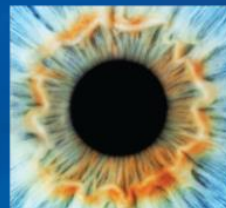


Fundamentals of Document and ESI Discovery July 18, 2017

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Pre-Litigation

Preserving Evidence

- “The duty to preserve evidence begins when litigation is ‘pending or reasonably foreseeable.’”

Micron Tech., Inc. v. Rambus, Inc., 645 F.3d
1311, 1320 (Fed. Cir. 2011)

- “It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”

Arthur Andersen LLP v. United States, 544 U.S.
696, 70 (2005)

Spoliation Sanctions by Circuit

Victor Stanley, Inc. v. Creative Pipe, Inc.,
269 F.R.D. 497 (D. Md. Sept. 9, 2010)

“Litigation Hold Letters”

- Identify employees who are likely to have discoverable information
- Identify categories of likely discoverable information
 - What are the key issues in the case?
 - What type of reports or other documents do we generate?
- Identify sources of information, including personal computers, cell phones, backup storage, etc.

Pre-Discovery

“Rule 26(f) Meeting”

FRCP 26(f): “Conference of the Parties; Planning for Discovery”.

(1) *Conference Timing*. . . the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties’ Responsibilities*. In conferring, the parties must . . . discuss any issues about preserving discoverable information”

(3) *Discovery Plan*. . . A discovery plan must state the parties’ views and proposals on: . . . (C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced”

“Rule 26(f) Meeting”

Note: Some courts have additional, local rules that supplement the requirements of the Rule 26(f) meeting

Example (NDGa): “Issues and agreements between the parties regarding discovery of electronically stored information”

“Rule 26(f) Meeting” - Preparations

Best practices

Talk to IT representative(s) and understand:

- systems and networks;
- document retention policy (destruction and backups);
- approximate number of custodians;
- location of custodians (multiple locations? Overseas?);
- large hard-copy repositories

“Rule 26(f) Meeting” – Preparations (cont.)

Best practices

Additional items to discuss with outside counsel

- “Hosting” ESI and documents collected/received during litigation
- Should we propose to limit the number of custodians?
Should we propose to use search terms?

Pre-Discovery Agreements

- Examples
 - “ESI Agreements”
 - Protective Orders
- Drafts usually presented by the plaintiff before the Rule 26(f) meeting or other early planning meeting

“ESI Agreements”

- Tool for managing burden of document and ESI discovery
- Key terms
 - Document production format (“load file” format, resolution, color, etc.)
 - Native Production
 - Key word searches/custodian limits

Protective Orders

- FRCP 26(c): Protective Orders.
 - (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . .”
- Parties may ask (and routinely do ask) for a protective order before discovery starts to lay the ground rules for producing sensitive materials and other protections

Protective Orders

- Key Terms
 - One-tier vs. two-tier
 - Source code
 - Approval of experts
 - “Clawback”
- Some courts have model Protective Orders

“Initial Disclosures”

“Rule 26(a)(1)(A): a party must, without awaiting a discovery request, provide to the other parties . . . a copy—or a description by category and location—of all documents, ***electronically stored information***, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses”

During Discovery

Collecting Documents and ESI

- The scope of the collection and production is tied to the document requests
- Rules
 - 26(b)(2)(B): “A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost”
 - 26(b)(2)(C): “On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the discovery sought is unreasonably **cumulative or duplicative**, or can be obtained from some other source that is more convenient, **less burdensome**, or less expensive”

Collecting Documents and ESI

- Rules (cont.)
 - 26(b)(1): “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and ***proportional to the needs of the case***, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit

Collecting Documents and ESI

Best Practices

- Gather **preliminary information**
 - Review each document request with outside counsel
 - Who are the IT personnel who administer email?
Workstations?
 - Who are the potential custodians?
 - How many use laptops?
 - What are the potential collection locations (networks, drives, folders, warehouses, laptops, etc.)

