Surviving E:discovery
Rules and Realities

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In little over a year since the implementation of amendments addressing discovery of electronically stored information (ESI), lawyers and judges have struggled with the rules and the wide array of technologies. New issues arise daily and answers are being devised on a case by case basis. After a year of experience, it seems that certain core concepts and a veritable "top 10" list of techniques have emerged. These can be utilized to survive discovery in federal litigation. I do not mean survive in the T.V. show "Survivor" construct of "outwit, outplay and outlast", nor by the skin of your teeth standard. Survival in this instance should be measured as a competence to work within the rules to the best interest of your client. These techniques or tips, are essentially a blend of the rules, realities and anecdotal experience of the author, following a review of developing case law and the experience gained in managing discovery issues in federal court.

ESI is critical in cases, since 95 percent of all business documents are created electronically, 75 to 80 percent of the data is never printed, and 70 percent of historic data is stored electronically.[2] Few cases go to trial, but almost each one involves some discovery. Discovery is easily the most expensive aspect of each case.

Looking at core concepts, we should start with the fact that our disclosure and discovery rules are aimed at a goal of providing full disclosure and minimizing the time and expense associated with discovery. More specifically to ESI, we need to accept the following:

1. Unless discovery in specific cases dictate otherwise, "documents" include ESI in discovery requests;

2. Disclosure requirements (initial, expert and pretrial) under Rule 26 include ESI;

3. ESI is defined as "information that is stored in a medium from which it can be retrieved and examined, and courts have included ephemeral or transient data in this definition."[3]

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[1] This is adapted from a presentation on January 24, 2008 to the Association of Business Trial Lawyers, San Diego Chapter and the State Bar of California's Litigation Section. © Anthony J. Battaglia, 2008. All rights reserved.

[2] University of California, Berkeley How Much Information 2003 Study.

[3] The principal cases in this area are *Columbia Pictures v. Brunnell*, 2007 WL 2080419 (CD Cal); *Paramount Pictures v. Replay TV*, 2002 WL 32151632 (CD Cal); and *Convolve Inc. v.*

The definition is purposely flexible recognizing that technology will evolve in many, as yet unimagined, means for information creation, transmission and storage; and

4. ESI is everywhere, from computers, PDAs, backups, printer memories, wireless routers, fax machines, thumb drives, Ipods, etcs. Essentially, anything with a memory provides a source for ESI.

With these core concepts in mind, lets explore ten tips for survival.

1. Don't Forget Rule No. 1. That is Rule No. 1 of the Federal Rules of Civil Procedure, of course. That rule states that the federal rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action." This should be the mantra of counsel in planning, discussing, and arguing discovery issues. Despite how technical the area of ESI sounds, the base line, and our goal, is established by this rule. It is our obligation to strive to meet this goal recognizing that discovery is a major portion of the expense associated with litigation. As stated previously, not every case goes to trial, but every case has some degree of discovery or disclosure required.

2. Meet and Confer Like You Mean It! A meet and confer process is required under the federal rules, specifically in Rule 26(f), and under most local rules. Judges consider the concept of meet and confer extremely important and will require you to comply very literally. In other words, pick up the phone, or arrange a meeting. Avoid e:mails, letters and faxes as the vehicle to meet and confer[4]. They perpetuate arguments. It is just too easy to say "no" in a written communique. There is nothing like a face to face or voice to voice discussion where people can be earnest in their demands and work out agreements for what they really need.

If you can't resist the temptation to get into a letter writing (fax or email) campaign, please do not send copies of the correspondence to the court, unless it has been asked for. Copying the court will violate any number of local rules (e.g., Local Rules of Practice for the United States District Court for the Southern District of California, Civ. L. R. 83.9). It is an improper and ex parte communication. Trust me, you won't persuade the judge to your way of thinking. Rather, you are apt to annoy, if not anger, the judge and the court staff. You might also end up on the wrong side of a sanctions hearing or disciplinary referral. Not a good idea!

Compaq Computer Corp., 223 F.R.D. 162 (S.D.N.Y. 2004). These are very fact specific cases, and seem to revolve around three key points. The first is whether or not the ephemeral or transient data is captured in the normal business operations of the party; next, the extent to which the information has been requested; and, probably the most key factor, what efforts, cost and relevance are associated with the collection of the data.

