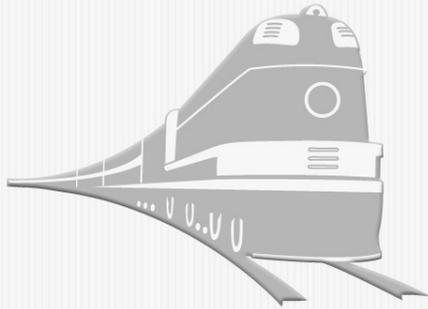


2007 BUSINESS LITIGATION EXPRESS



DESTINATION : INNOVATION

[InsideCounsel]

FOLEY
FOLEY & LARDNER LLP

 **LexisNexis**
Martindale-Hubbell*

©2007 Foley & Lardner LLP • Attorney Advertising • Prior results do not guarantee a similar outcome • Models used are not clients but may be representative of clients • 321 N. Clark Street, Suite 2800, Chicago, IL 60610 • 312.832.4500 • 07.3575



2007 BUSINESS LITIGATION EXPRESS

Discovery Exposed: Managing Costs and Directing Information in a Digital World

Mark F. Foley, Foley & Lardner LLP
William (Bill) J. McKenna, Foley & Lardner LLP
Scott T. Seabolt, Foley & Lardner LLP
Scott Wrobel, Stout Risius Ross
Frank Ziegler, Lawson Products, Inc.

[InsideCounsel]

FOLEY
FOLEY & LARDNER LLP

 **LexisNexis**
Martindale-Hubbell*

©2007 Foley & Lardner LLP

07.2007



Electronic Discovery

Developments and Strategies

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



Electronic Discovery

- » New FRCP effective December 2006
 - New state court rules and guidelines adopted
 - U.S. District Court local “guidelines” adopted

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



Rule 34(a): What Is a Document?

- » **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents **or electronically stored information** - including writings, drawings, graphs, charts, photographs, sound recordings, images, **and other data or data compilations stored in any medium from which information can be obtained** - translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 34(a): What Is a Document?

- » The new definition removes any ambiguity whether electronic records are included
- » “Electronically stored information”
- » “Stored in any medium”
- » Same definition is used elsewhere in the Rules – 26(a), 33(d), 45
- » Make sure nevertheless to use broad document definition, including “electronically stored information,” in your discovery requests

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 34(b) Form of Production

- » A document request may specify the format of production
- » A responding party may
 - Object to the requested format
 - State the reasons for the objection
 - State the form that will be used

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 34(b) Form of Production

- » If no particular format is requested or if objection is made, then the producing party must state the format of production that it intends to use; and
 - May use a format that it ordinarily uses; or
 - May designate a “reasonably usable” form
- » Absent a court order, a party need not produce a document in more than one format. (Note for Rule 16 conference and 26(f) Meet and Confer)

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 34(b) Form of Production

- » What does this mean in practice?
 - Clients usually maintain “native” documents, meaning Microsoft Word, Excel, or PowerPoint
 - Metadata in “native” documents may be significant

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Rule 34(b) Form of Production

software to look over the hard drive and find the characters “g-a-d-g-c-t” in order without specifying search terms to find. This search can be performed in a search engine, where the search terms are relevant to a specific search only.

A good forensic analyst will use an initial part, for example, keywords and deleted files. Upon further review, the analyst will find the email address.

Keyword Searching Limitations_TOTM Properties				
General	Summary	Statistics	Contents	Custom
Created:	Tuesday, August 17, 2004 10:10:00 AM			
Modified:	Tuesday, August 17, 2004 10:13:19 AM			
Accessed:	Sunday, August 22, 2004 12:50:34 PM			
Printed:				
Printed by:				
Last saved by:	dstenhouse			
Revision number:	1			
Total editing time:	2 Minutes			
Statistics:	Statistic name	Value		
	Pages:	:		
	Paragraphs:	5		

Vital Dates and Times

system for locating the address to the attorney search through

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Embedded Data

The screenshot shows a Microsoft Excel spreadsheet with the following data:

	A	B	C
1	Employee Name	Employee Number	SSN
2	Janice Smith		1 111-11-1111
3	Mike Barnes		2 222-22-2222
4	Joe Marks		3 333-33-3333
5	Laura Jones		4 444
6			
7			
8			
9			

A tooltip for Laura Jones (row 5) contains the following text:

Dave Stenhouse:
Laura's been late to the last two office meetings. Her alcoholism might be back on the rise.

