CT Summation

The Rising Tide - The Flood of Electronic Litigation

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ABSTRACT

This paper will look at the evolving changes in e-Discovery attorneys are now facing including voice mail and less obvious forms of electronic information. This document will explore technology solutions provided by CT Summation and will offer new strategies in today's modern lawsuit.

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Introduction
The Rising Tide: The Flood of Electronic Litigation

Legal professionals can experience a sinking feeling when faced with the rising tide of e-Discovery law changes. The new Federal Rules of Civil Procedure and local rules such as California Rule of Court 3.750(b)(10), require parties to complex cases to discuss the exchange of documents in the context of an online depository. Add discovery requests for databases and instant messages, and the situation can appear overwhelming.

Advances in technology have triggered an upswell of both angst and costs in litigation. In drafting discovery requests, attorneys now must consider requesting voice mail and other less obvious forms of electronic evidence. A client meeting must now consider whether a party's employees can bring into the workplace removable media, such as MP3 players. The end result of this technology tsunami is that lawyers can be swimming, even drowning, in electronic data.

Technology has created a "Brave New World" of litigation considerations. It also provides a solution, however, to this rising tide of information, data, and new strategies employed in the modern lawsuit.

The New Federal Rules of Civil Procedure: A Review of the Rising Tide

The new Federal Rules of Civil Procedure have only recently put to sea, and we are still learning how the new ship sails. This latest modification of the rules contains the greatest number of revisions since 1970. Data compilations are no longer a subset of "documents". "Electronically Stored Information" (ESI) is a separate category that includes, "data compilations stored in any medium that can be translated into a reasonably useable form."[1] A Party may produce ESI in a "reasonably useable form," but ESI ordinarily kept in electronically searchable form "should not be produced in a form that removes or significantly degrades this feature."[2]

The new Rules apply to, "insofar as just and practicable, all proceedings then pending"[3] on the effective date of December 1, 2006. One such lawsuit involved a party that had produced a large volume of ESI as TIFFs (image files). The requesting party did not dispute the form of production. However, a dispute over the form of production did arise after the new Rules became effective. In resolving the dispute, the Court found no reason why applying the new Federal Rules would be unjust.[4]

A very practical question to ask is: Just what is ESI? In short, it can be virtually anything created by a computer, stored on an MP3 player, or saved as a voice mail. The breadth of ESI could require one to depose an opposing party's qualified designees regarding their computer networks, information systems, messaging systems, archiving policies, and back-up data.[5] One recent ruling actually gave authority to a party's lawyer and expert to conduct informal interviews of their opponent's IT personnel regarding the opponent's databases and how information could potentially be produced or extracted from them.[6]

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[1] Federal Rules of Civil Procedure, Rule 34(a)

[2] *In re Payment Card Interchange Fee, Slip Copy, 1007 WL 121426 (E.D.N.Y.)*, 4, citing Fed.R.Civ.P. 34(b), 2006 Amendment, Advisory Committee's Note.

[3] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Slip Copy, 1007 WL 121426 (E.D.N.Y.), citing Rule Amendment Order ¶ 3.

[4] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Slip Copy, 1007 WL 121426, 4 (E.D.N.Y.)

[5] Federal Rules of Civil Procedure, Rule 30(b)(6)

[6] *In re Seroquel Products Liability Litigation*, Slip Copy, 2007 WL 219989 (M.D.Fla.)

The Discovery of Electronically Stored Information (ESI)

The Courts have authority to manage the discovery of electronically stored information. Federal Rule of Civil Procedure 16(b) grants the Court power to issue scheduling orders for the disclosure and discovery of ESI. Additionally, parties must include ESI in their initial disclosures under Rule 26(a). Parties are also required to discuss preservation and disclosure of ESI at Rule 26 planning conferences. District Courts have issued guidelines to assist with these procedures. For example, Kansas Guideline 3 requires a party seeking ESI to notify their opposing party at a Rule 26(f) conference and identify categories of information sought.[7] Additionally, a party must disclose any ESI to support claims or defenses.[8]

Litigation Holds: Preserving Electronic Evidence

Lawyers and clients face an old burden in a new form: activating an effective litigation hold for electronically stored information under the new Federal Rules of Civil Procedure. One party to the recent case did not do so and paid dearly for its ignorance: *In re Napster Copyright Litigation* (Slip Copy, 2006 WL 3050864 (N.D.Cal.).

As most people know, Napster was sued for copyright infringement by the RIAA. *In re Napster*, however, is a separate case involving a Napster investor, Hummer Winblad Investments. Through a very protracted set of facts, Hummer Winblad was put on notice that the recording companies intended to sue Napster's investment firms for copyright infringement.

What followed was a case study in litigation disaster:

- a mismanaged litigation hold
- retention policies not being followed or enforced
- relevant emails being destroyed.

