Sponsors: **ACC Litigation Committee and Fios, Inc.**
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ASSOCIATION OF CORPORATE COUNSEL
Title: Spring Cleaning: Steps To Reduce Electronic Discovery Costs Under The New FRCP Amendments (or Planning For The New Federal Rule Changes)

Moderator: Melvin Merzon
March 23, 2006
1:00 p.m. ET

Operator: Just a reminder, today's conference is being recorded.

(Merzon): Welcome to all of you today. I'm (Merzon) and it's my privilege to serve as the moderator for today's Web cast, a presentation of ACC's litigation committee and sponsored by Fios.

No doubt, all of you all familiar with (Jubilate) and (Exprogony), and the numerous problems and concerns these decisions, along with later holdings, have imparted to the litigation discovery process.

Over the last several years, various studies, meetings, discussions, conferences and seminars have convinced the bench and bar of the necessity for and the importance of these essential changes to the federal rules of civil procedure in the electronic discovery arena. These revisions are the organized bar's efforts to bring uniformity, consistency and enablement to what some have called the chaos of electronic discovery.

In the next hour, therefore, we will be looking, as in-house counsel, and, for many of us, as litigators, at the ways in which we may prepare. Perhaps we should really say, we must prepare, for the coming December, when the changes in the rules will be put into practice. And it is there where our focus today will lie.

To give us their incite, we will be turning for assistance to our two, well-qualified experts. Note their backgrounds for their task at hand on the next slide as I introduce to you (Mary Mack) of Fios, the sponsor of today's Web cast and (Molly Nichols) with First Advantage Litigation Consulting Services.

Given the time constraints, to attempt to discuss all these changes in the rules would present an impossible task. Our speakers will therefore focus your attention specifically on two of the rules; Rule 26, which deals with early discussion and disclosure and Rule 37, dealing with sanctions and good faith. Both of these, as you will see, may well affect what we must do today, once before the rules themselves become active.

Following their presentations, which will be given without any interruption, (Mary) and (Molly), as the remaining time permits, will try to respond to specific questions and concerns you may have made during the Web cast.

Enter your question at any time, by placing your text in the box at the lower right of your screen labeled "Questions," and then press the send button. Know as well, that both our speakers will be pleased to respond my E-mail to any follow-up query. I will give you their E-mail addresses at the end of the Web cast.

Please remember to complete the evaluation, which you can easily find at the right of your screen under links number one.

May I know, therefore, turn our presentation over to (Mary Mack).

(Mary Mack): Thank you, (Mel). As we move into our discussion about the rules, let's talk a little bit about how things are right now and have been over the past years in E-discovery.

If we look at the timeline of a typical lawsuit, you'll see that the E-discovery phase is at the end primarily of the lawsuit. Many -- most people are doing preservation, and have been doing preservation of paper documents from the beginning of a lawsuit, but in our experience, people are just beginning to get their arms around preservations very early. And (Molly's) going to be talking about very early preservation and requirements around that.

The most Zubalake hardened organizations are, of course, preserving very, very early and discussing things very, very early, but primarily, the number of lawsuits that get to the end of this phase are very, very few, because settlements are going on, motion practice is going on, motions to dismiss, for example, summary judgment, so you eliminate a lot of cases that need dealing with.

When we move towards December 2006, because the time has been moved up to prior to the scheduling conference, which is 120 days, then more lawsuits are going to need attention in the E-discovery area. This will have staffing implications for all of you in your department, as well as the IT department, because they'll be information that needs to be discovered internally, adapted and then discussed with outside counsel. So this is the purpose of alerting you to the implications in time for budgeting.

(Molly) will be talking about what needs to be done early in the process, and she will be discussing Rule 37.

(Molly), do you have any comments about the timing involved in all of this?

(Molly Nichols): Absolutely. The preservation of the electronically stored information is going to be a key in where I'm going to focus my comments.

What we find is once the lawsuit is filed, that we have put ourselves in a very bad position, because internally, we didn't have all of our ducks in a row in order to preserve the information that ultimately will be requested during the E-discovery process the (Mary) was talking about.

