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E-Discovery For the Rest of Us

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The Paperless Office



1.5 billion emails daily

Substantial portion of “documents”
never printed

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What are we talking about and what are all these *buzzwords*?



E-Discovery means producing and requesting material that is stored electronically (“ESI”), and includes:

- O Final Form Data—email, word processing documents, spreadsheets, etc.**
- O “Meta-Data”—characteristics of the final form data such as who wrote it, who changed it, who viewed it and when. In some cases it must be produced.**
- O Raw Data –collected data that can be re-formulated into usable form, such as taking raw accounting data and generating a comparison chart**

Courts have set few limits on electronic “dumpster diving”



- The dumpster gets bigger and bigger
- The dumpster gets truly emptied less and less

Example

- “Leveraging our strong share on the desktop will make switching costs high. If they get our technology by default on every desk, then they will be less inclined to purchase a competitive solution”
- Complaint, United States v. Microsoft Corp.

Example

- “As it appears that (the solar technology) is a pipe dream, let [the buyer] have the pipe”
- ARCO on the sale of its solar subsidiary

Example

From:
Sent:
To:
Cc:
Subject:

RE: [redacted]

Gentlemen,
Our group has been working with [redacted] for almost 7 years to get a rotational seat. Its time to put up or shut up. We have been stringing this customer along for years with loose promises about when will enhance the ergonomics on the F108 series. Perhaps we should wait until the lawsuits come pouring in before we react to the cumulative trauma injuries that they are suffering on a daily basis. We can't buy any more time with our valued customers. We need results sooner rather than later.
We have used up all of our excuses to avoid dealing with this issue. [redacted] intends to hold us accountable to the schedule that [redacted] set fourth earlier this year. This schedule was a key factor for them to extend our sole supplier agreement for an additional year. [redacted] can not afford to lose a \$3,000,000 account along with the high profit margin and market share that [redacted] affords us. [redacted] we need to know if we are going to get the engineering time and resources to complete this project. If the answer is no, we need to tell our customer and move on. Please advise ASAP.

“Perhaps we should wait until the lawsuits come pouring in before we react to the cumulative trauma injuries that they are suffering on a daily basis...”

“We have used up all of our excuses to avoid dealing with this issue...”

Example

–“I do not know how much our company stole from [plaintiff], but it must have been a lot because our product is just like theirs.”

–Two engineers exchanging emails in infringement suit

FLIP SIDE

- Your “good” evidence, increasingly, will be in the form of ESI as well.
- E.G., Adjuster’s “electronic notes” referencing that C&O of fire was “likely unattended cooking on the stove.”
- E.G., Invoices, payroll records, AR information, purchasing information, versions of the K at issue (with attribution and timing of changes)

Why Me? Why Now?

- FRCP Changed December 2006
- Md. Rules Changed January 2008
- Anticipate Trickle Down
- Head Off Great Opportunities for Mischief
- Avoid Game-Changing Sanctions and Malpractice
- Opportunity!?

Preservation

- Federal jurisprudence is that this duty arises prior to litigation actually being filed, when litigation is “reasonably anticipated.”
- Fertile ground for sanctions
- Requires development of litigation hold policy
- Rule of Thumb: over-preserve!
- Can you trust the custodians?

Highlights of the Md. Rule Changes

- Similar to the FRCP changes, and federal jurisprudence (for now) can be helpful
- 2-402(a) officially “adds” ESI to scope of permissible discovery
- 2-504.1(b) permits court to order that parties “conduct sufficient initial discovery” on ESI issues 10 days before any scheduling conference
- Like what? (See Committee Note)
 - Where is your stuff and how long do you keep it?
 - Format for production
 - Privilege Agreements
 - Proposed cost shifting or cost sharing
 - Metadata
 - See Proposed ESI Protocol on D. Md. Website to impress your friends....and scare your enemies



I Don't Even Own An iPod

ESI can be found in a variety of places and formats, and courts expect you to potentially search, preserve and produce:

- Servers
- Hard Drives (including home and laptop)
- Portable Devices (PDA's, thumb drives, zip drives, GPS)
- Instant and Text Messages
- Voicemail
- Web Sites
- Legacy and Back-up Data
- Third-Party Locations

What Are the Boundaries?