The end result for this evidence mismanagement was the Court's finding that Hummer Winblad committed gross negligence in failing to preserve relevant information. Along with this finding, the Court granted a preclusion order and an adverse inference instruction against Hummer Winblad and awarded attorneys' fees to plaintiffs.

Adverse outcomes such as that of Hummer Winblad in the case cited above can be avoided with effective litigation holds that meet a party's obligation to preserve relevant data. The duty to preserve begins in any of the following situations:

- Litigation is pending, imminent, might occur or is reasonably foreseeable.
- Litigation is anticipated or there is a likelihood of litigation.

[7] USDC Kansas Guidelines for ESI, Guideline 3

[8] USDC Kansas Guidelines for ESI, Guideline 2

- A complaint has been filed.
- Discovery requests have been served.[9]

Lawyers and their clients should consider creating a discovery response system to preserve discoverable data whenever litigation is imminent or anticipated. A properly designed system will require lawyers and their clients to identify or define all the people and processes that make up the client's discovery response system. Stakeholders can include IT personnel, corporate information security specialists, records management personnel, the corporate legal team, and business unit managers. Protocols should be established to identify how requests are communicated and how the responses are collected.

Reasonably Accessible: Setting Standards

Federal Rule of Civil Procedure Rule 26(b)(2) codified the *Zubulake* "reasonably accessible" information rule: ESI that is not reasonably accessible due to undue burden or cost need not be initially produced; however, the party claiming that ESI is not reasonably accessible has the burden of proving such inaccessibility. The Courts will hear arguments that depend heavily on expert testimony, covering issues of native file formats, the cost necessary to convert forms, the time required to perform such processes, and other steps necessary to make the ESI reasonably accessible.

- Data (Content)
- Metadata (Context)
- Deleted data
- Structured data (Data in database systems, such as records management systems)
- Un-structured Data (Disorganized data, such as loose files on a hard drive).

[9] Michael Arkfeld, Electronic Discovery and Evidence, 7.9 [D][1], When the Duty to Preserve Arises

Interrogatories & Electronically Stored Information

It takes a fair amount of thought to draft interrogatories containing reasonably particular and relevant requests for ESI. For example, interrogatories could include requests for data retention and destruction policies, instant messages from the company network, or data contained on employees' removable storage devices, such as thumb drives or MP3 players.

Federal Rule of Civil Procedure 33 allows for the situation when interrogatory responses "may be derived or ascertained from the business records, including electronically stored information…and if the burden is the same for both parties, then specifying the records and a reasonable opportunity to inspect the records will suffice for an answer."

Database inspection that requires inviting an opposing party into a client's business will not likely be a responding party's first choice. An option in this situation is the use of an electronic repository, a Web-based litigation support system hosted by a third party. Using an online solution also removes the danger of spoliation of data by an inspecting opponent. A party interested in this solution would need to have their data defensibly copied by an expert and then delivered to the third-party host. The requesting party could then securely access the responsive information over the Internet.

Request for Production of ESI

Federal Rule of Civil Procedure Rule 34 gives a party the authority to request electronically stored information from an opposing party. Rule 34(b)'s provisions for specifying "form of production" in ESI requests are likely to be highly litigated. Under Rule 34(b) the form of production of ESI can be specified by the requesting party in a request or thereafter by a responding party in a response. But if unspecified, it must be produced in the form in which it is ordinarily maintained.

Many parties will save costs with native file review of their client's evidence. Parties must develop policies to protect privileged information they cannot easily redact in native format. Until technology develops for a meaningful redaction tool for native files, producing parties will have to convert privileged native files to image formats, such as TIFFs or PDFs.

The massive amounts of electronically stored information force attorneys to take even greater care in drafting discovery requests. ESI discovery requests still must follow traditional discovery rules for relevancy, reasonable particularity and other criteria under FRCP 26(b)(2)(C).

The sheer volume of ESI has caused lawyers to file motions to compel and protective orders over improper discovery requests. *In Thompson v Jiffy Lube International, Inc.*, the plaintiff requested, "any and all information related to email… including messages."[10] Making matters worse, this request covered nine-year period and 3,000 employees with email access. The Court denied the request for production, holding, "[t]he mere suspicion that a document containing relevant evidence might be located in defendant's computer files does not justify the production of all email communications or computer records."[11]

Lawyers can find themselves in a delicate balancing act, attempting to draft narrowly tailored requests, rather than verse broad requests subject to objection. Below are examples from a discovery dispute that have been modified to include a specified form of production and time period:

Request No. 19: All documents or electronically stored information in native file format referring or relating to www.webpage.com created by John Smith from March 16, 2002 to January 1, 2005;

Request No. 26: All documents or electronically stored information in native file format referring or relating to all the websites that Alpha/Bravo/Charlie have used since March 16, 2002, to market, describe, or otherwise refer or relate to any products or services provided by Alpha/Bravo/Charlie;

Request No. 33: All documents or electronically stored information in native file format referring or relating to all persons involved in developing the computer software supporting or interfacing with the Accounting Program from March 16, 2002 to January 1, 2005.[12]

Discovery of Hard Drives

Many attorneys harbor the false belief that they can instantly demand the production of an opponent's hard drive. Federal Rule of Civil Procedure 34(a) does not create a direct route to a party's ESI system. Direct inspection of a computer raises privacy and confidentiality concerns. Moreover, case law has held that the "Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."[13] Copying a hard drive is allowed only on a finding that the opponent's document production has been inadequate and that a search of the opponent's computer could recover deleted relevant materials.[14]

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[10] *Thompson v Jiffy Lube International, Inc*, 2006 WL 1174040, 3.

