

Managing the eDiscovery engagement

Under the revised Federal Rules of Civil Procedure (FRCP)



WHITE PAPER

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Introduction

The litigator's role in discovery has traditionally been the advocate and defender of client's interest. Attorneys are trusted advisers, shouldering the burdens of managing complex fact patterns and appreciating and parsing the finer nuances of the law. As corporations adopt modern modes of data storage and communication devices, technological innovation creates a new lexicon for attorneys. This new and changing vocabulary demands an appreciation for, and understanding of, technology, digital communications and electronic storage. Courts are now requiring attorneys to understand the "data retention architecture" of their clients' IT infrastructure. The courts are also creating affirmative and non-delegable attorney obligations to instruct and manage the electronic discovery activities of corporate clients.

With an effective date of December 1, 2006, the changes to the Federal Rules of Civil Procedure signal the start of a new era, unlikely to be welcomed by the corporations, law firms, lawyers, paralegals, litigation managers and information technology professionals tasked with managing the myriad legal and technical challenges the changes bring. This paper presents a road map that addresses the origin and impetus for the changes to the Federal Rules, suggests likely changes in litigation practice and attorney obligations, and reviews cutting-edge technology used to identify and search electronically stored information* (referred to in this paper as ESI) in an efficient, proactive and cost-effective manner. Finally, we present a practical framework for managing cases involving electronic information.

** The rules' new term for documents created in electronic format is electronically stored information or ESI. This term expands beyond "data compilations" and the ambiguous term "document."*

Background to the pending changes to the Federal Rules of Civil Procedure

In 1999, the Civil Rules Advisory Committee undertook a five year project to answer the following questions:

- What are the differences between paper and electronic documents?
- Do these differences create problems that can or should be addressed by changes to the FRCP?
- If there are problems that rulemaking can address, what rules can be crafted to suit that purpose?

The committee was particularly mindful of inconsistent decisions, development of state versions of law and guidelines, and a general confusion on how to properly confront the following five technical challenges:

- Replication (multiple copies of the same document)
- Electronic communications
- Digital information that defies deletion
- Unseen and hidden ESI
- Legacy data (backup tapes, difficult-to-access and recover digital media)

Each of these technical realities imposes significant resource and time commitments at the first notice of litigation. Despite the fact that technology has created many extraordinary efficiencies and business advantages, it simultaneously increases the scope, complexity, and costs of litigation.

It will come as no surprise to those who read the Wall Street Journal on a regular basis that e-mail often forms the basis for criminal investigations of senior executives from the country's largest corporations. Savvy attorneys and investigators request the laptops and e-mail servers hosting information relating to a particular individual, understanding that e-mail can form the basis for proving or disproving the elements of the matter or investigation. It is unlikely that most attorneys anticipated the growth of digital communications and the substantial role such growth would come to play in litigation. That growth has brought unique challenges to litigators. For example, (1) what must be preserved; (2) who bears the financial burden of restoring and reviewing backup tapes; (3) how should counsel handle instant messages; (4) what are the best practices for handling volume containment; (5) how can limits be placed to keep overly broad document requests in check; (6) how can the demands of responsible and competent representation be met.

These issues are moving targets, but can be made more manageable by adopting a framework and a consistent procedure for each matter an attorney handles. The initiation, implementation and adherence to business records policies are critical to the success and viability of many large and midsize corporate entities. Without a sophisticated electronic information management program that addresses regulatory, business and anticipated legal issues, an organization will have to play "catch-up" when faced with the rapid-fire demands of discovery. An unprepared company puts itself at a strategic and financial disadvantage, and will be forced to draw crucial resources away from core business purposes. Although any litigation or investigation is reactive in nature, organizations can and should proactively prepare for litigation by anticipating a broad range of document requests and depositions that will focus on their systems and electronic document storage policies. Managing electronic discovery engagements and the demands of providing accurate ESI has now become a cost of doing business and needs to be addressed with the sophistication applied to other business processes in an organization.

