategies for controlling the costs and timeframes for discovery. This type of sampling can provide counsel with greater insight into the stored ESI and will allow them to negotiate more effectively.

We also work with counsel to gather their "privilege list" to allow more sophisticated review of potentially privileged material and to quality control production sets. Some companies use an export of their e-billing system as a foundation for their privilege search terms.

Editor: What type of methodologies can be applied to the Rule 26(b)(2) arguments for accessible vs. inaccessible documents and burden arguments?

Mack: The main methodology is to understand the information infrastructure and maintain a content map where potential evidence may reside. By undergoing a formal assessment, counsel can better understand what ESI is stored on backup tapes and the other systems. Once located, it will make it easier to argue what is germane to the case and what is difficult to restore and review.

When dealing with inaccessible documents, a company should be prepared with a persuasive cost shifting argument to potentially modify the scope of discovery or reduce the financial burden. The producing party needs to understand what it has and be able to quantify how much of a burden it is to produce the information. The Committee Notes on the new rules allow the producing party to include the cost of review in the calculation designed to shift the cost of production. Companies that prepare early will be in a better position to shift these costs. An unprepared company can negotiate themselves into a corner or be compelled to search all of their ESI, so I urge companies not to wait. Not understanding what you have is one of the greatest areas of risk in discovery. Assessing and planning early will enable you to begin addressing the gaps now, as well as place yourself in a better position to talk about the merits of the case rather than just focusing on the e-discovery challenges.

Editor: Closing comments?

Mack: Some Federal Court judges have been presiding over cases as if the new amendments were effective last summer. As a result, I believe there will be a faster adoption of these rules now that they are "official." The driving force for judges is to decrease their caseload and to smooth the process by frontloading the discussions about electronic discovery rather than waiting until a couple months before the discovery cut-off date.

As such, the question I get asked most frequently is "How are we really expected to prepare in such a short amount of time?" The way we help our clients depends on the company's culture and what they are looking to achieve. For instance, we provided a paralegal group in a pharmaceutical company with an overview of the new rules because they wanted to be ready for what their attorneys would request of them. We also worked with an energy company where we gave a four-hour training session to the entire legal department, including the transaction lawyers.

Training, assessments and creating a litigation response plan are the first steps counsel should take to avoid costly mistakes.

Please email the interviewee at mmack@fiosinc.com with questions about this interview.