

You & Your Clients: Communicating About E-Discovery

- First Webinar: Reforming Discovery: Use of the 7th Circuit E-Discovery Principles to Improve Your Discovery Processes



View On-Demand at www.tcdi.com

- Today's Panelists



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Why is E-Discovery Communication Important?

- Every computer system is unique
- Clients know their systems best, Counsel knows legal issues and standards best
- Strong communication enables you to leverage what both parties bring to the table

Counsel, Educate Yourself!

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- 7th Circuit E-Discovery Pilot Program Principles
 - www.7thcircuitbar.org
 - www.tcdi.com
 - Proposed Standing Order Relating to the Discovery of ESI
 - E-Discovery Amendments and Committee Notes to the 2006 Rules
 - www.uscourts.gov/rules/congress0406.html
 - The Sedona Conference® Cooperation Proclamation
 - www.thesedonaconference.org
 - Georgetown Law E-Discovery Law Blog
 - www.law.georgetown.edu/cleblog/

Suggestions for Working With Clients New to E-Discovery

- Educate your client
 - Do not be over technical
 - Listen to your client: About systems and cost-related concerns

- Explain the obligation and scope through a series of conversations to gain a common understanding of:
 - Data Volume
 - How its created, stored and overwritten
 - Cost of process

- Counsel and advise
 - Aid in assembling internal and external teams
 - Do not play “gotcha” with your client

Why the Emphasis on EARLY Discussions

- Courts see results of delay - they understand consequences of poor communication
 - Motions for sanctions
 - Cost of re-collection, additional discovery
- Issues in discovery motions could have been resolved if issues addressed sooner
 - Breadth of preservation
 - Collection format

How Principles Encourage EARLY Discussion

- Principle 2.01(a) - Parties should discuss electronic discovery with their opponents *before* the initial status conference
- Principle 2.01(c) - Counsel should speak with their clients before meeting with opposing counsel
- Principle 2.01(d) - Courts can require additional discussions or impose sanctions if a party is not a good faith participant in the process

Where to Start?

- Look at allegations & issues, including damages and defenses
 - Principle 2.04 requires a party to identify the specific need for E-discovery sought.
 - Principle 2.03 provides that vague and overbroad preservation orders should not be entered.

- Identify key people - the internal team
 - Custodians
 - IT Professionals

- Determine where relevant information is stored

- Consider going to see your client's systems. Observations may allow you to consider information sources that your client may not have considered
 - Telephone systems
 - Mobile devices

Types of Data Stores to Consider

- Defining some terms:

Data Stores

- Servers
- Workstation
- Removable media

Data Types

- Email
- Loose files
- Structured data

- Talking points for practitioners:

- Email
- Location and types of loose files
- Web pages
- Location(s) of structured data and how data is organized
- Other data types (ex. CAD files)

Identifying Key People in Large Enterprises

- Employees with relevant ESI
 - Employees with knowledge of relevant facts tend to own relevant ESI
 - Examples:
 - Contract case, look at employees involved in drafting and negotiating
 - Employment case, look at decision makers, HR, etc.
 - Think Rule 26(a) disclosure list +

- Employees with knowledge of computer systems (IT Professionals)
 - Examples of systems:
 - Email
 - Shared networks
 - Employee workstations
 - Structured data
 - Leverage their knowledge of systems and their familiarity with company policies and procedures
 - Who: IT Professionals (Larger Enterprise), Business Managers/ Department Heads (Smaller Organization)

E-Discovery Communication with Clients

- Learn your client's policies and procedures for E-discovery (ex: how they handle legal holds)

- Due diligence includes
 - Educating yourself
 - Understanding client's culture
 - Understand client's level of sophistication
 - Factor in the nature of the case

- Remind clients that E-discovery efforts must be documented and defensible

Principle 2.04 and Proportionality

- Principle 2.04 requires e-discovery obligations should be in proportion to the significance of the litigation
 - Proportionality factors in FRCP 26(b)(2)(C)
 - Learn client's cost of retaining/producing material
 - Learn impact on client's business of retaining/producing material

- Educate clients on the risks of E-discovery mistakes
 - Morgan Stanley (Florida, billion dollar verdict exacerbated by discovery violations)

- Educate yourself - Counsel plays an active role in evaluating sufficiency of client's response
 - Qualcom, 539 F. Supp.2d 1214,1239 (2007)(rev'd on other grounds)

