

ESI: Is It Contagious?

James L. Gale, Special Superior Court Judge – Thursday, June 25, 2015
(with special thanks to Katie Braddow)



"That virus was so contagious. I'd even refrain from using the same electrical outlet."

TOPICS FOR DISCUSSION

- A Primer on ESI
- Why Should Judges Care?
- Standards & Practices
- How the Rules Apply
- Increased Emphasis on "Proportionality" and Judicial Management
- Challenges and Opportunities
- Questions
- References

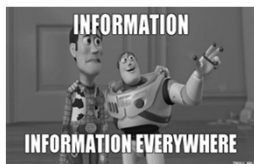


MYTH OR REALITY?

ESI only affects the big cases.



ESI: IT'S EVERYWHERE



WHAT IS ESI?



SIMPLY EXPLAINED: METADATA




WHAT IS METADATA?


- Data about data.
- "An electronic document or file usually does not include only the visible text but also hidden text, formatting codes, formulae, and other information associated with the file." The Sedona Conference, *The Sedona Principles Second Edition: E-Discovery & Digital Information Management* 60 (2007).

WHAT YOU SEE ...

Anne Dodsworth
Sales Representative
18 West 35th Street
Dallas, TX 54407




WHAT YOU DON'T



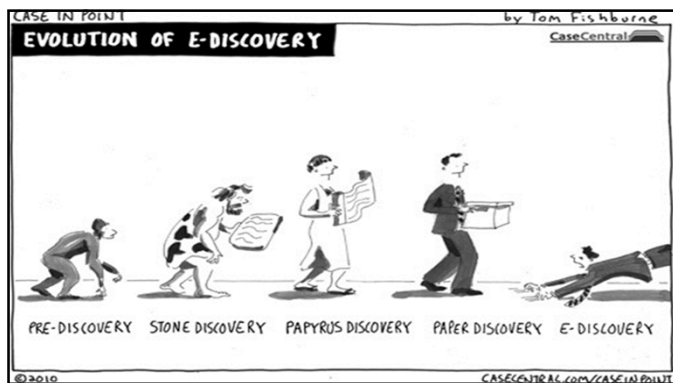
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A NEW GAME IN TOWN



- Approximately 205.6 billion emails are sent/received per day.
- In 2010, Eric Schmidt, CEO of Google, announced that every two days, we create as much information as we did from the dawn of civilization up until 2003.
- Most desktops can store the equivalent of 40 million typewritten pages of information. Some hard drives can hold a terabyte of data, which is the equivalent of 100 million reams of paper (**made from 50,000 trees**).



WHEN IT WAS JUST PAPER...

- Document preservation – comparatively easy process.
- Identify custodians
- Search on location
- Make copies
- Review for responsiveness
- Review for privilege
- Index and number
- Produce

Plaintiff's Request for Production 1:
Paper please!

WHY CARE?

"The key to reducing the cost and delay associated with eDiscovery is judicial attention to discovery issues starting early in, and continuing throughout, any given stage of an action. The expenditure of a small measure of judicial resources at the beginning of litigation to set the tone and direction for discovery—and the judge's availability to the parties at each stage of discovery—will most likely save the expenditure of significantly more judicial resources later."

➤ The Sedona Conference Cooperation Proclamation: Resources for the Judiciary (Dec. 2014).

ESI: IT'S DISCOVERABLE

Electronic Discovery Reference Model
www.edrm.org

(Electronically Stored Information) "includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients." The term does not include other metadata unless otherwise agreed or court-ordered.

N.C. R. Civ. P. 26(b)(1).

- Under Rule 34, electronically stored information is subject to discovery requests. A producing party must produce ESI in a reasonably usable form and may not produce the material in more than one form.

RISE OF E-DISCOVERY


- The American Records Management Association reports that over 90% of documents created today are in electronic format.
- Considering that approximately 90% of US organizations are currently engaged in litigation of some kind, e-discovery is on the rise.