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell



Rule 34(b) Form of Production

- » Difficulties in working with “native” documents
 - Issues of applying bates control numbers and/or confidential legends
 - The document is “dynamic” – a live document and can be altered
 - Clients frequently have proprietary programs necessary to view or use the data, which software may otherwise be unavailable, and therefore must be given to the requesting party

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell



Rule 34(b) Form of Production

- » For ease of document management, the producing party will most often want to produce “picture” images, such as “TIFF” files
- » Practice suggestion: Get a stipulation from the other side to produce in TIFF images, while reserving the right to request native documents when potentially important. Agree on metadata.

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » **A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, **the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.** If that showing is made, **the court may nonetheless order discovery from such sources if the requesting party shows good cause,** considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.**

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » The drafters rejected an “active” versus “inactive” data test, and enacted a multi-factor test to determine whether records are “reasonably accessible”
- » Factors for determining if document is “Reasonably Accessible”
 - The specificity of the discovery request
 - The quantity of information from other and more easily accessed sources
 - The failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources
 - The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources
 - Predictions as to the importance and usefulness of the further information
 - The importance of the issues at stake in the litigation
 - The parties’ resources

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » Issues
 - Obsolete hardware or software
 - How frequently does the IT department restore data from backup tapes?
 - How long does it take to restore a file?
 - Has there ever been a full-restore performed?
 - What kind of disruption will there be to the responding party’s business?

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » Objection Requirements
 - Not a privilege log
 - However, objection must identify the category and type of sources not searched
 - Objection should provide enough detail to enable other party to evaluate the burdens and cost of providing the discovery and likelihood of finding responsive information in the identified sources
 - Objection should provide an explanation of the technical issues and likelihood of finding relevant information

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell*

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » Cost Shifting – Generally, no cost shifting although advisory note suggests that the requesting party's willingness to bear cost to access data is a factor to be weighed in determining whether good cause has been shown

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell*

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(2)(B) Reasonably Accessible Documents

- » Unanswered question: If a party objects that some sources of data are not reasonably accessible, what is that party's duty to protect against destruction of that evidence?
 - The advisory notes state that the rule does not absolve a party from any common law or statutory obligation to preserve records
 - Whether there is an obligation to preserve depends on the facts of the individual case
 - The advisory note may arguably be contrary to Zubulake IV, 220 F.R.D. 212 (S.D.N.Y. 2003), which generally states that inaccessible backup tapes are generally excluded from a duty to preserve

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Rule 37(a) – Safe Harbor

- » Prohibits a court from imposing sanctions where the destruction of evidence was based upon the operation of a party's routine, good-faith operation of an electronic information system
- » Purpose
 - Help calm fears (and avoid sanctions) when data is lost or overwritten in the normal course of business
 - Designed to cover “the ‘routine operation’ of computer systems including the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents”

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Rule 37(a) – Safe Harbor

- » Rule 37(a) does not give a pass to destruction of records by the normal operation of an electronic information system
- » Parties have duty to refrain from destruction by the implementation of a “litigation hold”
- » Preserve back-up tapes if data is “likely to be discoverable and not available from reasonably accessible sources”

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(5)(B) Retrieval of Inadvertently Produced Privileged Documents

- » The Rule: If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. . .

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Rule 26(b)(5)(B) Retrieval of Inadvertently Produced Privileged Documents

- » Rule does not address the substantive waiver question, which remains a matter of either state or federal law
- » Rule simply provides a procedure by which notice of the inadvertent production and demand for return is made

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



What Has Happened in the First Year of the New FRCP?

