



COUNSELOR'S CORNER

Tackling eDiscovery Before it Bites

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Consider the percentage of bank transactions that involve electronic images and data, not to mention the number of voicemails, emails, texts and social networking posts created by bank employees. Most, if not all, business begins or ends with electronically stored information ("ESI").

Now consider the duties imposed by state and federal law on parties to a lawsuit. For example, a duty to preserve arises when litigation becomes foreseeable and requires both suspension of current policies that might alter or destroy relevant ESI and affirmative steps such as issuance of written litigation holds and identification of key ESI custodians and locations.

For entities that generate staggering amounts of data on a daily basis, cost-effective compliance may seem impossible. On the other hand, ignoring these obligations creates an even greater risk, particularly as more and more plaintiffs discover that noncompliance can be an effective Hail Mary pass. Courts have considerable leeway when it comes to sanctions, which often range from monetary penalties,

to adverse inferences and jury instructions (i.e., the jury may assume the lost data would have supported a plaintiff's claim had it been preserved), to outright dismissal or judgment in more egregious cases.

And while the prospect of losing a small claim may not be terrifying enough to prompt banks to implement institutional compliance mechanisms, consider the impact of an order alerting every litigant in every lawsuit of a systematic oversight. In March of 2011, the Eastern District of Texas issued just such an order in *Green v. Blitz US*. The defendant was not only required to pay significant monetary fines, but was ordered to provide copies of the opinion to every plaintiff in every lawsuit for the last two years and, further, to file the opinion in every lawsuit for the next five.

In other words, while many banks believe compliance on a case-by-case basis is too costly, non-compliance can cost far more. The following are just a few examples of ways banks can reduce the risk of sanctions and make ESI preservation and retrieval more manageable:

First, don't underestimate small cases or weak claims. While many lawsuits resolve before formal discovery begins, banks still have preservation obligations. Failing to issue an adequate litigation hold and to suspend internal policies (i.e., routine email deletion), even in small cases, can turn an otherwise defensible lawsuit into a losing battle.


Second, know the landscape. While competent outside counsel should ultimately oversee the proper collection of ESI, knowledge of internal systems and storage saves time and money. Make an effort to understand basic duties, and ensure that IT personnel are familiar with and can explain internal systems when the time comes.

Third, utilize existing resources. Many companies don't possess effective tools for analyzing ESI, while banks maintain detailed records that capture account activities over time. Imagine a disgruntled borrower who claims the bank failed to follow its internal policies in handling his/her loan. Waiting until formal discovery to determine who the borrower emailed or called



and which employees handled the account is not only too late, it's unnecessary. Pull account records at the first sign of a dispute.

Fourth, plan ahead. Lack of communication between key departments is a common eDiscovery pitfall. For example, human resources and bank employees often are the first to receive notice of a likely dispute, while IT departments routinely alter or delete ESI, and officers, directors, and bank counsel implement holds and other compliance measures. Develop policies and protocols so that disputes are identified and reported early, which not only helps with preservation, but demonstrates good faith.

Lastly, an increasing number of law firms now have eDiscovery groups and services. Take the time to ask questions, as finding competent and creative counsel can be an effective way to decrease costs and increase predictability when it comes to eDiscovery. 



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