Best Practices in Electronic Discovery

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It's not unusual in cases of this type and in many, probably the majority, of the cases in the Court of Chancery that electronic discovery is proceeding by way of search terms and searches of custodians. That's the way it's usually done. If it's a surprise to any attorney or something like that who's dealing with it, then that attorney needs to associate himself or herself with people who know what they're doing and are more familiar with it. It's not a hugely steep learning curve, and I'm sure they can make appropriate arrangements.

Questions to Ask

- What ESI does your client have?
- When do you have an obligation to preserve?
- What will you preserve?
- What will you collect?
- What ESI do you want?

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ebay
IMDb
NETFLIX
SoundHound

Sources of ESI

- "The Digital Footprint"
  - Identify the sources of electronic discovery for your clients
  - Identify the sources of interest in the possession of other parties

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Sources of ESI

- Work
  - Hard Drive
  - Network
    - Personal Drives
    - Shared Drives
  - Work E-mail
  - Thumb Drives & Other Portable Storage
  - Work Cell Phones
  - Instant Messaging
  - Copy Machines

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Sources of ESI

- Personal
  - Home Computer
  - Cloud (*e.g.*, Apple Cloud, DropBox)
  - Personal E-mail
  - Thumb Drives & Other Portable Storage
  - Personal Cell Phones
  - Scanners
  - Social Media

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Preservation

- When is a party obligated to preserve ESI?
  - Reasonable anticipation of litigation
- Who is responsible of seeing to it preservation occurs?
- How is preservation implemented?
- Court of Chancery's Guidelines for Preservation of ESI

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Issuing a Litigation Hold

- What is a document retention policy?
- What is a litigation hold?
  - What effect does it have on a routine document retention policy?
- When should it be issued?
- How is a litigation hold issued?

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Collection

- Defensibility
  - Self-collection
  - Vendors
  - Attorney involvement
- Proportionality

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Understanding Your Client's Technology

- Under what circumstances should a lawyer be responsible for understanding a client's technology?
  - D.L.R.P. 1.1 Competence
- How does one go about doing it?
  - Court of Chancery's document collection outline
- What is the right level of understanding needed?

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The Meet and Confer

- What is the Meet and Confer?
  - What should be discussed?
    - Superior Court E-Discovery Plan Guidelines
- When do you do it?
  - Iterative process
  - D. Del. Default Standard – Before Rule 16 conference
- Who should attend?
- Motion to Compel / Protective Order
  - Chancery Practitioner Guideline 7(a)

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Protection of Privilege

- How do you protect against inadvertent production of privileged information?
  - Sample Confidentiality Stipulation
  - Sample Quick-Peek Stipulation
  - Non-waiver orders under Fed. R. Evid. 502(d) & DRE 510(f)

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Delaware Case Law

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Form of Production / Metadata

- *The Ravenswood Inv. Co., L.P. v. Winmill*
  - 2013 WL 6228805 (Del. Ch. Nov. 27, 2013)
    - Motion to compel ESI production in native format
    - Court disagreed that its rules require native production
    - Absent "particularized showing of need," motion denied
  - C.A. No. 3730-VCN (Del. Ch. Feb. 12, 2014)
    - "Whether that possible inconsistency proves anything is not the question. The question is whether it is sufficient to justify the expense and burden of producing the metadata. It is a factual matter of some importance, and the metadata may be the most effective way to address this factual issue."

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Key Word Searches

- *Eurand, Inc. v. Mylan Pharm., Inc.*, 266 F.R.D. 79 (D. Del. Apr. 13, 2010)
  - "Mylan's arguments force the court into the mysteries of keyword search techniques, specifically the efficacy of various methods used to search electronically stored information, which often involve the interplay of computer technology, statistics and linguistics—complex issues on which counsel deign to 'express as facts what are actually highly debatable propositions.'"
  - "Neither lawyers nor judges are generally qualified to opine that certain search terms or files are more or less likely to produce information than those keywords or data actually used or reviewed."
  - Reasonableness test used to determine adequacy

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Technology Assisted Review

- *EORHB, Inc., et al. v. HOA Holdings, LLC, et al.*, C.A. No. 7409-VCL (Del. Ch. Oct. 15, 2012)
  - Transcript: "This seems to me to be an ideal non-expedited case in which the parties would benefit from using predictive coding. I would like you all, if you do not want to use predictive coding, to show cause why this is not a case where predictive coding is the way to go."

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Cost Shifting

- *Omnicare, Inc. v. Mariner Health Care Mgmt. Co.*, 2009 WL 1515609 (Del. Ch. May 29, 2009)
  - Restoration required of 2 years of backup tapes
  - *Zubulake* factors applied
  - "Defendants have not adequately demonstrated that the ESI in question is not reasonably accessible. Simply because the ESI is now contained on Backup Tapes instead of in active stores does not necessarily render it not reasonably accessible."

