



Effective Strategies for Conducting eDiscovery

The Importance of Communicating

Famous Irish Playwright George Bernard Shaw once remarked that the “single biggest single problem in communication is the *illusion* that it has taken place.”

Agenda



- ▶ Key FRCP Rules & Case Law
- ▶ California Approach
- ▶ Managing Electronically Stored Information (ESI)
 - ▶ Creating Data Maps
 - ▶ Implementing Litigation Holds
 - ▶ Chain of Custody
 - ▶ Data Tracking
 - ▶ Leveraging IT resources
- ▶ Document Review
- ▶ ESI Production Formats
 - ▶ Native
 - ▶ Quasi-native
 - ▶ Quasi-paper
 - ▶ Paper
- ▶ Tracking and logging production efforts

“Mutual Knowledge of all the relevant facts gathered by both parties is *essential* to proper litigation.”

Hickman v. Taylor, 329 US 495 (1947)

FRCP Rules and their Practical Effects

- ▶ **1. Rule 16(b) Pretrial Scheduling Order:** Pretrial scheduling order must contain ESI provisions
- ▶ **2. Rule 26(a) Duty of Early Disclosure:** Must offer account of all ESI in possession relevant to each claim and defense to satisfy this duty.
- ▶ **3. Rule 26(f) Meet and Confer Conference:** Meet and Confer conferences are required to cover all ESI preservation issues prior to commencing discovery.
- ▶ **4. Rule 26(f) Discovery Plans:** All eDiscovery issues, such as form or production, must be included in any discovery plan.
- ▶ **5. Rule 26(b)(2) Limitations on Discovery:** Data that is not reasonably obtainable due to undue burden or cost does not need to be produced absent a protective order or motion to compel. All accessible, relevant, non-privilege and responsive ESI must be produced.
- ▶ **6. Rule 26(b)(5)(B) Privilege Issues:** Requesting party learning of post-production privilege or work product claim must return, hold or destroy the ESI and cannot divulge until the case concludes unless Claw Back, Open Peek or Quick Peek arguments asserted.
- ▶ **7. Rule 33(d) Interrogatories:** Parties can provide ESI as a response in an interrogatory.
- ▶ **8. Rule 34(b) Production of Documents:** Requesting party sets the form of production. If silent, the default is that which is ordinarily maintained or reasonably useable.
- ▶ **9. Rule 37(f) Sanctions:** No sanctions can be imposed for losing ESI as a result of good faith, routine IT procedures (“Safe Harbor”)

Eight Ways The Duty To Preserve Relevant Materials May Arise



- ▶ **1. When litigation or an investigation is reasonably anticipated** Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)
- ▶ **2. When a Summons and Complaint are properly received** Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 108 (2d Cir. 2001)
- ▶ **3. When representatives 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 established facts suggest that litigation is likely** Computer Assoc. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 168 (D. Colo. 1990)
- ▶ **6. When one receives a written claim that expressly and credibly threatens a lawsuit** Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)
- ▶ **7. When a plaintiff chooses to file a lawsuit** Struthers Patent Corporation v. Nestle Co., 558 F. Supp. 747, 758-59, 765 (D.N.J. 1981)
- ▶ **8. When a business is first on notice** Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003)

California Approach to eDiscovery



I. PROPOSED AMENDMENTS

- ▶ The Proposed Amendments of the Judicial Council of California would amend the California Code of Civil Procedure's Civil Discovery Act to address electronically stored information (ESI). If adopted the amendments would go into effect on January 1, 2009.

A. Three Key Ways How They Would Differ From FRCP

1. **Scope:** The FRCP avoids defining what exactly comprises electronic data. Under the proposed California amendments, electronic data would be specifically defined as having "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."
2. **Data Produced Inadvertently:** Unlike the FRCP California would not precisely define a formal procedure regarding inadvertently produced privileged information. Instead, California would mandate the producing party to notify the receiving party of the problem. At that point, then, the receiving party would need to immediately sequester the information--either for return or for court determination. i.e. No Claw Back, Open Peak or Quick Peak in California
3. **Inaccessible Data:** The FRCP maintains that a party requesting discovery must seek leave of court to force the opposing party to produce data that the latter construed as being inaccessible. Should the California version take charge, the responding party would have to request a court's protective order to prevent producing information on the grounds that it is inaccessible. This approach increases risk for the responding parties.

B. Current Status

- ▶ The amendments were approved in April 2008 by Judicial Council of California. However, must still be approved by legislature and signed by the governor to become law. As such, for now, defaulting to the FRCP and case law remains route of choice in California.

California eDiscovery Continued

II. CASE LAW

- ▶ eDiscovery case law that is particular to California has by and large been confined to one case, Toshiba, which deals with cost-shifting. Toshiba American Electronic Components, Inc. v. Superior Court (Lexar Media), 124 Cal.App.4th 762 (2004).