Collecting Documents and ESI

- Gather **preliminary information** from IT personnel
 - Email
 - Who administers?
 - How archived?
 - Which programs?
 - Amount of data per custodian

Collecting Documents and ESI

- Gather **preliminary information** from IT personnel
 - File Servers/Databases
 - Who has access to servers
 - Backups?
 - Operating systems
 - Approximate size

Collecting Documents and ESI

- Gather **preliminary information** from IT personnel
 - Workstations, PCs, Laptops
 - Who administers
 - Operating systems
 - How many use laptops
 - Anyone use home computers
 - “Legacy systems” and timeline for them

Collecting Documents and ESI

- Custodian Interview
 - Walk through their story
 - Who else was involved (more potential custodians)
 - Email practice
 - Hard copy document practice
 - Which servers and systems they access
 - Laptop use
- Iterative Process

Collecting ESI

- Create a collection plan based on interviews and document your reasonable collection
 - Identify ESI sources and custodians
 - Identify tools used to collect
 - Identify hard copy sources and locations
 - Identify search terms
- Document your search request by request or categorize
- Forensic vs. Self Collection

Collecting Hard Copy Documents

- “Unitization”
- Notes and sticky notes
- “Glasswork” vs. document feeder

Processing ESI

- “de-NISTing”
- “de-DUPing”
- “Threading”
- Controlling costs

Privilege

- General Requirements
 - An attorney
 - A client
 - A confidential communication
 - Confidentiality maintained
 - Primary purpose was legal advice or assistance
- Ex.: Jane Doe, Esq. to John Client: “In view of the ‘871 patent, you should modify your machine to remove the lighted switch.”

Privilege – Derivative communications

- John Client to Jane Engineer: “Let’s modify our machine to remove the lighted switch.”
 - Privileged?
- John Engineer to Jane Engineer: “Please run the light meter test on the new polymer S-547 material.”
 - Privileged?
- Key: Does the derivative communication reveal the substance of confidential client communications?

Privilege – Third Parties

Communications with third parties – can they ever be privileged?

- “Commonality of Interest” of “Common Interest” doctrine
 - Joint Defense
 - Broader: common “legal” interest versus a common “business” interest
- Ex.: Jane CEO, Acme Corp., to John CEO, Widgit, Inc.:
Based on our teams’ discussions, let’s modify our machine to remove the lighted switch.”
 - Privileged?

Commonality of Interest

“That the parties were on adverse sides of a business deal . . . does not compel the conclusion that the parties did not share a common legal interest. . . . [T]he defendant and a prospective buyer . . . had sufficiently common interests to permit the defendant’s sharing of a patent opinion letter . . . because the defendant and prospective purchaser faced the possibility of joint litigation.”

Louisiana Mun. Police Employees Retirement System v. Sealed Air Corp., 253 F.R.D. 300 (D.N.J. 2008)

Privilege – Foreign Witnesses

- Analysis: Does the communication materially involve legal issues in the United States (“touch base”)?
 - If “yes”: apply U.S. privilege laws
 - In “no”: apply law of the country with the most direct and compelling interest in the communication.

Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1169
(D.S.C. 1974)

Privilege – Foreign Witnesses

- Not all countries recognize privilege
- Also depends on the specific qualifications of the witness
- There is some case law addressing certain countries, but these issues may require expert declarations from legal professionals in the foreign country to establish whether privilege is recognized

Privilege Log

FRCP 26(b)(5): Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Privilege Log

“The [privilege log] is simply a device to identify documents withheld on privilege ground, providing enough information to allow a requesting party to make an initial determination of the validity of a privilege claims.”

U.S. v. Illinois Power Co., 2003 WL 25593221, *2 (S.D. Ill. 2003)

“A privilege log must identify “(1) the attorney and client involved; (2) the nature of the document; (3) all persons or entities shown on the document to have received the document; (4) all persons or entities known to have been furnished the document or informed of its substances; and (5) the date the document was created.”

Dole v. Milonas, 889 F.2d 885, 888 n.3 (9th Circ. 1989)

Privilege Log – Additional Issues

- Attorney-Client vs. Work-Product
- Witness titles
- Post-complaint communications
- Jurisdictional differences
- Timing

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