Sanctions

- *Genger v. TR Investors, LLC, et al.*, 26 A.3d 180 (Del. 2011)
  - "We do not read the Court of Chancery's Spoliation Opinion to hold that as a matter of routine document-retention procedures, a computer hard drive's unallocated free space must always be preserved. The trial court rested its spoliation and contempt findings on more specific and narrow factual grounds—that Genger, despite knowing he had a duty to preserve documents, intentionally took affirmative actions to destroy several relevant documents on his work computer."

Spoliation

- *Micron Tech., Inc. v. Rambus Inc.*, No. 00-792-SLR (D. Del. Jan. 9, 2013)
  - "The 'fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice.'"
  - "Having considered the exceptional circumstances of this case and lesser sanctions available, the court finds that the only appropriate sanction is to hold the patents-in-suit unenforceable against Micron. Rambus' destruction of evidence was of the worst type: intentional, widespread, advantage-seeking, and concealed."

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Spoliation

- *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc., et al.*, C.A. 3369-VCP (Del. Ch. Oct. 7, 2010)
  - To reopen discovery, movant must show:
    1) newly discovered evidence has come to his knowledge since the trial;
    2) it could not, in the exercise of reasonable diligence, have been discovered for use at the trial;
    3) it is so material and relevant that it will probably change the result if a new trial is granted;
    4) it is not merely cumulative or impeaching in character; and
    5) it is reasonably possible that the evidence will be produced at the trial.
  - "Discovery of electronically stored information ("ESI") is ubiquitous in litigation today. It is important that litigants not defer discovery of such information until the last minute. Yet, as demonstrated by WSP's motions to compel production of the laptop in this case, that is essentially what they did. I did not condone that approach at the time, and see no reason to do so now."

Spoliation

- *Beard Research, Inc., et al. v. Kates, et al.*, 981 A.2d 1175 (Del. Ch. 2009); 2009 WL 3206416 (Del. Ch. Oct. 1, 2009)
  - "An adverse inference instruction is appropriate where a litigant intentionally or recklessly destroys evidence, when it knows that the item in question is relevant to a legal dispute or it was otherwise under a legal duty to preserve the item. Before giving such an instruction, a trial judge must, therefore, make a preliminary finding that the evidence shows such intentional or reckless conduct."
    - "[I]nference does not amount to substantive proof and cannot take the place of proof of a fact"
  - Awarded fees and costs

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Spoliation

- *Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc., et al.*, 2009 WL 1387115 (Del. Ch. May 18, 2009)
  - Affirmative duty: "to preserve evidence [which] attaches upon the discovery of facts and circumstances that would lead to a conclusion that litigation is imminent or should otherwise be expected."
  - "For an adverse inference to be drawn, Delaware law requires a determination that the party acted intentionally or recklessly in failing to preserve the evidence."

Personal / Non-Work Email

- *In re Information Management Services, Inc. Deriv. Litig.*, C.A. No. 8168-VCL (Del. Ch. Sept. 5, 2013)
  - Executives did not have a reasonable expectation of privacy
  - Company's policy that employee files and emails are open to access by the company and its staff
  - Emails were not subject to the attorney-client privilege

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Other Case Law

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Personal Devices

- *United Factory Furniture Corp. v. Alterwitz*, No. 2:12-cv-00059-KJD-VCF, 2012 WL 1155741 (D. Nev. Apr. 6, 2012)
- *Wood v. Town of Warsaw*, N.C., No. 7:10-CV-00219-D, 2011 WL 6748797 (E.D.N.C. Dec. 22, 2011)

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Personal Devices

- *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)
- *Quotient, Inc. v. Toon*, 2005 WL 4006493 (Md. Cir. Ct. Dec. 23, 2005)
- *Ball v. Versar, Inc.*, 2005 WL 4881102 (S.D. Ind. Sept. 23, 2005)

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Personal / Non-Work Email

- *Easton Sports, Inc. v. Warrior Lacrosse, Inc.*, 2006 WL 2811261 (E.D. Mich. Sept. 28, 2006)
- *In re Royce Homes, LP*, 2011 WL 873428 (Bkrtcy. S.D. Tex. Mar. 11, 2011)
- *Holmes v. Petrovich Dev. Co., LLC*, 2011 WL 117230 (Cal. Ct. App. Jan. 13, 2011)

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Take Away Points

- Questions to Ask in Every Case
  - What ESI does your client have?
  - When do you have an obligation to preserve?
  - What will you preserve?
  - What will you collect?
  - What ESI do you want?

Questions?

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