Spotlight on Electronic Discovery: What Every Information Audit Professional Needs to Know
The Importance of Communication

“The single biggest problem in communication is the *illusion* that it has taken place.”

---George Bernard Shaw
Agenda

- Introduction to Electronic Discovery
- Applicable Electronic Discovery Law
  - Federal Rules of Civil Procedure
  - Duty to Preserve
  - California Approach
- The Electronic Discovery Process
  - Sedona Conference, ABA EDDE and EDRM
  - Best Practices
    - Information Management
    - Data Identification
    - Preservation of Relevant ESI
    - Effective Data Collections
    - Data Processing Techniques
    - Document Review Goals
    - Data Analysis
    - Managing Productions
    - Presentation at Trial
- Lessons Learned
Introduction to Electronic Discovery

- **Electronic Discovery**, or "e-discovery", is simply the extension of discovery to include data in *electronic format* referred to as Electronically Stored Information "ESI".

- **Recent University of California at Berkeley Analysis:**
  - 93% of data created in 2003 is digital; *Cohasset Survey: today probably 96%*
  - Over 70% of electronic data is not printed.
  - Civil litigation: 75% discovery orders require the production of email

**Almost All Discovery is eDiscovery**

- From the smallest of cases the question should not be, “Is eDiscovery relevant in my case,” but “How can I better manage my case by using eDiscovery.”

  "Paper Discovery” originates online →
Unique Characteristics of ESI

- **Technical**

1. ESI can be incomprehensible when separated from the systems that created it
2. ESI is dynamic, can be shifted just by turning a computer on/off
3. ESI is stored in much greater volume than paper documents
4. Metadata: “data about the data” Logs when, how and who engaged the ESI

- **Social**

People tend to be more informal interacting with a computer.
Federal Rules of Civil Procedure

Amendments
FRCP was amended by in December 2006 to include digital evidence

Goal
How to incorporate ESI to the discovery process. Set standards and avoid piecemeal approach.
Early ESI Planning

a. **Meet and Confer Conference** (Rule 26 (f)) must include
   - Format of production
   - Issues relating to preserving discoverable information
   - Privilege claims
   - Any party negotiated “quick peek” or “claw back” agreements

b. **Pretrial Scheduling Court Order** (Rule 16)

c. **Depositions** (Rule 30 (b)(6))

d. **Duty of Early ESI Disclosure** (Rule 26 (a))
   - “without awaiting a discovery request” for each claim and defense
   - 26(a) initial disclosures must include “category and location of ESI”
What is ESI?

Common ESI Locations

- Computers hard drives (desktops and laptops)
- Email systems
- Portable devices: Blackberries, cell phones, PDA’s, flash drives, CD-ROM’s etc.
- Voice Mail and VOIP
- All company servers: Shared, Individual, User Specific General Company
- Third party and offsite systems
- Preceding company systems such as backup tapes

Rule 26(b)(2): Accessible v. Inaccessible ESI

Sliding Scale

- Accessible ESI: Emails/thumb drives.
Format of ESI Production

- **FRCP Rule 34**
- Parties choose the form for production
  - Requesting party can specify the format, but other party can object
  - If form not specified by requesting party, “must” produce in the form “in which it is ordinarily maintained” OR “reasonably usable” form.
  - “Reasonably Usable” includes access to metadata. Accessdata Corp. v. ALSTE Tech. GMBH, 2010 WL 3184777 (D. Utah Jan. 21, 2010)
- Parties need not produce in more than one form
- **Importance**
  - Be proactive to prevent default format
  - Can impact scope/cost of later data processing and review to be conducted
Unplanned ESI Disclosure

FRCP Rule 26(b)(5)

- If privileged information inadvertently produced, producing party may notify receiving party

  - Receiving party must “promptly return, sequester, or destroy” the specified materials and cannot use or disclose the materials until claim is resolved

  - Receiving party “may promptly present” the information to the court under seal to test the privilege

FRE 502

- Protects against the disclosure of privileged information.
ESI Safe Harbor/Sanctions

Rule 37: “Sanctions cannot be imposed for loss of ESI resulting from routine, good faith operation of an electronic information system”


Common Sanctions

d. Adverse Inference: Zubulake V

A Word on Seminal Zubulake

During 2003-2004, United States District Court Judge Shira Scheindlin issued 5 groundbreaking opinions in the case of Zubulake v UBS Warburg.

Zubulake deals with wide range of electronic discovery issues.

- Scope of a party's duty to preserve electronic evidence during the course of litigation
- Attorney duty to monitor client compliance with ESI preservation and production
- Data sampling
- Cost shifting
- The imposition of sanctions for the spoliation (or destruction) of ESI
Duty to Preserve


2. When a Summons/Complaint are properly received Byrnie v. Town of Cromwell 243 F.3d 93, 108 (2d Cir. 2001)

3. When agents know that a lawsuit is a possibility Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003)

4. When counsel anticipates a lawsuit or investigation Capellupo v. FMC Corp., 126 F.R.D. 545 (D.Minn. 1989)

5. When receiving a letter that credibly threatens litigation Fujitsu v. Fedl Express 247 F.3d 423, 436 (2d Cir. 2001)
What are the States doing?

- Source: Law Technology News
California Approach

Effective July 2009, the California Electronic Discovery Act amends CCP’s 2016.010 et seq to address ESI. The Act mostly parallels the FRCP and contains an urgency clause.

Three Key Ways How California Differs From FRCP

A. Scope: FRCP avoids defining ESI. California: "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."

B. Data Produced Inadvertently: FRCP allows for Claw Back and Open Peak agreements. California does not; court to make determination.

