



2014 Professional Liability and eDiscovery Conference  
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You've Got Mail. . . And it is Replete with e-Discovery Risks

I. ESI & e-DISCOVERY INITIAL STEPS

What is ESI in the medical malpractice context?

- Electronically Stored Information (ESI) can include everything from the EMR, electronic calendars, audit trails, websites, chat logs, documents, blogs, recorded messages, photographs, e-mails, and text messages—anything that is stored electronically and relevant to a certain case is ripe for discovery.
- ESI offers much more than hard copies, as it provides metadata, or data about data.
  - o “Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as ‘embedded data’ or ‘embedded edits’) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called ‘metadata’) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference.” F.R.C.P. Rule 26(f), Committee Note.

Issues—generally

- Preservation orders – careful- violations will invite sanctions
  - o No requirement that ESI be “frozen” – just preserved - need ability to move data; and
  - o Limit scope in time, place and who is impacted.
- Identification, segregating, organizing, de-duplicating, and reviewing
- Production

A. Proactive guidelines for ESI

When served with a lawsuit where you have potentially relevant ESI or subpoena requesting ESI, immediately:

- Issue a litigation hold of ESI
  - o Formulation (what should it include? time parameters? how should it be preserved?)
    - “When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of

what is often called a ‘litigation hold.’” F.R.C.P. Rule 37(e), Committee Note.

- Distribution (to who? what departments?)
- Adherence and implementation (notice, follow-up, record-keeping)
  - “Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a ... party agreement requiring preservation of specific electronically stored information.” F.R.C.P. Rule 37(e), Committee Note.
- Determine the relevant sources of ESI
  - Time periods
  - Type
  - Location
  - Format
- Determine all records custodians (IT experts should be prepared to testify)
- Any unique risks to the data? (i.e. consult IT to ensure no automatic overwriting after x days)

## **B. Strategic Considerations for Pursuing e-Discovery**

Don't throw stones in a glass house...

- Use a cost-benefit analysis in deciding whether to initiate and pursue e-discovery, by looking at the:
  - size of the case
  - impact the ESI could have in the case
  - the cost of seeking the ESI (relevant time frames, software needed, other limits)
  - the cost of reciprocal e-discovery
  - is your ESI in order? (appropriate litigation holds, ESI retention policies implemented and monitored, and what story is your metadata going to tell?)

## **C. Strategic Considerations for Responding to e-Discovery**

- Timing of disclosure
- Confer with adversary and voluntarily disclose or wait for discovery request or order?
- Stipulated confidentiality order
- Destruction/return of data/documents produced upon completion of litigation
- What party bears burden and cost?
  - Burden and cost include: identify and segregate data, preserve, de-duplicate, review and sort, remove confidential and privileged material
  - Is responding entity/person a party responding to a RFP or a non-party responding to a subpoena?
  - Cost of inspection instead of production. *See Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985).

- Form of production (native format, data ordinarily maintained or reasonably usable?)
  - o “The Court, mindful of Rule 26(a)(1)(B), finds that where a party already possesses relevant information in electronic form, it is obligated, by way of mandatory disclosure, to so advise the adversary. Once advised of the existence of electronic data, a party may then make an informed decision as to the manner by which discovery could be produced.” *In re Bristol–Myers Squibb Secs. Litigation*, 205 F.R.D. 437 (D.N.J. 2002).
  - o *See also*: “The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e–mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information.” F.R.C.P. Rule 34(b), Committee Note.

#### **D. Production**

- Closely examine the instructions that accompany the discovery requests to ensure production is limited to what is actually requested. *See also* F.R.C.P. Rule 34.
- Search terms can be agreed upon. *See U.S. v. O’Keefe*, 537 F. Supp. 2d 14 (D.D.C. 2008); *In re Seroquel Products Liability Litigation*, 244 F.R.D. 650, 662 (M.D. Fla. 2007).
  - o If search is decided and conducted unilaterally, keep track of search terms used to identify the requested information to show to requesting party and/or court.
- Risk of inadvertent production of confidential, proprietary, or privileged information.
  - o Relevance, burden, privilege or licensing restrictions may prevent production.
  - o Withheld documents should be tracked with coding and/or tagging systems that can be converted into charts.
- Support objections with detailed affidavits, if appropriate.
- Resist on-site inspections.

## **II. ESI & e-DISCOVERY ISSUES IN PROFESSIONAL LIABILITY CASES**

### **A. Non-Compliance (full or partial, perceived or real)**

- Motions to Compel/Sanctions
  - o Demonstrate extent of compliance

- Unreasonableness/burden/irrelevance of further compliance
  - “If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.” F.R.C.P. 26(b)(2), Committee Note.
- Types of sanctions available
  - Costs
  - Exclusion of evidence
  - Limitation upon claims or defenses
  - Default judgment

### **B. Inaccessible ESI**

- “Not reasonably accessible because of undue burden or cost” *See* F.R.C.P. 26(b)(2), Committee Note.
- Data stored in back-up storage is usually not reasonably accessible.
- Deleted data not necessarily inaccessible. *See Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).
- Difficult to determine if responsive data contained there without incurring substantial cost/burden.
- Be prepared to explain why and how data is inaccessible.