Preservation Obligations of Outside Counsel

- Understand importance of due-diligence and conducting your own, independent investigation
- Maintain an ongoing dialogue with your client
 - Open communication can prevent outcomes like Morgan Stanley
 - Issues can typically be addressed if they are handled early!
- Obligations as an “Officer of the Court”
 - Maintain communication with court (ex. When problem arise and the steps you have taken to resolve them)
 - Utilize the necessary internal and external teams in what you represent to the court (ex. You need to know what requests are burdensome and why)
- Locate ESI, preserve and produce responsive matter

Types of Preservation Questions to Ask Your Client

- E-mail:
 - Auto deletion?
 - Mailbox quotas?
- Loose files:
 - Document management systems?
- Databases:
 - Method for input and saving?
 - Overriding policies?
 - Historical records?
- Web pages:
 - Content management system?
- Near-Line Storage
- Back-ups (Addressed in Principle 2.04(d)):
 - Schedule & rotation policy?

How the Principles Address Preservation Letters & Responses

- Preservation is a common law obligation - the Principles do not require the use of letters and responses
- If you are going to use them, letters and responses should provide useful and specific information
 - See Principles 2.03(b) and 2.03(c)
- Decide on an approach with your client and communicate that approach to opposing counsel

Topics to Discuss About the Collection of ESI

- Where and how files are maintained?
 - Particularly the handling of email and loose files
- IT Staff and System Managers who understand practices and procedures
 - Email storage? Archives? Use?
 - Network servers?
 - Defaults that apply to the creation of loose files (collected centrally or from individual hard drives)?
- Individual users who created, used and maintained relevant data
 - How data is created, used and saved?
 - Handheld devices? Syncing?
 - Secretary's Role?
 - Home Computers?
- Talk to opposing counsel before you go forward with collection
 - Outline protocol
 - Ask for agreement

Collection of Back-ups?

- Not usually subject to discovery because generally duplicative
- Defining Back-ups: Disaster recovery media intended to be used for the purpose of recreating a particular computer environment
- Why the expense and burden associated with back-ups
 - Data is compressed
 - Environment must be recreated
 - Locating data

Other Types of Data That Can Pose Collection Issues

- Non-standard email platforms
 - Beyond Microsoft Outlook
 - Understand vendor's experience

- Databases/Structured Data Stores
 - Large amounts of data stored by an organization
 - Most databases are unique
 - Not designed to format information for litigation discovery

- Watch for statistical analysis that requires production of raw data

- Make sure you agree on the format of data that will be produced - in writing!

Internal or Outsourced Collection of ESI?

- Depends on nature of case
 - Internal IT staff capabilities
 - Volume of data
 - Number of custodians
 - Complexity of data
 - Sensitivity of collection
 - Affidavits and In-house experts?

- Outside counsel must play a role in reaching decision on whether collection is done internally or outsourced

Production Format

- Rule 34(b)(2), Principle 2.06(a)
- Email and loose files are commonly encountered data types
- Native Files...
 - Can be more complicated
 - Situations when valuable
- Image (TIFF) and load files
 - Allows for bates numbering
 - Include relevant metadata
- Two Concepts:
 - Proportionality
 - Cost-shifting
- Gain agreement on protocol from opposing counsel

Production Format: Think About It While You Are Collecting Data

- Reach an agreement as to production format
 - Principle 2.06 requires the parties to make a good faith effort to agree on formats for production at the Rule 26(f) conference

- Assess how the information is kept
 - Seek to protect the integrity of the data while limiting the burden on your client

- Determine if reports can be run
 - Consider cost sharing where a database is not designed to ordinarily produce responsive reports

E-Discovery Liaisons

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- Purpose: To improve communication
 - Who should it be?
 - Litigation counsel
 - Paralegal
 - Client representative
 - Consultant
 - One, or more than one?
 - Complexity of issues may make more than one prudent
 - What is the liaison's role?
 - Know the data types and data stores
 - Communicate accurately

Helpful Links & Wrap-Up

- Download this Webinar on-demand:
 - www.tcdi.com
 - www.7thcircuitbar.org

- Technology Tidbits: 5-20 minute podcasts on particular areas of technology coming soon - www.tcdi.com
 - Back-ups vs. Archiving
 - Information Management

- All attendees will be emailed a link to the Course Evaluation

- After submitting this form, attendees practicing in the State of Illinois will have the ability to download a Certificate of Attendance