The federal Electronic Records Archives Program Management Office (ERA-PMO) was officially established on October 31, 2002, in accordance with a directive issued by John W. Carlin, archivist of the United States. The goal of a business records program is multifaceted (as presented at www.archives.gov), but certainly includes the following three high-level goals in pursuit of its mission, as defined by the National Archives and Records Administration:

1. Essential evidence will be created, identified, appropriately scheduled and managed for as long as needed.
2. Essential evidence will be easy to access regardless of where it is or where users are for as long as needed.
3. All records will be preserved in an appropriate environment for use as long as needed.

The general components of a business records program should include a robust effort to:

- Understand the meaning of "document"
- Appreciate business, legal, administrative, and regulatory requirements mandating the retention of important corporate business records
- Identify a team which includes legal (both in-house and outside counsel), IT, administration, and HR personnel
- Develop a mechanism for classifying corporate records, by type, subject, custodian, and department

- Develop the framework for retention, including—
 - Nature of document
 - Purpose of document
 - Specific retention requirements for document(s)
 - Length of retention period
 - Location(s) of document
 - E-mail-specific policies and procedures

Building a business records program assumes added importance in the context of the revised Federal Rules of Civil Procedure. The term “electronically stored information” in the amended Rule 34(A) of the Federal Rules significantly expands the potential scope and breadth of discovery. By inserting this term in the new rules, the courts and parties are on notice that discovery requests are not limited to hard copy documents.

In addition, the litigator’s “peripheral vision” must be expanded to include tracking, managerial and historical information (metadata) relating to stored material, deleted information, and any hidden or embedded information.

With an eye toward the extraordinary costs of managing electronically stored information, the advisory committee suggested a sensible solution for reducing cost in litigation. Given the volume and the disorganized and duplicative nature of electronic communications, business records and employee information, it is often appropriate to consider incremental strategies designed to reduce cost and recalibrate discovery directions. The new amendments suggest that sampling may be used to determine the relevance and usefulness of information stored on hard-to-access media. Sampling may determine the likelihood of finding responsive information and may test claims that such information would require unduly burdensome and costly restoration activities. Sampling techniques and technologies should not, however, be limited to inaccessible information and can be effectively used to evaluate the entire data collection. Sampling is just one reasonable method for addressing cost concerns in conducting electronic discovery. A variety of technical methodologies can validate search terms and ultimately narrow the scope of document review to specific servers and custodians.

The framework and procedures outlined in this paper are designed to present an approach that will aid attorneys in formulating a legal strategy for managing the electronic discovery engagement.

The “gentleman’s agreement” employed in the past in order to avoid requesting or producing ESI will no longer be an option. The new language of Rule 26(f) — the “meet and confer” — requires the parties to discuss a variety of issues

associated with electronically stored information, and the discovery of relevant e-mails and other electronic documents. The results of those discussions must be reported out to the court, so that any scheduling order as provided in FRCP 16 can include agreements relating to preservation, production formats and privilege. Judicial involvement in electronic discovery management has resulted in rigorous common law requirement imposed on attorneys to affirmatively manage their client’s response to discovery requests for electronic information. Attorneys and judges are attempting to determine the appropriate standard of care for properly preserving, searching and producing electronic information amid concern for cost containment and privilege waivers. As outlined below, a standardized approach assists in the complex management of integrated legal and technical issues.

The 10 steps

The 10 key steps listed below and the balance of the paper will provide substantive commentary and strategic direction on managing the electronic discovery engagement, thus balancing the risk of exposure and costs:

1. Preservation
2. Assign matter control
3. Defining the strategy
4. Mapping the problem
5. Meet and confer
6. Understanding ESI
7. Collect the ESI
8. ESI processing (reduction and conversion)
9. ESI review
10. Production of ESI

As soon as litigation can be reasonably anticipated, parties are on “notice” to preserve relevant ESI. In light of the unique operation of technology whereby ESI is routinely overwritten and destroyed without human intervention, preservation must be actively implemented. In the days of paper-only documents, document destruction occurred at the explicit direction of the document manager, or when the warehouses hosting the documents became overburdened. In contrast, electronically created and stored information may be destroyed based on predetermined schedules (tapes and corporate server data schedules), or by the touch of a button or the click of a mouse when individuals intentionally or inadvertently clean out their deleted e-mail folders.

Therefore, time is a critical element in litigation and especially calls for early drafting and delivery of preservation or litigation hold notices.

