

DAILY BUSINESS REVIEW

MIAMI

LAW ■ REAL ESTATE ■ FINANCE

\$2.00

THURSDAY, FEBRUARY 12, 2009

DailyBusinessReview.com

VOL. 83, NO. 170

An incisivemedia publication

THURSDAY, FEBRUARY 12, 2009 • DAILY BUSINESS REVIEW • A17

SPECIAL REPORT: E-DISCOVERY

Lawyers must get tech-savvy to help gather evidence

Commentary by Silka Gonzalez



Gonzalez

Judges and lawyers are increasingly recognizing the importance of electronic evidence, especially since the 2006 e-discovery amendments to the Federal Rules of Civil Procedure.

The rules now make explicit that attorneys must consider electroni-

cally stored information, or ESI, from the start of litigation.

Attorneys and their clients also must take steps to stop deleting relevant ESI once litigation is reasonably anticipated.

Lawyers need to increase their understanding of information systems to avoid sanctions, properly conduct discovery and choose technical experts.

Lawyers also must become familiar with each client's IT infrastructure. This includes the network diagram and components to understand the complexity of the infrastructure and the types of computerized technologies used by the client.

For example, organizations may have an infrastructure that is centralized at one location or decentralized with processing and storage in different places.

Clients are likely to use different types of computer hardware in addition to workstations, laptops, servers, mid-range computers and mainframes. Networks also include different types of devices like routers, fire-



COLIN ANDERSON

walls and wireless mobile devices. Valuable information may be found at all these locations.

Next, the lawyer will need information about the client's software and data. This involves identifying the client's operating systems, applications, databases, auxiliary software like e-mail and backup systems. Electronic data includes not just documents and databases, but also computer logs.

To identify the locations where relevant ESI may be found, lawyers must determine the scope and time period of information needed for the case. For example, attorneys might find the needed ESI is not in the current IT system but may be on a backup tape either on- or off-site.

If there is a pending or expected lawsuit, the lawyer needs to put a litigation hold in place to ensure all relevant ESI is preserved.

Clients may have to stop routine operations such as deleting e-mail and recycling backup tapes.

Lawyers also will need to determine whether the required ESI is reasonably accessible and evaluate the retrieval cost. Some relevant ESI may exist in backups created by legacy systems, and the client may no longer have the outdated hardware and software needed to access the old ESI.

A similar understanding also is needed for the opposing party's IT system. Getting input from someone with IT expertise is vital, whether it is a client's employee, someone with the law firm or a consultant.

Depending on the level of cooperation, some preliminary information can be obtained at an initial meeting. The parties may choose to have an IT consultant join the meeting.

It may be necessary to schedule an early deposition of an IT employee from the opposing party. An IT employee or consultant is useful in developing deposition questions, and consultants are increasingly present for depositions.

An attorney will need to choose the format for requesting data so it is usable. For this, it is necessary to understand the types of applications and data maintained by the opposing party and the resources available to retrieve and analyze the data. A technical specialist can help make the request correctly the first time.

In cases where the opposing party claims some relevant ESI is not accessible without undue burden, an IT consultant may be brought in to challenge this assertion. Similarly, lawyers may need to evaluate whether the opposing side preserved relevant ESI and performed electronic searches correctly.

In some cases, key evidence may be found only with computer forensics. In a 2008 sexual harassment case against Latimer Biaggi Rachid & Godreau, a law firm in Puerto Rico, the key evidence was deleted pornographic images found only after a forensic search of a hard drive.

While new technology and electronic evidence pose challenges, lawyers and judges are increasingly embracing it as critical to their cases. ■

Silka Gonzalez is the founder and president of Coral Gables-based Enterprise Risk Management with experience in information technology security and auditing.

Press Clip Courtesy Of



TRESTER MURRY AGENCY
PUBLIC RELATIONS & MARKETING