



CORPORATE ACCOUNTABILITY

VOL. 8, NO. 590

REPORT

JUNE 11, 2010

Document Retention

Boards Advised to Oversee E-Discovery By Tapping IT, Compliance, Other Functions

■ **Practice Tip:** *As the use of electronic discovery in litigation grows, boards of directors are advised to enlist the aid of other corporate functions—particularly information technology, compliance, and corporate counsel—to help manage the flow, storage, and retrieval of data in their organizations.*

All public company boards would be wise to collaborate with other functions within the company to monitor how information is being documented and retrieved throughout the organization in light of the growing use of e-discovery in litigation and the increasingly complicated effect that advanced technology is having on a board's ability to manage data, corporate attorneys and a business development specialist told BNA in recent interviews.

It is imperative that boards and managers take information management seriously to avoid problems in future litigation and with upholding their reputation, Betsy P. Collins, a business and securities litigation partner at Burr & Forman LLP in Atlanta, told BNA June 7.

An increasing number of boards are finding it useful to designate specific directors to handle e-discovery, Edward H. Rippey, a patent litigation partner at Covington & Burling LLP in Washington, told BNA June 3. "Companies that do not have such a director in place should strongly consider whether one should be assigned," he said.

For further guidance on e-discovery, directors can look to the recent decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, Rippey said (*Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, S.D.N.Y., No. 05 Civ. 9016 (SAS), amended opinion filed 1/15/10) (8 CARE 122, 2/5/10).

For improved data management, companies should consider integrating their information technology and records management functions with their legal departments, Dean Kuhmann, vice president of business development at Lateral Data LP in Houston, told BNA May 27.

Furthermore, many companies have, and will be, facing complications with document retention and

e-discovery resulting from the use of electronic mailing systems, Jon A. Neiditz, a partner who leads the information management practice at Nelson Mullins Riley & Scarborough LLP in Atlanta, told BNA May 27. "E-mail has long been known as an imperfect medium for organizational communication, but few organizations have taken a hard look at what would be better," he said.

Strong Information Management Is Crucial. There is an entire area of risk management that is addressed solely as "cyber risk," Collins said. "There are many ways a company can encounter problems these days from cyber risks and many more governmental regulations in this area than in the past. Therefore, this issue must rise to the board oversight level," she said.

Information technology and data management are important risk factors that should be included in enterprise risk management for all companies and their boards, Collins said. "There are committees that boards of directors appoint for risk management purposes. Even at the audit committee level, the ability to effi-

Key Steps for Effective Data Management.

Betsy P. Collins, a business and securities litigation partner at Burr & Forman LLP in Atlanta, told BNA May 26 that boards should consider taking any of the following actions to make sure they are effectively managing their documentation systems:

- Implement and diligently maintain and enforce a strong document retention program;
- Set up clear protocols or procedures for litigation holds—a suspension of routine document retention and destruction policies that ensures preservation of routine documents for litigation purposes;
- Establish an e-discovery committee responsible for developing plans for handling litigation involving e-discovery and general document production;
- Consider setting up special document repositories and a data map showing locations of information within the organization; and
- Consider employing e-discovery directors and consulting with information management specialists.

ciently, accurately, and quickly process data is crucial," she said.

"Boards I have worked with, especially by and through their audit committees, do have general oversight of the company's internal controls and systems that might pose risks to the company," Collins said. These boards—particularly the outside directors and audit committees—must rely on management, internal auditors and outside auditors to do the "heavy-lifting," she said.

"I have seen companies have committees that were set up to address ERM issues, but the ones I have seen included management on the committee," Collins said. Generally, ERM issues may fall under the audit committee's purview, she said. For pending litigation, sometimes a special committee with oversight of a particular piece of litigation could run into these issues, she said.

"I think that management, particularly the general counsel, should be addressing these issues and making recommendations about putting in place systems and measures to effectively handle these issues," Collins said.

The general counsel's office should be making recommendations about addressing the aspects of data management that relate to e-discovery, litigation, investigations, compliance, and similar areas, Collins said. The IT department, records department, or similar functions should also be highlighting areas of concern, she said.

