O'MELVENY & MYERS LLP

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E-Discovery: International Considerations

Electronic Data Is Everywhere

- As international business grows, so does the electronic evidence it generates.
- 92% of new information is stored electronically.
- Approximately 60 billion e-mail messages are sent each day.
- 60% of business information is stored within corporate e-mail systems, up from 33% in 1999.
  - LexisNexis/Applied Discovery (2006)

A Typical Client

- Several email & file servers
- Websites, sharepoints, shared folders, workspaces
- Document management systems
- Proprietary applications
- Accounting databases
- Outsourced applications (*e.g.,* Salesforce.com)

A Typical Employee

- Desktop
- Laptop
- File Cabinet with mystery hard drive
- Home computer with home email account
- Flash drives
- Floppy disks
- PDAs

A Typical Employee

2-4 GB of User Data

OR

150,00-300,000 pages

OR

60-120 boxes

Document productions may average 30,000 – 75,000 pages ***per employee***.

The Legal Duty to Preserve

Counsel should become *fully familiar with the client's document retention policies*, including its data retention architecture, and *speak with the "key players" in the litigation* to understand how they store information.

Zubulake v. Warburg,
2004 WL 1620866 (S.D.N.Y. 2004) (*Zubulake V*)

The Legal Duty To Preserve

- Arises
  - Anticipated litigation
  - Investigations
  - Serial litigation
  - Lawsuit filed
  - Statutory obligations

- Dangers with International Data
  - Attorneys are not familiar with ever-changing technologies and laws
  - Overseas employees are often not familiar with scope of preservation obligations

Develop A Pre-Litigation Preservation Plan

- Implement a comprehensive retention and destruction policy
- Understand your international IT infrastructure
- Understand foreign office computer usage policies and work habits
  - Network drives vs. hard drives
  - Email vs. text messaging
- Consider building litigation hold team in each office, including IT contacts
- Develop an office-specific strategy for issuing litigation holds and collecting data

Develop A Pre-Litigation Preservation Plan

- Analyze Applicable Law
  - *Level 1*: European Union Directives, Rules, or Recommendations
  - *Level 2*: Nation-specific Document Retention & Privacy Regulations
- Research whether the relevant foreign laws require/excuse non-compliance with U.S. discovery requests
- Consult with Local Counsel
  - Discuss legal and cultural differences

Consider Specific Types of Records

- *Toxic Exposure Records:*
  - *European Union*: Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), available at http://reach.jrc.it/legislation_en.htm

- *Tax Records*:
  - *Germany*: Section 62(2) Implementing Regulation of the Turnover Tax Law (UstDV) – retaining tax records.
  - UK: Section 7 of the VAT Act of 1983

Consider Preservation-Related Laws

- *Data Privacy*: Directive 95/46/EC on Data Protection requires that persons have right to rectify, erase or prevent the use of incorrect personal data.

- *UK's Duty to Preserve*: Cresswell Report (UK), http://www.hmcourts-service.gov.uk/docs/electronic_disclosure1004.doc

Once the Duty to Preserve Commences:

- *Assess the scope*
  - Relevance to the allegations
  - Location of witnesses and data
  - Strategic considerations
  - Corporate organization

Parent-Subsidiary Obligations

- United States: Absent a defense, U.S. parent corporations are responsible for documents located abroad in their foreign branches or subsidiaries
  - *In re Investigation of World Arrangements*, 13 F.R.D. 280, 285 (D.D.C.1952)
- United Kingdom: Parent companies are not responsible for production of records of their subsidiaries
  - *Compare Lonrho Ltd. v. Shell Petroleum Co.,* [1980] 1 W.L.R. 627 (H.L. (E.)), and *Reg. v. Grossman*, 1981, 73 Cr. App.R. 302 (C.A.), *with Wallersteiner v. Moir*, [1974] 1 W.L.R. 991 (C.A.).