A. The Facts

- ▶ Defendant Toshiba withheld from production hundreds of computer backup tapes, spanning an eight-year period. According to Toshiba's eDiscovery expert restoring and processing the tapes and searching them for relevant data would cost between \$1.5 and \$1.9 million. Plaintiff Lexar would not agree to shoulder any of that cost on the grounds that requiring it to pay for the processing of the tapes would be unfair because the tapes were made using outdated software and required specialized tools to access them. In addition Lexar noted that some of the tapes were labeled incorrectly and had also deteriorated over time.

B. The Outcome

- ▶ The court concluded that Lexar should cover the reasonable cost of restoring the inaccessible data from Toshiba's backup tapes because demanding parties must pay the "reasonable expense" for any "necessary translation" of electronic evidence that had been archived. The court stated that reasonableness and necessity are factual issues to be determined by the court on a case by case basis. The Toshiba court also noted that if the demanding party disagrees with the producing party as to the reasonableness of the data costs or does not consider the translations as needed it may seek a protective order.

C. The Lessons

- ▶ **Demanding Parties** should attempt to minimize expenses by having their demands as narrowly tailored as possible because the courts have frequently punished overbroad demands with having to pay substantial unnecessary eDiscovery costs.
- ▶ **Responding Parties** should organize their data prior having to prove that the expenses of accessing their data are reasonable.
- ▶ **Both Parties** should take steps to update their backup and archival procedures to eliminate contentions that the costs of accessing them are unreasonable and should not be shifted to the demanding parties.

ESI Data Maps (Objectives)

- ▶ Discover where your data is
 - ▶ Identify accessible/non accessible sources (i.e. data residing on live systems such as a functioning computer desktop as opposed to that on a backup tape)
 - ▶ Burden or costs: the more data is inaccessible, the more difficult and expensive it is to collect it
 - ▶ Examples of inaccessible data are corrupted, deleted, hidden, password-protected and encrypted files.
 - ▶ Preserve any potentially relevant data
 - ▶ Implement a litigation hold
 - ▶ Avoiding Spoliation

ESI Data Maps

- ▶ An ESI Data Map lets you know where your Electronically Stored Information is stored, in what form, and to whom it belongs
- ▶ How to create an effective ESI data map:
 - ▶ **Be Proactive:** Courts have consistently punished those who forgo working on their data map until the last moment with costly sanctions.
 - ▶ **Work With Key Personnel:** Seek out the principal owners, IT professionals and those involved with records coordination and management.
 - ▶ **Create a Flexible Document:** Since the discovery process remains fluid it is important to create a data map that can adapt to how the ESI is being stored. Also ensure the data map is understandable to all players: lawyers, judges and IT.
 - ▶ **Focus on Potentially Relevant Information:** Zone in on the type and scope of all the existing potentially relevant data, how that data is stored, how the data is being preserved as well as who created the data.

Preserving & Collecting Relevant Data

- ▶ Consider the types of data maintained by client
 - ▶ Many types of information
 - ▶ Consider dividing data into categories
 - ▶ Primary Data: Email or other active data in your client possession
 - ▶ Secondary Data: Not intended for everyday use (Backup Systems, data saved for disaster recovery purposes)
 - ▶ Tertiary Data: Data that exists despite no active effort to maintain or save it
- ▶ Chain of Custody
- ▶ Locate Potentially Responsive documents
 - ▶ Identify the potential **custodians** (who has the documents)
 - ▶ Identify the actual **location** of the data (where does it reside, Servers, Laptops, Hard drives, CDs, PDA, ZIP, iPods, Thumb Drives, Blackberries)

Preserving & Collecting Relevant Data



- ▶ **Develop a sound collection protocol**
 - ▶ If possible, interview the custodians to understand where they keep their documents
 - ▶ Keep a description of the guidelines and procedures followed when collecting the data
 - ▶ Avoid possible disruption to the client and custodians

- ▶ **Keep a record of collection efforts**
 - ▶ Who, When , Where, Why and the outcome

Selecting a Document Review Platform



▶ Factors to consider

- ▶ Time and Cost
- ▶ Culling and Filtering options to minimize the data
- ▶ Keyword searches (diamond v. diamond)
- ▶ Document volume
- ▶ Data review format
- ▶ Data production format
- ▶ Review platform features
- ▶ Reviewer familiarity with the document review platform
- ▶ Safe Harbor requirements when working with off-shore teams
- ▶ Data security and integrity
- ▶ Overall project management lead

Managing ESI Productions

- ▶ Production formats
 - ▶ Native
 - ▶ Quasi-native
 - ▶ Quasi-paper
 - ▶ Paper

- ▶ Tracking and logging production efforts

Protecting Your Client's Information



- ▶ Object to overbroad or burdensome requests
- ▶ Beware of the Claw-back provision (You can't un-ring the bell)
- ▶ Make sure that your eDiscovery vendor can protect client data in their possession
 - ▶ All in one solutions are useful for increased awareness but may pose difficulties when it comes to software compatibility

Lessons Learned

1. Create an ESI data map
2. Collect potentially relevant information
3. Interview key personnel
4. Protect client data
5. Carefully select document review platform
6. Carefully select vendors
7. Use case management tools
8. Assign a project lead / responsible person for the data
9. Change management procedures for outsourced projects

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.com



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