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Making Sense of E-Discovery: 10 Steps for Producing ESI – Part 1

Have you ever been handed a detailed flowchart on electronically stored information (ESI) and wondered what to make of it? Have you read case law summaries about ESI and thought, "How do I actually apply this holding to my practice?" And when you do produce ESI, is there any concern whether the methods you used would pass muster if critiqued by a federal judge?

When the next big case comes in, have a plan to make sure you do everything right. Of course, you will have to tailor your methods and budget to the size of the case, but at least some ESI will come into play any time communications or stored data might become evidence. If producing ESI takes you out of your comfort zone, here are 10 steps that might work for you.

1. Prepare your team. As soon as you staff the case within your office, hold a team meeting to discuss the nature of the case and what kinds of ESI might be relevant to prove the claims and defenses. Be sure to include everyone in the meeting, such as a shareholder, an associate, and a paralegal. In discussing ESI, consider not just computers, but other things like workplace video cameras, parking garage entry logs, and other records kept electronically. You should stress the importance of keeping a journal at your law office to track all the decisions you make regarding ESI. The journal needs to be easily accessible by everyone on your team and should be updated regularly. In fact, the minutes from your meeting should be the first entry in the ESI journal.

You may also want to review social media and run Google searches on anyone who is likely to be deposed, and print everything immediately in case it becomes unavailable later. You should also be sure a spoliation notice is mailed to opposing counsel and a preservation letter or "litigation hold" letter goes to the client. Make them short and understandable, with possible inclusion of social networking sites as part of the litigation hold.

2. Meet with the client. Set up a conference at your client's office to review its organizational chart and discuss how information is stored electronically among various people and locations. The client's decision maker should attend, as well as the person most familiar with the issues in the litigation, and a member of the information technology (IT) department who knows how much work goes into collecting data. Keep in mind that the IT person may be more optimistic at this meeting in front of his boss than he might be when you talk to him on the phone in private. Bring your team and, if necessary, someone from your IT department who can ask some of the technical questions.

Keep in mind that the producing party usually pays for ESI, and though your client may be weighing the cost of being thorough against the risk of sanctions, you are ethically required not to let the client cut corners. Explain to the client what the rules of civil procedure require, and note that you can save costs by working with opposing counsel to limit the scope of the search. Record everything in your journal, and be sure the client has properly implemented the litigation hold in all relevant departments and among all information systems. You might also go over the client's data retention policy to be sure it is simple, enforceable, and actually being enforced.

3. Interview the employees. You will probably learn the names of the employees who might have information relevant to the case. You should interview them and find out which devices they use in performing job duties as well as the different forms of communication. For example, they may use some combination of email, instant messaging, home computers, voicemail, text, cloud storage, social media, special software programs, and perhaps log books where other data is recorded.

If the employees are heavy users of online networking, you might advise them not to make statements online that could impact the case. You may want to increase their security settings and advise that anything they have accessed as part of the job is subject to being searched. You should also find out whether employees are new to the job and, if so, whether their predecessors may have some of the information.

Take detailed notes for your journal, and be sure the employees are properly observing the litigation hold implemented by the company. You have to be the watchdog because, although employees may seem helpful and willing, they might not try their hardest on completing tasks that don't fall within their job description. Make a checklist of all the sources of information they have identified and, for anything outside the company premises, write down how and when they plan to provide it to you.

If one or more employees are no longer with the company, the IT department should be able to

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And last but not least, the Orlando office of **Greenberg Traurig LLP** received first-tier rankings in eight practice areas in the *U.S. News-Best Lawyers 2014* edition of "Best Law Firms." The practice areas recognized in the firm's Orlando office include: Commercial Litigation, Construction Law, Litigation - Patent, Litigation - Real Estate, Mergers & Acquisitions Law, Public Finance Law, Real Estate Law, and Tax Law. Nationally, this marks the third consecutive year that Greenberg Traurig received the most overall first-tier rankings and the most first-tier metropolitan rankings. Greenberg Traurig also received the "Law Firm of the Year" designation for its Government Law and Policy and Real Estate Litigation practice groups as a result of an impressive overall performance in the evaluation process.

That concludes this month's presentation. As always, if you have any exciting news about yourself or your fellow OCBA members, please feel free to send them to our communications manager, Peggy Storch, at peggys@ocbanet.org, or to me at chris@tadyates.com. Or feel free to stop and see me in person at our new and improved offices in College Park. See you next month!

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identify what data they had when employed, as well as anything they may have downloaded and taken with them.

4. Outline the plan. You need to think about three things: what ESI your client has, what issues are relevant to the lawsuit, and what your obligations are under the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and state law.

Generally speaking, FRCP 16 requires you to know how to produce ESI so that agreements can be made for scheduling orders.

FRCP 26 requires discovery to be proportional to "the needs of the case" as measured by a cost-benefit analysis. It limits discovery of ESI from sources that are "not reasonably accessible," but of course your client cannot deliberately make its data "not reasonably accessible." It also tightens the definition of relevancy to the claims and defenses at issue and not simply to anything that "appears reasonably calculated to lead to" the discovery of admissible evidence.

FRCP 33 specifically allows the production of ESI in response to interrogatories, and FRCP 34 explains how ESI should be produced in response to a document request. Often the requested form is native file because those files tend to reveal the most, and you might not have the software necessary to view ESI in other forms.

FRCP 37 allows judges to impose sanctions for discovery abuses, but includes a safe harbor for ESI that is no longer available through no fault of your own

FRCP 45 protects non-parties from some of the costs and burdens of e-discovery similar to the rules governing parties.

FRE 502 protects attorney-client privileged communications and excuses inadvertent disclosures if you took reasonable steps to prevent the error and quickly attempted to remedy it You may want to enter into a "clawback agreement" from the outset to give more reliability than Rule 502 which hinges on reasonableness and inadvertence.

FRE 901 requires that evidence be authenticated to verify that it is what it claims to be, and metadata can be used in that respect for ESI. These federal rules have generally been incorporated into Florida Rules of Civil Procedure 1.200, 1.201, 1.280, 1.340, 1.350, 1.380, and 1.410, although there is no state "meet and confer" requirement. In reviewing these rules and outlining your discovery plan, you should name the custodians and ESI sources, noting what you believe would be unduly burdensome, not reasonably accessible, or otherwise limited by the proportionality rules.

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