

Managing Electronic Data: New Rules in the New Year — *By Matthew Bryant*

The electronic revolution has irrevocably changed how we do business. According to statistics from Ferris Research, the typical number of Internet emails sent and received by a business user is 600 per week. For a business with 100 employees, this translates into over three million emails per year; with back-up and retention policies, that number can sky-rocket into the billions. When that company is sued and those documents are demanded, cost of litigation sky-rockets as well.

For that reason, certain amendments to the Federal Rules of Civil Procedure (FRCP) that have been in the making for nearly a decade became effective December 1, 2006. These amendments have been crafted to avoid costly disputes, also to provide uniformity in case management. While many of the amendments will primarily affect outside counsel, there are significant changes that take place immediately and affect companies and their in-house counsel.

The key rule for in-house counsel is Rule 26. Rule 26 works hand-in-hand with the court's Rule 16 Scheduling Conference. The new rule requires parties to meet at least 21 days before a Rule 16 Order is due, to discuss and plan electronic discovery -- that is 99 days after the complaint is filed or 69 days after the first responsive pleading. Given those time constraints, in-house counsel needs to be prepared.

THE BASICS

DOCUMENT RETENTION. There is nothing new when it comes to the importance of keeping up to speed on your company's document retention policies. However, it's no longer just about retention. In-house counsel or IT directors should keep updated copies of not only the company's document retention policies but: (1) back-up policies including *industry specific regulatory requirements to which the company is subject*; (2) the company's network system and computer use including,

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Industry Watch

The Securities Industry Association and the Bond Market Association have merged to become The Securities Industry and Financial Markets Association or SIFMA (www.sifma.org). The groups, which separated in 1976, have now merged to better speak with a single voice before regulators and Congress and, according to the new website, are a "single powerful voice for industry and market regulatory and legislative priorities, delivering education and information to individual investors to advance their knowledge."

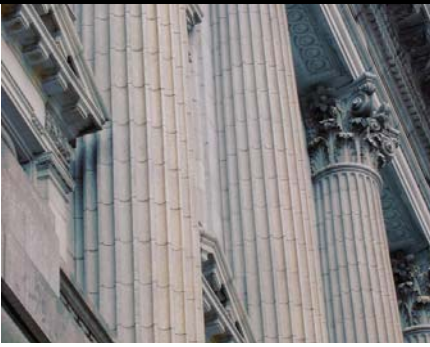
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By the Numbers

(stats from industry-related source*)

48%

of small and mid-sized
business service companies
have no professional
liability coverage.*

Insurance Binders: Are They or Aren't They Binding?

— By Geoff Heineman and Blaise Chow

If you spent any time following the financial fallout of 9/11, you are probably aware of the huge insurance dispute that arose between insurers and World Trade Center leaseholder, Larry Silverstein (Silverstein). At the time of the attack, several of Silverstein's policies had yet to be issued. The only thing obligating the insurance companies to provide coverage was a device known in the insurance industry as a "binder."

Issuing binders is a common and necessary practice in the insurance industry. Brokers are typically eager to accommodate their clients, and insureds are eager to have insurance. Binders therefore operate as a work-out-the-details-later device until the signing and delivery of a more comprehensive and conventionally detailed policy. An insurance binder can best be described as a "temporary" embodiment of the coverage agreed to until a formal policy can be issued.

Although useful and necessary, binders usually have a short life span. They normally take effect once an agreement to provide coverage is reached, and end when a policy is either issued or refused due to the failure to provide "contingencies." Thus, a binder is limited in time and usually lasts no more than one or two months.

If your company sustains a loss before the full policy is issued, but after the issuance of a binder, rest assured that your insurance exists. But do not celebrate quite yet, because the terms of the binder will be open to scrutiny. The plain terms commonly found in the binder may sometimes make it hard to discern the precise scope of coverage. Typical issues include who is an

"insured," what kind of "damages" are going to be covered, what constitutes a "loss," what constitutes an "occurrence," and when a notice of claim must be filed.

If you find yourself in a coverage dispute, there are a few things to consider:

- 1) the specific terms contained in the binder or incorporated by reference (What does the binder actually say?);
- 2) to the extent necessary as gap-fillers, the terms included in the usual policy currently in use by the insurance company or those required by statute (What do similar insurance policies usually cover in this circumstance?);
- 3) the objective expectations of the parties (What were each party's reasonable expectations when the policy was sold?); and
- 4) other communications that preceded the issuance of the binder (What did the insured say he wanted coverage for, and what did the insurer promise it would provide?).

