Fall 2006

Wayman, Irvin & McAuley, LLC

WI&M

# Your Best Defense

Lawyers Solving Problems

Vol. 5 No. 2 www.waymanlaw.com Associate Member of PAMIC

Welcome once again to Your Best Defense, Wayman, Irvin & McAuley's bi-annual newsletter. This edition provides a look at a number of hot topics of interest to a broad spectrum of readers, as recent legislation and court decisions could greatly impact how one conducts business and assesses risk of liability exposure.

Of prime interest in the field of litigation, as well as the area of corporate record keeping and maintenance, are the new amendments to the Federal Rules of Civil Procedure dealing with ESI, or electronically stored information. Kevin Eddy takes a detailed look at the new rules, discussing not only the requirements for production of this type of information in a legal setting, but also the practical implications for a company that needs a defined system for e-record retention and retrieval systems.

Michael Magulick examines an area of major concern to defendants and their carriers, namely the manner in which attorney fee awards are to be calculated in Pennsylvania. Examining the traditional "lodestar" method of calculation and the increasingly proposed percentage-of-recovery method, Mike looks at recent case law and addresses the pros and cons of each in both high and low verdict scenarios. He concludes with a suggestion of the position that insurers should take with respect to this issue.

Our firm has represented for over forty years a wide variety of local agency and sovereign entities. In this edition, Richard McMillan looks at recent case law in this area which strains to expand the exceptions to local agency immunity and which, ultimately, effects how and under what circumstances immunity can be successfully asserted. This is critical reading for anyone that analyzes the exposure risk for local agencies.

Finally, James Creenan dissects a recent decision where, in a pharmaceutical case, the defendant attempts to challenge the plaintiff's choice of forum. The doctrine of forum non conveniens in Pennsylvania is examined in this article, and conclusions are drawn as to what to expect from the courts in addressing issues as to where a plaintiff is permitted to bring an action against a pharmaceutical company or other corporate entity.

*We hope you enjoy the Fall 2006 edition of Your Best Defense. Please contact Dale Forsythe at dforsythe@waymanlaw.com or any of our contributors for more information on the topics discussed or on any of the areas of our practice described at www.waymanlaw.com.*

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## *FORUM NON CONVENIENS AND THE PHARMACEUTICAL CASE*

*By: James W. Creenan, Esq.*

In an important statement for defense counsel attacking a plaintiff's chosen forum, the Pennsylvania Superior Court recently reversed a trial court's ruling that granted the defendant's motion to dismiss for *forum non conveniens* ("FNC"). *Wright v. Aventis Pasteur, Inc.*, 2006 PA Super 203 (Pa. Super. 2006).

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<u>Background</u>

The Wright family resided in Texas and brought suit in the Philadelphia County Court of Common Pleas against various manufacturers of preservatives and vaccines. The Wrights alleged in their complaint that the Thimerosal-containing preservatives and vaccines caused their son's autism, neurological and immunological problems. They further alleged the Thimerosal contained high levels of mercury.

The Wright's child received his vaccinations in Texas, and substantially all prenatal care occurred in Texas. No treatment occurred in Philadelphia County or anywhere in the Commonwealth of Pennsylvania.

The defendants first filed preliminary objections and

*Forum Non Conveniens, continued on page 2*

*Forum Non Conveniens, continued from page 1*

later the subject FNC motion to dismiss after the plaintiffs amended their complaint. The defendants also stipulated each would accept service of process, admit personal jurisdiction, and waive any statute of limitation defense if the Pennsylvania court dismissed the case.

Plaintiffs responded to the motion alleging that two witnesses and a back-up computer storage unit were in Philadelphia and that the defendants transact business in the county.

The trial court concluded that the plaintiff's chosen forum - Philadelphia County - should not be disturbed in the absence of "weighty reasons" but held the chosen forum had only tenuous contacts with the lawsuit and dismissed the case under 42 Pa. C.S.A. § 5322. The trial court addressed the long-standing public and private interests that must be addressed in resolving a *forum non conveniens* motion.

