

**World Tobacco article on the December 1, 2006 amendments  
to the American Federal Rules of Civil Procedure**

*The tobacco industry seems to be one of those industries where litigation is rife. Tobacco companies can expect at some point to be engaged in litigation so it is therefore vitally important, that they particularly, have their houses in order regarding the storage and retrieval of electronic data should they be pulled in to litigation. Without it being in order it could be a costly and time consuming process. It has now been over a year since amendments were made to the civil procedure rules regarding the electronic disclosure of documents in court. Imagine a company is pulled into a litigation case and they need to produce as evidence every e-mail relating to a particular client/ issue. Where do you start, with the millions of e-mails and the huge amount of data that is created on computers each day in a company, it can be a nightmare.*

*Tom could discuss what lessons have been learnt over the past year, the type of mistakes that have been made and what business should be doing to make sure they are ready for litigation when it happens. Tom could discuss the importance of litigation readiness and how proper document management, including retention, storage and destruction policies, can help to reduce the cost of litigation. He could explain what business should be doing to make sure they can comply should they get pulled into litigation.*

*On the 1 December new rules come in to force covering electronic disclosure in US federal courts. Tom could discuss what these changes are and what they will mean for businesses. He could explain what effects this might have, what happens if your parent company is in the US, or you have subsidiary over there, do you also need to comply.*

*World Tobacco is a monthly journal covering the worldwide tobacco industry from leaf tobacco production and other raw materials supplied to products manufacturers.*

*It covers the whole industry and is read by the big manufacturers down to SMEs.*

**Article – FINAL DRAFT**

On 1 December 2006, the American Federal Rules of Civil Procedure (FRCP) were amended to take into account some of the challenges associated with the disclosure of Electronically Stored Information (ESI) within the discovery stage of litigation. Similar amendments took place in October 2005 to the English Civil Procedure Rules (CPR). The purpose of this article is to look at how the English changes have impacted companies, explore the effect of the US modifications and specifically examine what tobacco companies might do in order to prepare for the at times daunting challenges of an e-disclosure project. As the majority of tobacco litigation emerges from the US, any firm doing business in this area could be significantly impacted by the new rules.

Most people's definition of ESI will refer to electronic data, such as emails, Word, Excel, PowerPoint or MS Project files. Collecting this information from a variety of locations, such as laptops, central servers and back-up systems, is complex enough, but ESI can also include the data stored on mobile phones, personal digital assistants (PDAs) and pagers. It can also include hidden data, such as "metadata", system information and deleted files. Finally, instant messaging (IM) is also within the remit of ESI and may need to be disclosed. Small wonder then that techno-savvy lawyers will be at a distinct advantage in the so-called "meet and confer" phase and may be able to obtain distinct advantages over their less technically literate opponents.

Both the CPR and the FRCP changes incorporated two main modifications. First, that it is now mandatory for the parties to have early discussions on e-disclosure issues, and second, parties must now declare those data sources they are not going to review for relevant material.

Companies might want to amend their litigation strategy to take account of these changes and should certainly incorporate an “early look” at the e-disclosure process into their case preparation efforts. The evidence from this last year would suggest that in England these changes to the CPR have yet to have a significant impact. In contrast, the US system – with its more advanced case law and in particular the recent trend of the courts imposing heavy sanctions and penalties on defaulting parties – could prove to be a less tolerant environment for those companies who are slow to embrace the new way of working.

The main thrust of the remaining amendments to the US rules is to attempt to apply some proportionality to the preservation and production processes. For example the new rules provide “limited protection” against sanctions for a party’s inability to provide relevant ESI lost as a result of the good-faith “routine modification, overwriting and deletion of information that attends normal use”. This concept was called “Safe Harbour” during the drafting of the rules, but this label has gone from the final version, possibly as an acknowledgement that the rule may actually offer very little protection from sanctions. As this concept has yet to be explored and tested by the US courts, for now the recommended approach would be to place a “litigation hold” on all such business practices as soon as it can be reasonably identified that there is the possibility of litigation. The mind-set of juries appears to be that companies always have a nefarious reason for deleting data and the punishments flow accordingly.