### **C. Lost or Destroyed ESI**

- If data lost or destroyed, demonstrate:
  - When did the obligation to preserve arise/accrue?
  - Was the lost or destroyed data subject to production?
  - Was the destruction result of routine operation of system as opposed to intentional human destruction?
    - Document (and ESI) retention policy?
    - May be protected by safe harbor rule
    - Employee's destruction of data on his employer–owned laptop amounted to willful spoliation of evidence supporting dismissal. The employee knew that he was obliged to preserve all data on the laptop. But he not only destroyed private files but intentionally deleted employment–related files and then wrote a program to write over the deleted documents after he filed his lawsuit. *Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006).
    - Sanctions were warranted against employer for gross spoliation of evidence in light of its failure to preserve e–mail in manner

contrary to its normal retention policy despite being placed on notice of potential litigation arising out of plaintiff's claims of sexual harassment. Defendant acted in bad faith in failing to suspend its email and data destruction policy or to preserve essential personnel documents in order to fulfill its duty to preserve relevant documentation for purposes of potential litigation. *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D. Md. 2005).

- Are any applicable requirements of resulting prejudice met?

**D. Where ESI has sunk or saved a case... lessons learned from the courtroom.**

- A few cases are discussed involving ESI issues that helped or hurt the case and serve as lessons learned.

**III. CAPABILITIES AND RESOURCES FOR ESI & e-DISCOVERY**

**A. Know your duties and get assistance when needed (Rule 1.1, Duty of Competence)**

- Preserve if you reasonably anticipate litigation. (*Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1456029 (S.D. Fla. Apr. 5, 2011)).
- Reasonable (not perfect) inquiry in response to Request for Production under Rule 34.
- The standard for sanctions for spoliation range from negligence to bad faith in various jurisdictions. *See Dardeen v. Kuehling*, 821 N.E.2d 227 (Ill. 2004)(discussing a negligence standard); *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, 2011 WL 1448137 (S.D. Fla.)(discussing a bad faith standard).
- Do not be afraid to employ technical or project management assistance. *Bray & Gillespie Management, LLC v. Lexington Ins. Co.*, 2009 WL 71678 (M.D. Fla.)(mildly admonishing counsel for not knowing it or its vendor's capabilities).
- Know how to make informed decisions regarding vendors. Can you get the services you need, consistent with your duties and the needs of the case, without exceeding your client's budget?
- *Martin v. Northwestern Mutual Life Ins. Co.*, 2006 WL 148991 (M.D. Fla.)(attorney confession to being "computer illiterate" as reason for failure to produced electronically stored information was "frankly ludicrous").

**B. Communicate with your client, especially regarding preservation**

- Jump start outline (The Sedona Conference), available for download from [http://www.thesedonaconference.org/dltForm?did=jumpstart\\_outline.pdf](http://www.thesedonaconference.org/dltForm?did=jumpstart_outline.pdf).
- Ask the right questions to get the information you need. F.R.C.P. 26(g) requires discovery responses based upon a "reasonable inquiry."
- Carefully document important decisions.
- Most sanctions regarding electronically stored information arise from a failure to preserve, which is a process, not an event.

- Cooperate with opposing counsel regarding electronic discovery efforts.
- You are serving your client’s interests when you cooperate regarding scope of preservation, scope of discovery, form of production, etc.—if nothing else, you’re saving your client money. *See Mancina v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).
- Respond to communication from opposing counsel regarding form of production because the failure to do so can have consequences.
  - Rule 34(b): “If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use”;
  - Rule 34(b): “The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested”; and
  - Rule 34(b): “Regarding the discovery of electronically stored information: (1) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (2) a party need not produce the same electronically stored information in more than one form.
- Tailor your discovery requests.
- Evaluate what opposing counsel proposes before you agree.
- Educate the court on issues that are likely to arise or that have arisen.

### C. Duties

- ABA Rule of Professional Conduct 1.1 (Competence) and Comment 8.
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
  - To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the 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).
- ABA Rule of Professional Conduct 3.4 (Fairness to Opposing Party and Counsel).
- Fed.R.Civ.P. 34(a)
- Fed.R.Civ.P. 26(g) (Signing Disclosures and Discovery Requests, Responses, and Objections).
- Fed.R.Civ.P. 37 (but do not forget about the court’s inherent power to maintain its docket. *See, e.g., Kipperman v. Onex Corp.*, 260 F.R.D. 682 (N.D. Ga.

2009)(citing FRCP 26 and 37, as well as its inherent authority, in imposing sanctions of over \$1,000,000)).

- Fed.R.Civ.P. 45

#### **OTHER RESOURCES:**

*Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008)

*U.S. v. O'Keefe*, Cr. No. 06-249, (D.D.C. Feb. 18, 2008)

*Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598 (S.D. Tex. 2010)

Hon. Paul W. Grimm, Ilan Weinberger, and Lisa Yurwit, *New Paradigm for Discovery Practice: Cooperation*, 43 Dec. Md. B.J. 26 (2010)

Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery*, 60 Mercer Law Review 983 (2009)

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