1. Preservation

Preservation obligations are challenging for counsel, because most documents and communications are created and stored in electronic format these days and it is not easy to stop their automatic destruction. Most jurisdictions impose the duty to preserve at the moment counsel can reasonably anticipate litigation. In practical terms, this means that counsel must have a face-to-face meeting with their client's information technology staff about both high-level and granular topics relating to digital communications, systems and networking issues. Factors requiring attention include the specific policies and procedures that govern the retention and destruction of documents potentially relevant to the litigation. One should note that the comments in the newly revised Federal Rules state that the preservation obligation may be broader than the production obligation. Therefore, even where there may not be a duty to produce information deemed "inaccessible" (i.e., hard to access and restore) under Rule 26 of the new federal rules, there may still be an obligation to set such information and media aside for review at a later date.

For requesting attorneys, electronic discovery can be a frustrating exercise because the body of documents potentially responsive to a request can seem limitless. Clearly, it is no longer sufficient simply to reference paper documents or Bankers Boxes. Rather, the preservation notice or litigation hold needs to include paper and ESI, which may be located in a variety of places, including, but not limited to:

- Laptops
- Servers
- Backup tapes
- Mobile devices
- Outsourced data application systems

Once the preservation notice has been sent, counsel must step back and make project management decisions regarding the case. This stage, or second step, is a critical milestone.

2. Assign matter control

The landmark decision *Zubulake v. UBS Warburg* definitively places the responsibility for discovery management on the desks of both inside and outside counsel. *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003). In addition to the legal obligations, there exist multiple strategic, technical and project management issues which must be addressed in a timely and appropriate fashion. For these reasons, the people responsible for electronic discovery matters have crucial duties. Why is assigning control so important to do at this early stage?

Discovery obligations run to the client's counsel, who is responsible for the client and the matter; thus, choosing the right individual(s) or entity with the critical mix of skills and resources is the first decision to make. These persons or entity must be competent, conversant and aware of all of technological and legal issues relating to electronic documents. In a recent highly publicized case, the financial management firm Morgan Stanley suggested it might file a legal malpractice claim against its outside counsel, Kirkland & Ellis, primarily because of eDiscovery issues. Certain states, including Delaware, have created default rules for the appointment of an eDiscovery liaison. These developments highlight the fact that downstream decisions made by the individual or entity responsible for such decisions may result in adverse discovery rulings undercutting the substantive merits of the case. As courts increasingly see this role as critical to proper electronic discovery management, law firms and corporate counsel must respond by designating people well versed in law and technology to be responsible for matter management. There are several obvious options: an individual from the law firm, from the client organization, and outside consultants experienced in project managing the typical and atypical issues.

Consider the following factors when designating personnel for key eDiscovery decision making and when determining what tasks should be outsourced.

- Personnel available
- Experience with the particular type of matter at hand
- Technology of the client organization, the law firm, and expertise
- Production schedule
- Volume of potentially relevant data
- Types of data
- Complexity of data

3. Defining the Strategy

The third step, defining the strategy to properly manage the client matter, involves crafting the appropriate mix of time, resources and expertise to document damages of the case. The size, type and time line of the matter and, of course, the exposure of the case, will determine the budget and strategy. By understanding certain parameters, one can begin to develop the case strategy.

For eDiscovery purposes, cases can be categorized as complex or standard.

- Complex cases
 - Large data sets
 - Multiple types of data
 - Short time frame
 - High exposure
- Standard cases
 - Moderate data volume
 - Negotiable production time frames
 - Little data variability

Complex cases require expert vendors, automation and sophisticated technology. The importance of risk mitigation, regardless of the size of the case or complexity, increasingly depends on technical resources and consulting from the start. In standard cases, when the volume of data is smaller, the production time frames are negotiable and the exposure is lower. In order to save money, a corporation or law firm might choose to use internal resources for a standard or smaller case to perform such tasks as data collection and pre-culling of the dataset before passing to a vendor for a “first pass” sampling and searching of the electronic documents. First pass sampling and searching, typically a review of ESI in native file format (that is, documents in their application format) is a way that — given a less stringent time line — counsel can save significant money on data processing fees. For instance, an Excel document would be examined and reviewed by opening the MSExcel application and opening up a specific Excel workbook; or e-mail archives originally created by MS Outlook would be opened and reviewed in Outlook. Attorneys can review the native-format documents and then select those that need to be converted to TIFF or PDF images for redaction and annotation purposes before passing on to the requesting party.

