



ATTORNEY GENERAL OF TEXAS
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GTC Southwest eDiscovery and Government Records: What You Need to Know

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- ▶ Amendments to the Federal Rules of Civil Procedure Go into Effect



Why Should You Care?

- ▶ Litigation is going paperless
→ “electronic discovery”
- ▶ Data is evidence
- ▶ Evidence must be preserved



Recent Data

- ▶ With approximately 30 billion e-mails created or received by federal government agencies each year,
- ▶ Probably close to 100 billion e-mails are sent daily...
- ▶ ... at least 25% of which have one or more attachments of varying length.



▶ 1 in 4 recently reported cases involving eDiscovery involved SANCTIONS,

- Per National Association of Attorneys General
- Citing Kroll Inc. study of 138 cases
- January 1, 2008-October 31, 2008



The Net(work) Effect of the New Rules

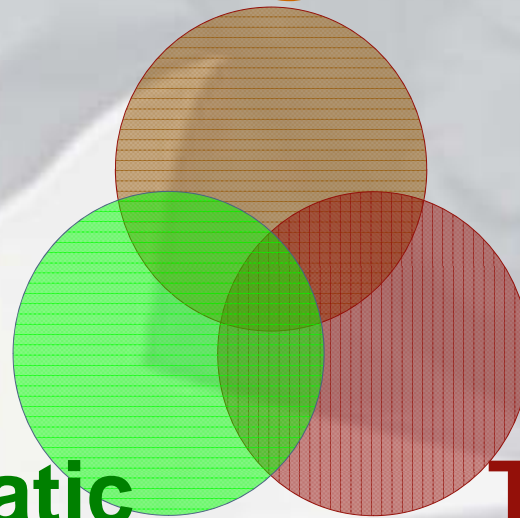
New and Better Clarified Duties

- For counsel
- For courts
- For clients, which includes:
 - Administration
 - In-house counsel
 - Staff
 - **IT**



Oh, My! The New Reality

Legal



Programmatic

Technical



What Data Needs to be Preserved?

- ▶ All forms of electronic communications – e.g.,
 - e-mail
 - word processing
 - calendars
 - voice messages
 - instant messages
 - spreadsheets
 - videos & photographs
 - information in PDA's
 - and data in any other locations where electronic information may be stored



The New Rules

- ▶ Contemplate the suspension of routine or intentional
 - purging,
 - overwriting,
 - re-using,
 - deleting, or
 - any other destruction of electronic information relevant to a lawsuit, wherever it is stored.
- ▶ At a work station, on a laptop, or at an employee's home



- Information must be preserved in its original electronic form, so that all information contained within it, whether visible or not, is also available for inspection.
- It is NOT sufficient to make a hard copy of electronic communication.



Are My Personal Devices Included?

- ▶ YES, when used for official business.
- ▶ This will make the IT job more complex if asked to place litigation hold on computers outside of your control.



How IT Can and Must Help

- ▶ **You will direct or assist your** office's effort to:
 - identify and
 - preserve
 - all potential sources of electronically stored information in your possession or under your control.



Controlling Costs

- ▶ IT can and must quantify costs
 - To acquire tech solutions,
 - Software
 - Backup tapes
 - In manpower
 - To implement a preservation effort
 - To identify ESI
 - To gather and organize ESI
 - To review ESI for Privilege and Confidentiality
 - To produce ESI



How will I(T) know when this duty is triggered?

- ▶ IT should be advised of the duty to preserve electronically stored information through a notice.
- ▶ This is called a **“litigation hold”** (or **“preservation hold”**).



Duty to Preserve

Party is under a duty to preserve information when

- ▶ Litigation is pending, or
- ▶ Litigation is “**reasonably anticipated**”



Duty to Preserve

When Under the Duty to Preserve, “Litigation Hold” Kicks In

- **Intervention** in routine operation of information system, i.e., document retention plan.



What if the information or system is remote or arcane?

- It's unclear if good faith requires prevention of data loss of information
 - ▶ that the party believes is not reasonably accessible
 - ▶ To be decided on case by case basis



What about policy for auto delete of files from e-mail or the network?

- ▶ When a litigation hold is imposed IT must ensure compliance--→
- ▶ Endeavor to preserve all records and data identified by the hold.



May employees remove data from computers or the network?

- ▶ Yes, if they know that:
 - It is not the subject of the litigation hold; and
 - Removal is consistent with policy.



What happens when an employee leaves employment with the State?

Employment transitions are no excuse.

