

How To Effectively Prepare for and Manage ESI in Civil Litigation

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Workflow Opinion From the Bench



- “[Defendants] failed to demonstrate that the keyword search they performed on the text searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; **and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.**”

Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) - Judge Grimm: US District Court of Maryland.

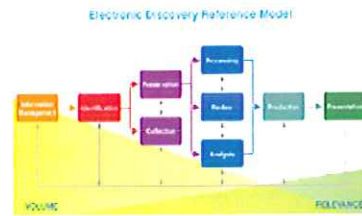
- In September, 2009 Judge Grimm was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure



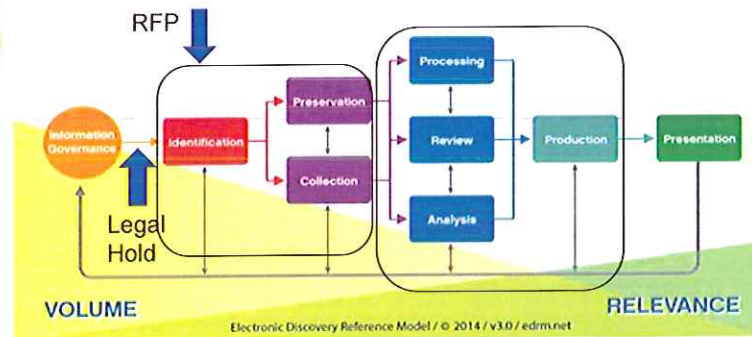
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Electronic Discovery Reference Model*

*<http://edrm.net/>



Electronic Discovery Reference Model



California State Court: ESI Litigation

***Production of Electronically Stored Information

- Production should be in a form that it is “usually maintained” or in a “reasonably useable form” C.C.P. 2031.280(d) (Applies specifically to ESI). May not be the same.

SAMPLE LITIGATION HOLD LETTER CONTINUED.....

Any documents relating to the Subject Matter need to be preserved. In this regard, please remember that "documents relating to" is a rather broad term. In addition to traditional paper files and documents, the term "documents" includes such things as notebooks, accounting papers, drawings, graphs, charts, photographs, electronic or videotape recordings, electronic data, and data compilations. As to electronic data (such as e-mails, PowerPoint presentations, Spreadsheets, Engineering Drawings, etc.), in addition to preserving documents maintained in the Inbox and other usual locations on your computer, care needs to be given to preserving potentially relevant documents that may currently reside in computer "Recycle Bins," "Trash Cans," "Deleted Items," temporary folders, or on network drives, flash sticks, memory sticks, external hard drives, CDs, etc. In addition, care needs to be given to preserving atypical "documents," such as Instant Messages, text messages, video tapes, calendars, notes, and diaries (including personal ones) that mention information coming within the scope of the Subject Matter, including any meeting (whether solely within the Company or including any other third party) in which any matter relating to the Subject Matter was discussed. In other words, if in doubt, you should assume that the item is a "document" and it should be kept.

Also, if you believe that any other individual, whether or not a Company employee, other than the other listed recipients of this Legal Hold, have knowledge of facts or access, custody, or control of documents relating to this matter, please identify them for me (by sending me an email), along with a brief note regarding what role they may have played in the matters relating to the Subject Matter, as well as the relevant documents you think that they might possess. Please do not forward this Notice to those individuals - I will do so once I receive your note. Likewise, if you are not involved in any way with respect to the subject matter, please let me know.

confidential matter, and not to discuss the subject unless necessary and then only with the highest respect.



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SAMPLE LITIGATION HOLD LETTER CONTINUED.....

COMPANY COUNSEL: The Company has hired counsel in this matter. They are [Names, law firm and phone number], and they will be assisted by others in their firm. You should feel free to discuss this matter with any of them. If, however, you receive a phone call and are not sure whether the person is with that firm, you should feel free to say that you will call back and use the main phone number of the firm. Should you have any questions or doubts, please do not hesitate to contact me.

Your compliance with this Hold Notice is critical to the successful resolution of this matter. In addition, failure to comply may subject you to disciplinary action, up to and including termination.

Thank you very much for your assistance and cooperation, if you should have any questions, please do not hesitate to contact me.

Regards,

[name and signature block of handling attorney]

I have read and understand my obligations under this Legal Hold Notice

Signature

Date



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Rule 34 **PRODUCTION OF CERTAIN INFORMATION** 32

where information, including all documents responsive to a search, is produced to the requesting party, the party to whom the information is produced shall be deemed to have complied with this rule.

(b) **Request for Production.** A party may serve on any other party a request to produce and permit inspection and copying of all documents, electronically stored information, and tangible things, in the possession, custody, or control of that party and to which the party is entitled to inspect and copy in accordance with this rule, but the request must specify the documents or electronically stored information to be produced and permit inspection and copying of all documents, electronically stored information, and tangible things to which the party is entitled to inspect and copy in accordance with this rule.

(c) **Form of Request.** The request must be in writing and must be in the form of a subpoena, or a subpoena duces tecum, or a subpoena for production of documents, or a subpoena for production of electronically stored information, or a subpoena for production of tangible things, or a subpoena for production of all or any of the foregoing.

(d) **Form of Response.** The response must be in writing and must be in the form of a subpoena, or a subpoena duces tecum, or a subpoena for production of documents, or a subpoena for production of electronically stored information, or a subpoena for production of tangible things, or a subpoena for production of all or any of the foregoing.