[11] *Thompson v Jiffy Lube International, Inc*, 2006 WL 1174040, 3.

[12] Examples are modified requests from *Advante International Corp., et al., v. Mintel Learning Technology, et. al.*, 2006 WL 3371576 (N.D.Cal)

[13] *Diepenhorst v. City of Battle Creek*, Slip Copy, 2006 WL 1851243, 3, citing Advisory Committee Notes.

[14] *Diepenhorst v. City of Battle Creek*, 3 citing, *Simon Property Group*, 194 F.R.D. at 640-41 (allowing imaging on a finding of "troubling discrepancies" in the opponent's document production); *Playboy Enter., Inc. v. Welles*, 60 F.Supp.2d 1050 (S.D.Cal.1999) (allowing imaging on a finding of systematic deletion of relevant e-mails after litigation had commenced).

One Court refused to allow imaging of a hard drive on mere suspicion that the opponent may be withholding discoverable information.[15] Another Court allowed for the imaging of a computer hard drive upon a finding of evidence that copies of emails were altered to downplay or conceal the relationship between plaintiff and a third party. These discrepancies and others justified a forensic examination of responding party's hard drives.[16] However, the requesting party was not entitled to set the conditions of the inspection unilaterally nor select the person who would perform the inspection. All data collected had to first be produced to the responding party for review for relevance, responsiveness, and privilege before being produced to the requesting party.[17]

Deposition & Trial Testimony with Native File Exhibits

With Rule 30(b)(6) allowing the deposition of an opponent's IT witnesses and Rule 45 allowing one to subpoena a party to copy, test, sample, or produce ESI at a deposition or trial, judges, lawyers and court reporters are understandably nervous about the idea of dealing with such files. For starters, how do you mark a native file as an exhibit?

There are several ways to meet these challenges. First, CT Summation software contains tools that can meet a Rule 45 subpoena in several ways: producing native files within a Summation Briefcase Folder for CT Summation users or delivering a Browser Briefcase to non-users. Second, authentication can get complicated with native files. Parties stipulate to it or metadata is used to prove it. For example, one trial presentation specialist produces native files on CD or DVD and then marks the media as an exhibit. This allows a witness to testify about ESI in a hearing and have the "live" version of the data attached to the record as evidence. Conversely, if a native file has been converted to a TIFF or PDF for examination, the exhibit may be printed and marked by the court reporter.

As for trial presentation, a party can present evidence using native files. However, the technology is limited in that a user cannot enlarge, highlight, or perform other "Hollywood" style effects on a native file. If a party wishes to be able to highlight or zoom into sections, the native file must first be converted to a TIFF or PDF.

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[15] *Diepenhorst v. City of Battle Creek,* Slip Copy, 2006 WL 1851243, 3

[16] *Advante International Corp., et al., v. Mintel Learning Technology, et. al.*, 2006 WL 3371576, 1 (N.D.Cal)

[17] *Advante International Corp., et al., v. Mintel Learning Technology, et. al.*, 2006 WL 3371576 (N.D.Cal)

Turning Back the Rising Tide:
The Review of Electronically Stored Information

CT Summation can help lawyers and paralegals turn back the flood of electronic evidence. CT Summation's iBlaze search tools allow for efficient review of electronically stored information. Use key terms and connectors to cull relevant documents from your database of coded data and metadata. Next, search across ESI text and database info using an integrated search. The ability to search and browse through your client's evidence allows you to effectively review client data and ESI produced in discovery.

CT Summation's iBlaze and CaseVault products can assist with the quick review of client and opponent electronic evidence. If your opponent has CT Summation, they can create a Summation Briefcase File containing documents responsive to a discovery request. The first step in assessing this evidence is to create a Review Set in iBlaze. In CaseVault, the process is to Auto Allocate Documents. Both processes employ a set search assigned to a specific reviewer, such as a paralegal or associate attorney. The reviewer can quickly bring up their assigned documents for objective review, such as authors and recipients, or subjective review, such as issue coding.

Technology has created a flood of information, confusion, and concern over how lawyers try cases. Technology also provides the solution to manage the digital storm, making the practice of law more effective and avoiding costly mistakes.

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