What I'm going to focus on is Rule 37. Rule 37F is a brand new section. There has never been an F before. This -- and this is the rule where there was, I guess, the most controversy. It changed most significantly after the comment period, than any of the other proposed rules.

Now there's good news and bad news with this section. You know, we, as lawyers, have been put in a very interesting position with regard to all of this electronic data. It's taken us out of our comfort zone, and when we have learned through these cases that, wow, our information systems are actually destroying data all the time, and now the court is saying I should have kept it? How the heck was I supposed to do that?

Well, that's what Rule 37F is supposed to address. It's supposed to be protecting the parties now when the electronic evidence is lost of the routine, good faith operation of an electronic information system.

So that sounds pretty good, and that means maybe that the E-mail cycles that we've set up, you know, whether it's the amount that we allow by the number of days or by the volume. We can let that continue to cycle, and we'll be okay, right? Well, not exactly, and that's what we're going to talk about. This should calm some of your fears, but there's going to be a lot of discussion and a lot of case law to kind of flush this out and how much it will protect you. As you know, we've got more than just the E-mail I was discussing.

We've got backup tapes that are recycled within our document retention policies. We've also got live databases that are automatically creating and discarding and updating information, and so these are the types of things that will be covered in this particular rule.

Now in the past, this rule has been called the Safe Harbor, and for those of you who are familiar with (Ken Withers), who was at the Federal Judicial Center and is now a part of the Sedona Conference, he has been very vocal about not calling this a Safe Harbor. That it actually -- it has a lot of red flags that we're going to need to make sure that we plan and prepare before this takes effect.

Now, in effect, this rule codifies Zubalake, and I know the series of Zubalake opinions has scared all of us. We need to continue to look back at those for some direction in what our preservation duties are because they still exist.

We need to understand not only what our duties are, but also how are we going to accomplish this? This is a situation where we're going to need to understand a lot of different things about the organizations that we represent.

And this rule also does not prevent, of course, from issuing sanctions if a party does actually lose this responsive information. They have built judicial discretion within the rule. The rule starts out "absent exceptional circumstances" the sanctions will not be issued.

So it's the language of "absent exceptional circumstances" that allows this judicial discretion, and so we're going to still have to look at the jurisdiction that we're going to be litigating these cases, the particular judge and also the specific situation on how the data is lost.

The reason this was put in, during the comment period, there was a lot of concern from the judges that their discretion was taken away, but it also protects an entirely innocent party requesting discovery against serious prejudices, and that was the big concern of the judges.

Anyway, what are parties still required to do? And this is the hard part. Modify or suspend the routine operations to prevent the loss of information. This is the preservation obligation. When does that duty arise? Well, I think it's very instructive for you to read the comments to 37F, and I have put a couple of quotations in this particular slide.

The preservation duty isn't articulated within the comments, but it does say when a party is under a duty to preserve information because of a pending or reasonably anticipated litigation, and that's the exact language that was used in Zubalake, and you find that, you know, every jurisdiction has something a little different, what the standard is, but we're seeing reasonably anticipated litigation in most these days.

Then the question is, do we preserve our backup tapes? This has always been a big concern of organizations. The answer is probably yes. You need to preserve the backup tapes if the data is likely to be discoverable and not available from reasonably accessible sources. That's a direct quote from the comments.

OK, now how do we prepare for this change? What we need to do is look at our policies. We need to ensure that we have a litigation hold that is built into our document retention policies. We need to make sure that we educate our employees what this litigation hold actually is. We need to audit our policy to make sure there is compliance, and then we need to revise that policy to meet our business needs but also to make sure that we are complying with our obligation to preserve data.

Now the courts are going to be looking at how we go about implementing our litigation holds in our document retention policies. And when we go back to the language in Rule 37F, it talks about the good faith operation of the information system, and the question is what are they going to look at – what are the judges going to look at when deciding whether this was a good faith operation?

Are they going to look at whether our policy was designed in good faith? So at the time the design of the records retention program was made, or are they going to look at the operation at a certain point in time? And I think the answer's going to be both, and so this is a part of the process that you're going to be able to show the judge that yes, in fact, we had a good faith operation of our information system, this is the process we went through to build in this litigation hold within our document retention policy and then you can show the education, the audit and the revision due to, you know, whatever has come up within your business to make sure that that works effectively.

