Spoliation of ESI Risks Criminal Prosecution

BY ROBERT D. BROWNSTONE, ESQ.

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FENWICK & WEST LLP

A prime topic for discussion at the Executive Counsel eDiscovery briefings continues to be the interaction between the various Electronic Discovery ("eDiscovery") process stakeholders. Effective collaboration is needed among individuals and groups from: the client organization's business side and legal department; the law firm retained as outside litigation counsel; the technology/processing bureau or vendor; and the reviewers' bureau or vendor.

As those folks play out their respective roles throughout a lawsuit or other legal proceeding, their efforts to toward achieve the salient goals can be fraught with potential pitfalls. When it comes to electronically stored information (ESI) in lawsuits, the pertinent yin and yang consist of striving to:

- *win* the case on the merits by efficiently and effectively conducting factual investigation to put one's side in the best position to succeed; and
- *not lose* the case before reaching the merits – because of an ethical, project-management or technological lapse in the eDiscovery process.

The latter can be a direct or indirect result of a judicial finding that preservation and/or production efforts have been so deficient that illegal destruction ("spoliation") has occurred. While most jurisdictions require intentional, malicious conduct as the basis for a penalty (a/k/a "sanction") in other jurisdictions, reckless or even negligent conduct could be enough.

Spoliation sanctions in a civil lawsuit can include: a default judgment against a defendant; a dismissal of some or all of a Plaintiff's claims; huge monetary penalties; reimbursement of some of the other side's legal fees and/or costs; a jury instruction that tells the jurors they can or must presume that the contents of all non-preserved ESI must have been harmful to the party who deleted or disposed of it; a mistrial; and exclusion of evidence at trial.

Even scarier, individuals can be the targets for some of the other possible ramifications of inapt, untimely disposition of ESI, such as:

- Jail time for a CEO for civil contempt, as was contemplated in *Victor Stanley v. Creative Pipe* case in the U.S. District Court for the Southern District of California.
- Referral to a state Bar for an ethics investigation of in-house and/or outside counsel, as was initially ordered in the *Qualcomm* case in the U.S. District Court for the Southern District of California.
- Criminal prosecution if ESI were destroyed to impede or obstruct a governmental agency inquiry or investigation.

As discussed at prior Executive Counsel eDiscovery Briefings, the above parade of horrible warrants not only a legally compliant eDiscovery process but also a disciplined memorialization to provide defensibility. Increasingly, judges have required litigants to be able to demonstrate the eDiscovery steps they took and chose not to take – and why.

Those most often in the throes of eDiscovery deem the most potent recipe for success to include effective project-management, transparent budgeting/costs-estimates, ongoing written communication between point people and an appropriate melding of search tools and people's brain-power. Absent these factors, finger-pointing can ensue as can, and the key player's mutual expectations can become muddied and unmanageable.

The consensus at recent briefings seemed to be that eDiscovery "best practices" are not set in stone but evolve over time as stakeholders get together and discuss how to develop a "better way." Don't put your head in the sand and shy away from this unique 21st Century challenge.

Please join the dynamic discussion at upcoming Executive Counsel Institute "Exchanges" on eDiscovery, including the one being co-chaired by Fenwick & West's Robert Brownstone in Los Angeles on December 5-6, 2011.

** Robert D. Brownstone, Esq. is the Technology & eDiscovery Counsel and Electronic-Information-Management (EIM) Group Co-Chair at Fenwick & West LLP in Silicon Valley. He is a nationwide advisor, speaker, writer and media resource as to eDiscovery, records-retention, EIM, information-security and privacy. His full bio and extensive bibliography are available at ‹http://www.fenwick.com/attorneys/4.2.1.asp?aid=544›.*

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