Forum Non Conveniens in Pennsylvania

Pennsylvania courts utilize two different analyses when determining a FNC motion - one for intrastate (asserting another county in Pennsylvania is more convenient than the county chosen by plaintiff, requiring proof of "oppressive and vexatious" forum-selection) and one for interstate (asserting another state is more convenient that Pennsylvania). Section 5322 of the Judicial Code allows a trial court to dismiss a case upon a determination that "in the interest of substantial justice the matter should be heard in another forum." The case law requires consideration of a series of "public" and "private" factors, with emphasis on two additional factors. First, weighty reasons must exist to disturb the plaintiff's chosen forum. Second, an alternate forum must be available to the plaintiff. Therefore, even if the trial court has jurisdiction, the case can be dismissed on FNC grounds that another court can more conveniently resolve the suit.

Trial Court Reversed

On appeal of the trial court's order granting the defendant's motion to dismiss, a three-judge panel of the Superior Court examined the same factors but arrived at a contrary result.

The Superior Court first noted that the FNC motion was filed on the deadline to file pretrial motions, negating any claim that discovery and depositions would be more conveniently conducted in the alternate forum. This underscores the need for an early initial litigation analysis.

Next, the Superior Court recognized that the plaintiff's case focused on decisions made by the Philadelphia manufacturers to use Thimerosal without adequate warnings throughout the world. The court further examined the pleadings to conclude that the defendant corporations took certain action in the Philadelphia area, and the plaintiffs listed 21 cooperate witnesses that live in the Philadelphia area and other witnesses subject to the jurisdiction of Pennsylvania courts. This point emphasizes the "weighty" consideration afforded to the plaintiff's pleaded claims and trial strategy.

Moreover, the parties had completed discovery, rendering null any argument that the parties, counsel, or witnesses would be inconvenienced by traveling to the chosen forum.

Conclusion

In sum, the Superior Court ruled the defendant corporations were required to conduct the trial of the plaintiff's Thimerosal claims in an "inconvenient" forum due to the nature of plaintiff's claim and trial strategy, and, to a lesser extent, the timing and absence of any inconvenience to the parties.

*Attorney Creenan will be happy to discuss these or related issues further if you would like. Please contact him at jcreenan@waymanlaw.com.*

## *UPDATE TO LOCAL AGENCY IMMUNITY*

*By: Richard L. McMillan, Esq.*

The Pennsylvania Commonwealth Court recently revisited the issues dealt with by the Pennsylvania Supreme Court in the case of *Grieff v. Reisinger*, 548 Pa. 13, 693 A.2d 195 (1997). In the case of *Reid v. City of Philadelphia*, 904 A.2d 54 (Pa.Cmwlth. 2006), a three-judge panel of the Commonwealth Court appears to have further expanded the exceptions available to plaintiffs to the immunity provided to local agencies under the Political Subdivision Tort Claims Act, 42 P.S. Section 8541 et seq. The fact situation involved a typical slip and fall on a snow and ice covered sidewalk. Significantly, however, this was a sidewalk that happened to abut property owned by the City of Philadelphia.

Instead of addressing this situation within the parameters of the exception to immunity for "sidewalks within the right-of-way of streets owned by the local agency," Section 8542(b)(7), the Commonwealth Court looked to the exception provided for the "care, custody or control of real property in the possession of the local agency," 42 Pa.C.S. Section 8542(b)(3). The plaintiffs

would not have prevailed if the court had examined the facts as they applied to the "sidewalks" exception, since that exception to immunity requires "a showing that the condition causing harm arose from a defect *of* the property, rather than from artificial substances on the property," *Reid* at p. 59. Before the Supreme Court decision in *Grieff*, the Pennsylvania courts had treated both the real property and sidewalks exceptions to local agency immunity as requiring an actual showing of a defect inherent in the real estate or sidewalk, rather than the accumulation of substances such as snow and ice thereon. The Supreme Court, however, departed from earlier precedents in the *Grieff* case by holding that a fire association could be held liable for injuries arising when an individual was burned when paint thinner used to clean the floor of the fire station ignited.

Later, the Pennsylvania Supreme Court, relying on its earlier decision in *Grieff*, held that the City of Philadelphia could be held liable under the real property exception for an accumulation of snow and ice on a roadway located at the Philadelphia International Airport owned by the City, *Kilgore v. City of Philadelphia*, 553 Pa. 22, 717 A.2d 14 (1998).