Mindset About Documentation Needs To Change. Directors and executives generally do not manage their records for ease of producing them to a plaintiff's attorney, Collins said. "First and foremost, their records are managed for the purpose of running the company," she said.

"With e-discovery rules and the advancement of technology in the business world, companies must put aside the mentality that they are spending money for something that is effectively to assist plaintiff's lawyers in the event of litigation," Collins said. "Companies must consider their document retention systems and management of information as a matter of potential enterprise wide risk for the organization," she said.

Some large companies are even employing directors of electronic discovery, Collins said. "This may be a wise practice for management to consider, and perhaps at the board level with audit committees," she said.

"Many companies are looking to outside counsel to help them generate document retention programs that will adequately take into account their particular industry, litigation, and compliance risks," Collins said.

With regard to disclosures in ongoing litigation, Collins said, "I don't know that it's possible to generalize as to what everyone is doing, but I would not expect every piece of litigation and the disclosures associated with it to be board level questions."

"I have seen these issues rise to board level concerns, but usually only in connection with bet-the-company litigation or in litigation that has developed serious problems brought about by disclosure or spoliation issues," Collins said.

"For most large public companies, preparation is key because there is no question that litigation requiring e-discovery will occur. It is only a matter of time," Collins said. "It is simply too late for boards to stop and organize information once litigation is underway," she said.

Boards Can Look to Recent Case for Guidance. According to Rippey, *Pension Committee* offers much needed clarification regarding e-discovery requirements.

In an opinion filed Jan. 11 and amended Jan. 15, plaintiffs involved in a complex financial transaction suit were sanctioned for conducting discovery "in an ignorant and indifferent fashion." The court in its opinion included a discussion on how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls in each category. It also discussed the law governing the imposition of sanctions for a party's failure to produce relevant information during discovery.

"An emerging problem that companies will definitely see more of in the near future is the growing use of more fluid technologies for communication including Facebook, Twitter, and other sites that contain user-generated data," Rippey said.

For improved data management, it would be wise for companies to consider integrating their information technology and records management functions with their legal departments, Dean Kuhlmann, vice president of business development at Lateral Data in Houston, told BNA May 27.

According to Kuhlmann, with e-discovery, much of the focus lies with targeted collections of data.

"Companies do not want to find themselves collecting extra data that they will later end up spending time and resources to filter through again," Kuhlmann said. "There is a growing focus on better search and categorization technologies, methods of extracting data from the corporate environment prior to actual processing and review," he said.

Among the highest e-discovery related concerns for companies now is the high cost of data search and categorization technologies, Kuhlmann said. However, the speed of the review and accuracy of retrieved data are benefits of such technologies that should not be overlooked, he said.

E-mail Is Major E-Discovery Issue. It is time for organizations to consider alternatives to e-mail and instant messaging not only in collaboration software, but in communications as well, Neiditz said. "If a preservation obligation exists, then the obligation can be satisfied through the use of technologies that do not involve the flaws of e-mail systems that lead companies to lose control over information," he said.

Companies should "consider the issue of replication, which has always been a problem even when sender and recipient organizations control all of their own servers," Neiditz said. Both organizations are likely to create many replications and backups of every e-mail, giving what can be construed as "eternal life" to information that was intended as a casual communication under an illusion of privacy, he said.

"The problem has been magnified a hundredfold now that you never know what the recipient organization is doing with public cloud computing when you send them an e-mail," Neiditz said. "If the recipient's e-mail service is outsourced to a cloud provider—which is increasingly likely given that such outsourcing greatly enhances speed and capacity—the sender's e-mail may be replicated all over the world, including in places from which it cannot be retrieved and destroyed, the moment it hits the recipient's server," he said.

According to Neiditz, new modes of “text-based communication that cannot be so forwarded or so replicated raise ‘knee-jerk’ questions about whether the sender is trying to ‘hide something.’” In response to this new technology, e-discovery specialists may immediately point to the possibility of spoliation, or the failure to

preserve all electronically stored information relevant to a reasonably likely dispute or investigation, he said.

BY TINA CHI

*A full text of the **Pension Committee** case is available at <http://op.bna.com/car.nsf/r?Open=tchi-8622f3>.*