eDiscovery and Electronically Stored Information ("ESI")

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Overview

- Background
- CEDS Exam
- Offices
- Forensic Lab
- eDiscovery Summit
Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically-stored information.”

Zubulake v. UBS Warburg LLC

eDiscovery

Introduction

- Electronically stored information ("ESI") grew at the rate of 30% annually from 1999 to 2002
- Sheer volume is astounding
- A major corporation can have 10,000 tapes or more
- One tape can store as much as 1 terabyte of information (200-mile high stack of paper)
- Biggest addition is transitory in nature (email)
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Electronic Data Overview/Metrics

- Global Electronic Data – 95%
- Growth Rate – 40% electronic data
- 2.7 Zetabytes exist in the digital universe today
- Doubling in size every two years
- Global Communications – 93% are electronic
- Today, there are 3.7 billion email users
- 269 billion emails sent and received each day
- More than five billion people are calling, texting, tweeting and browsing on mobile phones worldwide
- More than half the world uses a smartphone
- Almost two-thirds of the world’s population has a mobile number
- More than one in five of the world’s population shopped online in the last 30 days
YouTube users upload 48 hours of new video every minute of the day
571 new websites are created every minute of the day
100 terabytes uploaded daily to Facebook
465 Twitter accounts with 175 million tweets each day
30 billion pieces of content shared on Facebook every month
Data production will be 44 times greater in 2020 than in 2009
Electronic Data Overview/Metrics Cont’d

- Megabyte (MB) = 1,024 kilobytes (873 pages of text)
- Gigabyte (GB) = 1,024 kilobytes (894,784 pages of text)
- Terabyte (TB) = 1,204 gigabytes (916,259,689 pages of text)
- Petabyte (PB) = 1,024 terabytes
- Exabyte (EB) = 1,024 petabytes
- Zettabyte (ZB) = 1,024 petabytes

2016 Allergan Metrics

- 44 matters, 717 custodians, 884GB
- 1GB = 100k email files = 1.5 average pages
- 65k Word = 9 average pages
- 166k Excel = 50 average pages
Amendments to FRCP took place in 2006 and again in 2015
Primarily on how discovery is performed
There to help court and litigants with guidance on how to meet new challenges
26(f) conference
  - Discuss issues over ESI
  - Create a discovery plan
Rule 26 Discovery Plan
  - Subjects of discovery
  - Format of production
  - Claims of privilege including inadvertent disclosure and waiver
  - Begin negotiations of custodians, date ranges and search terms
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- Internal Counsel
- External Counsel
- Internal Paralegal
- External Paralegal
- eDiscovery Manager
- Project Manager
- Computer Forensic Technician
- Custodians/Witnesses
- Joint Defense Groups
- Technology Partners
Matter Types

- Patent Infringement
- Commercial
- Products Liability
- Investigations, Subpoenas
- Others
Courts

- Federal Court
- State Court
- Courts of Appeal
- Supreme Court
- Arbitration/Mediation
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Stages of Litigation

• Pre-Pleading
• Pleading
• Discover**y**
• Motions Practice
• Trial
• Appeal
• Settlement
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Discovery

• Interrogatories
• Document Requests
• Requests for Admission
• Depositions
  - Individuals
  - Persons Most Knowledgeable
• Subpoenas
**eDiscovery**

**Important Discovery-Related Issues**

- Legal Hold
- Identification of Witnesses
- Attorney-Client Privilege
- Document Creation
- eDiscovery
Custodian-Based ESI

- Office computer
- Home computer
- Computer of personal assistant/staff
- Smartphones/tablets
- Company smart phones
- SharePoint sites
- BOX accounts
- File shares
- Thumb/flash drives
- Personal or ad hoc backups
- Replaced/removed drives
- CDs/DVDs and other legacy media (floppy disks)
Custodian-Based ESI

Messaging Systems

- E-mail
- Email archive
- Text messages
- Electronic calendaring
- Voice mail
- Instant messaging
- Cloud computing
Custodian-Based ESI

- Word processing programs
- Spreadsheet programs
- Social Media
- Database programs
- Web browsers
- Graphical presentation programs
- Document publishing programs
- Sales and personal contact programs
Non-Custodial ESI

- Enterprise-based ESI
- Organization specific applications
- Databases
- Generic enterprise applications
- Accounting
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EDRM Model

Electronic Discovery Reference Model

Information Management -> Identification

Preservation -> Collection

Processing

Review

Analysis

Production

Presentation

VOLUME

RELEVANCE
eDiscovery

EDRM Model

• Information Management
  - Getting your electronic house in order to mitigate risk and expenses should e-discovery become an issue.
  - Records management/record retention

• Identification
  - Locating potential sources of ESI & determining its scope

• Preservation
  - Ensuring that ESI is protected against inappropriate alteration or destruction. Legal hold.

• Collection
  - Gathering ESI for further use in the e-discovery process

• Processing
  - Reducing the volume of ESI and converting it to reviewing format
eDiscovery

EDRM Model

• **Review**
  - Evaluating ESI for relevance & privilege

• **Analysis**
  - Evaluating ESI for content & context, including key patterns, topics, people & discussion

• **Production**
  - Delivering ESI to opposing counsel in appropriate form & using appropriate delivery mechanisms.

• **Presentation**
  - Displaying ESI at depositions, hearings, trials
eDiscovery Manager

- Also a Corporate Records Manager
- Manage all aspects of a lawsuit as it relates to custodian electronic data
- Manage early case assessment
- Manage key words/search term list (with business unit & external counsel)
- Attend meet & confer with external legal counsel
- Manage e-discovery requirements (timing, resources)
- Manage document review strategy (collection, assignments, productions, document searching, document filtering, data sets, etc.)
- Manage/monitor document review practices of external counsel and monitor fees/costs relating to third party vendor platforms
- Participate in hands-on preservation/collection activities for cases or custodians
- Manage resources that will preserve and collect ESI
- Manage litigation hold, chain of custody and ESI collection/production
- Manage/drive policy development and implementation
- Manage litigation profile
- Manage training on document creation and litigation hold procedures
Case Study

• Court Order 11/13 20 days = 12/3 all custodians in relevant areas (RA, SM, 850+)
• Started to ID relevant custodians, plaintiffs rejected
• Motions for Relief – 11/25
• EDT continued to work, negotiated with plaintiffs, search terms, custodians, production schedule
• 12/2 reached an agreement – rolling 12/4 to 1/20
• Case Metrics
  • 261 = 758 GB
  • 6.6m pages, 415k docs
  • $662k
Qualcomm, Inc. v. Broadcom Corp.
-Southern District of California

- Qualcomm brought patent infringement suit against its competitor Broadcom.
- Email concealment by Qualcomm.
- Qualcomm ordered to pay Broadcom’s attorneys’ fees in excess of $8.5 million.
Zubulake v. UBS Warburg, LLC
-Southern District of New York

- Sex discrimination case.
- $29.3 million verdict for the plaintiff after the judge issued five separate opinions on a range of e-discovery issues.
- UBS was sanctioned for destroying relevant emails during the litigation.
- Plaintiff was allowed to pursue additional discovery and the Court issued a jury instruction permitting a negative inference to be drawn from missing evidence.
Questions?

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