A significant difference in the *Reid* case is that the accident did not happen on the actual property owned by the city; rather, it happened on a sidewalk abutting the property. The argument was made that the Court should have examined the facts under the sidewalk exception rather than under the care, custody and control of real property exception, since the accident happened on a sidewalk within the right-of-way of streets owned by the municipality.

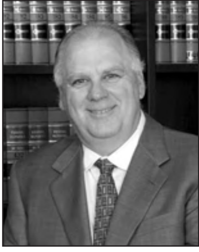
The three-judge panel of the Commonwealth Court in the *Reid* case adopted reasoning from the plurality decision handed down previously by the Commonwealth Court in *Sherman v. City of Philadelphia*, 745 A.2d 95 (Pa.Cmwlth. 2000) and the Pennsylvania Supreme Court's analysis in *Walker v. Eleby*, 577 Pa. 104, 842 A.2d 389 (2004). The *Sherman* opinion brushed aside away the clear language of the "care, custody or control of real property" exception to immunity which unambiguously stated that " 'real property' shall not include:...(iv) sidewalks." The *Sherman* court reasoned that, "despite the clear language of the real property immunity waiver - and particularly that section's exclusion of liability with regard to sidewalks - a municipality can be primarily liable for injuries resulting from the municipality's negligence as to the condition of its sidewalks that adjoin the municipality's real property. (As summarized in the *Reid* decision, supra. at p. 58.) Furthermore, the Commonwealth Court panel in *Reid* concluded that the Pennsylvania Supreme Court had "tacitly accept[ed] this Court's plurality conclusion in *Sherman* that, where a municipality is the owner of the real property that adjoins a sidewalk, the municipality can be held primarily liable under Section 8542(b)(3)" for a failure to make the sidewalk safe for pedestrian travel, *Reid*, supra. at p. 58. Because the Pennsylvania Supreme Court had stated that the city could only be secondarily liable in the *Walker* case since it "did not own the premises", the Commonwealth Court inferred that the Supreme Court would have held the city primarily liable if it had owned the abutting premises.

To some, including this writer, the reasoning of the various cases cited in the rather thorough analysis in the *Reid* opinion may seem tortured as part of an effort by the courts to expand the exceptions to immunity even though the legislature was very specific in stating that the term "real property" shall not include "sidewalks" for the purposes of the care, custody and control of real property exception.

The *Reid* opinion also provides a review of the long recognized "hills and ridges" doctrine, but there was little factual dispute as to whether the accumulation was of such size and character to satisfy the requirements of the plaintiff's burden under the hills and ridges doctrine. In *Reid*, the city's own maintenance employee testified that the accumulation of ice and snow on the sidewalk abutting the city property was such that it would have required the use of a pick to remove it. When he was unable to locate the pick, that employee simply spread rock salt over this clearly hazardous portion of icy sidewalk. As is often the case, a bad set of facts can lead to bad law.

The clear hazard presented by ice that was allowed to exist on the sidewalk so long that its thickness required a pick to break it up for removal may have doomed the city's efforts to convince the court that the plaintiffs should have been required to satisfy the requirements of the "sidewalks" exception to avoid immunity. Instead, the appellate courts of Pennsylvania have again found a way to get around the legislature's stated intent to insulate local agencies from liability and to also get around the doctrine often stated by our appellate courts that exceptions to immunity under the Political Subdivision Tort Claims Act are to be "narrowly interpreted," *Mascaro v. Youth Study Center,* 514 Pa. 351, 523 A.2d 1118 at p. 1123 (Pa. Supreme Ct. 1987).

*Attorney McMillan will be happy to discuss these or related issues further if you would like. Please contact him at rmcmillan@waymanlaw.com.*



## LODESTAR METHOD OF CALCULATING COUNSEL FEES IN A BAD FAITH ACTION

*By: Michael L. Magulick, Esq.*

The United States Supreme Court has applied or recognized the general American rule that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. Pennsylvania's bad faith statute, 42 Pa.C.S._8371, provides that "[i]n an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court **may…assess court costs and attorney fees against the insurer.**" (emphasis added). As such, Pennsylvania's bad faith statute provides an exception to the general American rule against awards of attorneys' fees. In *Polselli v. Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524 (3d Cir. 1997), the Court held that plaintiff was entitled to recover not only the fees she incurred in litigating the contract claim, but also those incurred in litigating the bad faith claim. The Court further held that Pennsylvania Rule of Civil Procedure 1716 governed the calculation of the award.

