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# FIVE THINGS EVERY LAWYER SHOULD KNOW ABOUT eDISCOVERY

Megan Scheiderer & Tessa Jacob  
 April 10, 2017  
 LAKC Opening Day CLE

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CASE IN POINT  
**OCCUPY E-DISCOVERY**

by Tom Fishburne  
 CaseCentral

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## Today's Agenda – "5 Things"

1. You need to know the ethical and civil rules that impact your obligations with respect to eDiscovery
2. You need to have a basic understanding of IT systems in order to fulfill your obligations
3. You need to know that early planning is the root of all eDiscovery compliance
4. You need understand your options for collection and searching so that you can present defensible yet cost-effective options to your clients
5. You need to know that document review has evolved from pure linear review

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## ETHICAL AND CIVIL RULES

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### Current Perceptions

- The problem of competence is reaching a near ethical crisis level. (Ralph Losey, leading eDiscovery practitioner)
- Don't be blind leading the blind. (Craig Ball, Attorney and Forensic Examiner)
- Even the littlest cases have e-discovery, everyone has to know how to do it. (Judge Scheindlin, U.S.D.C. S.D.N.Y.)
- Lawyers are using 20<sup>th</sup> Century technology to address 21<sup>st</sup> century production. (Patrick Walsh, Recommind)
- Lawyers are designing keyword searches in the dark. (Judge Peck, U.S.D.C. S.D.N.Y)

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### Federal Judges Survey

- January 2017 (3d Ed.) Exterro
- 22 Federal Judges
- The typical attorney still does not have the required eDiscovery competency to effectively counsel clients
  - 0% “strongly agree” or “even agree”
  - 45% “disagree
  - 18% “strongly disagree”
  - 36% “neutral
- Judges are now ahead of the bar

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### Federal Judges Survey

- Complete lack of or poor cooperation between the parties is the biggest problem
- Next biggest problem?
  - Parties are not educated on eDiscovery issues

**Takeaway:**     **Hard to talk to the other side if you don't know what you are talking about.**

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### Competence

- ABA Model Rule of Professional Conduct 1.1 – Competence
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Comment 8
  - 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** . . .

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### CONFIDENTIALITY

- Model Rule 1.6(c)
  - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client
    - Document Reviews
      - Metadata/Hidden Content
    - Use of Vendors

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**ETHICAL DUTIES WHEN OUTSOURCING**

- Comment 3 to Model Rule 5.3 – When using [a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information] a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.
  - Vetting
  - Monitoring
  - Charges

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**RISK OF SANCTIONS**

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## RULE 37

- Failure to Obey a Discovery Order
- Failure to Disclose or Supplement
- Failure to Preserve
  - 2015 Amendment
- Expenses for Discovery Motions/Failure to Present Discovery Plan

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## Rule 37e

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## Rule 34b

- Rule 34(b)(2)(A) – **must specify a reasonable time for the production of documents**
- Rule 34(b)(2)(B) – **must state with specificity the grounds for objection, including the reason**
- Rule 34(b)(2)(C) – **must state whether any responsive materials are being withheld on the basis of an objection**
  - Detailed description or log not required
  - Requires party to alert other parties to facilitate informed discussion
  - INCLUDES SEARCH

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**Mancia– No Boilerplate Objections**

- “The failure to particularize these objections as required leads to one of two conclusions: either the Defendants lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required.”

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**Branhaven– Promises You Can’t Keep**

- “I had not been provided discovery responses by the client. In an effort to provide discovery responses, I forwarded responses to Defendants’ document requests . . . Indicating that responsive documents would be made available for review by Defendants at a mutually agreeable date and time.”

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**Branhaven – Promises You Can’t Keep**

- Little or no reasonably inquiry
- No knowledge of the number and identify of responsive documents
- No effort to ensure client provided complete responses
- “Plaintiff essentially misled defendants and their counsel, in its affirmative statement that responsive documents would be ‘available for inspection and copying at a mutually available time,’ while in fact not knowing what if any responsive documents there might be and when if ever they would be identified and produced.”