The other main attempt to reduce the burden of e-disclosure is to enable clients to exclude “not reasonably accessible” data sources from the scope of the production process. Again, this approach has yet to be tested by the US courts, and until the case law emerges, lawyers will need to have a wealth of technical information at their fingertips to argue as to the accessibility or otherwise of ESI. Remember these arguments might well be conducted in front of a Judge who is also coming to terms with a new, complex and rapidly changing environment. The early indications in this area seem to be that judges will tend towards a “sampling” approach, in effect forcing companies to at least have an initial stab at revealing all the identified data sources.

That said, the US rule changes are in effect trying to encourage a “two-tier” methodology for data production, with the “readily accessible” data being provided first and the more difficult (and costly) information only being produced if it can be proved that it is required. In advancing and countering the arguments for a two tier approach, lawyers will need to demonstrate their grasp of the technologies involved and the relative ease (or otherwise) that information can be retrieved, and the associated costs. The principle of cost sharing is associated with these debates, as lawyers will try to convince a sceptical judge that the production burden is onerous and should be borne (at least in part) by the requesting party.

As part of the new approach to the “meet and confer” process for both sets of rules, the opposing parties must also agree the format they will use to exchange data. This seemingly innocuous requirement also has the potential for complex technical discussions. In the US, the party requesting production has the right to specify the manner in which the data is produced and if they choose not to exercise that right they will have to accept the default option selected by the producing party. The producing party can challenge the proposed format if they consider it would be unduly burdensome. However, they are prevented from degrading the information by making it less searchable than it was to start with.

A final part of the attempt to obtain a more consensual approach in the US revolves around legally privileged documents. The rules recognise that a perennial problem with the large scale volumes associated with e-disclosure is the inadvertent production of privileged documents. To this end they encourage lawyers to consider entering into agreements over procedures for reviewing and producing documents without waiving privilege or work product protection. The rules provide two examples, called “quick peek” and “clawback”, but in practice their effectiveness may be limited. Certainly for tobacco firms, it would be a very brave lawyer who entrusted the safety of privileged documents to these defences, neither of which exist in the UK anyway. A priority for any e-disclosure exercise is the planning and implementation of an on-line privilege

review by a suitably qualified group of lawyers. A recent exercise for one firm saw the review work being controlled by UK law firm, with the data held in London, but being reviewed online by a team of contract lawyers in New York. This approach made maximum use of the US lawyers being able focus on privilege issues within the American system and was a cost effective means of delivered the required result.

What have been the practical lessons learnt by tobacco firms in preparing for litigation under these new rules? For the majority of the larger companies, who have lived in a state of perpetual litigation for many years, the concept of “hold orders” is well established for the paper documents and their traditional records management policies also encompass these concepts. However, the day to day practices of their IT departments will now have a vital impact upon their readiness to face litigation and it might be prudent for the in-house legal team to ensure their firm’s IT polices and procedures also meet their retention requirements.

What might prove to be more challenging for firms is firstly mapping their technical infrastructure and identifying where the information “silos” exist. Next will come the challenge of retrieving that data from the current environment and possibly also the back-up system, with the nightmare of trying to restore obsolete tape technologies and formats, ever present in this area. Though both sets of rules purportedly exclude the more “difficult to retrieve” information, the traditionally hostile approach of the courts to tobacco firms could possibly reduce the already limited effectiveness of this defence.

Based on the experience of one firm who recently engaged in the wide scale collection of ESI, an unexpected issue was the amount of personal information “embedded” within relevant, disclosable emails. Under UK data protection legislation, employers have a duty to prevent this information from reaching the public domain. Employees will be less than pleased to see their personal details and communications featuring on anti-tobacco websites as part of the online display of disclosed data. The time and cost of a review mechanism to find and redact this kind of information needs to be factored into any e-disclosure process.

In summary, companies and lawyers engaged in – or that might become involved in – litigation in the UK or US should plan early and extensively for the disclosure process. This may require detailed technical assistance so they can carry the argument for their approach quickly and understand the implications of the production process. They should be wary of loosing any control over privileged documents and above all embrace the thrust of the new approach before they (inadvertently or by default) fall foul of the courts and/or before a more techno-savvy opposition gains an obvious advantage.

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