Under the newly revised Rule 26(f) mandated discovery conference, counsel must now address electronic discovery issues, and this initial legwork (or “IT discovery”) will be a factor both in cost assessment and strategic decision making. This early work in defining the case strategy can contribute to long-term cost reduction while simultaneously helping to rebut any claims of inadequate discovery preparation that might be made by opposing counsel.

Once the strategy is defined, counsel and client next collaborate to understand the specific challenges created by their document management systems and the retention policies (which are often designed without attorney participation). That process is referred to in this paper as Step 4 – Mapping the Problem. Following the lead of emerging case law, the notes to the Federal Rules emphasize the need of counsel to understand the technology systems of their client prior to the Step 5 – Meet and Confer.

4. Mapping the problem

In order to comply with discovery obligations, counsel must identify all information that might lead to the discovery of potentially relevant information; in effect, locating all the information that “touches” the matter. Unfortunately, the innate form and organization of electronic data does not usually fit the requirements of discovery. File structures, e-mail databases and multiple linkages make it extremely difficult to establish the natural boundaries of discoverable information. The challenge for litigators in mapping the problem is to identify the intersection of the document requests and the shifting nature of electronic documents. This is what is called “mapping the problem.” Mapping the problem involves delving into details of the matter and asking probing questions. This step is designed to help attorneys and the legal support staff get their arms around the electronic information to formulate the proper responses. This requires taking all appropriate steps to understand the electronic data organization and policies in place which might impact discovery and, if missed, risk court sanctions.

Let’s take a look at the elements of this step. For example, in product liability cases, class action lawsuits and obstruction of justice matters, the needs of the cases and likely location of relevant information will likely require an examination of records stored electronically. This data may exist either on easily accessible media such as laptops or servers, or in more difficult-to-access places such as backup tapes. The advisory committee notes acknowledge the differences in volume and complexity between paper and electronically stored information, specifically the distinctions arising from multiple storage types and locations. The notes to the new Federal Rules recognize the logistical and financial burdens associated with producing certain types of information stored in hard-to-access media that may be expensive to restore. In the absence of a court order or an agreement with the opposing side, therefore, a responding party need not produce information stored on media that that party identifies as “not reasonably accessible.”

However, the party must still “identify, by category and type, the sources containing potentially responsive information that it is neither searching nor producing.” Tape sampling is a recommended tactical option to reduce cost and allow early analysis of media content and volume.

Once there is a solid feel for the nature of the claims and potential avenues to address them, the discovery team must create a diagram of all sources of potentially responsive information, such as laptops, servers and handheld devices, and whether the network is centrally organized or decentralized. Counsel should ask for a client’s network chart and IT department policies. Policies and procedures, of

course, and the extent of the compliance with those policies, are good road maps for additional investigation. One of the most difficult aspects of electronic discovery is obtaining a true understanding of the practical implementation of policies and procedures by the information technology department. Rule (30)(b)(6) depositions of key persons knowledgeable about computer systems (otherwise known as “the IT deposition”) provides counsel a better understanding and clearer view of corporate records policies, the practical versus theoretical application of those policies, and likely sources of discoverable information. This discovery tactic is being used with increasing frequency by the requesting party to explore the existence and locations of discoverable information.

For example, tape recycling policies may determine which tapes must be acquired for further investigation. If the investigation involves a certain time frame, it may be necessary only to acquire the tapes containing data that pertains to that period.

