

# Considerations for E-Discovery When the Scope Is International

## How to Avoid Common Pitfalls

Over the past few years, many multinational companies, and the law firms that service them, have made a concentrated effort to control the management of data created, stored, or sent overseas. It is no easy task. An estimated 99 percent of new information is stored electronically, mostly on computer hard disk. This is a tremendous amount of data considering that a company's primary day-to-day contact with its own foreign executives may be conducted through e-mails, instant messaging, online video conferencing, or other forms of electronic communications.

In the United States, a burgeoning body of case law has brought e-discovery out of the hands of a few tech savvy lawyers and introduced an entirely new element to civil discovery to a growing number of practitioners. Counsel that ignores the pronouncements of *Zubulake v. UBS Warburg* may be dealt a heavy blow at trial and on appeal. In addition, the Federal Rules of Civil Procedure incorporate several amendments dealing specifically with e-discovery.

Overseas, however, many countries are still in the process of developing even rudimentary standards for e-discovery. Indeed, the laws of certain foreign jurisdictions may actually make it illegal to transfer certain data stateside. Thus, a careful analysis of foreign e-discovery laws and procedures is necessary to ensure the smooth transition of documents and data from overseas. At the same time, data should be harvested quickly, efficiently and without unnecessary interruption in the foreign company's day-to-day operations.

Lawyers with a multi-national practice must approach the situation with an eye for the varying—and often contradictory—notions of fairness and justice spanning the globe.

Regardless of what jurisdiction the electronic data originates from, there are several overarching considerations common to any case. Taking stock of these issues early will put you in the best position to avoid the most common international e-discovery pitfalls.

### **Document Preservation**

Global companies must be equally vigilant in tracking data created abroad as in the U.S. The first step is to determine where the data is located and how it is preserved. Consequently, companies must make sure that their document retention and destruction policies are, to the extent practicable, implemented globally, with obvious attention to potential differences in the laws of each foreign jurisdiction.

In addition, when litigation or an investigation is pending or reasonably anticipated, companies must develop litigation hold procedures to control data created, stored, or sent to foreign offices. IT and records managers in foreign offices must know about the duties imposed by the litigation hold and should be reminded that the company can be sanctioned for the intentional or negligent destruction or alteration of data. The litigation hold should apply not just to the data contained on office computers. Rather, companies must be mindful of data contained on laptop computers, employees' home computers, PDAs, and even mobile telephones. In so doing, lawyers must keep in mind that the data's host country may have restrictions on how the data may be used and who has access to it.

### **Privacy Concerns**

Companies with overseas offices must also be sensitive to who may claim privacy rights in data contained on their servers. In the U.S., an individual's right to privacy is severely abridged in the workplace. Generally, a worker has little or no expectation of privacy in documents prepared in the workplace, including personal emails and data that reside on the employee's work computer. The U.S. would seem to be in the minority view with respect to workplace privacy.

In many European countries, employees have a privacy right in their data. If data contained on their company computers is of a personal nature or contains personal information, it may be difficult to process or transfer the data for discovery purposes in the U.S. The European Union's Data Protection Act restricts the transfer of personal data outside the European Economic Area (the 25 member states, plus Iceland, Liechtenstein and Norway). Even assuming that privacy issues are resolved, the data must still be collected and transferred to the U.S. in accordance with the laws of the European Union.

### **Document Review**

Once electronic documents are transferred to the U.S., there must be a plan in place to segregate and review them. Issues as varied as language barriers, differences in date formats, or inconsistencies in how documents are named and stored, can become important considerations. Fortunately, e-discovery technology provides a great deal of assistance in overcoming these obstacles.

For example, de-duplication technology is an important tool in foreign language document review. De-duplication allows for identification and segregation of duplicate electronic data. The identification of exact duplicates can cut down on review time and expenses as the documents will only need to be reviewed once by the attorney and once by the interpreter.

In addition, documents should be sent to interpreters on a rolling basis as they are discovered in the production. If any part of a document contains text in a foreign language, the document, along with any attachments, should be marked for review. This may help the interpreter understand the context of the writing, and potentially identify other relevant documents.

### **Conclusion**

With a global marketplace, the rapid expansion of outsourcing, and the continued demand for imported goods, the number of documents and emails generated between a company in the U.S. and its foreign employees is staggering. Lawyers should pay particular attention to the evolving laws of the country to determine whether the data can be processed and transferred to the U.S. Companies should also ensure that they know where the data is located and have protocols in place to quickly locate, disseminate and efficiently review these documents in the event of litigation.

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