Electronic Information Management (EIM) for Daily Efficiency and Litigation-Preparedness

Data Mapping § II – Strafford Broadcast

February 25, 2009

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THESE MATERIALS ARE MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO ELECTRONIC INFORMATION MANAGEMENT AND ELECTRONIC DISCOVERY. THEY ARE NOT TO BE REGARDED AS LEGAL ADVICE.

ORGANIZATIONS OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.

Robert D. Brownstone, Esq.

Outline/ Agenda

- A. Technology's Impacts on Liability Risks
- B. Records-Retention and EIM Regimes
- C. eDiscovery Preparedness
- D. Benefits to be Derived from Data Mapping
  - 1. "Going Paperless"
  - 2. Compliance Issues
  - 3. Litigation Preparedness

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A. Tech's Impacts on Liability Risks *(c't'd)*

- **ESI's pre-eminence in our digital world . . .**
  - **Only 0.01% of newly created information is stored in paper (UC Berkeley Study 2003)**
  - **7 trillion e-mails sent annually**
  - **60-200 daily e-mails per employee**
  - **PLUS Internet activity, blog posts, wikis, etc.**

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A. Tech Impacts – ESI . . . .

- **Under amended Fed. R. Civ. Pro. (@ 12/1/06), Initial Disclosures, Interrogatories, RFP's and Subpoenas now all encompass electronically stored info. (a/k/a ESI)**
- ***Compare* enacted – and pending – state law procedural rules:**
  - <http://www.applieddiscovery.com/ws_display.asp?filter=State%20Courts>
  - <http://www.krollontrack.com/rules-statutes/>
- **Biggest data set always e-mail**

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A. High Tech Liability Evidence

"Quick, delete that e-mail before Eliot Spitzer sees it!"
(Corante NY 7/29/05)

- **"Smoking Guns"**
  - **E-mail communications generally less formal and thoughtful than other correspondence**
  - **"Candid comments" can have significant impact**
- **CAN'T GO BACK IN TIME AND "TERMINATE" AN E-MAIL**
  - ***"Nine Lives of E-mail" (available upon request)***
  - **Correy Stephenson, *Clients Advising clients before they hit 'send'* (Lawyers USA Jan. 2009) (quoting me ☺)**
    <http://fenwick.com/pressroom/5.1.1.asp?mid=606&loc=FN&p2=23&f=2.23.3&s=1055>
  - **Meridith Levinson, *10 Things You Should Never Write in an E-Mail or Instant Message*, CIO (12/1/08)**
    <http://advice.cio.com/meridith_levinson/10_things_you_should_never_write_in_an_e_mail_or_instant_message>
- **SO USE BEST EFFORTS TO REFRAIN FROM WRITING AND FROM OVER-SAVING . . .**

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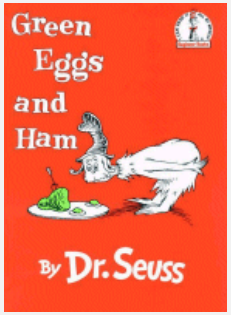
A. ~~eInformation~~ eEvidence – "Writing For Multiple Audiences"

- "Green Eggs & Ham" Test:
  - Would you like it in the press?
  - Would you like it on a competitor's desk?
  - Would you like it in the government's hand?
  - Would you like to read it on the witness stand?



- If the content will get you slammed, then . . . .

DO NOT WRITE IT, SAM I AM

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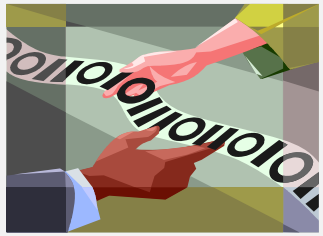
<www.fenwick.com/services/2.23.0.asp?s=1055>

A. High Tech Liability Risks



- **Not just live E-mail . . . also . . .**
  - E-mail Archives (company-wide and individual)
  - Databases (DMS, etc.)
  - Shared Network Drives
  - Hard Drives of local machines
  - Portable Media (hard-drives, CD's, DVD's, USB sticks)
  - External Websites
  - Intranet/Portal
  - Blogs and Wikis (authorized), both external and internal
  - IM (company-provided) and Voicemail