Now, let's talk about E-discovery and how that all works together. We know about our obligation pre-suit when we reasonably anticipate the litigation. And we know we need to develop a policy to make sure that this happens. Well, how do we do that? How do we make sure that we do this properly?

Well, you have to get a lot of people involved and got a list here. It's not a complete list. It's just a list to show that there are multiple people who need to be involved in this process. The general counsel, of course, IT, whether it's the systems administrator, you know, somebody else, including the CIO if you've got one within your organization. It's going to be different from organization to organization.

We should also include our records managers, outside counsel. We also need to understand that we will have different custodians, or as Judge (Shindlan) referred to them in Zubalake, these key players, those who are involved in the particular situation with which the litigation did arise.

Those folks are going to have to be included in this process when we get to a point where we're trying to communicate that there is a litigation hold that is in place for certain amounts of data -- for certain types of data. And it's the communication amongst all of these players that have been cited in so many cases, and the familiar to communicate has been problematic for many defendants, many companies, many organizations.

As far as technology goes, a part of the process, and, you know, putting together your policies and putting together these litigation holds, you're going to have to look at your particular systems to see what options are available to capture this data, to archive it, to monitor it, suspend various operations.

Every organization is going to be just a bit different, so you need to work with the various people within you organization to figure out how to preserve specific data for specific cases. Again, it's going to be different in every organization. But this is how you are building your case to be protected under Rule 37F and the good faith operation of your information system.

OK, who in your organization is the best to be a part of this process? That's something who you're going to have to evaluate, but you have to look at players from all different parts of your organization to put together not only the policy, but the practical implementation of that policy.

You have to figure out where all of the potential documents reside. Now, I don't know how many of you have experienced this problem, but I can tell you I have. We've got data out there that we would never expect. We've got employees who have some drive, or they like to forward documents to their home computers, or they use Web based E-mail accounts like Yahoo or G-

Mail and all the sudden, we've got data everywhere that it's not supposed to be. And so we need to start planning and putting in our policies provisions to deal with this kind of information.

We also need to figure out during our litigation holds how to find out if this information does exist even though you have a policy that says employees shouldn't E-mail documents home. You need to have a mechanism, whether it's just there's somebody responsible for interviewing each individual who may be a key player in this particular litigation. There are a lot of different ways to do it, but you need to figure out what's best for your organization.

The evidence collection plan is also going to be critical for organizations. When the litigation begins, once the case is actually filed, what we have seen is that the information that's been preserved or collected up to that time has been compromised in several different ways that it was not collected properly, whether that's taking a forensic image or, you know, however the decision is to collect that particular data. But we find that there are problems in that specific area, so you need to decide as a general counsel, as an organization, you know, how you're going to collect this evidence so that it can be authenticated down the road. It's going to be critical at some point in time.

Now if it's a particular case where you don't necessarily want to put the resources into getting forensically found images of all these various hard drives, then you need to be able to justify why you didn't do it that particular way, or there was another way that you could authenticate that particular data.

OK, continuing to plan for a December 1st, just in case that hasn't been said, December 1st, 2006 is when these new rules go into effect. You have to, like I have said before, that you have to identify the custodians, but how do you identify them, and how do you notify them?

It's this communication that is critical. You can't rely on sending E-mails. There has to be something else built into the process. It's -- whether you have, again, individual communication with each custodian, whether you have them signing off on something, but it's not just one path that you need to make at these particular custodians.

What we saw Zubalake, for instance, one of the custodians received notice at the beginning, but then was never asked to produce that information until late in the game. We've also seen that an initial E-mail at the beginning of a lawsuit to preserve data does not suffice. We need to continually update these custodians to ensure that they are continuing to preserve that data.

We also need to make sure that we are storing it properly, so that we can maintain the chain of custody and make sure that, again, we can authenticate that data. Now, you have to make a decision at some point in time, who is going to be doing these various things? Who's going to be collecting the data?

Do you want somebody within your IT department to ultimately take the stand and talk about the chain of custody or talk about the method of collection, or would you rather have a neutral third party out there to go ahead and assist with the collection, assist with developing the plan and even assist with developing the policy, looking at both the written policies and the actual practical implementation of those policies.