- 2-402(b)(2) provides that party may decline to provide ESI “not reasonably accessible” without undue burden or cost
 - Argue “proportionality” here
 - This showing must be detailed, not usual lawyer nonsense
 - One test of “accessibility” is can end user get to it?
 - Court may nonetheless order production and/or cost shifting
 - As technology gets better, this showing will get more difficult to make
 - E.g., client archiving systems

Form of Production



- Other side may specify form of production (e.g., paper, .pdf, .tiff, “native”)
 - Also with or without metadata (or some meta data)
- May be instead produced as maintained or in a “usable” (i.e. searchable) format
- Other side may request testing or sampling, but typically will not be allowed to do on-site inspection
 - This may avoid needle in haystack



Privilege



- 402(e) allows post-production assertion of privilege within reasonable time if reasonable precautions were in place
- Allows agreement with other side like “claw back”
- But....Not binding on third parties absent court order

Enforcement and Sanctions

- Rule 2-433 allows for sanctions
- Shallow, reef-filled “safe harbor” for ESI destroyed “through routine and good faith operation of a computer system”
 - Stop the autodeletion that occurs with almost every computer system
- Robust federal jurisprudence on sanctions in e-discovery, with and without intent or bad faith
- Particularly vulnerable in “preservation” stage

Don't Forget About Evidentiary Rules of Admissibility

- Read: Lorraine v. Markel American Insurance Co. (D. Md. 2007)
 - Relevance
 - Authenticity
 - Hearsay
 - Best Evidence (preference for original)
 - Prejudice
- And this was at Summary Judgment stage!

Read and Cite:

- The FRCP
- The FRCP Comments
- Any opinion written by Judge Grimm
- Zubulake (Attack) or Rowe Entertainment (Defense) (SDNY)
- Md. Rules Commentary
- ABA Civil Discovery Standards
- Maryland Discovery Guidelines
- Local Rules (e.g., “Suggested Protocol” in D. Md.)
- Grimm, Fax & Sandler’s Maryland Discovery Problems & Solutions
- The Sedona Principles
- The Uniform Rules
- Kroll On-Track Monthly Case Reporter

Case Study

Slacker v. Charm Corp.

- Employment Discrimination

- 50 Employee Company

- sex harassment, chiefly through email from 8 members of her group including supervisor

- Hostile work environment due to pornographic websites and screen savers on co-workers computers

- Retaliation, as shown by “new” version of employee review after she complained

- Charm Corp. says employee was running ebay business from work station during work hours and texting her friends all day instead of answering phone

- Charm Corp. also claims employee deleted key files from company laptop prior to leaving

Preservation

- Slacker's company laptop and employee computers
 - Likely that files were deleted from both laptop and employee computers
 - To keep computers in service:
 - Make images of hard drives
 - Pull out existing hard drives and replace with new drives
 - Put images on new drives
 - Original drives preserved and available for analysis

Preservation

- Network shared drives
 - Make copies of directories of key players
 - Is metadata important? (i.e. last accessed date, create date of files)
 - If so, collection methods preserving metadata may be required

Preservation

- E-mail
 - Small company; likely that single e-mail server used
 - Have IT dept. make copy of e-mail database
 - Otherwise, insure that e-mail databases of “key players” preserved
 - E-mail databases may be present on local PCs (i.e. Outlook – permits use of local .PST files)
 - Ask about automatic deletion policies – may need to be suspended
 - Third party e-mail? Company should have right of access
 - If Gmail/Hotmail utilized – may be challenging to get access
 - PDA/Blackberries? Generally, e-mail not stored on such devices, but should confirm

Preservation

- Text messages
 - Was Slacker using company texting service? If so, could still have expectation of privacy depending on company policy
 - Federal Stored Communications Act could be implicated – see *Flagg v. City of Detroit*, 2008 U.S. Dist. LEXIS 64735 (E.D. Mich. Aug. 22, 2008)

Preservation

- Slacker's employee review
 - Determine how review was produced
 - If generated from HR computer system, may need to preserve records relating to employee plaintiff
 - If Word document, where was review produced? Worst case scenario – may need to pull hard drive of machine to preserve prior versions of review

Preservation

- Backup tapes
 - If used for disaster recovery only, not discoverable
 - If truly used for disaster recovery, tapes will only cover the most recent several days of data – doesn't make sense to restore a system using old data
 - Otherwise, gain understanding of backup tape scheme
 - e.g. *Cache La Poudre v. Land O'Lakes*, 2007 U.S. Dist. LEXIS 15277 (D. Colo. Mar. 2, 2007) : “Land O'Lakes has 400 servers, each of which is backed up on a daily basis, weekly for five weeks, monthly for a year, and annually forever.”
 - Determine which tapes could have relevant data
 - Useful in case many documents have been deleted

Collection

- In small company, is IT staff trustworthy?
 - Are any of the “key players” buddies with the IT staff?
 - Potential avenue of attack on data integrity
- May justify collection by neutral third party
- Likely to search for .JPEG or .GIF images/movies
- Advisable to agree on search terms with other side

Collection

- May want to consider document repository if number of documents collected is sufficient
 - Facilitates searching of documents
 - Documents can be coded, bates stamped, redacted for privilege
 - Easier to produce documents – options to produce in different formats (PDF/TIFF, or native)

Production Issues

- Data “not reasonably accessible”
 - Deleted data from hard drives
 - Backup tapes
 - Prior versions of Slacker employee review
- Plaintiff must establish good cause – may be dependent on how much “active” data is found
- May be able to resist production of costly inaccessible data on grounds that inaccessible data is duplicative

Questions?

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