[4] It is appropriate to use e:mails, letters and faxes to set an agenda, or to confirm an agreement, but not as the medium for "discussion."

One word of caution about the meet and confer process is warranted. It is important to keep in mind, that turn about is fair play. If you insist, and are successful in imaging your adversaries entire data base, they will no doubt want yours! Recognizing that there are seldom one way streets in litigation, the court will likely embrace reciprocity in the interest of a level playing field. Of course, in the meet and confer process, don't forget Rule No.1 You goal should be to find a just, speedy and inexpensive solution to your discovery needs, not bury your opponent in bits and bytes.

3. Be a Rules Geek. There are seven rules that cover the process of disclosure and discovery. They are Federal Civil Procedure Rules 16, 26, 30, 33, 34, 37 and 45. It is important to read these rules periodically. Despite the recent restyling, they are lengthy, complex, and address various items. Familiarity with the rules is of significant assistance in working through discovery problems. As a lawyer, you are a craftsman. These rules are your tools. Using the tools without reading the operating instructions can spell disaster.

It is also important to focus on the Committee Notes. Read them as well! The Committee Notes are effectively the legislative intent of the rule makers. They provide significant meaning, definition, and explanation with regard to the rules. Often, key distinctions or practical examples are listed.

For super geeks, there is also a resource on the Administrative Office of the U.S. Court's website (called the JNET), at www.uscourts.gov/rules/index/html, where you can find committee reports, transmittal memoranda, and past public comment about the rules with a highly technical issue as presented. Please keep in mind, that judges are schooled on the rules, the notes, and have ready access to the JNET. It is good to be on the same plane as the judge in trying to prevail in a discovery dispute.

4. Don't Forget You Are Not Alone. As talented as lawyers are, they can never do , or know, everything themselves. They need to rely upon clients, partners, associates, paralegals, secretaries, house counsel, litigation counsel, experts, consultants, and legal vendors. All these people need to be on the same page. It is important to discuss the details of the case, the discovery plan, and the rules that form the basis for the discovery and disclosure process with these people. It is critical to have a base line understanding with the members of this "team."

Lack of communication, miscommunication, et al., can be costly. That is the lesson illustrated in *Qualcomm v. Broadcom*, U.S. District Court for the Southern District of California, 05cv1958. In ruling on a motion for sanctions and attorney's fees, and in ordering almost $9,000,000.00 in relief to a party abused by discovery violations, Judge Barbara Major has said, "for the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and e:mails are maintained to determine how to best locate, review, and produce responsive documents." Order of January 7, 2007, page 17-18, docket No. 718.

It is important to work as a team from planning to execution to survive the discovery process. After *Qualcomm,* can there be any doubt? In one word, this is a call for you to "communicate."

5. "Be Careful What You Ask For!" With ESI, you can ask for too much, too little, or the wrong format, just to name a few perils. It has been customary over the years to seek "any and all" of the subject documents or information a party is interested in to avoid missing something. The problem is, asking for "any and all" when it comes to ESI can bring you volumes and volumes of data in forms very difficult to work with. This is because the technological advances allow us to create more data, create it faster, and keep it virtually forever. As a result, storage requirements for ESI are reported to quadruple every year.[5]

The volume of data is daunting. One gigabyte is roughly the equivalent of 65,000 pages, or 10,833 documents. The physical space to store this amount of data would take 26 banker's boxes. Statistics as of 2007 indicate that a person creates about 4 gigabytes of e:mail per year. That means, 104 banker's boxes full of this data. A gigabyte is very small in terms of its own physical space. Most thumb drives start at 2 gigabytes, basic IPods start at 4 gigabytes and your personal computers are advertised at very low prices, with 60 to 100 gigabyte hard drives. Multiply this by the number of employees, or the computer storage capacity of a major corporation, and you will soon recognize the huge volume that you are dealing with.

Keep in mind, that computerized data is not stored similarly to the old filing cabinet. Hard drives store the information in sectors, and the related sectors of a file are not necessarily sequentially located on a hard drive. The computer can distribute parts of a document throughout the disk, just like you would distribute pepperoni on top of a pizza. The operating program will reconstitute the information into a viewable document on screen. When you obtain the data in native file format[6], it will present itself as a series of zeros and ones. It will be very disorganized and will need to be organized and reconstructed into logical and understandable "documents" through the use of the correct software. Upon initial presentation, a copy of a hard drive with one gigabyte of data will look like one banker's box full of shredded documents.

