New Rules for Electronic Discovery

By H. Christopher Boehning and Eric Twiste

The proposed new Federal Rules of Civil Procedure directed to electronic discovery take effect on December 1, 2006. With that date fast approaching, corporate counsel must become familiar with the nuances of the rules and the technology available to help with the often daunting task of collecting, reviewing and producing electronically stored information (ESI). But what does this mean for insurance professionals? Before these rules take effect, consider the following:

Designate a point person. The new rules require that litigants be prepared at an early stage to discuss the sources, types and availability of ESI. The greatest danger to companies—and the danger that can and has resulted in sanctions—is providing inaccurate or incomplete information. Often even innocent mistakes at the outset of a litigation (e.g., incorrectly indicating that back-up tapes are not available or failing accurately to describe the company's e-mail system) can create the impression with either an adversary or the court itself that the party is purposely being evasive.

Insurance companies should consider designating specific personnel to ensure that accurate and consistent information is provided to all outside counsel, adversaries and regulators. Without a singular point person, there is a real danger that the information an outside lawyer provides to a court in one jurisdiction might not mesh with what is provided by another lawyer defending the same company in another jurisdiction. In fact, some courts even require that a client representative on e-discovery be specifically designated or identified.

Evaluate your ESI. Insurance companies rely on ESI. Claims may be tracked electronically and employees may be taught to keep all relevant materials, including e-mail, in the electronic claim file. Such databases and claim-tracking software are a benefit to efficiency and productivity. Many companies with such systems have successfully resisted searching e-mail and other sources of ESI (e.g., servers with traditional word processing files or spreadsheets) by arguing that the relevant material is kept in the electronic claim or underwriting file.

Ensure regulatory compliance. Insurance professionals operate in a heavily regulated industry. But have you thought recently about those regulations and how they overlap with discovery and e-discovery obligations? Investment banks have already been forced to think about these issues. If a bank is supposed to preserve all e-mail for three years, an adversary will no doubt raise an issue when email from two years ago is unavailable. Insurance companies have similar record keeping obligations and are likely to face similar questions.

Focus on your document retention policy. Insurance companies get sued. That is a fact of life. And that fact has caused many insurance companies to have concerns about how to structure a document retention policy that recognizes the realities of today's business environment (if you do not have a system for disposing of files and information, your company will grind to a halt and incur tremendous expense on storage) and the risks of today's litigation and regulatory environment (sanctions and obstruction of justice charges for document destruction). This conflict might lead many companies to do nothing. But that is the wrong course.

In *Arthur Andersen v. United States* (2005), the Supreme Court, has acknowledged that document retention policies—policies that "are created in part to keep certain information from getting into the hands of others, including the government,"—are "common in business" and that there is nothing wrong with directing employees to comply with such policies under "ordinary circumstances."

Indeed, the reality is that it is often worse to have a document retention policy that is not followed—or followed in an inconsistent fashion—than no policy at all. The lesson of *Andersen* and other recent cases is that companies need strong document retention policies that are actually followed as well as a coordinated process of instituting a litigation hold Spend time now reviewing your document retention policies and practices and your system for implementing and monitoring litigation holds. ■

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