

Ethics and eDiscovery

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eDiscovery basics

We will cover:

- Preservation and spoliation
- Searching and producing documents
- Supervising lawyers and nonlawyers

We won't cover:

- Confidentiality

Some vocabulary

Electronically stored information (ESI) =
anything preserved in an electronic
medium

ESI Preservation

Preservation: the basic rule

Client has a duty to preserve all information that may be relevant to an active litigation, or to a litigation that is reasonably anticipated

Preservation: lawyer's duty

- Gather information from client about:
 - document retention policies & practices
 - ESI & retention systems
- Define scope of preservation & production and explain to client, in writing
- Initiate litigation holds and periodic review

Litigation hold - first steps

- As soon as you suspect litigation, send litigation hold letter to client and all potential custodians
- As soon as you know the opposing party suspects litigation, send litigation hold letter to opposing party or counsel if represented

Hold letter requirements

- Notify custodians of preservation obligations
- Clearly identify what must be preserved and give details
- Presumption of preservation
- Provide details on where and how to save
- Suspend deletion/overwriting of current and backup media
- Stop recycling computers and storage media
- Provide contact information for questions
- FOLLOW UP PERIODICALLY

Preservation cases I

- *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004): counsel must affirmatively monitor compliance so that all sources of discoverable information are identified and searched
- *Pension Committee v. Banc of America*, 685 F. Supp. 2d. 456 (S.D.N.Y. 2010): failure to issue a *written* litigation hold is gross negligence when likely to result in destruction of relevant information
- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010): assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has preserved relevant evidence

Preservation cases II

- *Jones v. Bremen High School District*, 2010 U.S. Dist.LEXIS 51312 (N.D. Ill. 2010): It is unreasonable to allow a party's interested employees to make the decision about the relevance of documents
- *Passlogix v. 2FA Technology*, 2010 U.S. Dist. LEXIS 43473 (S.D.N.Y. 2010): spoliation included emails, text-messages, and Skype messages
- *Treppel v. Biovail Corp.*, 249 F.R.D. 111 (S.D.N.Y. 2008): Equates duty to preserve upon reasonable anticipation of litigation with reasonable anticipation of litigation test required to claim work product, *i.e.*, if document is work product then you should be preserving ESI at the same time

Search for and Production of ESI

Search and production

WA & OR RULE 3.4*

A lawyer shall not:

- (a) knowingly and unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
* * *
- (d) in pretrial procedure, knowingly make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

*Blue text is in OR rule only

FRCP 26(b)(2)(B) limits on ESI production

- Party need not produce ESI from sources it identifies as not reasonably accessible because of undue burden or cost.
- On motion to compel or for protective order, objecting party must show that information is not reasonably accessible.
- If that showing is made, the court may still order discovery from such sources if the requesting party shows good cause, considering the limitations of FRCP 26(b)(2)(C).

Factors to consider

- Who?
 - Custodians, IT personnel, related entities
- What?
 - Scope of production
 - Use internal resources for production or hire vendor
- Where?
 - Servers, permanent and temporary media, backups, laptops, cloud data, emp'ees' home computers, personal email accounts
- When?
 - Past, present, future

A few metadata issues

- Should metadata be reviewed before production?
- Is privileged/confidential information in the metadata?
- Can you review metadata in documents produced by another party? *See generally* ABA Formal Op. 06-442 (generally permitted, but several exceptions, e.g., Alabama, D.C., H.Y., Florida)

Search/production cases

- *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. March 5, 2008): \$8 MM sanction imposed on counsel/client who failed to heed warning signs throughout discovery that document searches and productions were inadequate
- *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004): counsel has affirmative duty to ensure relevant documents are discovered and produced
- *Pension Committee v. B of A Securities, LLC*, 685 F.Supp. 2d 465 (S.D.N.Y. 2010): counsel is expected to take necessary steps to ensure that relevant records are preserved, reviewed and produced to the opposing side

Ethical Issues Raised When Supervising Other Lawyers, Nonlawyers, and Vendors

Duty to supervise: lawyers

WA & OR RULE 5.1*

* * *

- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of these Rules of Professional Conduct if:
 - (1) (a) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) (b) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Blue text is in OR rule only, red text is in WA rule only

Duty to supervise: non-lawyers

WA & OR RULE 5.3*

With respect to a nonlawyer employed or retained **by or associated with**, supervised or directed by a lawyer:

- (b)** (a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c)** (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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Supervision cases I

- *Pension Committee v. Banc of America*, 685 F. Supp. 2d. 456 (S.D.N.Y. 2010): attorneys can be liable for failing "to sufficiently supervise or monitor their employees' document collection."
- *J-M Manufacturing v. McDermott Will & Emery*, LA Sup. Ct. No. BC462832 (filed 6/2/11), alleges that McDermott "negligently performed limited spot-checking of the contract attorneys' work," causing disclosure of about 3,900 privileged/irrelevant documents. Also includes allegations regarding significant markups of contract lawyers' fees.

Supervision cases II

- ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) - attorney of record is responsible for the results of the entire legal team, including any outside vendors. "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client."