So, be careful, don't over expand the request in the blind hope that you have asked for enough to cover the issues in your case. You may well go blind reading the zeros and ones on your computer's screen as you sift through the staggering mountain of data you receive. By consultation with your team of clients, associates, experts and staff (Remember Tip 4!), you should detail the information sought with your capacity to be able to utilize it.

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[5] See footnote 2.

[6] Native file format or raw files refer to the data in the manner it is stored on the media. This is the way it is ordinarily maintained for use by a specific computer program. If you don't want it in this format, better specify that to your opponent. Rule 34(b)(1)(C) and (b)(2)((E)(ii).

Rule 34(d)(iii) limits a responding party's duty to one form of production. You can ask for too little information in a general sense, and not get a second chance to ask for more. You can also ask for too little data by requesting it in the wrong format for production. This will result if you are unaware of the varieties and relative advantages or disadvantages of the various formats. As a result, choosing the right format is another significant concern for the litigator.

There are a variety of formats. For purposes of this article, lets focus simply on two, native and image. As noted above, native format is the form in which the data is typically stored. That is the "default" manner for production under the literal reading of the rules. Fed. R. Civ. P. 34(b)(2)(E)(i). Image format, is essentially a picture of the document.

In a very simple illustration, remember that for native format, you will need the operating program software, including any different versions used by the party creating the data, in order to work with the data. Native format has the ability to allow you to fully explore metadata[7], formulas, spread sheets, audio and video files. The limitations to native format include the fact that you cannot search the attachments to e:mails in the data, can't effectively redact information, nor can you bates number, or do a single search across all data. Also, the data is changeable and changed by working with it.

Image format,[8] on the other hand, is simpler, to search, review, organize, redact, bates number of search all from one interface. It presents metadata limitations, although some image programs have searchable text formats, and it is also more expensive to produce. Ultimately, however, the data is fixed, that is unchangeable which could be important for admission at a later trial. It also tends to be more expensive to produce.

It is important to understand what it is you want to do with the data. Are you seeking a data base, that is, the raw information from which you can determine the formulas used, run the spread sheets enclosed, or develop other information analysis? Do you need to exhaustively search the metadata for all documents in the database? Or, do you really just need a picture of the documents, with some limited metadata search capability, but a perhaps more usable format to use? These are the questions you need to ask so that the right answer will come to you, for your case.

In the end, you should consider different formats for different things. It may be that for e:mails, image format will do fine. If you need human resources data or spread sheet information, go with the native format. If a picture that allows you to view e:mails and their attachments with some metadata involved, then image format with searchable text attributes would be the thing for

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[7] Data about the data, including date of creation, author, changes made, dates of transmission. It's "hidden" in a paper or screen image, but available digitally.

[8] There are a variety of image format programs available. PDF and TIFF, are two generally referred to.

you. You can easily, and with proper planning, request a mixture of formats for varying data. As stated, while the rules limit the producing parties obligation to no more than one format [Rule 34[(b)(2)(E)(iii)], that is specific as to certain data. It does not mean that you can not obtain certain things in native format and others in an image format.

Finally, lawyers, as advocates, often want to dive into archival files and legacy data without always understanding whether it is necessary. The proverbial, "no stone unturned" method of litigation. This can be a very costly and time intensive process with ESI. However, when new computer systems are adopted, a great deal of data is often migrated into the new system from the prior system. It may well be that the data you seek is in the current data base since it was migrated in from the old system. As a result, it could be unnecessary to get into the archival or legacy data at all. This is important to consider. As noted, restoring and reconstructing these old files can be very expensive and time consuming.

Know how would you know? Remember Tip No. 4, "You Are Not Alone." Talk to those involved on your team about what you want and truly need, and then return to Tip No. 2, call and discuss it with your opposing counsel. There should be a written migration plan for the switch over. It should answer many, if not all, of the questions in this regard. Where doubt remains, always consider sampling of the archival and legacy files before going "whole hog." That's likely what the judge will order if you are in a dispute in this regard.

Everyone will benefit by the precision these efforts will provide.

