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# Practical eDiscovery

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# Agenda

- Discovery
- E-discovery concepts & challenges
- Scope of Discoverable Electronically Stored Information (ESI)
- Data organization and analysis process
  - Phase 1: litigation hold/early case assessment
  - Phase 2: active discovery
  - Phase 3: data archival

# Discovery

- Legal system has a low bar to entry
- Discovery- pre-trial phase in litigation where a party obtains evidence from the opposing party via the devices provided in the federal or state rules of civil procedure (i.e. requests for production, interrogatories, and depositions).
- Discovery is key to clarifying the facts and narrowing the issues in order to determine whether any of the claims have merit or defenses before the law.

# E-Discovery

- Discovery involving the exchange of information in an electronic format, otherwise known as electronically stored information (ESI).
- Differs from paper based discovery
  - Volume
  - Ease of distributing
  - Metadata
  - Informal form of communication
  - Ease of inadvertently modifying
  - Manner of destroying

# E-Discovery Challenges

- Preservation-Ensuring evidence is not lost or deleted
  - FED. R. CIV. P. Rule 37(e) Failure to preserve ESI
    - If found to have acted with intent to deprive the other party of the information's use, the court can impose some serious sanctions.
- Volume-Too much data, impossible to manually review all case files in a timely manner
  - 1 GB= 70,000-80,000 text pages or 35-40 banker boxes
- Cost-Expensive to analyze and review all files
  - Document reviewers are expensive
  - Software tools can be expensive and time consuming too learn
- Bottom line: Need tools and processes to make eDiscovery a strength, not a weakness.

# Scope of Discoverable ESI

- FED. R. CIV. P. 34(a)(1)(A)
  - a party may gain access to “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 either directly or, if necessary, after translation by the responding party into a reasonably useable form.”
- FED. R. CIV. P. 26(b)(2)(B)
  - a party does not have to produce “electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”
- FED. R. CIV. P. 26(b)(2)(C)
  - Limits frequency or extent of discovery

# Don't Let This Be You

- *Cache La Poudre v. Land O Lakes Farmland Feed*, 244 F.R.D 614 (D. Colo., 2007)
  - Defendants failed at preserving “potentially relevant and responsive information due to wiping clean computer hard drives”
  - Defense counsel “failed to properly monitor the discovery process”
- Key lesson: “[c]ounsel retains an on-going responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests.”
- Result: Defendant was sanctioned and the plaintiff was awarded \$5,000 to cover some of their legal fees and expenses.

# Data Organization and Analysis Process

- Both legal and technology based
- Requires coordination between the attorney, legal support staff, client, and any service providers
- Managed by the responsible attorney
  - Counsel can avoid unnecessary exposure to potential sanctions by simply implementing and monitoring compliance with a data organization and analysis process. The following approach and accompanying descriptions should assist in formulating such a process.



# Phase 1: Litigation Hold/Early Case Assessment

- **Timing:** Beginning with the decision to sue for the plaintiff, or for the defendant from the time that they are in reasonable anticipation of litigation, until the FED. R. CIV. P. 26(f) meet and confer.
- **Goal:** “Scoping” the matter by understanding the information that you have.
- **Phase 1 Tasks:**
  - Issue a litigation hold to your client(s)
  - Identify parties, key custodians, and non-custodial data sources involved
  - Begin legal research and establish legal theories
  - Technical decisions
    - Decide on data structure
    - Select, implement, and load an analysis tool to effectively analyze and review the data
  - Collect paper and ESI from key custodians and parties that are available
  - Begin looking broadly at the collected data

# Litigation Hold

- Issue a written legal hold to each custodian or client
- Define and provide the scope within the litigation hold
  - Be clear about the types and subjects of information that need to be preserved
  - Modify as the details of the matter become more clear
- Maintain a record
- Monitor and send out reminders to those individuals that are “on hold”.

# Select, Implement, and Load Analysis Tool(s)

- Analysis is easier when all case information is in one format and in one place
  
- Considerations/Potential Issues
  - Skill set and budget
  - Encrypted Files
  - OCR accuracy of scanned paper varies
  - ESI may contain data types that are proprietary or are not supported by review tool
    - May have to review these natively

# Early Case Assessment

- As data is loaded, the attorney has the opportunity to use Early Case Assessment Tools to:
  - Determine/Confirm the relevant time period of the matter
  - Identify key words that will likely produce relevant ESI
  - Identify additional custodians and non-custodial data sources
  - Review e-mail communication chains
  - Adequately prepare for the Rule 26(f) Meet and Confer so that the document review is scoped effectively.

# Phase 2: Active Discovery

- **Timing:** Beginning with the FED. R. CIV. P. 26(f) meet and confer and proceeding until the scheduled close of discovery
- **Goal:** Analysis of the data continues and the focus is further narrowed to the most relevant case issues and data
- **Phase 2 Tasks:**
  - Narrowing Case Issues
  - Culling Data in Accordance with the Rule 16 order
  - Document Review
    - Tips for Effective Final Document Review
  - Managing the Data Volume
  - Authenticating Data

# Narrowing Case Issues

- FED. R. CIV. P. 26(f) Conference of the Parties “Meet and Confer”
  - Results in Joint Status Report with Provisional Discovery Plan
  - Combined determination of the relevant time period, custodians, file types, and subjects/keywords that will receive emphasis during discovery.
    - Maintain the spirit of FED. R. CIV. P. 1 to work towards a “just, speedy, and inexpensive determination of every action and proceeding.”
  - Key opportunity, based on Early Case Assessment results, to tailor discovery appropriately to minimize costs
  - Decide on the format of disclosures 26(f)(3)(A)
    - PDF, single or multi-page TIFF, native, with/without load file, or paper based
  - Decide how to handle inadvertent disclosure of privileged ESI through “claw back” Agreements using 26(f)(3)(D) & FED. R. Evid. 502