- » Dozens of cases
- » Some emerging trends

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

© 2007 Foley & Lardner LLP

07.2007



Not Reasonably Accessible: Rule 26(b)(2)(B)

- » “Not reasonably accessible” includes:
 - Back-up tapes
 - “Deleted” computer files
- » Mere conclusory statements about undue burden are insufficient

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Good Cause for Producing Not-Reasonably Accessible Electronically Stored Information (ESI)

- » What constitutes “good cause” to require production of “not reasonably accessible” information?
 - More courts than not have made a “good cause” finding
 - *Ameriwood Industries v Liberman*: Good cause exists, and doesn’t

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Safe Harbor for Routine Good Faith Data Losses: Rule 37

- » Extensive evidentiary record required to establish the nature of the system and the adequacy of the production
 - “Good faith” requires a timely litigation hold
 - “Good faith” requires a well designed, effective litigation hold
 - “Routine” is critical. Deletion operations that are varied often do not qualify.

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Form of Production: Rule 34(b)(ii)

- » The preservation duty clearly includes metadata
- » Courts are split on requiring production
 - Courts requiring metadata rely on “how documents are maintained in the ordinary course of business”
 - Emerging rule: So long as ESI is produced in a searchable format, must produce metadata only after requesting party shows particular need for it

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Failures to Produce

- » 3-Step collection protocol ordered to remedy failure to fulfill obligations
 - Requesting party hires independent examiner who examines producing party's computers
 - Examiner gives extracted ESI to producing party for privilege review
 - Producing party produces responsive, non-privileged documents within limited time

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Sanctions

- » Money: Plaintiffs receive \$6.72 million reimbursement of fees and expenses caused by failure to obey discovery order. *Wachtel v. Health Net, Inc.*, 2007 dis. LEXIS 44225 (D.N.J. June 19, 2007)
- » Steps to Take: Produce Back Up Tapes for failure to put litigation hold in place early. *Disability Rights Counsel v. Wash. Metro.*, 2007 WL 1585452 (D.D.C. June 1, 2007)

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Sanctions

- » Counsel threatened: *Qualcomm Inc. v. Broadcom Corp.*, No. 05-CV-1958-B (BLM) (S.D. Cal. Aug. 13, 2007)
- » Sanctions denied: No obligation to preserve evidence based on letter and call notifying defendant of trademark rights, but inviting resolution short of litigation. *Cache La Poudre Feeds, LLC v Land O'Lakes, Inc.*, 2007 U.S. Dist. LEXIS 15277 (D. Colo. Mar. 2, 2007)

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Privileged Document Clawback

- » Advisory Committee on Evidence Rules approved proposed Rule 502(a)
 - Exception to general rules re: inadvertent disclosure “if the holder of the privilege. . . took reasonable precautions to prevent disclosure” and acted promptly after discovery of the inadvertent disclosure
 - Waiting for U.S. Supreme Court decision

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



International Issues

- » Multinational companies with European affiliates face conflict of laws issues
 - U.S. discovery law vs. extra-territorial application of orders
 - U.S. discovery law vs. European Union (EU) Data Privacy Directive

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



International Issues

- » Is data held in the EU reasonably accessible?
 - Yes, if you have a legal right to get it. In re: NTL Securities Litigation, 02 Civ. 3013 (LAK)(AJP) (S.D.N.Y.) (Op. and Or. Jan. 30, 2007)
 - Yes, even if EU law prohibits it. *Columbia Pictures, Inc. v. Bunnell*, 2007 WL 2702062 (Aug. 24, 2007): (the mere existence and reference to the Dutch [privacy] law...was not good enough to excuse production in a U.S. proceeding; production ordered within two weeks)

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Corporate Designee Depositions