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FINDING, READING, AND TRANSLATING ESI


- Requires technical expertise
- Compatibility concerns, particularly with "Cloud" storage trend
- Complicates privilege review

A NEW ESI INDUSTRY



- Many litigators hire experts to conduct their collections and interpret data.
- In-house system
- Collection methods
 - Sampling
 - Search term queries
 - TAR
 - Other

NEW ABA STANDARD




ABA Model Rule 1.1, Comment 8

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."
(emphasis added)

THE COST OF ESI CAN BE CASE DETERMINATIVE

- Plaintiff's perspective
- Defendant's perspective



EXTRAORDINARY COSTS

- E-discovery costs range from \$5,000 to \$30,000 per gigabyte of data.
- One third-party vendor charges \$175/hour for technical time, 11 cents per page for conversion to TIFF format, and \$250/gigabyte for initial data filtering.
- The "Average" Litigator's Toolbox



A LOOK AT THE RULES



FEDERAL RULE 1



"These rules govern the procedure in all civil actions and proceeding in the United States district courts, . . . They should be construed and administered to secure the *just, speedy, and inexpensive determination of every action and proceeding.*" F. R. Civ. P. 1 (emphasis added).

FEDERAL RULES APPROACH




- Early federal rules
 - Traditional notion of “lead to relevant evidence”
 - Tended to outweigh “proportionality”
 - Judicial reluctance to manage discovery
- Collision between breadth of rule and breadth of ESI
- Emergence of Sedona Conference and similar organizations

AMENDED FEDERAL RULES COMING SOON!

- Will take effect on December 1, 2015 absent congressional action.
- Rule 1 – amended to emphasize judicial management and parties’ cooperation
- Rule 16(b)
 - Shortens time for submitting scheduling orders
 - Urges an in-person or telephone conference


AMENDED FEDERAL RULES COMING SOON!

- Rule 26
 - (b) (1) and (2) – emphasizes proportionality in scope of discovery
 - (c) – protective order may include “allocation of expenses” provisions
 - (d)(2) – allows discovery requests prior to Rule 26(f) meet and confer
 - (f) - requires identification of open preservation issues with ESI in discovery plan and issues regarding clawing back accidentally produced documents.




- Rule 34 (b) – permits requesting party to designate form(s) in which it wants ESI produced and adds requirements for objections
- Rule 37
 - (e) – Requires "reasonable steps" in preserving information
 - Committee Notes suggest this is a more flexible standard, accounting for varying degrees of familiarity with preservation duties.

FEDERAL RULE OF EVIDENCE 502(B)
Attorney-Client Privilege and Inadvertent Disclosure



STATE COURT APPROACHES



- Pilot Programs – e.g., Colorado, IAALS Rule One Initiative
- National Conference of State Courts



The Sedona Conference

- Nonprofit institution "dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation and intellectual property rights."
- <https://thesedonaconference.org/>




IAALS
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INSTITUTE for the ADVANCEMENT of the AMERICAN LEGAL SYSTEM UNIVERSITY of DENVER

- "[A] national, independent research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system."
- Mission is to forge "a legal system that is fair, accessible, reliable, efficient, and accountable, and therefore inspires trust."
- <http://iaals.du.edu/>

NORTH CAROLINA



- Rule 16 – Pre-trial conference
- Rule 26 – Defines ESI and includes commentary on metadata and scope of ESI discovery.
- Rules 33 and 34 – Interrogatories and Production of Discovery re: ESI (format, production, and exchange)
- Rule 37 – Discovery sanctions re: inadvertent destruction of ESI
- Rule 45 – Includes ESI in scope of subpoena

2011 AMENDMENT TO THE NORTH CAROLINA RULES



- Definition of ESI
- Mechanism for requesting certain forms of production and resolving disputes among litigants regarding form
- Consideration that certain e-discovery might be inaccessible
- Safe harbor against spoliation for "routine, good-faith" deletion of electronic information
- Comprehensive pre-trial discovery plan process
- Mechanism for attempting to claw back privileged discovery

PROPORTIONALITY AND JUDICIAL MANAGEMENT



DEVELOPING ISSUES

- Transparency
- Privilege
- Spoliation
- Cost Shifting



TRANSPARENCY

OPPOSING COUNSEL COUNSELLING by Tom Fuchs

CLIENT: DIDN'T YOU SAY YOU'D SEARCH EVERYTHING?
IT'S DONE. HERE WE GO.
SOMETHING?

