

Electronic Discovery: A Brief Overview

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The New Federal E-Discovery Rules

- Rules 16 and 26(f) require parties to confront issues of ESI early in the litigation & stress cooperation
- Rule 26(a) requires initial disclosure of ESI that party may use to support claims or defenses
- Rule 26(b)(2) – party need not provide ESI from sources that party can prove are “not reasonably accessible” (undue burden & cost), though court may still order upon showing of good cause

E-Discovery Best Practices

- Document management policy
 - Written
 - Enforced
- Litigation holds
 - System in place before litigation arrives

Document Management Policy

- Create a plan for regular destruction of electronic data
- Do not preserve data beyond useful life
- Compliance with laws requiring preservation of data
- Ensure that employees understand and comply with the policy

Potential Consequences of Failed Document Management Policy

- *Toshiba Am. Elec. Components, Inc. v. Superior Court*, 124 Cal. App. 4th 762 (2004) (litigant had more than 800 backup tapes from the relevant eight-year time period)
- *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 282-83 (S.D.N.Y. 2003) (estimating cost of \$273,649.39 to restore, search, and review data from 77 backup tapes)

Reasonable Accessibility and Document Management Policy

- Rule 26(b)(2) places limits on need to produce data considered “not reasonably accessible”
- Limit use of backup tapes to disaster recovery
 - *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (backup tapes are accessible if “actively used for information retrieval” as opposed to being limited to “disaster recovery”)

Litigation Holds

- Electronic data is destroyed/altered routinely
- Implementation of a litigation hold suspends routine data destruction and preserves potentially relevant data
- Properly implemented litigation holds are critical for avoiding spoliation sanctions
- Tips for effective litigation holds
 - Form litigation hold should be prepared beforehand
 - System in place for triggering litigation hold
 - System in place for implementing litigation hold

Litigation Holds: When Duty to Preserve Begins

- Duty to preserve begins when party knows or reasonably should have known that evidence may be relevant to current litigation or “probable” future litigation. *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060 (N.D. Cal. 2006)
- Possible triggering events:
 - Filing or service of complaint
 - Demand letter/notice of claim
 - Cease & desist letter
 - Request to preserve evidence
 - Subpoena

Potential Consequences of Failed Litigation Hold: Spoliation Sanctions

- Destruction or significant alteration of evidence
- Potential spoliation sanctions
 - Adverse inference jury instruction
 - Exclusion of evidence
 - Default judgments
 - Monetary sanctions
- *Zubulake v. UBS Warburg* (S.D.N.Y. 2004) – adverse inference jury instruction
- *Coleman v. Morgan Stanley* (Fla. 2005) – partial default judgment leading to \$1.5 billion verdict

Public Records Requests

- Public records of the state, a county, city or town, or other political subdivision of the state are subject to inspection by any person. A.R.S. §§ 39-101 & 39-121
- “Many e-mails generated or retained on a government computer system are public records because they relate to government business.” Employees’ personal e-mails are not public records, but e-mails of government employees are subject to in camera inspection by court to determine whether they are public records. *Griffis v. Pinal County*, 215 Ariz. 1 (2007)
- Unlikely to get costs of searching for public records. *Hanania v. City of Tucson*, 128 Ariz. 135 (App. 1980)