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B. Records-Retention and EIM Regimes

- **Over-Saving Costs:**
  - **retrieval capability**
  - **storage fees**
  - **efficiencies in:**
    - **operations**
    - **projects**
    - **transitions**
    - **collections/productions**

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B. Records-Retention & EIM Regimes *(c't'd)*

- **Under-Saving Risks . . .**
- **. . . include not meeting Business Needs, *e.g.*, . . .**
  - **Corporate/historical records**
  - **IP (including engineers' records for patent conception proof; invention assignments, etc.)**
  - **Contracts (until performance end dates plus SOL?)**
  - **Contractually imposed requirements (audit rights)**

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C. eDiscovery Prep. – Cost Reduction

Law Technology News August 2007

- Aim for effective and cost-efficient collection in response to government-inquiry or lawsuit
- eDiscovery costs staggering
  - Estimated costs in U.S. commercial litigation
    - Last Year (2007) = $ 2.6 Billion
    - This Year (2008) = $ 3.3 Billion
    - Next Year (2009) = $ 4.1 Billion

    <http://Socha-Survey-2007.notlong.com> and <www.sochaconsulting.com/2007survey.htm>
  - Cost-shifting iffy at best under federal case law
  - Unavoidable services expense for litigant, especially when outsourced by law firm via an .asp model (pay-per-gig or per-click)

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C. eDiscovery Prep. – Destruction Safe Harbor

- "Safe Harbor" in FRCP 37(e) (adopted 12/1/06)
  - "Absent exceptional circumstances, a court may not impose sanctions under these rules for failing to provide electronically stored information lost as a result of the routine, good- faith operation of an electronic information system."

<www.uscourts.gov/rules/EDiscovery_w_Notes.pdf>, at 40

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C. eDiscovery – Safe Harbor *(c't'd)*

- "AN electronic information system" (not just party's)

  Rules Report, at App. C-89
  <www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=174>

- "[P]rotects a party who has contracted with an outside firm to provide electronic information storage[.] . . . [But, t]he party remains obliged to act in good faith to avoid loss of information in routine operations conducted by the outside firm."

  Id.

- So, to extent data storage outsourced, synch up schedules

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C. eDiscovery – Safe Harbor *(c't'd)*

- **To extent data storage out-sourced, synch up schedules**
  - **Assume your organization will ultimately be held responsible for production of any pertinent records in discovery**
  - ***Cf. Tomlinson v. El Paso Corp.*, 2007 U.S. Dist. LEXIS 64783 (D. Colo. 8/31/07) (given that ERISA imposed duty to ensure employee benefits records were accessible for inspection, compelling production – under Fed. R. Civ. P. 26(a)(1)(B) – of information as to recordkeeping system of third-party hired to administer benefit records)**

    <http://Tomlinson-DColo-8-31-07.notlong.com>

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D. Benefits to be Derived – 1. "Going Paperless"

- **Access/Retrieval Efficiencies**
- **Huge speed increases and risk reductions to be gained from – and legal support* for – an all-electronic environment**
- **Electronic vs. Paper:**
  - SEDONA PRINCIPLES; *Best Practices Recommendations & Principles for Addressing Electronic Document Production* (June 2007), at 2-5 (.pdf pp. 15-18) <www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf>
  - W. Fenwick & R. Brownstone, *Efiling*, 19 Santa Clara Computer & High Tech. L.J. 181 (2002) <www.fenwick.com/docstore/publications/Litigation/efiling.pdf>, at .pdf p. 25 (comparing retrieval times of 25 minutes and 20 seconds)

**** list of authorities available on request***

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D. Benefits to be Derived *(c't'd)* – 2. Compliance Issues