ATTORNEY: I SURPRISED MY KNOW-
IT-ALL SEARCH RESULTS?
THE SEARCH WAS JUST A
STANDARD SEARCH. YOU JUST
A PROFESSIONAL.

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- Front-end vs. back-end
- Transparency and communication among counsel and litigants is more important than ever.
- Early discussion of data storage systems and potentially inaccessible data reduces post hoc explanations as to why documents were not produced.

PRIVILEGE

PRIVILEGE by Tom Fuchs

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- The process is much different
- What could happen if counsel takes shortcuts? See, e.g., *Blythe v. Bell*, 2012 NCBC LEXIS 44, *17 (N.C. Super. Ct. July 26, 2012).

SPOILIATION

SPOILIATION by Tom Fuchs

Old Concept, New Uses

I anticipate litigation - Save everything.

When does the duty to preserve arise and what is its scope?
"[W]hen the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. USB Wargburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

- *In re Actos (Pioglitazone) Products Liability Litigation*, MDL No. 6:11-md-2299, 2014 U.S. Dist. LEXIS 86101 (W.D. La. Jan. 27, 2014).
- *In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, No. 2:13-cv-05578, 2015 U.S. Dist. LEXIS 35609 (S.D. W. Va. Feb. 4, 2014)

SPOILIATION: ADVERSE INFERENCES AND OTHER SANCTIONS

"In practice, an adverse inference instruction often ends the litigation . . . [w]hen a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of realization that the evidence was unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits." *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 100-01 (D. Md. 2003) (citing *Zubulake v. Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)).

N.C. PATTERN JURY INSTRUCTION – CIVIL 101.39

"When evidence has been received which tends to show that *(describe despoiled evidence)* was (1) in the exclusive possession of the [plaintiff] [defendant], (2) has been [lost] [misplaced] [suppressed] [destroyed] [corrupted] and (3) that the [plaintiff] [defendant] had notice of the [plaintiff's] [defendant's] [potential] [claim] [defense], you may infer, though you are not compelled to do so, that *(describe above evidence)* would be damaging to the [plaintiff] [defendant]. You may give this inference such for and effect as you determine it should have under all of the facts and circumstances.

"[The inference is permitted even in the absence of evidence that the [plaintiff] [defendant] acted intentionally, negligently or in bad faith.]

"[No inference is permitted if you find that *[(describe despoiled evidence)]* was equally accessible both parties] [there is fair, frank and satisfactory explanation for the failure to produce the *(describe despoiled evidence)*]."

(brackets and alterations in original).


COST SHIFTING

- Traditional Rule: producing party bears cost of production.
- Federal courts have, in some instances, begun shifting costs to the requesting party.
 - Uncertain guidelines: *Zubulake Factors*, Rule 26 Advisory Committee Notes, and *Sedona Principles*.
 - May shift cost to prevent "undue burden or expense."

NEW FRONTIERS

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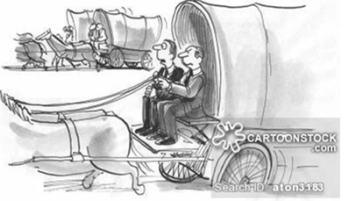
- Cloud storage
- Control vs. possession issues
- Reduction in cost
 - Life cycle costs approximately 65% less than alternative
- Risks
 - Loss/alteration of data
 - Unintentional waiver of privilege by commingling data or disclosing to third parties
 - Failure to properly and timely implement litigation holds



"You should have been here back in the old days before cloud computing."

NEW FRONTIERS

- TAR
- Spyware
- Social Media




"With our pioneering spirit we are going to break into some great new markets."

PARTING REMARKS

CASE IN POINT by Tom Fisk

I TRUST MY REPUTATION FOR HANDLING E-DISCOVERY ABUSES PRECEDES ME.




CASE IN POINT by Tom Fisk

E-DISCOVERY BUDGETING

HOW MUCH ARE WE GOING TO SPEND ON LITIGATION SUPPORT AND E-DISCOVERY NEXT YEAR?

I SEE A PRODUCT LIABILITY SUIT IN Q1 AND SOME UNEXPECTED MULTI-DISTRICT LITIGATION IN Q2.





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