



Practical Strategies for Managing 'ESI' under the New Federal Rules



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The Problem with Electronic Data

1. Exponential Volume

- Employee copies, drafts, versions, e-mail attachments, thumb drives, CDs
- IT copies, mirrors, backups, replicas, archives, distributed storage
- Formats: spreadsheets, databases, PowerPoints, business e-mail, personal e-mail, instant messaging
- No employee or IT incentive, time or budget to manage the proliferation

2. Metadata

- Paper example, the 'watermark'

3. Unknowns

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

→ **Cost and risk in 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 instruction, default judgment
Coleman v. Morgan Stanley

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

- ➔ \$29 million damages, adverse instruction (in ordinary 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



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**



Practical Strategies and Initiatives

1. Profile your systems and data
2. Reduce the pool of backup/archival data
3. Extend records/retention policy to electronically stored information
4. Establish "Preserve Now" team and process
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
- IT interviews and documentation
- Three deliverables
 1. Meet-and-Confer Profile: system basics, data scope, preservation options, and cost/accessibility
 2. 30(b)(6) Issue/Response FAQs: a scripted response to anticipated questions
 3. Concrete strategies and recommendations for reducing risk and cost associated with scope, volume and accessibility of existing data



2. Reduce Pool of Backup/Archival Data

- Define a policy minimizing retention period for backup tapes
- 'Sweep' locations for unmanaged media, inventory, reconcile
- Destroy media with no operational or litigation purpose
- Develop process to maintain inventory and retention period
- Obtain legal opinion and clear criteria on when to include backup tapes in litigation, and how to communicate to opposing parties



3. 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.
- Purge ESI outside retention period
- Document the policy, actions, and justifications for each action
- Develop audit protocol – periodically revisit policy, implementation
- [FOIA compliance, FOIA benefits]

4. “Preserve Now”

- Designate and train specific IT staff as “Preserve Now” team
 - ✓ Senior level, hands-on skills
 - ✓ Responsible for executing timely preservation tasks
- Establish ‘rules of engagement’ to ensure immediate and appropriate access to relevant systems and data
- Create checklists for Preserve Now team or outside vendors to ensure prompt, defensible preservation
- Identify IT representative for 30(b)(6) depositions
 - ✓ Maintains Meet-and-Confer Profiles and 30(b)(6) Issue/Response FAQs
 - ✓ Official spokesperson on IT interviews, follows scripted response



5. Streamline Litigation Hold Process

- Strategy for writing with narrowest scope possible
 - ✓ e.g., 'ongoing' preservation
- Include IT systems in all hold notices
- Develop process to track and monitor compliance for multiple litigation holds
- Develop policy on employee 'self-collection'

6. Manage Outside Counsel and Vendors

Define best practices, standards, checklists, cost expectations for:

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

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