Let the Harmony Begin

TOSHIBA
Don't copy. Lead.®

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- KUMBAYA?!
- Clear, well-thought-out policy language on which multiple constituencies (Legal, HR and IT, e.g.) have weighed in

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D(2). Compliance Issues *(c't'd)* – The Three E's

- **Three E's:**
  - **Establish** ↔ **Administration/Policies**
  - **Educate** ↔ **Training**
  - **Enforce** ↔ **Technology**
- **Three-pronged approach**

- ***See Global Cisco Study Applies Reality Check to Corporate Security Policies, Draws Connection to Data Leakage Risk*** **(10/28/08)** <http://newsroom.cisco.com/dlls/2008/prod_102808.html>
  - ***"Research Identifies Gap in Policy Awareness of Employees, Shows 1 in 4 Companies Lacks Security Policies"***

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D(2). Compliance Issues *(c't'd)* – Legal Defensibility

- Records Retention Policy that is "real"
- Litigation and eDiscovery Preparedness, including Litigation-Hold Protocol
- Compliance Gap Closing = Synching Retention Policy language with pertinent contents of other policies:
  - Technology-Use/Lack-of-Employee-Privacy
  - Departing Employees: Separation Policy; and IT Checklist
- Before implementation, segregate/collect ESI re: all pending and reasonably anticipated disputes and gov't inquiries
- Cannot achieve these goals without knowing what an organization has and where

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D. Benefits to be Derived *(c't'd)* – 3. Litigation Preparedness

- **Fenwick & West's "Pre-eCollection Checklist" *(highlights):***
  - **I. Key IT System Admins – get access to them**
  - **II. E-mail System(s)**
    - **Source: Internal or Third-party Vendor?**
    - **Type: Exchange? Lotus? GroupWise?**
    - **Purge in place? Suspended?**
    - **Changed? If so:**
      - **When?**
      - **Which admin. is/was responsible?**
      - **Whys/wherefores of to-be-restored back-ups?**

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D(3). Litigation Preparedness *(c't'd)* – eDiscovery Preservation

- **F&W's "Pre-eCollection Checklist"** *(c't'd)*:
  - **III. Non-Email ESI – Potential Sources, including:**
    - **Microsoft Office apps (Word, Excel, PowerPoint, etc.)**
    - **custom-developed applications**
    - **databases**
    - **shared networks drives**
    - **websites, Intranets/Portals, Wikis, Blogs, Extranets**
    - **pdf's (types 1, 2 and 3) and image files (.jpeg, .tif, etc.)**
    - **back-ups (rotation/recycling suspended?) and archives**
    - **voice mails (.mp3, .wma or proprietary?) and IM?**

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D(3). Litigation Preparedness *(c't'd)* – eDiscovery Preservation

- **FW's "Pre-eCollection Checklist"** *(c't'd)*:
  - **IV. ESI "Local" Locations, *e.g.***
    - **hard drives of desktops and laptops**
      - **on-site at:**
        - **U.S. locations**
        - **EU/International locations**
      - **at employees' homes**
        - **company-provided**
        - **personal?**
    - **mobile devices, removable media & portable drives**

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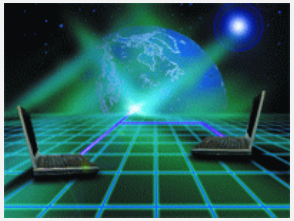
Conclusion/ Questions



- **Examples of Maps (Proactive and Reactive):**
  - **Web-ified Visio chart of data flow between databases and geographical locations**
  - **Slide deck flow-charts of SOX internal-controls workflows**
  - **Spreadsheet with information-types one on axis (rows) and Dep’ts/Divisions on other axis (columns)**
  - **Chart/diagram of physical locations, each with respective list of repositories**

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Conclusion/ Questions

- **Q+A**
  - **Robert D. Brownstone**
    - <www.fenwick.com/attorneys/4.2.1.asp?aid=544>
    - 650.335.7912 or <rbrownstone@fenwick.com>

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  - <http://www.fenwick.com/services/2.7.0.asp?s=1041>

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