



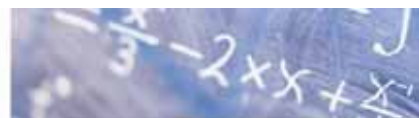
'Electronically Stored Information' under the New Federal Rules of Civil Procedure



LECG



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Principal

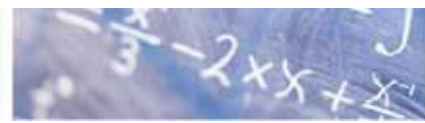


Overview of Lawsuit 'Discovery' Process

- **Plaintiffs and defendants gather information about each other to build their case:**
 - Interrogatories
 - Document requests
 - Depositions

- **'Documents' were deemed to include electronic data**

- **Delayed appreciation for**
 - Volume
 - Importance
 - Preservation and processing requirements



The Problem with Electronic Data

1. Exponential Volume

- Employee copies – drafts, versions, attachments, thumb drives, CDs
- IT copies – mirrors, backups, replicas, archives, distributed storage
- ➔ No employee or IT incentive, time or budget to manage the proliferation

2. '3D' Formats

- Spreadsheets, databases, PowerPoints, business e-mail, personal e-mail, instant messaging

3. Metadata

- Creation date, last modified, sent date, author, tracked changes
- Paper example, the 'watermark'

4. Unknowns

- Where is it all?
- How do I produce it?
- What is a reasonable effort?

➔ **Cost and risk determining “Have we produced it all?”**

The Trend in Court Decisions

Company said they located and searched all relevant backup tapes, but had not.

- **\$1.4 billion in damages, adverse inference, default judgment**
Coleman v. Morgan Stanley

Employees deleted relevant e-mail, IT continued to rotate, overwrite backup tapes.

- **\$29 million damages, adverse inference (in employment case)**
Zubulake v. UBS Warburg

Employees did not print e-mail subject to litigation hold, IT continued 60-day purge

- **\$2.75 million fine, employees precluded from testifying**
US v. Philip Morris USA

→ All were disconnects between the attorneys and IT.

Under the New Federal Rules

- 1. Know the basics about relevant systems ahead of time**
 - Scope of data – locations, volume, timeframe, accessibility, retention
 - Preservation options
 - Options and cost to access, cull and produce
- 2. Preserve relevant data/metadata right away**
 - Counsel issue litigation holds and monitor compliance
 - Management and employees responsible for compliance
 - IT preservation also should consider system settings that purge, archive, overwrite, prompt users to delete
- 3. Discuss 'ESI' preservation and production right away with opposing party**

→ New level of cooperation between IT and attorneys.

Practical Strategies and Initiatives

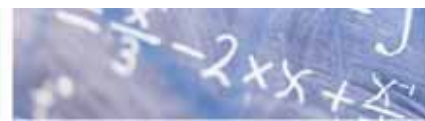
- 1. Profile your systems and data**
- 2. Establish IT “Preserve Now” team and process**
- 3. Reduce the pool of backup/archival data**
- 4. Extend records/retention policy to electronically stored information**
- 5. Streamline litigation hold process**
- 6. Manage outside counsel and vendors**

1. Profile Your Systems and Data

- **Decide which systems and data are potentially relevant to future litigation (80/20)**
 - For certain: computers, e-mail and file servers, backup tapes
 - Specific to port administration...
- **IT interviews, documentation, maintain**
- **Three deliverables**
 1. 30(b)(6) Issue/Response FAQs. A detailed, scripted response to anticipated questions.
 2. Meet-and-Confer Summary. For the attorneys, system basics, data scope, preservation options, and cost/accessibility.
 3. Concrete strategies and recommendations for reducing risk and cost associated with scope, volume and accessibility of existing data.

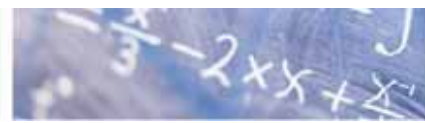
2. IT “Preserve Now” Team and Process

- **Identify IT representative for 30(b)(6) depositions**
 - ✓ Maintains Meet-and-Confer Summaries and 30(b)(6) FAQs
 - ✓ Official spokesperson on IT interviews, follows scripted response
- **Designate and train specific IT staff as “Preserve Now” team**
 - ✓ Senior level, hands-on skills
 - ✓ Responsible for executing timely preservation tasks
- **Create checklists for Preserve Now team or outside vendors to ensure prompt, defensible preservation**
 - ✓ Desktop computers, asset management system, loose media, Blackberries and PDA’s
 - ✓ E-mail server
 - ✓ File server
 - ✓ Backup tapes
 - ✓ etc.?
- **Establish ‘rules of engagement’ to ensure immediate and appropriate access to relevant systems and data**



3. Reduce Pool of Backup/Archival Media

- **Example: Stock option-backdating cases, global food manufacturer**
- **Define policy minimizing backup tape retention period**
- **‘Sweep’ locations for unmanaged media, inventory, reconcile**
- **Get legal opinion, then destroy media with no operational purpose, and not subject to litigation hold**
- **Develop process to maintain inventory, retention period**
- **Obtain legal opinion and clear criteria on when to include backup tapes in litigation, and how to communicate to opposing parties**



4. Extend Records/Retention Policy to ESI

- **Assess current policy, typically focused on paper records**
- **Extend policy, retention schedules to include relevant ESI**
- **Destroy paper that has electronic correlate**
 - ✓ Unless paper has unique notations, etc.
 - ✓ Can do whatever makes sense operationally, as long as not destroying ESI that should be under litigation hold
- **Purge ESI outside retention period**
- **Document policy, actions, and justifications for each action**
- **Develop audit protocol – periodically revisit policy, implementation**
- **[FOIA compliance, FOIA benefits]**
- **Example: 80,000 employees, purge file servers at 6-12 months**

5. Streamline Litigation Hold Process

- **Strategy for writing with narrowest scope possible**
 - ✓ e.g., 'ongoing' preservation (major IT impact)
- **Include IT personnel and systems in all hold notices**
 - ✓ Both personal and systems standpoint
- **Develop system to track and monitor compliance for multiple litigation holds**
 - ✓ e.g., PSS Atlas
- **Develop policy on employee 'self-collection'**
 - ✓ Do not forward e-mails to central mailbox
 - ✓ Do not copy/move files to central file share

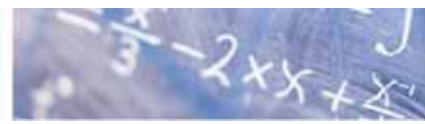
6. Manage Outside Counsel and Vendors

Define best practices, standards, checklists, cost expectations:

- **Preservation and collection**
- **Electronic data processing**
 - ✓ File filtering, date restriction, de-duplication, keyword searching, and review tool format conversion
- **Document review tool selection and pricing**
- **Managing the attorney document review process**
 - ✓ Staffing options, benchmarks, measuring accuracy and performance

Working Effectively under the New Rules

- **The emphasis is on clear roles, defined process, timeliness**
- **Potential technology initiatives:**
 1. Computer preservation
 - EnCase or FTK, not Ghost
 - Lock down My Documents, synchronize with file server
 2. E-mail archiving
 - Move PST's from desktop and file server to archive
 - EMC Xtender, Symantec Veritas Enterprise Vault, Zantaz EAS, etc.
 3. Litigation file repository
 - StoredIQ, EnCase Enterprise. Autonomy
 4. Litigation hold notice management
 - PSS Atlas



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