Next, the litigator must consider the types of information that may be relevant, a task no different from the approach historically taken in the discovery of paper documents and file cabinets. For instance, documents where responsive information is likely to be found may include the following:

- Correspondence
- Reports
- Studies
- Memoranda
- Financial data
- Draft documents
- Presentations

After identifying the policies, network architecture and likely relevant sources, and then creating a diagram outlining investigation and analysis, the parties must meet and discuss preservation, privilege waiver, litigation time lines and production requirements, a negotiation with the opposing side known as the “meet and confer, or discovery conference”

5. Meet and confer

Growing judicial discovery oversight emphasizes early and comprehensive discussion and negotiation among counsel about critical electronic discovery. One of the most significant additions to the Federal Rules is Rule 26(f), which specifically outlines key matters for the parties to discuss in preparing for a Rule 16 Scheduling Conference. Primarily known as the “three P’s”, they include:

- **Preservation** The advisory committee was mindful that electronically stored information may be destroyed,

intentionally or inadvertently, in the course of discovery, and thus wanted to draw attention to this issue at early stages of the parties’ discussion. The parties are encouraged to discuss past and current preservation steps and, if appropriate, formulate an agreement detailing their understanding as it relates to preservation activities.

- **Privilege waiver** Privileged electronic information can be easily, and inadvertently, produced to the opposing side. To avoid an automatic waiver of privilege, the parties may consider an agreement designed to keep the privilege intact.
- **Production format preferences** This is particularly important, as formats (such as native, TIFF or even paper) clearly have strategic and cost impacts that should be discussed at an early stage.

Once this preliminary meeting has taken place and a discovery plan (Form 35 as amended under the new Federal Rules) is presented to the court, counsel must become more familiar with the intricate and complex issues associated with the client’s electronically stored information.

6. Understanding the ESI

ESI includes, for example, e-mail, word processing files, spreadsheets, deleted information, metadata, and its application will doubtlessly change as forms of electronic information change. A “document” is merely one of several forms of ESI that may be sought. Therefore, counsel must be sufficiently familiar with ESI to handle discovery requests and productions competently.

Just being aware of the types of ESI is not enough. Courts now distinguish between reasonably accessible (usually active) information, and not reasonably accessible (usually inactive) information. Information identified as not reasonably accessible is more difficult to identify, search and review, and thus ostensibly more costly to obtain. Burden control was the primary driver for the amendments to Rule 26. The rule acknowledges the practical complexity that litigators must confront; attorneys are now asking “do you want my active documents, inactive documents or both, and how do you want them?”

In addition, the term “deletion” has a unique definition in the electronic world. Experienced computer forensic professionals can recover “deleted” information, though many computer users still think that once they hit the delete key, data is gone and untraceable. And ESI carries additional baggage that may illuminate key aspects or facts relevant to the litigation. Think of the electronic document in a three-dimensional representation with multiple data levels to help understand the differences between ESI and paper.

There are other sources of information to investigate in addition to computers and mobile devices. Backup tapes, just like desktop hard drives, laptops, other office computer systems, contain not only business records, application files, test results and marketing material, but metadata relating to that stored material. Such metadata may contain important clues as to the knowledge and communications between or among key individuals in litigation. The data stored on backup tapes is not easily searchable, and attorneys must understand how tapes are organized, the nature of the restoration process, and the difficulties associated with tape restoration. Identification and review of documents on backup tapes is not as simple as loading a tape into a drive and opening up files. The network and server environment from which the tape was created needs to be replicated in order for the data to be extracted. This is an intricate and complex process. Tapes have become a source of discovery despite arguments that they are simply intended for disaster recovery and should not be fodder for discovery disputes.

Dealing with server data, such as Exchange or Lotus Notes e-mail, or some other type of data, requires specialized software and handling. Some large corporations have legacy, proprietary e-mail systems that need to be converted to the more common MS Outlook or Lotus Notes formats.

Employing an expert at this point may be appropriate. It is important not to underestimate the challenges of data recovery, even though you may think of the client's IT staff as the first and least expensive resource for identifying and recovering ESI.

Once ESI's various forms and complexities are understood and incorporated into the litigation strategy plan, counsel must designate a delegate to acquire and marshal all ESI deemed responsive to the matter. Those steps are addressed below. Keep in mind that these steps may be broken down into smaller segments. For example, sampling or filtering using specific users or subject matter identifiers may be employed on specific tapes or media as a prelude for additional discovery or negotiation. This approach is certainly consistent with emerging case law as now codified in the Federal Rules.