In *The Birth Center v. St. Paul,* 727 A.2d 1144 (Pa.Super. 1999), affirmed 787 A.2d 376 (Pa. 2001), the court found that after a finding of bad faith, it was for the trial court to make a determination as to the policyholder's entitlement to interest, reasonable attorney's fees, and costs. This decision presented a number of significant holdings in regards to the award of counsel fees in a bad faith action. The fee is discretionary and subject to an abuse of discretion standard of review. Also, any award must ultimately be "reasonable." Also, recovery of attorney's fees "is not limited to the bad faith claim." An award of attorney's fees can also include "fees incurred in pursuing the insured's rights under the policy and/or protecting the insured's interests...including appellant fees..." *Id.*

To date, Pennsylvania courts have used the "Lodestar" method when awarding attorneys' fees in bad faith cases. Under this method, the initial estimate of reasonable attorneys' fees requires the Court to first inquire into the hours spent by the attorneys on their services and then multiply those hours by a reasonable hourly rate. Absent extraordinary circumstances, an attorney's reasonable rate for fee awards is the market rate charged to private clients. Once the lodestar has been established, the Court may then adjust this figure with a "multiplier" to reflect the quality of the attorney's work, the benefit to the client, and the contingent nature of the litigation.

In the recent decision in *Jurinko v. Medical Protective Company*, 2006 U.S. District Lexis 13601 (E.D.Pa. June 23, 2006), the United States District Court for the Eastern District of Pennsylvania upheld a $7.9 million award against an insurance company, marking the largest insurance bad faith verdict ever awarded in Pennsylvania. Plaintiff sought attorney fees. The Court first noted that the Pennsylvania Supreme Court has yet to address the application of attorneys' fees in cases brought under section 8371. The Court held that a trial court may not refuse to award attorneys' fees under section 8371 simply because it believes the insurer had been punished enough by a punitive damages award. An award of attorneys' fees serves not to punish a defendant, but to compensate a victorious plaintiff. Here, the Court found that the work of plaintiffs' counsel and the compensatory rationale of the bad faith statute more than warranted an award of attorneys' fees.

As to the issue of reasonableness, the Court first addressed plaintiffs' argument that the percentage-of-recovery method, rather than the traditional lodestar method, should apply. The Court held that while it is unclear whether Pennsylvania Rule of Civil Procedure 1716 necessarily precludes the percentage-of-recovery method, *Birth Center* made clear that application of Rule 1716 to a bad faith claim begins with use of the lodestar method. *Birth Center*, 727 A.2d at 1160. The Court further held that the Third Circuit had already declined to adopt the percentage-of-recovery method in *Polselli*. Additionally, the Court held that plaintiffs' proposed approach under the percentage-of-recovery method does not achieve the objective of awarding fees under Section 8371.

Defendant in *Jurinko* did not dispute the hours spent nor the rates charged. The dispute was within plaintiffs' argument to increase the lodestar figure by a multiplier of seven. The Court held that notwithstanding their favorable impression of counsel's work, plaintiffs have not offered sufficient evidence to justify an enhancement here. The Court further held that the punitive damages awarded worked to deter insurers from intentionally mistreating their insureds in the future and therefore no enhancement on the basis of results achieved and benefits to the public was appropriate. Moreover, the Court held that the magnitude and complexity of the litigation did not justify an enhancement either, as the actual legal issues and factual disputes were not considerably complex. Lastly, the Court found that a contingency enhancement was not warranted because any risk of contingency is fully incorporated in the base lodestar amount. As such, the Court concluded that the lodestar amount represented a reasonable award of attorneys' fees in the matter and that no adjustment to that amount was warranted.