So that might be advisable if you're getting into a situation where somebody does have to take the stand to even talk about whether it was a good faith operation of the information system. So those are things to think about. Those are things to start with your planning, and, again, the law hasn't changed as much as, perhaps, we would have hoped it would have.

Your preservation duties still exist, and you need to make sure that you understand what your organization -- how your organization keeps their information, and it's taking us, again, outside of our comfort zone with regard to technology, but it's absolutely mandatory at this point in time.

(Mary), I will turn over the reigns to you at this point, and let you take the ball into Rule 26.

(Mary Mack): Very good. Thanks, (Molly). (Molly) has talked about the preservation obligation and some of the ways to go about doing that, and it falls right into what needs to now be discussed during the meet and confer.

If you'll notice, in the rule, we're now talking about any issues relating to preserving discoverable information. So if you find you have systems that are -- make it difficult to preserve, it's important that you be able to document that and disclose it in a proper way that will support your lawsuit rather than hurt your lawsuit.

The other thing in this meet and confer is that you're developing a proposed discovery plan that indicates both parties' or multiple parties' views on what should be done about some pretty important information. Your data, your ESI, as they are now calling it, electronically stored information, also the form or forms in which it should be produced, we're talking about privilege and what to do if you need to pull something back after production, and this is fairly early in your case

So as you're working through the elements that (Molly) has gone through, and you're working through the -- with the people, the process and the technology that (Molly's) talked about, all of this is important as you move forward for the meet and confer. So you can see that your overall scope of discovery is going to be discussed, the preservation, not just limited to your data, of course, preservation of other things and then privilege.

And moving back to preservation, there is also a provision in the rules for preservation orders, but if they are going to be having a preservation order, which in the past has been things like, don't delete anything from your servers, well, I don't know any organization that can run as a business without moving things off their servers. So here, the rules were tailored so that if a preservation order were to issue, the guidance to the judiciary is to tailor it very narrowly. So hopefully we won't have those things where folks will have their servers killing over and that type of thing.

Also early on, there are some provisions for claw backs and quick peeks, which basically means that if you, in the claw back, if you inadvertently produce something, there is a process and procedure to pull it back. And the quick peek is where you actually don't even review, you just give over your data, and the other side tells you what they want, and they you get to tell them what's privilege.

So you'll want to consider all these options and the impacts on your case very early on and how early? It's extremely early. The scheduling order is within 120 days after the complaint's been served. Your meet and confer is 21 before the scheduling conference, so you're talking, you know, within a couple of months of being served, and that's very early, and that's a huge change.

Of course, your preservation obligation as (Molly) discussed is when litigation is reasonably anticipated, and that leaves your working time about 60 business days, and that's 60 business days to get legal people, technical people from various parts of your organization, you as general counsel, your outside counsel, get everybody altogether on what you want to present as your discovery plan moving forward.

So what I've done here is put together a timeline, and not every case is going to require every single step, but if you are in a case that does require this type of care, this sets out some of the steps that you either must do or can do starting with what (Molly) had discussed, your preservation and your litigation holds and your destruction policies. Afterwards, you're meeting

with the key custodians, and one of the key things there as (Molly) mentioned is you need to monitor your preservation effort. And so determining whether or not the legal hold is being complied with is a key element very early in the case.

One of the strategic advantages you can do is to figure out how much preservation is costing you so that if people ask -- the other side asks for more preservation, you can say, "Well, this is what we're doing, and if you want more, this is what it will cost you." So you're going to be giving schedules, so you're going to need to assess what you have and then, you know, put your proposal together, here's your deadline for the meet and confer, and then you can see the scheduling order.

So what's happening here is that all the motion practice that used to happen late in the case over electronic discovery has been pushed up to before 120 days. The purpose being to get it all out on the table, get it all resolved, to unclog the courts, move cases faster. There's all good intent in it. One of the unintended results, I think, is to put a whole bunch of work on the laps of general counsel and CIO's to get organized for many more cases than they would have had to previous.

People, technology and process, these are the things that you'll be talking about. Now, in terms of strategic discussion items, because the well-prepared general counsel and team will be able to move forward with these rules in a very strong way.