7. Acquiring the ESI

In many ways, the process of designating the individual or firm responsible for collecting the electronic information is much the same as determining who or what entity is responsible for the overall matter management. The size and complexity of the matter, resources, time and skill level available all influence this choice. For example, in a small or standard matter it may be acceptable to have the information technology staff collect the data. However, complex cases

involving a large number of hard drives and different types of data may require experienced outside experts, including forensic experts with testifying experience.

Collecting and processing key custodian data may allow you to settle a case at an early stage, or uncover the key pieces of evidence before much of the other data is needlessly processed. The client's internal resources or an outside expert can streamline the process of prioritizing custodians and types of data, helping to control costs and to meet court deadlines.

These early decisions support a risk-conscious approach to litigation. The integrity of the collection process can be challenged. Parties must consider the advisability of subjecting their internal IT staff to questions of competence or motive in collecting documents intended to be responsive to opposing counsel's document requests. As with many of the 10 steps, the overarching issue of weighing risks, benefits, costs and time always lingers. Regardless of who collects the data, attorneys must be cognizant of the fact that they are ultimately responsible for document preservation and collection, and that the duties extend to them and their firms, not just to their clients.

Once the data has been collected, the data will go either directly to a vendor that conducts technical analysis, or, when suitable, such work will be carried out by the firm. Whichever path it takes, the strategy developed at the onset of the case should drive such decisions; the chain of custody must be maintained throughout each step. The backup tapes, CDs and various other media now taking up space in the lawyer's office needs to be tracked in a chain-of-custody log, a proven defensible process. One cannot simply open the media and easily identify potentially responsive documents. Most attorneys underestimate the technical process required to search electronic media for multiple file types from different time periods.

8. ESI Reduction and Conversion

In limited circumstances the law firm or corporation can use an in-house solution for ESI reduction and conversion. However, because Step 8 is the most technical of the entire 10-step process, it is usually best accomplished by outside provider. This process is necessary because of the exponential and explosive growth of electronic information, convoluted storage strategies and the non-interoperability of many software and hardware solutions.

The first part of the reduction and conversion process is designed to separate the wheat from the chaff. Most data systems and networking environments contain irrelevant and nonresponsive files and documents that will clog the review

process if left in the collection — for example, nonprintable files (system files and other file types that do not lend themselves to be converted to images (i.e., audio files, video files, etc.).

Nonprintable files help a computer operate but are not relevant to the litigation (i.e., they are not communications, Word documents or spreadsheets that shed light on the claims or defenses of the litigation). These files and applications are often large. Once they are properly segregated, the peculiar problem of finding duplicate files must be attacked. Typically, by virtue of system operations and storage technologies, one can predict a certain percentage of exact duplicates in any given document population. It is more economical in the long run to first take advantage of the available highly sophisticated culling methods in order to reduce expensive redundant attorney review time later. Once duplicate e-mails have been identified (through the use of algorithms such as MD5 Hash) and segregated, the remaining files can then be searched and filtered. Documents can be searched using criteria such as file type, date range, keywords and file size. Searching and filtering strings can be overlaid to form complex compound filters, casting the narrowest net on the dataset and best refining the set of responsive documents. Experienced vendors provide expertise to consult on likely responsive search terms for particular matters and should use reports and sample datasets to assist in the refinement of search criteria.

Taking the time at this point in the engagement to determine the best culling approach to reduce the dataset will result in significant downstream savings. ESI replication, complexity, volume and data disparateness resulted in the amended Federal Rules. The new rules emphasize dialogue, not denials, and education, not evasion. Early discussion, supported by the utilization of sophisticated data mining strategies, is likely to yield the maximum benefits at the lowest resource output.

After being reduced to a search-responsive set, the resulting files will likely be converted into a uniform format — typically PDF or TIFF — for loading to a document review or management system. As part of the conversion process, key metadata such as hidden comments, spreadsheet rows, and embedded data should be unhidden and included with the delivered images.

An expert can help reduce the number of pages produced during conversion by giving special formatting considerations certain file types. For example, XLS spreadsheets are notoriously difficult to handle properly. But an experienced expert will employ a number of tools that can reduce the number spreadsheet images to those containing actual information. Reviewing XLS files in TIFF or PDF can be difficult, and applying special settings facilitates the review process (e.g., “printing over then down,” and adjusting font sizes).