In *Gallatin Fuels, Inc. v. Westchester Fire Insurance Company*, 2006 U.S. Dist. LEXIS 36033 (W.D.Pa. June 2, 2006), the U.S. District Court for the Western District of

Pennsylvania, similar to the court in *Jurinko*, held that despite the substantial damages awarded, both compensatory and punitive, an award of attorneys' fees was warranted to make plaintiff whole.

## IMPLICATIONS FOR INSURERS

Pennsylvania courts to date apply the lodestar method, but it is unclear whether the percentage-of-recovery method will be applied in Pennsylvania at some point in the future. The question thus becomes, in terms of paying out an award of attorneys' fees, is whether the percentage-of-recovery method or the lodestar method is more beneficial to insurance companies.

An obvious factor for consideration in answering this question is the size of the award. In cases such as *Jurinko* and *Gallatin*, the use of the lodestar method worked to the advantage of the insurance companies. The lodestar method yielded awards of attorneys' fees in the amount of $323,167.50 and $1.1 million respectively. Had a 30% percentage-of-recovery method been applied, the insurance companies would have been forced to pay $2.37 million and $1.75 million respectively. The apparent drawback to the application of the lodestar method lies within cases where the award is minimal. For example, in a case where a plaintiff is awarded $5,000 in compensatory damages, the lodestar method could easily yield an attorneys' fees award of $50,000 based upon the number of hours it took for attorneys to win their client that minimal award. If a 30% percentage-of-recovery method were applied in this case, the attorneys' fees award would only be $1,500.

However, there are some additional, less obvious considerations suggesting that application of the lodestar method is more beneficial to insurance carriers. First, as noted in the discussion of *Jurinko* above, a Court may increase the lodestar amount by a multiplier based on a number of factors, one of which is the quality of services rendered. The Court in that case however, held that notwithstanding their favorable impression of counsel's work, which yielded the largest insurance bad faith verdict ever awarded in Pennsylvania, plaintiffs were not entitled to an enhancement of the lodestar amount. Therefore, it appears as though Pennsylvania courts will apply an extremely high standard to warrant the use of a multiplier. As such, it appears unlikely that an insurance company would be require to pay an attorneys' fees award higher than the lodestar amount.

Next, as illustrated by *Interfaith Community Organization*, 426 F.3d 694 (3rd Cir. October 19, 2005), once a defendant makes a sufficiently specific objection to the hours submitted by plaintiff's counsel, the burden rests on the plaintiff to justify the size of its award, and a court must go line by line through the billing records supporting the fee request. This burden placed on plaintiffs thus reduces the risk of insurance companies paying for excessive billing by plaintiffs' counsel. Further, a line of decisions involving awards of attorneys' fees in civil rights cases indicate that for the determination of a reasonable attorneys' fees award, the amount involved and the results obtained should be considered. See, e.g., *Swann v. Charolette-Mecklenburgh Board of Education*, 66 F.R.D. 483, 484 (W.D.N.C. 1975).

In *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 718 (5th Cir. 1974), the Fifth Circuit listed the following among its guidelines for the determination of a reasonable attorney's fee award:

> "(8) The amount involved and the results obtained...Although the Court should consider the amount of damages, or back pay awarded, that consideration should not obviate court scrutiny of the decisions's effect on the law. If the decision corrects across-the-board discrimination affecting a large class of an employer's employees, the attorney's fee award should reflect the relief granted."

In *Hughes v. Repko*, 471 F.Supp. 43, 47 (1978), the Court applied the principles articulated in *Johnson* and gave significant consideration to the "results obtained." In that case, the jury returned an award of $1,250 in compensatory damages and no punitive damages. The Court held that the modest award of damages reflected the fact that the defendant's act of discrimination affected the plaintiffs in only a limited manner and that the defendant's misconduct, while not excusable, was of a minor nature. Therefore, the Court found that the verdict awarded did not correct across-the-board discrimination affecting a large class of persons nor did it eliminate a widespread or pervasive violation of civil rights. As such, the Court concluded that the minimal benefit produced by the litigation did not warrant an award of the full value of the time expended, and thus the Court reduced the objectively determined fee of $1,660 to $830.

This line of reasoning can be used by an insurer to defeat an award of attorneys' fees that is significantly larger than the compensatory award.