As your assessing your preservation, and you're learning about what needs to be preserved, you'll be talking with folks in your organization or contractors that serve the folks in your organization, and one or two of them will emerge as people who are articulate and who answer questions well, and they may become your person most knowledgeable.

Sometimes this task on preservation and finding out where all the data is is delegated to a technical person, but what I've experienced is many litigators like to sit in on those discussion so that they can assess people as witnesses -- potential witnesses.

Now, you can learn about how the custodians or the players are distributed within your organization and the impact on how much data there will be, which directly impacts not only the cost of E-discovery and preparing the data for review, but the downstream review costs where outside counsel reviews at an hourly rate, so your total cost of discovery.

So you can limit. I've listed some things that you can use as limitations. The last one is custodian creep, the same or similar duties, assistance, third parties and things of that nature.

That comes from the new rules for second requests. They've -- (austensively), they've limited the custodians, but they put in a clause that just broadened it like crazy, so as -- they have some great language in there that you can learn about how people do that, but they include the assistance, third parties.

And then the last item on this slide, communicating with particular people or on particular subjects. This will require that you go through everybody's E-mail or at least a much larger subsection than you would then if you name particular people or name particular departments. This is the most costly thing, so it's something to watch out for in your negotiations.

Around technology, (Molly's) covered preservation, accessible and inaccessible, that's outside of the scope of this particular Web cast, has to do with forensics. Inaccessible is generally has to do with forensics and back up tapes, and so most of you have read Zubalake. The definitions pretty much follow that, but whatever you can see with a computer with regular tools is generally considered accessible and the responding party is on the hook to pay unless it's not reasonable, and that's an old rule.

So as your discussing technology, you'll want to be talking about your search. This is -- we discovered this in Morgan Stanley where the search was not case sensitive, or excuse me, was case sensitive, so that if you search for Sunbeam with a capital "S" you would not get sunbeam with a small "S". This was key in that decision as was the search did not search attachments and things of that nature. So you'll want to know about that.

Date ranges, there are several dates on file, and my suggestion there is to use the modify date or the date sent/received as opposed to the create date or the access date. And then the sampling, we've experienced folks deciding to sample as a way to reduce costs. And depending on how the sampling is structured, that can be true or not true.

If you just restore one tape, for example, but need to process and review all the material on it, you may end up increasing your costs dramatically as opposed to sampling very discrete people, very discrete dates, that type of thing.

And then your production options, this is a shift, and this is -- currently practice is that the people who are responding get to specify how they're going to produce, so if somebody wants to produce in say, for example, tifs with load files, that's what they offer up, and then the other side needs to say why that's not good enough. Now the requesting party gets to say how they want it, and those who are responding must say why that's not appropriate. So there's a shift there, that I believe is going to cause more native files to be requested, and so you'll want to be prepared with strategies for that.

Around process, as I mentioned before, there is the inadvertent production procedure, and this is something I suggest developing a template for. There's a couple of these things that you can figure out now how do you handle that and have that at the ready so that you don't need to waste time developing it at the inception of a lawsuit.

So the inadvertent production procedure would need to cover if you receive information that is privileged, how will you, once notified, assure the other side that you have destroyed it? And so there's a technical process that will need to be developed, and that's something that you would need to do with your outside counsel. What review platform are they using and that -- those types of elements.

Your protective orders, this is key especially if you're going to be doing any quick peeks. Protective order around your non-disclosure and confidentiality, because even though you can get this material back, if you're giving over intellectual property or other information that should not be widely disclosed, or you don't wish to be used in other matter, you'll want to have a very tight protective order. And again, you can have a template developed so that you're at the ready with that.

Now, the next thing is what are you going to produce and when are you going to produce it? And that is going to be specific to each case. Some of the things where people have gotten into trouble is that they will make up what can be produced and when, not taking into account how long it takes to physically copy material from one devise to another. To then get it ready for review, how much human time does it take for an attorney to put eyes on a document and review it?

Are there ways that you can use technology to reduce the number of documents that that would need to happen for? But all of your first rolling production, your discovery cut-off date, you know, so those are the bounds of what you're dealing with.