6. Check Before You Speak. Before you commit to a production deadline, make sure it is feasible. How, talk to those experts, consultants and IT people. Don't come to a CMC or a discovery conference unsure of your ESI issues. This can only lead to trouble. In fact, you may want to bring the technical people with you to court on these issues.

Far too many lawyers don't grasp this point, and come to court far too little information from their clients and others about the realities of their client's information system, their clients IT sophistication, and the real abilities or limitations about producing information in their case. Keep in mind all clients are different. Just because your last client was able to quickly and efficiently produce volumes and volumes of ESI doesn't mean all clients will be similarly equipped. It is best to check to avoid trouble.

7. It Is Better To Ask For Permission Than Forgiveness. If you need an extension of a discovery cut-off, an extension of a discovery due date, or are having problems complying with discovery requests, or are involved in a discovery dispute, it is better to discuss this with your opponent and then the Court, prior to the expiration of the discovery cut-off or discovery due date. Courts prefer to be proactive in dealing with the problem in a real time sense, not after deadlines have run. If you delay, the case litigation schedule is likely prejudiced, the judge will be upset with you, and time and money will be wasted. You are more likely to get sanctioned for

your shortcomings if you wait until it's too late. Finally, you may suffer other consequences, like issue preclusion, evidentiary bars or outright dismissal or judgment.

One last note. When asking for "permission," be prepared to explain how you can't comply despite the diligence in trying. Courts embrace the premise that when a party seeks to modify a schedule or court order, if they have not been diligent, the request to modify should not be granted! *Johnson v. Mammoth Recreations, Inc.* 975 F. 2d 604 (9th Cir. 2002). So, do your best, but seek relief before deadlines have run.

8. See The Forest For The Trees. Remember that discovery is not the end game. In fact it's no game at all. It is a means to and end. It is a way to get information necessary to prosecute your clients claims or defenses. You should plan, meet and confer, and focus with that in mind. It is human nature to assume that where someone says they have no documents responsive to a request, they must be hiding something good! As a result, you will want to pursue that issue to the end of the earth, if need be. Realize, however, that sometimes "no" is a good answer. Think back to your classes and training in trial practice. The argument to a jury that these very "relevant" documents were not produced, don't exist, or were not kept by the opponent, can be particularly powerful.

9. Don't Get Caught Using Sound Bites. We love catch phrases, and that is a principle tool in current advertising and marketing. However, it is not helpful to use catch phrases in working through discovery problems, especially when presenting the issues to a Court. Telling the Court that something is not "reasonably accessible" isn't enough. It is a nice sound bite, but the operative phrase is "not reasonably accessible because of undue burden or cost." Of course, that is just where you start, the Court will always want to know the cost, timing and relevance factors associated with the information. The how much, how long and what's the point, is the real point here!

Another often used example relates to information lost, or not located, from a computer system. Lawyers like to toss out that they have "acted in good faith." Of course, the operative phrase from Rule 37(c) (in order to avoid sanctions under the rules) is that "the information was lost as a result of the routine good faith operation of an electronic information system." That is the proper context for the dispute, and, this complete statement, will need to be backed up by the details of operation of the electronic information systems, the degree to which a litigation hold altered the routine practice, the careful management and ongoing review of compliance with the litigation hold, and all other particulars associated with the data under consideration.

The pace of litigation and the overwhelming costs of discovery and discovery disputes warrant your very literal and present the right context for the positions you present. Sound bites are good for selling products and tickets or for gaining votes, but they are a nonstarter in the discovery arena.

10. Don't Forget Rule No. 1. Well, you really shouldn't forget any of these tips. But,

Rule 1 is the key. Courts have wide discretion and latitude in the area of disclosure and discovery. They will seek to find a fair, quick and inexpensive method to keep things moving. Being a zealous advocate, as opposed to a zealot, means being mindful of the what's best for your client. Getting mired down in unreasonable and protracted battles over discovery, or using an unsophisticated "shotgun" approach to collecting data, particularly ESI, will prove anything but fair, quick or inexpensive, or the best thing for you and your client.

If you want to boil this whole thing down into an even shorter list, say three things, it would be: (1) follow the rules with their express purpose in mind; (2) communicate; and (3) don't leave your common sense at the door! Good luck!

ajb/articles/surviving e:discovery.109