Finally, the use of the lodestar method reduces the possibility of the several million dollar attorneys' fees awards that are likely under the percentage-of-recovery method. Although in terms of smaller awards, the lodestar method may yield disproportionate attorneys' fees awards, application of the lodestar method will reduce the possibility of multimillion dollar awards that are likely under the percentage-of-recovery method as applied to significant jury verdicts, such as those in *Jurinko* and *Gallatin*.

*Attorney Magulick will be happy to discuss these or related issues further if you would like. Please contact him at mmagulick@waymanlaw.com.*

## E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

*By: Kevin M. Eddy*

On December 1, 2006, new amendments to the Federal Rules of Civil Procedure will take affect to specifically address the unique challenges of electronic discovery. The amendments will modify the existing rules in a manner intended to further highlight the importance of and provide a more established frame work regarding electronic discovery. Obviously, the unanswered question involving the procedural and operational adjustments concerning insurance companies and other organizations is wide spread. The likely impact of the amendments involve both intangible affects and more concrete operational changes.

Specifically, the amendment to Rule 26(a)(1)(B) requires the initial disclosure of copies, or description by category and location, of all electronically stored information ("ESI"). Rule 26(b)(2)(B) limits the disclosure of ESI from sources that the producing party identifies as not reasonably accessible because of undue burden or cost. In addition, the Rule 26(f) conference must also address any issues relating to disclosure of discovery of ESI, including the form or forms in which ESI should be produced.

Other ESI rule changes involve Rule 33(d), which allows a party answering interrogatories to indicate that the answer to a specific interrogatory can be gleamed from ESI. Rule 34, pertaining to document production, permits a party to produce any ESI, 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. Rule 34(b) permits the requesting party to request the ESI in a specific form. In responding to the Request for Production, the responding party must produce the ESI in the form requested, unless the party obtains a protective order. If the requesting party does not specify the form of the ESI production, the responding party must produce the ESI as it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form.

Lastly, Rule 37, pertaining to sanctions, has also been amended to address the ESI issue. Specifically, absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system. Otherwise, ESI is treated as any other form of documents.

The ESI concept has already permeated the vernacular of judges and legal pundits. Consistent and uniform terminology will result in a more uniform approach by the Courts to ESI discovery. The new amendments send a clear message of standardization and inevitability surrounding ESI discovery. Everyone is now on notice, and any uncertainty regarding the overall importance of ESI, is removed. As such, ESI discovery practice will only increase and will become part of almost all federal civil litigation.

In terms of a more specific operational impact, a consistent theme throughout the amendments is one of *de facto* requirement for large organizations to adopt a systemized internal process to address inevitable ESI discovery. This theme of systemization is steeped in three key elements of the amendments: the early attention requirements, the native file production requirement for ESI, and the safe harbor rule for deleted data in the normal course of business.

One of the most important aspects of the pending amendments is that they direct attention to electronic discovery issues early in a litigation process. For instance, the amended rules require that relevant or electronic evidence be identified, preserved and disclosed at the initial outset of the litigation. As noted by the judicial conference in the September 2005 comments: "the proposed amendments present a frame work for the parties and the court to give early attention issues relating to electronic discovery including the frequently recurring problem of the preservation of the evidence."

The preservation element is particularly critical. Courts are increasingly holding parties to a stricter standard concerning the preservation of ESI and the amendments and their corresponding comments strongly emphasize the important duty to properly preserve ESI. The comments to Rule 26(f) note: "the volume and dynamic nature of electronically stored information may complicate preservation obligations...failure to address preservation issues early in the litigation increases uncertainty and raises a risk of dispute." As such, under these new rules, litigants will face a much higher likelihood of court sanctions if they fail to properly preserve relevant ESI at the outset of litigation.

In order to properly identify, preserve and disclose relevant ESI, large companies are establishing a highly operational and systemized process to address ESI requirements as a standard litigation practice with each

case instead of a more reactive and *ad hoc* approach. The traditional "wait and see" approach to ESI discovery - or company and their counsel often defer addressing ESI until its production is demanded by their opponent - results in a disjointed approach to ESI typified by hurried out-sourcing of other non-systemized collection and preservation efforts that greatly increase costs and risk. However, such practices are no longer sustainable under this new frame work. Only with a integrated systemized and efficient and internal process to routinely identify and preserve relevant ESI at the outset of each case will organizations be able to establish reasonableness in the eyes of the court.