In some cases, review in a file’s native application may be required. For example, when an Outlook user creates an e-mail and sends it to a Eudora user, the file will appear differently in Eudora. But the sender’s intent may be found by reviewing the e-mail in its native Outlook view. During the conversion phase of mail items from their native application to PDF or TIFF, it may be desirable to capture certain mail items as they appear in their native format.

During the meet and confer discussion, consider the type of review format that will result from conversion that is another cost/benefit analysis. Factors impacting review format will include the document management review system of both parties and the feasibility and desirability of conducting a first pass review in native format. Native format review may increase the review time and cost, but lessen the later cost of converting files to images. Regardless of the format chosen, most of the commonly used document management systems can handle any combination of images, metadata, text and native files. Once conversion is complete, the data is ready to be loaded into the chosen review or document management system, which then permits counsel and staff to begin the initial review for privilege and relevancy, the ninth of the 10 steps.

9. Review for privilege and relevancy

The ninth stage retains much of the familiar feel associated with paper review, with the major caveat that much of the review and analysis of electronic documents is performed using either a document management system hosted by the law firm or client, or utilizing a Web-based document review and repository platform. The advisory committee was inundated by commentators expressing concern about the impact document volume has on the ability of parties to protect privileged communications with their clients. The committee responded by encouraging parties to adopt, by agreement, one of two possible avenues to protect privilege; the “clawback agreement, allowing a producing party to retrieve inadvertently produced privileged information without waiving the privilege, and the “quick peek” agreement, by which the producing party provides unreviewed documents to the opposing party, giving that party the opportunity to sift through documents and designate those of interest, subject to the agreement with the producing party. Regardless of the avenue chosen, parties are best served by employing sophisticated search technology to identify digitally generated information. Of course, the existence or nonexistence of document management systems at the law firm or client site will play a significant role in these determinations. Additional factors include the size and complexity of the case, the number of parties, the locations of attorneys, the nature of the case, the risks and the resources of the parties.

If a law firm or client does not have an in-house review system, it is appropriate and cost-effective to use a Web-enabled review and/or repository system. This type of review system is particularly desirable when the reviewing attorneys are located in different offices. Web-based systems allow the attorneys to engage in simultaneous review 24/7 from anywhere in the world. Most Web-enabled tools permit the development of the litigation strategy through mapping the case, creating folders for “hot” documents, and redacting and annotating relevant portions of key documents. Once the document collection has been reviewed, it can be produced to the requesting party, be it a regulatory agency or opposing counsel.

10. Production

Production is the final step of managing an electronic discovery engagement. Production in electronic format enables much more efficient searching and review than paper production. Foresight in early strategy meetings with the client and opposing counsel should properly prepare all involved for the challenges and benefits of electronic document production.

Consider the following:

- The format of the data set (PDF, TIFF, meta, text, native)
- The delivery format (CD, DVD, HD, FTP)
- The shipping method (FedEx, courier, etc.)
- The “batch load” or “load file” format, suitability for the waiting document system

The amendment to Rule 34(b) addresses the concern that production formats have been and will be used, either intentionally or inadvertently, to “create unnecessary obstacles for the requesting party.” Recognizing that the form of ESI production is “more important” than for paper production, the amendment permits the requesting party to designate the preferred form of electronic production. The intent of the rule is to encourage the parties to reach agreement on the form of production under Rule 26(f) (3). Under Rule 34, when no form is specified in the request, the responding party must state the intended production form(s) and, when there is no agreement or order, the responding party must produce ESI in forms “in which it is ordinarily maintained” or “reasonably usable” form. Because production format is very likely to become a key subject of negotiation, the choice of review format should weigh heavily in cost and strategic considerations. Emerging case law, supported by FRCP production requirements for “reasonably usable” forms of documents, is trending toward electronically searchable or native document productions, and caution must

be advised to those attorneys who believe they can review in electronic format but produce in paper format.

This concludes the 10 steps of managing an electronic discovery engagement. In order to fully appreciate the value of this 10-step framework, let’s now take a look at the 10 steps in the context of an actual case.