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**Post-Amendment Rule 34b Cases**

- *Liguria Foods, Inc., v. Griffith Labs, Inc.*, 2017 WL 976626 (N.D. Iowa, March 13, 2017)
  - No jurisdiction in the United States – federal or states – condones or approves of this practice
  - “NO MORE WARNINGS. In the future, using “boilerplate” objections to discovery in any case before me places counsel and their clients at risk for substantial sanctions.”
- *Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 28012, (S.D.N.Y. Feb. 28, 2017).
  - “From now on, in cases before this Court, any discovery response that does not comply [with Rule 34] will be deemed a waiver of all objections.”

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**Rule 26g**

- Discovery disclosure, request, response, or objection
- Signature certifies a “reasonable inquiry” has been made
  - Consistent with rules/law
  - Not for improper purpose
    - Harass, unnecessary delay, needlessly increase cost
  - Not unreasonable or unduly burdensome or expensive
- Must sanction

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**Rule 26g – Landmine**

- Failure to have a factual basis for response, request, or objection
- Serving request broader/more burdensome than necessary to obtain sufficient facts to resolve case
- Delegating responses to client
- Delegating discovery to a vendor
- Stating that you will make responsive documents available without knowing if you can deliver



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### Rule 26g – Pure Gold



- Use Rule 26g to your advantage to push back against boilerplate objections and overbroad discovery

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### Rule 26g – Compliance Best Practices

- Complete Identification Phase
- Meet and Confer
- Supervise all discovery
- Either object with a factual basis, or seek an extension of time
- Offer good faith alternatives that are definite in scope, time, and manner
- Verify information received by the client
- Do you need it? Can you narrow? Can you stipulate?
- Document, document, document – understand the qualifications of the persons involved in discovery, the searches employed, and how you monitored the process

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# IT BASICS

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- **3 Main Types of ESI**
  - Email
  - User Files – Office Files
  - Database
- **4 Sources / Places ESI is Stored**
  - Servers
  - Local Storage
  - Mobile Devices
  - Media

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### Type of Email System

- Type of System
  - Version
- Where is the server located?
  - Premises/ IT Vendor/ Cloud Service



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### Email Server – What’s On It?

What is the time frame of emails in the server?

- When was the server implemented/deployed?
- Were emails from prior server migrated into new server?

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## Email Server – Settings

- Offline or Online Storage
- Auto purges
- Size Limitations
- Time Setting
- Is the company Journaling email?
- Legal Hold Functions

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## Email Archives

- Archive variations
  - Type of archive
  - When was it implemented
  - Were all emails pushed into archive
  - Has it been purged
    - Are all users on same retention
  - Legal Hold Capabilities
  - Searching and export functions

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## Office 365 & Google Business

- Settings
  - Retention Settings
  - PSTs
- What was migrated
- Contract/Plan
- Archive
- Admin Functions



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### Internet Server Providers or Web Mail Providers

- Commonly used by individuals and very small businesses
  - Yahoo
  - AOL
  - Gmail
  - Hot Mail
- Email can be found on the server and sometimes, individual's computer
- Must preserve by collecting

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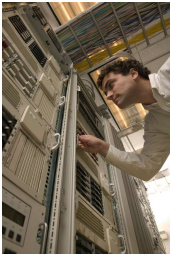
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### Where Email Lives

- **Easily Accessible**
  - Email servers
  - Email archives
  - Local storage/Hard drives
    - PSTs
    - MSGs
  - Network File Servers
  - Mobile devices



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### Where Email Lives....continued

- **Accessible but often overlooked**
  - Forwarded to personal accounts
  - Loose media
- **Not Reasonably Accessible**
  - Back up tapes/drives
  - Deleted emails on local hard drives
  - Internet/Temporary File History
  - Legacy email systems



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### Where User Files Live

- Network File Server
  - Personal drives
  - Shared drives
  - Public drives
- Hard drives
- Loose media (CDs, DVDs, hard drives, thumb drives, external hard drives)
- Home computers or other sources
- Backup tapes
- *Loose media*



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### Databases – The Basics

- Name of relevant database
- Purpose of database
- Platform and query language
- Date range and size
- User Groups
- Available system documentation
  - data dictionary/system catalog/Entity Relational Diagram (ERD)
  - schema
- Standard reporting and export capabilities.
- How can it be preserved in present state?