Subsidiary-Parent Obligations

- Not certain whether records of parent corporation can be reached through discovery orders issued to subsidiary.
  - U.S. courts have issued orders to that effect, but foreign courts have issued countermanding orders
    - *Krupp Mak Maschinenbau G.m.b.H v. Deutsche Bank A.G. (Landgericht, Kiel 6/30/82), 22 Int'l Leg. Mat. 740 (1983)* (West German court ordered a German bank not to comply with a United States grand jury subpoena)

What about Burden?

- How relevant is the foreign data?
- Is it accessible?
  - Is it stored in legacy systems? Backup tapes?
  - Are systems compatible with U.S. computer systems/review platforms?
- How costly will it be to produce?

Burden (con't)

- See F.R.C.P. 26(f) ([Parties must confer] **to discuss any issues relating to preserving discoverable information**, and to develop a proposed discovery plan…)
- Consider negotiating geographic limitations to otherwise infinite discovery obligations
- Be transparent about how you plan to preserve data
- Negotiate phased discovery of data stored outside the United States

Conflicts with International Law

- *Enron v. J.P. Morgan Secur. Inc.,* No. 01-16034 (Bankr. S.D.N.Y. July 18, 2007) (held that threat of French blocking statute did not excuse a party from its discovery obligation nor did it warrant the invocation of the Hague Convention).

- *Columbia Pictures Industries v. Bunnell*, No. 2:06-cv-01093 FMC-JCx2007, U.S. Dist. LEXIS 63620 (C.D. Cal. August 24, 2007) (defendants objected to preserving and producing server log data based on prohibitions in Dutch law; court found that Dutch law did not prohibit the production of solely anonymous information and, even if it did the *Aerospatiale* factors weighed in favor of requiring defendants to preserve and produce server log data).

Conflicts with International Law

- These cases follow the principle articulated by the Supreme Court in the *Aerospatiale* case that "[foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.,* 482 U.S. 522, 544 n.29 (U.S. 1987).

Litigation Hold Strategies

- Consult with IT (again) to discuss IT landscape and its relevance to specific litigation
- Review jurisdiction-specific privacy and retention laws
- Identify users and locations of relevant data
- Identify and suspend applicable destruction policies
- Consider whether to suspend backup recycling policies
- Issue litigation hold notices; follow up with oral interviews; accurately track distribution and receipt
- Consider whether to collect relevant data to preserve it

Litigation Hold Notices

- Consider distributing to a clearly defined scope of employees (e.g., the entire office or department)
- Consider non-witnesses with access to electronic data (e.g., administrative assistants, interns, IT administrators)
- Will employees read and understand the Notice?
- Develop follow-up methods, e.g., conference calls, interviews
- Consider establishing local office “monitors”
- Consider preservation methods that do not rely on custodians (preservation of backup tapes, archives)

Collection Considerations

- Comply with data privacy laws when shipping data to U.S.
- Frame collection by user/custodian/data source
- Develop a forensically sound collection method and track chain of custody
- Consider incompatibilities with American software and review platforms
- Copy services/translations/review

Sanctions within Europe

- Intentional or negligent destruction or alteration of data
  - *Douglas and others v. Hello, Ltd. and others* [2005] All ER (D) 280 (May) (UK)
    - Sanction for document destruction prior to the commencement of litigation if:
      - conduct is an attempt to avoid justice, or
      - criminal contempt.

Other Sanctions

- Companies conducting business outside of EU can be subject to other nation's sanctions
  - Australia
    - The Crimes Bill (Document Destruction)
      - makes it a crime to destroy documents that are or are reasonably likely to be required as evidence in a legal proceeding
      - jail term of five years
      - fine
        - » $75,000 (individual)
        - » $300,000 (company)

Model Requirements for the Management of Electronic Records (MoREQ)

- Model requirements for the management of electronic records
- Requested by European Commission
- MoREQ2 to be released in 2008
- Available at, http://www.cornwell.co.uk/edrm/moreq.asp

Questions & Contact Information

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Jeff Fowler is a counsel in the Class Action Defense Practice Group and one of the founders of the firm's Document Retention and Electronic Discovery Practice. His experience handling electronic discovery issues spans eight years and includes some of recent history's largest electronic document productions. Jeff advises clients on related topics, including litigation preparedness, legal hold obligations, electronic data collection and production, and document retention and destruction policies.