



# ELECTRONIC DISCOVERY

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## E-Discovery Facts

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- 93-99% of all information is now electronic
- 30% is never printed to hard copy
- 60 billion emails are sent and received each business day
- 1 gigabyte of data = 75,000-100,000 hard copy pages
- 2,500 pages per box (30-40 boxes per gigabyte)
- A single laptop can contain 30 gbs of data



## FEDERAL RULES OF CIVIL PROCEDURE (AMENDMENTS EFFECTIVE DEC. 1, 2006)

### Meet and Confer: Rule 26(f)

- Production of electronic documents has always been required in litigation, but was not usually addressed until discovery was underway.
- Amended rules change the time frame in which these issues are addressed.
- Electronically stored information (“ESI”) must be discussed *early on* in the litigation at the Rule 26(f) conference – which will occur within less than 120 days after a Complaint is served.



## FEDERAL RULES OF CIVIL PROCEDURE cont'd

### Reasonably Accessible Data?

- Rule 26 provides that a party need not provide discovery of ESI from sources that the party identifies as “not reasonably accessible because of undue burden or cost.”
- Accessible data must be produced. *E.g.*, files on **active networks and local hard drives**
- Data that is not reasonably accessible must still be preserved. *E.g.*, back-up data for disaster recovery because it can be time consuming/ expensive to unpack data and restore it to an accessible form.



## Cost Shifting

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- Should be considered *only* when electronic discovery imposes an “undue burden or expense” on the responding party.
- Apply *Zubulake* 7 factor test.



## Zubulake I: 7 factor cost-shifting analysis

1. The extent to which the request is specifically tailored to the discovery of relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.



## Safe Harbor Provision Fed. Rule Civ. P. 37

- If documents are not properly preserved, and the Court finds spoliation, could be sanctioned.
- Rule 37(e) creates a safe harbor from sanctions for spoliation if the ESI is lost in the regular course of business.
- Rule states that “[a]bsent extraordinary 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.”
- The party must act in good faith.



## When Does the Duty to Preserve Arise?

- Duty to preserve arises upon “reasonable anticipation of litigation.”
- Duty to preserve what you know/reasonably should know is relevant to the action; reasonably calculated to lead to admissible evidence; reasonably likely to be requested in discovery; or is the subject of a pending discovery request.



## What To Do Upon Reasonable Anticipation of Litigation

- Analyze claims to identify relevant categories of information and key custodians that may have such information.
- Determine relevant time periods.
- Identify what systems/devices/databases are most likely to contain the information and decide which parts of the client's records retention policy need to be suspended to preserve all relevant data.



## What To Do Upon Reasonable Anticipation of Litigation (cont.)

- Send a litigation hold memo to all persons likely to have relevant data.
- The litigation hold memo should instruct clients on their obligations to preserve information, including ESI.
- Form, content, and distribution of a litigation hold will vary depending on case and client circumstances, but there are sample memos on the intranet.



## What To Do Upon Reasonable Anticipation of Litigation (cont.)

- Analyze and document the burden/cost of producing data such as back-up tapes, including the onus of restoring and searching that data. Record your decisions and rationales concerning preservation in writing.
- Discuss whether or not an outside vendor should be hired to assist in the preservation and production of your data, and review of data from the other side.



# Collection of Electronic Documents

- Where is the data stored (Local hard drives? Network drives? Back up tapes? Blackberries? Home computers?)
- What mail server is being used (Microsoft exchange? Lotus notes?)
- Size of email accounts? Limitations on the size?
- Is there proprietary software being used by the company?
- What back up software is being used? What is the retention/recycle process for back-up tapes?
- Depending on the volume of data to be collected, may decide to use a vendor to assist with the collection.
- Chain of custody issues.



## Review of Documents

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- What type of review tool with you use (In house software? Online review tool?)
- What search capabilities are available with the review tool?
- Who will conduct the review? (In-house counsel? Outside counsel? Vendor?)



## Production of Documents

- Try to come to an agreement with the other side as to how each side will produce their electronic documents.
- Rule 34 states that if the parties do not agree, ESI must be produced in the form in which it is ordinarily maintained (*i.e.*, native format).
- Native format: Includes metadata, but needs the associated applications/programs to access the information.
- TIFF/PDF: Easier to review; can bates-stamp these documents for easier identification later in the litigation.
- The parties can agree to produce different types of ESI in different forms.



## Privilege Issues

ESI can include voluminous amounts of information.

Rule 26(b)(5)(B) states that a party who inadvertently produces privileged information must notify the recipient and assert the basis for privilege. The recipient must “promptly return, sequester, or destroy” the materials. If the claim of privilege is disputed, the parties can file the information under seal for the Court to decide.

**BEWARE:** Rule 26 does not address whether the privilege has been waived as to third parties by the inadvertent production.



## Protective Orders

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- Used to protect sensitive/ confidentiality information.
- If there is a protective order, need to know how it addresses production of these documents (*e.g.*, stamp “Confidential”).