Some realistic production intervals, you're not going to want to produce, for example, weekly. That would put -- at least not to volunteer to produce weekly -- that would put everybody on a

fairly force march. Perhaps every two weeks would be a more appropriate thing, or every month would be an appropriate thing.

Then you want to build in a procedure for exceptions and exceptional circumstances, because you're -- there's always going to be the data that doesn't fit into -- neatly into a box. They'll be proprietary assistance, especially if you're in manufacturing or transportation where you may have devices that data needs to be pulled from that you can't use traditional tools from.

So you'll want to have that procedure baked into your proposal. I have a note here on number of days prior to a deposition, if you can get some relief on that, that would be a good thing to discuss and have baked into your proposals as well.

Now back to the scheduling order, once this is baked, if your proposals are put into an order, and that's not a given, it's not going to be modified. You can see that, you know, this is different than an agreement of the parties where you might be able to go back and get a little bit of extra time. You're setting yourself up very early in the lawsuit to either demonstrate good faith or not, and so all of your preparation and all of your negotiations in this first 120 days become all that much more important.

Now I'm going to turn it back over to you, and (Molly), you were -- do you have any comments or questions?

(Molly Nichols): Actually, I do have a comment. There were some questions that came in during the presentation asking about things that were outside of meet and confer and the sanction provision under 37F, and just want to make sure that everyone understands that we weren't talking about all of the various rules, and so that we will not be responding to those types of questions today. It would take a lot more time than we have available, so we apologize about that, and if we had a little more time, we could go into those other rules.

(Merzon): (Mary) or (Molly), do you want to respond specifically to some of the questions that were asked by our attendees? We still have a little bit of time left, and perhaps we can use that to respond to these questions or concerns.

(Mary Mack): Well, sure. There was one question around whether or not discussing accessible and inaccessible data is important in the Rule 26 discussions, and I would say, yes, absolutely. If you can bake that into your agreements early as to -- obviously backup tapes are inaccessible, but how many are you going to preserve? Are you going to preserve your daily backups? That doesn't make any sense. That doesn't make economic sense, and you may be able to have monthly or quarterly tapes backed up, or you may be able to save only tapes for a particular time period that is of interest in a particular matter and save quite a bit of money on that.

The other -- other than backup tapes, the inaccessible data would also be forensically collecting everything. Doing that is a big expense. It also saves a lot of material, for example, people's Web searches and a lot of their personal information that you may or may not want to be saving, and that's a decision that you'll want to make amongst yourselves, but to have an agreement on only a small amount of forensic collection, and perhaps they'd need to specify who'd they want and an agreement on costs surrounding that. That would be key.

Now the other parts that -- where there's some wiggle room in the accessible/inaccessible, I believe, are around things like voicemail where it's a proprietary voicemail system, very difficult to collect, very difficult to review as opposed to what they would call a unified messaging system, and those of you who have received bound files in your E-mails, those would be a little -- those, I probably consider accessible, but the ones that are in your PDX system, I -- you know, you could easily make an argument that those are inaccessible.

So with the expansion of electronic evidence into electronically stored information, things that weren't previously considered discoverable or at least arguably so are now, you know, squarely in the bally (wick), but you may be able to make the argument and get it down that it is inaccessible and therefore, have the opportunity to shift costs and put it into the second tier. In the second tier discovery, you, you know, you're moving down the contours of the case, and some of these cases will disappear, and you won't have to do it.

(Molly), do you have a different view?

(Molly Nichols): I think just another thing to add, when you're looking from the sanction on what you're going to end up preserving, you know, backup tape wise, you've got to consider whether that the data or the information would be available from a reasonably accessible source to begin with, you know, before you get to those backup tapes.

So if you prepare ahead of time to consider that when you're developing your policy and when you're looking at your particular system, perhaps there's another way before litigation is -- has even been filed to preserve that information. You know, whether, again, it's doing some sort of program to preserve that information, to capture it or archive it, then try to do that ahead of time, so that you don't have to get into the situation of preserving, you know, all the backup tapes that (Mary) was talking about, the daily, the weekly. Or you could look at it in an interval situation to capture as much of the data in looking at the intervals of your backups and taking -- you're basically doing a sampling at that point, recreating almost all of the data by looking at your various intervals.