Remember: binders are enforceable as a contract. An insurance binder is more than an agreement to agree to terms in the future. When reviewing your own binder, make sure it includes the terms that you want, such as the policy period, limits, and deductibles. If you know you want attorneys' fees covered, you should put it in the binder. Be careful to examine any "exclusions" that may operate to limit or, "exclude" coverage. If not, you might find yourself battling over the terms of the binder—and that is not something anyone wants to do. ■



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local use, software and hardware policies; (3) protocols for employees' remote access to the network; and (4) protocols for employees' use of *personal computers* for work.

It's now just as common for companies to issue laptops as it is for employees to work from a home PC. Once a remote client server is involved in your company's computer system, the network administrator has created various policies that define and limit the extent to which employees can access and use network data, save data to a local C: drive, and even whether an employee can install new hardware and software or access the Internet independently from the network. A litigator armed with an accurate and thorough description of your company's network protocols can end most discovery disputes before they begin.

RULE 34: BACK-UP POLICIES AND REASONABLY INACCESSIBLE DATA.

Retrieving back-up, or inaccessible, data can be costly and time consuming. Under the new Rule 34, reasonably inaccessible data no longer needs to be produced without a showing of good cause. However, amendments to the new Rule 26 require a party to identify all sources of electronic data and documents; sources that it may use to prove its claims, as well as potential sources of electronic data that it has not searched for relevant evidence, such as stored back-up tapes. This not only allows the other side to conduct a cost-benefit analysis of compelling the production and potentially bearing costs, it also prohibits dilatory tactics such as identifying potential sources of evidence from long-term or inaccessible storage in the middle of discovery.

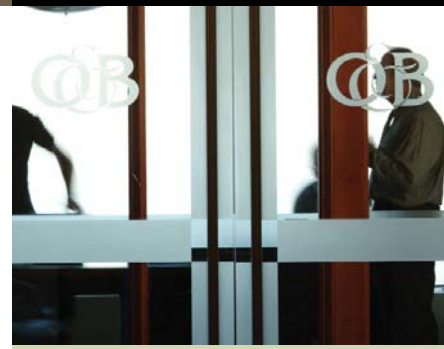
Just as companies can save time by immediately providing procedures and policies to outside counsel, they can pre-negotiate and select an electronic data discovery (EDD) provider — and potentially electronic forensic experts — to use when large scale discovery is foreseeable. The benefits of an external EDD

firm have been well documented. By some estimates, EDD firms can reduce the costs of discovery on a per document basis by threefold or more. However, whereas some EDD firms charge heavy fees up front, others charge higher fees for storage. As with any expert, you need to be aware of the costs associated with using a preferred provider.

RULE 37: SANCTIONS. The good news: the new Rule 37 bars sanctions for loss of data based on a party's "routine, good-faith operation of an electronic information system." The bad news: Rule 37 does not technically affect a court's inherent authority to sanction a party for pre-litigation conduct or spoliation of evidence; nor does Rule 37 change the fact that discovery sanctions can be imposed based on negligence alone.

Accordingly, it is incumbent upon in-house counsel (or your outside counsel) to draft and implement document preservation policies, communicate those policies to the appropriate channels and ensure that they are followed. A party's duty to preserve evidence attaches when it becomes aware of a claim, not when a complaint is formally filed. In-house counsel must be proactive in enforcing litigation holds, and also ensuring that there are protocols to track and stop any individual employee's misuse of electronic data.

Perhaps the most important aspect of the new rules is one that is not expressly stressed: communication. When it comes to electronic data, in-house or outside counsel needs to be the medium between the litigators, the company's IT department, and the company's various offices, branches, departments and employees. To do this, counsel needs to communicate regularly and effectively with those who rely on the information that is provided. When counsel is aware of the new requirements and armed with the right information, the new rules become a valuable tool to expedite large scale litigation. ■



O&B NEWS

Last month, **Ted Stefas** who won his appeal in *Stanley v. Punch* before the Appellate Division, First Department was named Counsel to the firm. Details of the case can be found on www.oandb.com.

Mike Brown was quoted in the Bureau of National Affairs *Health Care Daily* regarding his representation of Jamaica Hospital and Flushing Hospital in their case against Oxford Health Plan (NY) and United Healthcare Insurance Co. Visit www.oandb.com to read the full article.

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Are you in compliance?

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OHRENSTEIN & BROWN LLP
COUNSELORS AT LAW

ONE PENN PLAZA
NEW YORK, NY 10119
212-682-4500

1010 FRANKLIN AVENUE
GARDEN CITY, NY 11530
516-873-6334

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