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### Other Types/Sources of Data

- Instant Messaging
  - Types
  - Logging
- Mobile devices
  - Most companies synchronize email
  - Deleted emails on mobile devices
  - Texts
  - GPS Data
  - Social Media



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### Other Types/Sources of Data .... Continued

- Social Media
  - Company's
  - Individual's
- Web Sites
- Logs
  - Internet access logs
  - Other logs



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### IT Policies / Practices

*When employees leave:  
What happens to data?*

- Email
- User Files
- Computers
- Cell phones



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### Backups



**IMPORTANCE OF BACKUPS**

ANY CHANCE WE STILL HAVE DATA FROM THE MERGER 10 YEARS AGO?

EVERYTHING IS ON BACKUP TAPES

NO IDEA

PHEW! WHERE ARE THE TAPES?

EACH OFFICE KEEPS THEIR OWN INVENTORY

AND THE TAPES ARE TOO OLD TO RESTORE

AND WE NO LONGER HAVE THE RESTORATION SOFTWARE

BUT TO ANSWER YOUR ORIGINAL QUESTION, YES, WE STILL HAVE THE DATA

\* Back-Ups Often Irrelevant -- You Really Need to Know the Backup Cycle\*

*but also helpful:*

- Type • Legacy

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# EARLY PLANNING

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## Meet and Confer

- Craig Ball's famous words:
  - *Two lawyers who don't trust each other negotiating matters neither understand*
- Cynical? **Yes.** True? **Probably**, at least with respect to electronically stored information

**Be an Ambassador for Change**

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## Start BEFORE Discovery

- What do they want?
  - Topics outlined in demand letter, preservation letter, charge, lawsuit
  - WAY before discovery is propounded– what is likely to be sought in this case? What would I ask for? What do I need to defend it? (Vice Versa)
- Who Has It?
  - Key Custodians – you MUST interview custodians. CANNOT rely on one contact at the client to do it for you. Not considered reasonable
- Where Is It?
  - Tessa's IT Basics
  - IT Interviews
- Preserve It

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**FRCP 26f**

- Discuss issues about preserving discoverable information
  - TIME FRAME
- Discovery Plan
  - Subjects of discovery – what do you need?
  - Phases – priority documents? Priority players? Email only?
  - FORM OF PRODUCTION
  - Any issues about disclosure/discovery of ESI
  - Protection – 502d Order

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**Meet and Confer BEFORE Discovery**

- "As soon as practicable"
  - Preservation letter
  - Charge
  - Lawsuit filed
  - Rule 26f
  - Again after discovery is served
- Shortly after discovery is served
  - Do you really want this?
  - What do you mean by this?
  - Can we stipulate to this?
  - Can we generate a document that provides this info?
  - Will you narrow this?
  - By asking it this way, you are getting X
  - Here are the issues that will result in needing \_\_\_\_ days to produce this information
- Again as needed once results are coming in
  - We overshot this term, we are getting X

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**Other Topics to Consider**

- What are the common data forms?
  - Is this mostly email? How much? What System?
  - Is there an important database at issue (i.e., sales information)? What reports can be generated? Can data be modified once entered?
- Keyword Searching
  - Do you want them to run suggested keywords?
- Is this a forensics case?
- Production Agreements

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**Meet and Confer – Other Pointers**

- Research your jurisdiction’s requirements
- Communicate in advance with opposing counsel about what you plan to cover during meet and confer and what information you want from them
- Give yourself time for a meaningful conference
- Document – confirm agreements and action items in writing

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**The Sedona Cooperation Proclamation**

- Goal – just, speedy, and inexpensive determination of every action
- Accomplished through collaborative and transparent discovery
- Methods
  - Using internal ESI “point persons” to assist in preparing responses and requests
  - Exchanging info on relevant data sources
  - Developing joint search and retrieval methods
  - Early identification of form or forms of production
- Recognition that won’t be achieved overnight
- Judicial Endorsements

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**Transparency Does Not Mean**

- Capitulation when disagreements arise
- Equal access to clients and data
- Volunteering legal theories
- Suggesting substantive paths of discovery
- Guide adversaries to “hot” documents
- Does Mean: **FACILITATE TARGETED AND EFFICIENT PROCESS FOR DISCOVERY**

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### But What about Zealous Advocacy?