(Merzon): (Mary) or (Molly), would you like to address some of the other questions?

(Mary Mack): Yes, we have a quick question here on claw back agreements, and the question is what is our view of Magistrate Grimm's analysis that they create exposure to waiver claims and other

litigation. And my view is that that's something that needs to be looked at jurisdiction by jurisdiction, because waiver claims arise, you know, in your particular area wherever the case is, but yes, I believe that this is an area that will go back and forth and that there is a risk there.

(Molly), do you have any thoughts on that one?

(Molly Nichols): Yes, the only thing that I would do is not only enter into the agreement with opposing counsel, but then get the court to order that if something is inadvertently produced that you can claw it back, and if there's a court order that's protecting you, I don't think there's anything else that you can do.

If you end up in a strict waiver jurisdiction, if you inadvertently produce it in another case in another jurisdiction, then the best you can do is to do a claw back agreement with an order from the court.

(Mary Mack): Right and I think underlining what both of us are saying here is that this is something to consider for mistakes, not as a strategy to produce without reviewing for privilege. (Molly), is that your sense?

(Molly Nichols): Absolutely. This is just for the inadvertent production of privileged material, and with the volume of data that we have in all of these cases, that is a real problem of inadvertently producing the privileged material, so protect yourselves.

(Merzon): Alright. There are a few other questions remaining. Would either of you like to tackle one of them?

(Mary Mack): Certainly. Certainly. One of the questions is around the plan, and is there only one plan or are there several plans. And the rules are written so that if you can't come to an agreement with

the other side, that you can propose your own plan, and what we're finding in some of the organizations that have serial litigation, just one after the other after the other, is even though the rules aren't into effect, they're coming prepared to these discussions, and they're documenting in such a way that they're plan looks extremely reasonable and looks like it is in the best of good faith using transparency as a strategic advantage.

And so you're able in some ways to limit your exposure, limit your costs, and at the same time look really good doing it. So that's one thing, and I'll just add to that, the rule requires that parties confer, and there was a recent case in a state court where the requirement to confer was actually spelled out by the judge who got pretty irritated, or the magistrate, where he said that it means really talk to each other.

It doesn't mean volleying E-mails back and forth to each other on here's what we want, oh no, you can't have it, and here's why. It means getting on the phone or having an in-person meeting where you actually have a discussion of these items, and I think that's a -- one of those canary in a coalmine things that we'll see that documenting your conversation, documenting your -- well, obviously you have documented your E-mails and your formal letters, but documenting those phone calls, documenting the times that you get together and actually make a good faith effort to come to an agreement will also go a long way towards demonstrating your good faith.

And as (Molly) said in Rule 37, the courts are going to be looking towards good faith as a reason not to give you sanctions, so it's key to do that. (Molly)?

(Molly Nichols): Looking at another question that came in about sharing model claw back agreements and E-discovery plans. (Mel) is going to share with you our E-mail addresses here shortly, and so feel free to E-mail me, and I'm sure (Mary) will do the same, and we will share different forms that we have with you.

(Mary Mack): Yes.

(Merzon): Let me give those E-mail addresses at this time. (Mary's) E-mail address is mmack -- "M" as in (Mary), of course -- Mack, M-A-C-K @fiosinc, F-I-O-S-I-N-C .com. And (Molly's) is mnichols, N-I-C-H-O-L-S, mnichols@ "F" as in Frank, "A" as in apple, "D" as in David, "V" as in Victor .com. Again, mnichols@fadv.com. So if you have a question that you don't feel was answered to your satisfaction and you would like additional information from either of our speakers, feel free to contact them.

In addition, if you simply want additional information about any of the topics covered in the Web cast today, they invite your E-mail as well. So take that opportunity to avail yourself of additional information.

At this time then, we will bring to a close our presentation of today. The three of us hope you have acquired some useful information from the presentations which have been made and have gained some incite on how you need to prepare now for what will be in December as you handle requests for electronic discovery in the remaining months.

(Mary), (Molly) and I thank you for being with us and hope you conclude that your time was well spent.

In closing, please remember to complete the evaluation form, which you will find at the right of your screen under links. Look for number one.

That takes care of our Web cast for today, and we wish you a good day. Thank you.

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