# Production Formats

- Requesting party should determine what format or formats they would like (Fed. R. Civ. P. 34(b)(1)(C), NMRA 1-034(B)).
- Common production formats: native files with associated metadata, TIFF or PDF files with/without an accompanying load file, searchable PDF, or hard copy documents.
- Responding party can object to the requested form and state the format that it intends to use (Fed. R. Civ. P. 34(b)(2)(D), NMRA 1-034(B)).
- Responding parties must keep in mind the document production requirements captured in Fed. R. Civ. P. 34(b)(2)(E) or NMRA 1-034(B)
- Advice: capture the production format in the Fed. R. Civ. P. 26(f) Discovery Plan

# Production Formats- Time & Costs

- ***Atlas Resources v. Liberty Mutual*, CIV 09-1113 WJ/KBM (D.N.M. Sep 08, 2011).**
  - Business dispute results in three motions for discovery sanctions
  - Liberty Mutual did not respond to some requests for production, and Atlas had to get a motion to compel to gain any hope of a response. Liberty Mutual eventually responded, but produced over 14,000 documents in the TIF format “without any indication as to the claim file with which each document was associated. Moreover, without the use of a specialized software program, [the] TIF files are not searchable”
  - Judge ordered Liberty to produce the information “in hard copy, in separate folders, indexed and labeled all at Liberty’s expense”
  - Atlas received attorney’s fees of \$1,912.00 in response to their first motion for sanctions.



# Production Formats- Access

- ***Perea v. Conner and State Farm*, CIV 13- 0697 KG/LAM (D.N.M. Sept 26, 2014)**
  - D requests a “copy”, of a pain journal maintained by P. P produces as scanned PDF.
  - D then requests the underlying word processing document with metadata to know when the journal was created, etc.
  - Court denied D’s request in part because “Defendant did not ask for the underlying word processing document, the ESI, or the metadata, for the pain journal, or for Plaintiff's computer, in her initial discovery request”.
  - Court then recites Fed. R. Civ. P. 34(b)(1)(C)) and Fed. R. Civ. P. 34(b)(2)(E)(ii)-(iii)).

# Culling Data in Accordance with Rule 16 Order

- From this point forward, focus is on the “responsive” data only and all other collected data is filtered out.
  - Data not previously collected, but requested via RFP or interrogatories can be collected and added as needed if modifying the order.
  - If not done already, load initially “responsive” documents into a review platform.

# Document Review Platforms

- Review Platform- software packages that allow the attorney and other selected reviewers to quickly review large sets of documents for litigation purposes.
  - Allow the reviewer to search, filter, annotate, and categorize the data to facilitate litigation
  - Additional Benefits
    - Ability to filter out duplicate documents
    - Capability to mass categorize many documents at once
    - Ability to redact from a document slated to be produced.
    - Ability to “brand” bates numbers or other information onto images of the documents.

# Tips for Effective Final Document Review

- Apply principles of project management
  - ID Key Deliverable Dates (initial disclosures, close of discovery, etc.)
  - ID and Mitigate Risks to Project Success
    - Lack of trained reviewers, ongoing collection/incomplete data, encrypted data
- Define Process
  - How to identify a responsive document in the case
  - How to resolve issues with the software

# Tips for Effective Final Document Review

- Create Categories based on issues
  - Be careful with the number of categories due to human limits
  - Create a category for documents that require a second look
- Sample reviewed documents for accuracy on regular basis and regularly share lessons learned with review team
- Leverage internal capabilities of the tool
  - Search for documents marked both as 'responsive' and 'non-responsive'
  - Rules that enforce category logic
  - Ability to categorize a family in the same manner (parent & child).

# Admissibility of ESI

- It is rare for a case to go all the way to trial, but we must treat each case as if it may end up in front of a judge and handle data accordingly.
- Primer from Judge Grimm in *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md., 2007)
  - ESI relevant under FED. R. EVID. 401?
  - Can ESI be authenticated under FED. R. EVID. 901(a)?
  - Is ESI being offered for substantive truth?
    - If yes, is the ESI hearsay under FED. R. EVID. 801?
    - If hearsay, is it covered by an applicable exception under Rules 801, 803, or 807?
  - Is ESI an original or duplicate under FED. R. EVID. 1001?
    - If not, locate admissible secondary evidence to prove the contents of the ESI
  - Does the ESI make it through FED. R. EVID. 403 balancing test?

# Phase 3: Data Archival

- **Timing:** begins after the close of discovery and ends with the conclusion of the matter.
- **Goal:** properly identifying data that needs to be archived from data that can be safely deleted and proceeding accordingly.
- **Phase 3 Tasks:**
  - Review data retention policies, archive and delete in accordance with the policies.
  - Once the matter is resolved, release the litigation hold

# Conclusion

- Focusing the right degree of attention to case data in the early case assessment, active discovery, and data archival phases will ensure that you have the right information at the right time to properly represent your client.
- By combining your legal expertise with a sound approach to managing litigation data, you can ensure that you have a solid understanding of the evidence in your case and can correspondingly respond appropriately with the right legal strategy.



# Questions and Answers