Case study

Your client, ABC Corporation, receives a subpoena from the state attorney general’s office which directs the recipient to provide all documents relating to a fraud investigation. Using the 10 steps, the case would be approached in the manner described below.

1. **Preservation** – Once the subpoena is received, or in the event previous communications or activities took place that could lead ABC Corporation to anticipate litigation, a preservation notice must be sent to the client by their counsel. The preservation notice should apply to both paper and electronic documents. All deletion activity and scheduled e-mail and file server tape recycling should stop immediately.
2. **Assign matter control** – Counsel must decide who will manage the project — the firm, the client or an outside provider. For the purposes of this case study, assume that in-house counsel will manage the project.
3. **Defining the strategy** – This case is a high-profile, large-scale investigation that could result in both civil and criminal litigation. Those possibilities must be taken into consideration at every step of the ED process. Compliance with a government investigation may take precedence over other strategic issues considered in a civil case, yet many of the technical decisions will remain the same.
4. **Mapping the problem** – Both paper and electronic documents will be of concern, and the IT department has reported that e-mail backups are performed on a weekly basis. At this point in time, it is unclear what types of documents will be requested, but it can be assumed that all correspondence and financial documentation will be at issue, as described in the subpoena. The exact parameters will be determined in discussion with the state attorney general’s office.
5. **Meet and Confer** – A negotiation meeting should be requested where the three “P’s” (preservation, production and privilege), together with time lines, should be discussed. At the meeting, it will be determined that the attorney general wants all correspondence, including e-mail, dating back to January 2003 —calendar items, financial documents and all active data on the system.

6. **Understanding ESI** – At this point, counsel will likely be significantly invested in understanding the policies and electronic information formats required for production, and will be discussing those formats with internal or external resources to begin the collection and review steps.
7. **Collect the ESI** – The team has decided to hire a forensic specialist to make forensically sound copies of hard drives of key individuals to capture all of the data and avoid spoliation. This vendor will also collect and restore the backup tapes for the time frame in question.
8. **ESI processing (reduction and conversion)** – Depending on the matter and the resources of the law firm and the client, this stage is usually carried out by an outside electronic discovery provider. For the purposes of this case study and consistent with the strategy decided by the trial team, given limited resources and technology, an outside consultant is retained to cull and convert the data, with proper law firm oversight. A search term list created with the attorney general's office has been provided to the electronic discovery provider, together with date and file extension filter criteria. The e-mails and files of certain users will be de-duplicated. Based on the document management systems used by the firm and in-house counsel, it was agreed that all documents other than XLS (Excel) files will be produced as TIFF images with metadata and text, and that all XLS files will be produced as native files with metadata and text. This decision will allow for easier review and will reduce processing costs. Any XLS files deemed responsive will be converted to TIFF later.
9. **ESI review** – Your firm uses Concordance and the client's internal counsel uses a Web-enabled review system, so the trial team decides that the best option is to use the Web-based system. By choosing that option, both you and the internal counsel can review the documents in question. All documents are reviewed for privilege and relevancy, with the privileged documents redacted, annotated for production to the attorney general's office, or listed on the privilege log.
10. **Production of ESI** – The attorney general's office uses Concordance. As the lead attorney, you direct your outside provider to batch-load the production set for delivery into Concordance. The resulting document population is then sent to the attorney general's office on DVDs. While the typical electronic discovery engagement usually has various unforeseen developments, the utilization of these 10 steps, and an emphasis on maintaining consistency throughout the process, will lead to an eDiscovery project that is effectively managed and subject to minimal risk.

Concluding thoughts

Regardless of the size and complexity of the documents in a case, following a few guidelines will provide a solid foundation to the seasoned or novice practicing attorney facing the electronic discovery issues.

- Measure twice, cut once — planning cannot be overemphasized.
- Stay on top of market trends and legal issues — new technology, regulations and discovery and evidence case law affect the decisions you will make regarding your next eDiscovery engagement.
- Utilize technology where appropriate and employ outside resources where necessary.

If you keep all of this in mind, you will minimize the risk and reduce the costs of your clients' electronic discovery and represent them with confidence and competence.

Go to www.pblegalsolutions.com for web casts, white papers and more information on Litigation Support and eDiscovery brought to you by Pitney Bowes Legal Solutions.

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