Another key systemization element of the amendments involves the provisions for the production of ESI. Rule 34(b) is amended to supply a procedure for specifying and objecting to the form of production of ESI. Under new subsections 34(b)(ii) and 34(b)(iii), the default form for production of electronically stored information is that "in which it is ordinarily maintained or reasonably usable." It is widely expected that parties will request that ESI be produced in native file format which is generally how the data is ordinarily maintained and is the most usable formats.

Additionally, numerous recent decisions hold that file metadata contained within ESI must also be preserved and produced. See *Nova Measuring Instruments, Ltd., v. Nano Metrics, Inc.*, 417 F.Supp. 2d. 1121 (N.D. CAL. 2006). (Upholding discovery orders requiring production of documents in native format with metadata is not clearly erroneous). While ESI discovery is out-sourced and not systemized, it is difficult to properly preserve and produce ESI in its native format with its metadata intact.

Finally, the safe habor rules are also a key systemization element of the new amendments. Subsection 37(f) is added which states, in full, "absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good faith operation of electronic information system." The advisory committee notes explained that ordinary computer use necessarily involves routine alteration and deletion of information for reasons unrelated to litigation.

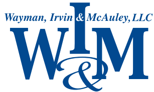
However, in order for a party to establish that deletion of ESI resulted from their routine and good faith operation of their electronic information system, the party must be able to demonstrate the existence of an established well documented and systemized electronic records management process. This process must be effectively tied into the parties litigation readiness plan, so that litigation holds are effectively executed. Again, this is impossible without a well-planned and established system wide process. As with each of the elements of the new rules discussed above, the more established and systemized the process to preserve, collect and delete ESI, the more reasonable and defendable the process will be seen in the eyes of the court.

The traditional and non-systemized approach to electronic evidence discovery involves a highly manual process to gather immense sums of data and then load that data onto a system that allows for searching and processing. This approach results in ever increasing costs as the volume of data in a corporation grows. For instance, without enterprise computer investigation technology, collecting files from hundred or even thousand of computers distributed across multiple locations must be performed manually. With no means to triage and filter out irrelevant data, the collection was a little broad, with a great deal of irrelevant data aggregated into a central data base where it is then finally processed and searched. Metadata is lost in the process and files are migrated into non-native format.

Establishing a defending process is a critical element of compliance as opposing counsel are now routinely seeking to capitalize on E-discovery struggles of large companies. Lawyers in particular seek to distract the defense with "litigation within litigation" allegations of spoliation or lack of due diligence in complying with E-discovery requests. Plaintiffs seek to gain a significant advantage of obtaining evidentiary sanctions, petitioning the court for an order allowing their own experts to investigate the corporate defendant systems or otherwise driving up the cause of litigation by forcing costly and over broad computer evidence investigation. With the new Federal Rules frame work, these tactics are only going to increase.

In the end, companies will need the assistance of counsel to implement guidelines and monitor ESI so that large volumes of data can be retained when necessary, deleted when appropriate, and produced when required.

*Attorney Eddy will be happy to discuss these or related issues further if you would like. Please contact him at keddy@waymanlaw.com.*



**Wayman, Irvin & McAuley, LLC**

*www.waymanlaw.com*

437 Grant Street
Suite 1624 Frick Building
Pittsburgh, PA 15219
(412) 566-2970

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# *Wayman Watch...*

- *Kate Fagan has recently been selected as Secretary of the prestigious Academy of Trial Lawyers of Allegheny County.*
- *The firm is please to announce the addition of William J. McPartland to our professional staff. Will is a 2004 University of Pittsburgh School of Law graduate and will be focusing his practice on defense of insurance bad faith actions.*
- *James Creenan was recently appointed to be a Trustee of the Allegheny County Bar Foundation and also nominated as a Fellow of the Allegheny County Bar Foundation.*
- *Dale Forsythe and Michael Magulick will be serving on the planning committees for the PAMIC 2007 Claims Summit and Convention.*

*Wayman, Irvin & McAuley, LLC*

*would like to wish you all a*

*Happy and Healthy Holiday Season!*