

## **U.S. Electronic Discovery Update**

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Since the e-discovery amendments to the US Federal Rules of Civil Procedure (FRCP) took effect on 1 December 2006, several courts have already started to further define the scope and influence of e-discovery in civil litigation. Within the latest cases, civil sanctions for failure to properly preserve electronic documents is the leading the topic of discussion. The trends, however, also demonstrate that many disputes arise, and will continue to arise, relating to native file production, cost-shifting, and the production of inaccessible data. As the technological aspects of the rules become more familiar with attorneys and the courts alike, we can expect to see frequent decisions regarding e-discovery and the duties imposed on litigants.

### **Noteworthy Cases**

Since December 2006 there have been several important decisions defining the e-discovery landscape, including the following:

#### **Faulty Litigation Hold Results in Sanctions**

*In re NTL, Inc. Sec. Litig.*, 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007). In a class action claim, the plaintiffs moved for sanctions against the defendant, alleging that the defendant deliberately destroyed and allowed spoliation of e-mails and other electronically stored information. The court ordered sanctions against the defendant for spoliation because they did not issue a proper litigation hold when litigation was reasonably foreseeable.

#### **Court Sets Forth Detailed E-Discovery Case Management Order**

*In re Seroquel Prods. Liab. Litig.*, 2007 WL 219989 (M.D. Fla. Jan. 26, 2007).

In a multi-district litigation matter, the court issued a discovery order addressing several issues related to electronically stored documents. First, the court set forth the party's document collection and production obligations and ordered that all documents be produced in a TIFF format and have Bates numbering. The court also addressed costs and held that each party shall bear its own costs for the production of accessible data. Inaccessible data and data contained in databases were only to be produced after consultation between the parties.

#### **Courts Refuses to Require Plaintiff to Re-produce Documents Natively, but Recommends All Subsequent Productions be in Native Form**

*In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007). In this class action, the defendants brought a motion to compel native production of documents from the plaintiffs which were previously produced in paper form. The court denied the motion to compel because it would require the plaintiffs to reproduce discovery already in possession of the defendants and would place a substantial and costly burden on the plaintiffs. The court did, however, also rule that any subsequent discovery should be produced in a native format.

#### **Court Declines to Order Spoliation Sanctions until Computer Forensics Examination is Concluded**

*Anadarko Petroleum Corp. v. Davis*, 2006 WL 3837518 (S.D. Tex. Dec. 28, 2006).

In a misappropriation of trade secrets case, the plaintiff alleged bad faith spoliation and destruction of data when the defendant transferred all of the data on his laptop onto a USB drive and deleted all data from his hard drive. The court ruled there was not enough evidence to demonstrate the defendant destroyed records in bad faith but ordered a forensic examination to determine if sanctions should be appropriate.

**Court Orders Mirror Imaging of Computer Hard Drives, Citing New Federal Rules of Civil Procedure**

*Ameriwood Industries, Inc. v. Liberman*, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006). In a suit concerning allegedly stolen trade secrets, the plaintiff sought e-mails from the defendant's work and home computers. The court ordered the mirror-imaging of the defendant's home and work computers because there was a sufficient nexus between the plaintiff's claims and the information sought.

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