- Zealous Advocate for Client
- Best Results at Right Price
- Diligent and Candid Discovery
- Integrity as Officer of the Court

### Twin Duties of Loyalty Not in Conflict

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### Collection, Processing, Filtering & Searching

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### Collection/Harvesting

- Client's IT collects
- Vendor collection
- Custodian

*Considerations:*

- Costs vs. Risks
- Searching capabilities
- Scope & posture of the case
- Preserve data broadly >> Preserve Carefully



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### Collection/Harvesting - Email

- Email Servers
  - Extract mailboxes
  - Turn on Journaling
  - Microsoft Exchange 2010 and newer (hold capabilities)
- Individual email archives
- Archives
- Web-based email accounts

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### Options for Collection/Harvesting – Network Servers

1. Custodians identify files
2. Collect Entire Server
3. Crawling Software
  - OCR capabilities
  - Time & Cost



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### Collection/Harvesting – Local Storage (Computers)



- Forensic Images
- Copy Selected Active Files
  - Options for copying
    - Self-collection
    - Remote collection
    - On-site collection by vendor
    - In-lab collection
- What can you find on an forensic image?

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### Collection - Documentation

- Defensibility
- IT Matrix
  - Who
  - When
  - How
- Chain of Custody



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### Processing – Making ESI Useable

- Expands containers and embedded files
- Extracts and indexes text
- Extracts Metadata
- De-NISTing
- OCR'ing

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### Filtering (To Reduce Volume)

- Date
- File Type
- File Size



- Can I have the client filter? Depends

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### Deduplication (To Reduce Volume)

- Vertical – deduplication within one custodian’s files
- Horizontal – deduplication across numerous custodians’ files
  - Know timing and order of deduplication
  - **Caution:**
    - **Must tell the other side**
    - **Consider providing an append file**
    - **Impact of eliminating custodians**
      - Review
      - Rolling Production

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### Applying Search Terms (To Reduce Your Volume)

- How to craft search terms
  - Know your issues and know your data set
  - Synonyms
  - Interviews and investigations
  - Sample or model documents
  - Stemming and wild cards
  - Boolean and proximity locator
  - Use common misspellings

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**Applying Search Terms  
(To Reduce Your Volume) (Continued)**

- Noise words
- Selective application of search terms to specific custodians
  - **Consider reviewing key witnesses mailboxes message by message**
- Get terms approved by client - not just in-house counsel
- Evaluate your results for accuracy
- Providing terms to opponent (RFPD)

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**Make Sure You Can Defend Your Search Terms and Process**

- Limitations of Key word searches
  - Are your search terms reasonable?
    - How were the search terms developed?
  - How were the search terms applied?
    - Are you searching the correct population?
    - Are you searching the correct fields?



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**Review & Production**

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### Review Platform

- Determine platform early
- Specify preferred form of production for chosen platform
- Consider workflow, review team, manner of searching, and form of production
- Using a database significantly increases accuracy, cost-savings, organization, and efficiency when compared to hard copy review

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### Cool Technology

- Analytics
  - Threading
  - Near Duplications
  - Compare
  - Concept Searching
  - Clustering Catagorization
- Efficient way to view images
- Computer Assisted Review

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### TAR – Technology Assisted Review

- Use of computers to identify responsive documents
- Algorithms to compare features shared by documents
- Computer trained by human reviewers, exemplar documents, and/or examination of data
- 50,000 + documents
- Judicially approved for use in appropriate cases
- Not widely used yet; but here to stay

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### Review Considerations

- Privilege
- Confidentiality
- Issue Tagging
- Highlighting
- Hidden Content
- Noise or Stop Words
- Redactions



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### Product Formats - Specify

- Under Federal Rule 34(b)(2), you have the right to:
  - Specify the form of production for each type of ESI sought
  - Object to a party's requested form
- You must:
  - Specify the form(s) you intend to use if you've objected to a party's requested form
  - Specify the form(s) you intend to use even if no form(s) is specified by the requesting party
  - Use the form(s) in which the ESI is ordinarily maintained or in a reasonably useable form(s)

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### Forms of Production

	Native	TIFF WITH LOAD FILES	PDF
PROS	Cheapest, Metadata intact	Bates and confidentiality branding, able to redact	Same as TIFF Images
CONS	Cannot be redacted, document numbers and confidentiality designations cannot be stamped on the document (must be in the filename/on media)	More expensive than native, not usable without database, some content/functionality may be lost	Most expensive option because of OCR; OCR not reliable; time consuming production

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**Questions?**

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