

# New Challenges to CIOs in eDiscovery and Electronic Records Management



Presented by:

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# Overview

- Federal Developments
  - “New” rules for “Electronically Stored Information” (ESI) effective 12/1/06
  - ESI rules as applied
- State Law Developments
  - Proposed amendments to CCP and Rules of Court

# New Definition in Fed.R. Civ. Pro. 34(a)

- Any party may serve...a request...to produce designated documents, 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—translated, if necessary, ...into reasonably useful form...”

# Four Concepts in the Federal ESI Rules

- **Early Consideration of ESI issues**
- **Two-Tier Approach to Back-up Media**
- **Practical Adjustments**
- **Shallow Safe Harbor for E-Document Destruction**

# Helpful Resource

- “Pocket Guide” from the Federal Judicial Center.
- Designed for attorneys and judges but written in plain English.
- Sketches key legal issues in practical way.

# Critical Decisions Come Early!

- **Rule 26(f) Conference Among Counsel**
  - ASAP but not later than 16 days before Rule 16 conference or issuance of scheduling order.
- **Rule 26(a) disclosures of ESI**
  - At or w/in 14 days of 26(f) conference unless a different schedule per stipulation or order.
- **Rule 16 Conference Order**
  - ASAP but at least w/in 90 days of appearance of defendant or 120 days from service of complaint.

# New Local Rules

- N.D. Cal. Civil Local Rule 16-9 requires a description of:
  - “Steps taken to preserve evidence relevant to the issues reasonably evident in the action, including interdiction of any document-destruction program and any ongoing erasures of e-mails, voice-mails, and any other electronically-stored material.” (Standing Order for All Judges of the Northern District of California re: Contents of Joint Case Management Statement (March 1, 2007) at CAND/Judges.nsf/700c1c62613a833e88256d48005fd21b)

# Better Guidance on What to Cover at Rule 16 Conferences

- Maryland D.Ct. issues useful protocol (Suggested Protocol for Discovery of Electronically Stored Information (D.Md.2007), at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>)
- Focus on “key players”, use of key word searches for preservation and production, informal information sharing and cost-sharing.
- “Gold” standard but delimits obligations

# Implications for CIOs

- Early conferences with lawyers on what you have and how it is stored.
- CIO probable manager of Litigation Hold.
- Probable participation in early conferences with opposing counsel.
- Possible testimony to describe and explain systems at case management conference and at Person Most Knowledgeable (PMK) deposition.

# Two-Tier Approach; Rule 26(b)(2)(C)

- “A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible”
- But Advisory Committee states that retention obligation may continue even if don't have to produce.
- Demanding party can motion for production if value outweighs burden; .
  - Burden of persuasion on producing party to show why too costly/irrelevant to produce.
  - Multi-factor *Zubulake* test endorsed
  - Sampling likely to be used to apply test; cost implications

# Forms of Production

- FRCP 34(b) authorizes demanding party to “specify the form or forms in which [ESI] is to be produced”
  - Subject to challenge by responding party.
  - Can specify different forms for spreadsheets and documents.
- Thoughtful decisions driven by document management technology and evidence rules

Bringing e-records into evidence:  
*Lorraine v. Markel Am. Ins. Co.*  
(D. Md. 2007) 241 F.R.D. 534

- Key questions, all affecting how ESI produced and maintained:
  - Conditionally relevant? (Fed.R.Evid. 104)
  - Relevant? (Fed.R.Evid. 401)
  - Authentic? (Fed.R.Evid. 901 & 902)
  - Hearsay? (Fed.R.Evid 801)
  - Hearsay exemption? (Fed.R.Evid. 803, 804, 807)
  - Original Writing Rule? (Fed.R.Evid. 1001-1008)
  - Value outweigh prejudice? (Fed.R.Evid. 403)

# *Lorraine v. Markel:* Examples

- Authentication
  - Testimony of System Administrator
  - Hash marks
  - Metadata
  - Inscriptions, marks, tags
- Hearsay exemptions
  - Excited utterance or present sense impression
  - Business record

# Implications for CIOs

- More likely to have to preserve and produce information with original metadata.
- May have to testify to “authenticate” electronic records.

# Rule 37: “Shallow Safe Harbor”

- FRCP 37(f) provides that “absent exceptional circumstances, a court may not impose sanctions...[for ESI]... lost as a result of the routine, good-faith operation of an electronic information system.”
- “Good faith” per Advisory Committee includes retention under common law, etc. and existence of effective litigation hold.

# Retention Obligation: Practical Perspectives

- Normal business destruction will not yield sanctions under FRCP.
- But Improper Destruction Creates Major Risks for Your Agency.
- Written Litigation Hold Policies Crucial.

# Spoliation Sanctions

- Adverse Inference Instruction
  - Truly ugly in competent hands
- Monetary
  - Most common
- Evidence or Issue
  - A focused remedy that can put injured party in position would have been absent spoliation
- Terminating
  - Only in most egregious circumstances but a number of reported cases

# Qualcomm v. Broadcom

- Federal patent case in San Diego
- In examination of last witness at trial, defense discovered that one key employee of plaintiff had archived 40,000 e-mails crucial to the case.
- **Result:** 2 key patents unenforceable; payment of \$8.54 million in fees and referral of lawyers to CA Bar for possible discipline. (1/7/08 Order)

# Implications for CIOs

- Outside law firm blamed Qualcomm staff for not doing proper search of own files.
- Likely that outside litigators will want to do own review of your e-files and the holdings of potentially key witnesses.

# Elements of a Litigation Hold Policy

- Distinguish between Retention of “Records” and Potential Evidence.
- Require Reports from Managers about Possible Litigation Threats.
- But Decision to set a Litigation Hold Should Be Made by a Knowledgeable Lawyer.
- Require written hold and protection of relevant electronic and paper materials.

# Proposed ESI Amendments for CA Law

- ESI already covered in CA Evidence Code.
- But CA Bar's Civil & Small Claims Advisory Committee has proposed:
  - New definition of ESI in Discovery Act
  - Change rules to require consideration of ESI issues at Case Management Conference.
  - Specification of form of production
  - Limited safe harbor for destruction

# Troubling Budget Issues: Costs for Managing E-Evidence

- Collect data
  - \$250-500 per hard drive or backup tape
  - \$2,000-3,000 per server
- Cull and Search for Relevant Data using Tech Tools
  - \$1,800 per hard drive; more for backup tapes.
  - \$450 per e-mail box
- Produce Relevant Data
  - \$750 per hard drive to prepare data for production in proper format
- Convert data to litigation support repository for privilege review
  - \$4 per Megabyte plus \$.10/page for Bates numbering and tiffing the images

# Intense Competition to Provide Services

- No dominant supplier of services; pressures to cut costs.
- Older Boolean search softwares giving way to concept searching.
- Storage companies getting into business.
- Larger companies purchasing smaller, innovative firms to meet demand.

# Conclusion

- Electronic evidence continues to present legal and financial challenges to policy-makers.
- Latest ESI amendments and possible new CA Rules mean that challenges are shifting, and require continuous monitoring.
- Let me know if we can help.

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