Use and Defense

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



The Rule 30(b)(6) Deposition

- » What is a Rule 30(b)(6) deposition?
 - Allows a party to name a corporate entity as a deponent
 - The party must specify with “reasonable particularity” the topics on which the corporation will be deposed
 - The corporation may then designate one or more representatives to be deposed on those topics
 - The designee’s testimony is binding on the corporation at trial
- » There are numerous similar state law provisions as well: Del. Sup. Ct. Rule 30(b)(6); Ill. Sup. Ct. Rule 206(a)(1); Tex. R. Civ. P. 176.6(b)
- » Some Rule 30(b)(6) pitfalls
 - No limit on the number of topics a party may specify for a single deposition
 - Party served with 30(b)(6) notice may be required to tender multiple officers or employees to respond fully to all topics

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



The Rule 30(b)(6) Deposition

- » More Rule 30(b)(6) pitfalls
 - Former employee or officer may even have to be tendered (if willing) to fully respond
 - Despite the “reasonable particularity” requirement, designees may be asked about anything
 - Some courts even allow designees to be questioned about matters relating to subsidiaries of the corporation
 - Parties may notice multiple depositions, each for a separate topic, and then depose one designee per topic for seven hours each (local rules permitting)
 - Designees are often deposed as both corporate representative and in their private capacity at the same time – which can lead to confusion about the “hat” they are wearing when answering
 - Opposing counsel may ask about the designee’s preparation – if only privileged documents form the basis of testimony, privilege may be waived

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



The Rule 30(b)(6) Deposition

- » Practice Tips
 - Make sure designees know they are not required to answer questions outside the scope of the noticed topics if they have no “corporate” knowledge (as opposed to personal knowledge)
 - If the designee is deposed as both a corporate representative and an individual, advise the deponent to ask whether questions ask for personal or corporate knowledge before answering

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Responding to Third-Party Subpoenas

Process and Efficiency

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Dealing with Third-Party Subpoenas

- » Rule 45 allows parties to issue third-party subpoenas right up to the start of trial
 - Nothing in the rule requires third-party subpoenas to be issued within the discovery period, though some local rules require it
 - Know your local rules
- » Rule 26's new e-discovery rules require more planning for third-parties responding to subpoenas
 - Anticipate how much responding to broad document requests might cost – an estimate may come in handy when dealing with the requesting party
 - Under 45(c)(2)(B), your client may be reimbursed for the cost of production pursuant to an order to compel – particularly for e-discovery
 - Knowing this in negotiation may help you scale back the scope of document requests

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Dealing with Third-Party Subpoenas

- » 45(d) provides that electronic data that is not “reasonably accessible” must be shown by the requesting party on motion to be worth the trouble of production
 - To decide accessibility, courts focus on the breadth of the request, the likelihood of finding responsive data, the availability of the data by other means, the amount in controversy, and the burden on the third party
- » Often a subpoena will not specify the format in which the information must be produced
 - 45(d)(1)(B) requires that information be produced in the form in which it is ordinarily maintained or in a form that is reasonably usable

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis®
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Dealing with Third-Party Subpoenas

- » Start the process of gathering and sorting as early as possible
 - Depending on the circumstances, consider assigning an in-house attorney on a revolving monthly or weekly basis to supervise receipt of subpoenas, tracking and organization of documents, and supervision of para-professionals
- » Label all potentially responsive documents “responsive,” “not responsive,” and “questionable”
 - Prepare a memorandum for each “questionable” document stating why it is not responsive – this will save time later if the requesting party challenges you
- » Prevent spoliation of documents by employees
 - Issue a “lockdown” or litigation hold on all responsive documents – especially electronic documents
 - Prepare a litigation hold memorandum beforehand to send to employees to ensure they understand their obligations

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis®
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Dealing with Third-Party Subpoenas