- ▶ Steps must be taken to preserve and protect data and information in all forms
- ▶ As required by your record retention policies, and
- ▶ As required by law.
- ▶ Special attention is essential when a litigation hold is in place.
- ▶ **ONGOING MONITORING IS A MUST.**



Who decides what data or information will be produced?

- ▶ Collaboration is the key
- ▶ Legal counsel will produce responsive ESI
- ▶ In coordination with those who:
 - Created
 - Retained
 - And/or retrieved the information
(GENERALLY **IT**)



A new intersection of law and technology



- ▶ ESI is subject to inspection & testing
- ▶ Information systems are, too
- ▶ WHY?
 - To insure integrity of the ESI that is produced
- ▶ THE CONSEQUENCE?
 - IT personnel are subject to scrutiny
 - You may give testimony under oath
 - As a person with facts relevant to discovery



A Slippery Slope on the Horizon

- ▶ Questions invite assertions of privilege
- ▶ And the need to be aware of the possibilities that some communications may/not be privileged



Rules on the Run

- ▶ Don't need to learn 'em
- ▶ But, you may want to know the big ones
- ▶ To know how they will affect your life



Initial Disclosures

A PARTY MUST

- Without waiting for a discovery request;
- Provide a copy or description;
- By **category** and **location**;
- Electronically stored information;
- Which may support a claim or defense
 - ▶ Unless solely for impeachment Rule 26(a)(1)(B):



Disclosure must be made
within 14 days of Rule 26
conference

You must be prepared to address and/or provide:

- A copy of description by category and location
- All Electronically Stored Information
- That may support a claim or defense Rule 26(a)(1)(B)



“A party need **not** provide discovery of electronically stored information

- From sources. . .not reasonably accessible
 - ▶ Because of **undue burden** or **cost**”
- Unless, and upon a showing of burden/cost
 - ▶ Good cause is found
 - ▶ Consider cost sharing
 - ▶ RULE 26(b)(2)(B)



\$Cost Sharing Factors to Consider

- ▶ Specificity of the request
- ▶ How narrowly tailored it is
- ▶ The relative cost of production vs. damages at issue
- ▶ The relative wealth of the parties
- ▶ Alternatives to the evidence sought



Claims of Privilege or Protection

- The so-called “Claw back” aka oops rule
 - ▶so, can I please have it back?
- Receiver must:
 - ▶ Return,
 - ▶ Sequester, or
 - ▶ Destroy
 - ▶ **OR PRESENT THE INFORMATION TO THE COURT UNDER SEAL Rule 26(b)(5)(B)**



Practice point

- To reduce cost and delay in risk avoidance
 - ▶ Parties may minimize the risk of waiver by agreement or protocol



Rule 33: Interrogatories

- ▶ Business records expressly includes electronically stored information
- ▶ “...in sufficient detail to permit the interrogating party to:
 - **locate** and
 - **identify**
- ▶ as readily as can the party served, the records from which the answer may be ascertained.”



Rule 34: Production

Of Documents, Electronically Stored Information, and Things

- Rule 34(a): party may
- inspect
- copy
- test or
- sample electronically stored information...
 - ▶ Including other data or data compilations stored in any medium
 - ▶ From which information can be obtained-translated, if necessary, by the respondent
 - ▶ Into reasonably usable form. . . .



Testing & Sampling

Now expressly authorized

- This includes the ESI that is produced AND
- The electronic information SYSTEM
 - ▶ Opening up the door to matters that may be
 - ▶ **Confidential** or **Privileged**



Rule 37: Sanctions

FAILURE TO MAKE DISCLOSURE OR COOPERATE IN DISCOVERY

- “Absent exceptional circumstances, a court may not impose sanctions...for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.”

- AKA THE

SAFE HARBOR

- BUT.....BEWARE



Below the Calm Waters of the Harbor

- Good faith means a party is not permitted to **exploit the routine operation** of an information system
 - ▶ **to thwart discovery obligations**
 - ▶ **by allowing that operation to continue in order to destroy specific stored information**
 - ▶ **that is required to be preserved.**



Applies to Non-Parties

- Duty in Responding
 - ▶ If the subpoena does not specify the form/s for producing electronically stored information
 - ▶ Must produce the information in a form that is:
 - Ordinarily maintained, or
 - Reasonably usable Rule 45



Texas Rules: 196.4 "Electronic or Magnetic Data"

- ▶ REQUESTING PARTY:
 - Must specify the form requested
 - Must make request specifically

- ▶ RESPONDING PARTY
 - Must produce responsive material that is:
 - **That is reasonably available**
 - **In the ordinary course of business**



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Questions





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Thanks,
and Good Luck