C. Inaccessible Data Burden: FRCP- Requesting party seeks leave of court to force the opposing party to produce. CA- Responding party requests court order to prevent producing data.
California Approach


  A. The Facts
  - Defendant Toshiba withheld from production hundreds of computer backup tapes
  - Restoration costs set between $1.5 and $1.9 million
  - Plaintiff Lexar would not agree to shoulder any of the restoration costs

  B. The Outcome
  - Plaintiff Lexar must pay the "reasonable expense" for any "necessary translation"
  - Reasonableness and necessity are factual issues found on a case by case basis

  C. The Lessons
  - **Demanding Parties**: Have demands as narrowly tailored as possible. Courts have frequently punished overbroad demands with having to pay additional costs
  - **Responding Parties**: Organize data prior having to prove reasonable accessibility
Electronic Discovery Models

- **The Sedona Principles**
  - ESI best practices developed attorneys, technical consultants, members of the judiciary and other interested parties.
  - Cited by U.S. courts as authority on most eDiscovery issues.
  - Contains practical glossary of terms related to ESI.

- **American Bar Association eDiscovery and Digital Evidence Committee (EDDE)**
  - The EDDE Committee brings together leading eDiscovery thinkers and practitioners to bridge the gap between technology and law.
  - The Section is viewed as an authoritative voice on eDiscovery and technology law.

- **The Electronic Discovery Reference Model**
  - Sets industry standards for consumers and providers in order to reduce the cost, time and manual work associated with eDiscovery.
  - EDRM is a conceptual procedural construct; each step need not apply.
Evaluate Document Storage and Retention for Litigation Readiness.

**Address:**
1. Policy for full record cycle: creation, retention and management
2. Common Questions: Address Email Deletion, Back Up Tapes & Metadata

**Companies Slow to Act:** (Cohasset Survey, 2007)

- Only 60% have records retention schedules in 2007 that include ESI
- Only 56% have a formal plan to respond to discovery requests for their records
- Only 14% of companies *always* follow their policy, while 50% generally do so
  - **Sloppy policies** create added risk and expense for company and employee
Identification

- Create a Data Map
  - A. Media that may contain ESI
  - B. Custodians connected to the ESI (Creators, Managers, Access)

- How to create an effective ESI data map
  - A. Be Proactive
  - B. Work With Key Personnel
  - C. Create a Flexible Document
  - D. Focus on Potentially Relevant Information
Preservation

 **Assure that relevant ESI is properly retained.**
  
   Obligation...runs first to **counsel**, who then has a duty to advise....client its obligations. *Telecom Int’l Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999)

   Obligation to preserve runs also to **senior corporate officers** *In re Prudential Ins. Co. of Am. Sales Practices*, 169 F.R.D. 598 (D.N.J. 1997)

 **Litigation Hold Notice:** Compose a thorough litigation hold notice
   Notify owners, administrators, users of type and location of data
   Include acknowledgement of receipt and tracking features
   Suspend normal document retention policy.

 **Consider Collect to Preserve.**
Collection

1. List all key custodians

2. Note location of custodian data [Accessible, Inaccessible, Forensic, Paper]

3. Maintain Chain of Custody
Processing

- Taking large amounts of ESI & boiling it down to for legal team to present at trial.
  - Find hidden data relationships
  - Files amassed into a central database to allow for large-scale searches

**Common Steps**

- Catalog and signature the files
- Uncompress any compressed files
- Flag duplicate files
- Remove content and metadata
- Eliminate program and operating system files
- Establish quality control procedure throughout
Review

- **Document Review Goals**
  - Determine purpose of review and implement benchmarks
  - Note privileged/responsive documents to be withheld from the opposing parties
  - Capitalize on the productivity of the document reviewers
  - Agreed on search terms and review methods/tools

- **Document Review Platform Considerations**
  - Time and cost
  - Culling and filtering options to minimize the data
  - Concept search ability (diamond v. diamond)
  - Capacity to handle various document volumes and formats
  - Data security and integrity
  - Overall project management lead
Analysis

Evaluating ESI to determine total relevant summary information.

- New important data, people, specific vocabulary and jargon.
- Performed throughout the remainder of the process as new information is uncovered and issues of the case evolve.
Production

- Conveying non-privileged, relevant ESI to opposing parties

- **Formats of Production**
  - Paper
  - Quasi-Paper
  - Native
  - Quasi-Native

- **Frequency of Production**
  - On going basis OR All in one shot
Displaying of ESI before an audience.
- Most common forums are at depositions, hearings and trials
- Native and near native are the dominant forms.

Options to display ESI at trial
- Proprietary systems: Trial Director, Sanction and Trial Max
- Outsource to major vendors
- For smaller cases, can use power point or Adobe
Office Best Practices

1. Form **interdisciplinary team** to proactively address potential discovery issues.
   - Legal, Team IT and Records management personnel
   - Others professionals as necessary (Compliance, Audit etc.)

2. Engage IT department for **targeted programs** and solutions.
   - Strong focus on litigation readiness, legal hold procedures and response planning
   - Designation of eDiscovery liaisons

3. Investment in **the right technology** to manage discovery cost and minimize risk.
   - Email archiving systems; forensic data collection systems
   - Shared document repositories for serial litigation
Top Ten Lessons Learned

1. Identify ESI
2. Awareness of Applicable Rules
3. Proactive Approach Throughout
4. Maximize Meet and Confer Conference
5. Create an ESI Data Map
6. Focus on Potentially Relevant, Accessible Data
7. Sources of Custodian Data
8. Maintain Chain of Custody
9. Carefully Select Document Review Platform
10. Protect Client Data
eDiscovery Resources

- eDiscovery Law:
  www.ediscoverylaw.com

- Electronic Discovery Research Model (EDRM):
  www.edrm.net

- Findlaw’s Legal Technology Center:
  www.technology.findlaw.com

- The Sedona Conference:
  www.thesedonaconference.org
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