- » Keep your documents organized
 - Keep documents in the context in which found, not by topic – it will be easier to determine whether privilege applies later
 - Index all responsive and questionable documents
 - Locate any critical, potentially privileged documents – keep close track of them to avoid inadvertent disclosure
- » Contact the requesting party to negotiate a response and discuss issues of privilege, scope, timing and form of production
 - Offer a sample of particular categories of documents to let the requesting party decide if they want full production
 - Stress costs of production if they may be assessed to the requesting party, as well as added time and cost of sifting through irrelevant documents
 - Weigh the costs of litigating objections to the subpoena against the benefit of keeping information confidential

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Dealing with Third-Party Subpoenas

- » Be sure to serve a Rule 45(c)(1)(B) response and objection within the time limit (earlier of 14 days or requested response date)
 - Can be in the form of a letter invoking appropriate rule
 - Service of such an objection automatically stays the obligation to produce until the requesting party obtains an order to compel (or you negotiate an arrangement)
- » Pay close attention to what is actually requested in the subpoena
 - Often, the “metadata” associated with electronic documents is not responsive to the subpoena request, even if the documents are
 - Non-responsive metadata should be scrubbed – putting the document in PDF format is not enough

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Privacy and Subpoena Response Issues

- » Health Insurance Portability and Accountability Act of 1996 (HIPAA)
 - Prohibits subpoenas for “protected health information” except
 - » Pursuant to an express court order;
 - » When the requesting party gives “satisfactory assurances” that reasonable efforts have been made to notice the person whose information is requested, but has received no response or all of that person’s objections are resolved; or
 - » When a “qualified protective order” (either a court order or an order issued on the parties’ stipulation) will prevent the information from being publicly released and mandate its return or destruction after the litigation

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Privacy and Subpoena Response Issues

- » Title V of Gramm-Leach-Bliley Act (GLBA) – 15 U.S.C. §§ 6801-09
 - Protects “nonpublic personal information” from release by banks
 - Nonpublic personal information is any information provided by a consumer, about a consumer resulting from a transaction with the bank, or information obtained about consumer in connection with providing services
 - Bank customers must be given the opportunity to opt out of any release of nonpublic personal information
 - However, § 6802(e)(8) of the GLBA makes an exception when banks must comply with a “properly authorized” subpoena issued by Federal, state or local authorities
 - Note that the GLBA does not provide protection when a bank provides customer information pursuant to an unauthorized subpoena – in other words, you need a court-issued subpoena for nonpublic personal information

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

Predicting the Unpredictable

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

- » Four steps for predicting the unpredictable
 - Case assessment
 - Benchmarking
 - Budgeting
 - Periodic Reviews/Repeat the Process
- » Each of these steps can be applied to the overall case or to an individual task in the case

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

- » Early case assessment
 - What is at stake?
 - » Direct financial exposure
 - » Indirect financial exposure
 - » Policies, principals and politics
 - What are the issues?
 - What are the strengths and weaknesses?

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

- » Benchmarking and Planning
 - Has the company or its counsel been involved in similar litigation or performed similar tasks before?
 - » What was the outcome?
 - » What impacted the outcome?
 - » What was the cost?
 - » What impacted the cost?
 - Develop a plan => how do we bring this case to a successful conclusion?

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

- » Budgeting
 - Keep the case assessment in mind
 - What are the assumptions?
 - » Volume of documents
 - » Number of depositions
 - » Motion practice (how do you know?)
 - » Experts
 - Are the assumptions valid?
 - What do we know about opposing counsel or the Judge that might impact the budget?
 - Compare against benchmarks

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Managing Discovery

- » Period Reviews/Repeat the Process
 - Budget vs. actual
 - » What have we accomplished in the plan?
 - » What did it cost?
 - » How has it impacted our case assessment?
 - Reassess the case
 - » Has the exposure changed?
 - » Has the climate changed?
 - Reassess the budget and the plan

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell

©2007 Foley & Lardner LLP

07.2007



Closing Remarks

- » Q&A
- » Thank you!

InsideCounsel

FOLEY
FOLEY & LARDNER LLP

 LexisNexis
Martindale-Hubbell®

© 2007 Foley & Lardner LLP

07.2007