Ask a Law Expert

This is part of a syndicated column I have created for ARMA chapters. My column is devoted to answering information governance, records management, privacy and related legal questions from Chapter Members or sharing my thoughts on current hot topics. As you read my column, please note that although I am an attorney specializing in these areas of law, these are only my opinions. My opinions should not be construed as legal advice. Kindly consult with an attorney for more formal advice.

This month I did not receive questions from our readers, but I have noted some interesting developments regarding E-discovery, which continues to evolve at a faster pace than any other information governance issues.

I. Courts Beginning to Scrutinize Records Governance Issues More Closely

This past October, Judge Grewal of the Northern District of California issued a decision regarding the "as ordinarily maintained language," a phrase also associated with "routine good faith business practices." In *Venture Corporation v. Barrett*, Case No. 5:13-cv-03384-PSG (N.D. California, October 16, 2014), the court addressed a motion to compel a request for production of ESI (Electronically Stored Information) "in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Plaintiffs sought to produce the ESI on flash drive and by email, consisting of approximately 41,000 pages. The drive and email did not contain a custodial index, table, or other taxonomy information at all—just the folders of the files. The court found that this kind of production "did not square with the rules," noting that

> "if documents are not organized and labeled to correspond to the categories in the request, **they must be produced as they are kept in the usual course of business**." (Emphasis added.)

The court then noted that Plaintiff "submitted no evidence that in the ordinary course of business they keep documents and ESI in folders as they were produced… At a minimum, the court would expect to see the documents and ESI kept by the name of the employee from whom the documents were obtained or at least which Venture entity had produced the documents." The court hence ordered Plaintiff to "produce the documents and ESI as they are kept in the ordinary course of business."

This case shows how courts are inching towards more scrutiny over how records and data are actually maintained in the ordinary course of business, including a look at key metadata fields such as filing systems and custodian data. According to the court, "this mean[s] that the disclosing party should provide information… [that] would include, in some fashion, the identity of the custodian or person from whom the documents were obtained, an indication of whether they are retained in hard copy or digital format, *assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system from which they were recovered.*" (Emphasis added.) Accordingly, the data has to be organized well before litigation is in the horizon. Otherwise, production of disorganized data

may make the courts suspicious of what you are producing, and thus lean harder on you to produce even more data.

II. Duty to Preserve Information on Personal Non-Employer Devices

The court in *Alter v. Rocky Point Sch. Dist.*, 2014 WL 4966119, at *10 (E.D.N.Y. Sept. 30, 2014) succinctly stated that personal non-employer devices are fair game, *if* they contain data relevant to the case at hand. Specifically, the court said,

> "Defendants claim that they were not obliged to preserve work-related ESI which employees… utilized on their personal computers. **However, to the extent that the School District employees had documents related to this matter**, the information should have been preserved on whatever devices contained the information (*e.g.* laptops, cellphones, and any personal digital devices capable of ESI storage)." (Emphasis added.)

III. Some Words of Caution on Electronic Signatures

At least one court has illustrated a way that electronically signed document can be invalidated. In *Ruiz v. Moss Bros. Auto Group, Inc.*, Case No. E057529 (Cal.App. 4th 2014, Dec. 23, 2014), the Court refused to enforce an employer's electronically executed arbitration agreement. The court found that the employer did not present sufficient evidence to prove that the electronic signature on the arbitration agreement was "the act" of the employee. The Court confirmed that an electronic signature has the same legal effect as a handwritten signature; however, any writing must still be authenticated. Here, the employee argued that 1) he did not recall signing the arbitration agreement and 2) that the employer failed to show that the electronic signature was an "act attributable" to the employee. The Court found that the employer did not provide details on how to verify that the employee electronically signed the agreement in question. Although the employer did explain how each employee is required to log into the HR system with a unique login ID and password in order to review and electronically sign the agreement, the Court found that the employer did not explain how such an electronic signature could only be placed by the employee in this case.

This decision signals a new way for counsel to seek invalidation of arbitration agreements, and by extension other kinds of electronic agreements. At minimum, when it comes to arbitration clauses, parties should evaluate the manner and means by which they obtain electronic signatures, including assurances that such signatures can be uniquely verified and attributable to the signer if ever questioned in Court.

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