(e) **Form of Production.** The production must be in the form of a subpoena, or a subpoena duces tecum, or a subpoena for production of documents, or a subpoena for production of electronically stored information, or a subpoena for production of tangible things, or a subpoena for production of all or any of the foregoing.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) **IN GENERAL.** A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following

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SECTION 11.

(b) PROCEDURE.

(1) **Contents of the Request.** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

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PART TWO: Terms, Definitions and Implications

Terms & Conditions

1 rules and requirements that one agree to abide by in order to use a service; 2 general and special arrangements, provisions, rules, specifications, or other part of

De-NIST, metadata, processing....

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E. Metadata. The metadata associated with each hard copy Document need only identify the Bates number, the custodian associated with that hard copy Document, and any Confidential Designation applied to that Document.

III. PRODUCTION OF ELECTRONICALLY STORED INFORMATION

A. System Files. ESI productions shall be de-NISTed using the industry standard list of such files maintained in the National Software Reference Library by the National Institute of Standards & Technology. The parties recognize that to reduce the document review population, additional file types will need to be excluded. Upon request of a receiving party, a producing

III. PRODUCTION OF ELECTRONICALLY STORED INFORMATION

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consistent with the requirements provided in this Order. ESI productions shall be produced and submitted in the OpenText Meta File (EMF) format.

ii. Auto-archiving strategy. ESI shall be produced as an in-process and display the document shown in the Document as it was last saved or modified by the custodian or end user, not the date of collection or processing. If this is not technically possible, the producing party shall use its reasonable best efforts to display the ESI code in the Document.

RFP Terms, Definitions and Implications

- **De-Duplication** – the process identifying and/or removing duplicate copies of a record to reduce/accelerate the review and production phase
- **De-NIST** – the process of removing files generated by a computer system; standard list of system file types established by the National Institute of Standards and Technology
- **Processing** – eDiscovery workflow during which the raw, native data is ingested into specialized software tool in order to (a) extract text and metadata, and (b) perform data indexing to ensure text searchability.
- **Metadata** – “data about data”; it is the underlying information that describes the characteristics about a record such as date created and date last modified
- **Load File** – a file used to import data into document review databases; it provides document breaks for images and often contains metadata for each document.

Additional Terms, Definitions and Implications

- **Tiff** – standard legal industry format for electronic review; essentially a snap shot of the document that prevents alteration and allows for redactions, branding ect
- **Extracted Text** – 100% accurate text extracted directly from the original native document by the processing software.
- **OCR** – Optical Character Recognition is the process of converting images of printed pages into electronic text; pertain to imaged based files.

Sample Data Set Collected

- 7 Custodians
- Previously collected client data
- 45 GBs produced



What to consider?

1. Data Sources
2. Possible Duplicative Data
3. Applicable Culling Criteria
4. Search Terms related to Case Issues
5. Privilege Terms



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Discovery Report

1	2	3	4	5	6
Item Type	Count	Total Size	Size in MB	Size in GB	Page Count
Microsoft Outlook Email	1,028	402,340,496	402.90	0.45	3,628
Graphics	129	6,840,763	6.52	0.01	129
HTML	15	315,103	0.31	0.00	15
Microsoft Word	123	17,147,723	16.36	0.01	3,124
Other	1	14,478	0.01	0.00	15
PDF	267	109,135,131	102.49	0.11	3,319
Text	8	6,192	0.01	0.00	8
Unknown	817	15,759	0.01	0.00	876
Word Processing	2	6,721	0.01	0.00	4
By Extension					
doc	819	17,113,718	16.4	0.01	819
docx	114	21,969	0.02	0.00	6
htm	1	12,828	0.01	0.00	3
htm	15	115,103	0.11	0.00	15
htm	1	14,478	0.01	0.00	15
htm	124	6,827,975	6.51	0.01	126
htm	3	3,172	0.00	0.00	4
img	1,028	402,340,496	402.90	0.45	3,628
pdf	267	109,135,131	102.49	0.11	3,319
txt	8	7,566	0.01	0.00	15
txt	8	6,192	0.01	0.00	8
txt	2	6,721	0.01	0.00	4
Summary Totals	1,028	402,340,496	402.90	0.45	3,628
File Totals	1,075	176,293,223	168.86	0.18	5,523
Grand Totals	4,401	658,639,729	628.66	0.68	6,511
Discovery Errors	0				
Note Level Discovery Errors	0				
Item Level Discovery Errors	0				
Indexing Problems	0				



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Protecting Privilege in eDiscovery

- Have a clawback agreement in place, incorporated into a protective order under FRE 502
- Perform an electronic screen for potentially privileged terms and names
- Ensure that all attorney-generated documents (pleadings, briefs, communications, etc.) are adequately “scrubbed” to delete draft and hidden data

Finding the responsive documents to produce.....

Workflows B and C

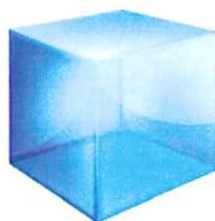
Proposed Workflow for B

- Utilize IN/OUT Processing Model
- Ingest entire data universe
- Provide information on data universe to case team for review (file extensions, date range ect)
- Globally de-dup, De-NIST, and run search terms/date restrictions across entire data set
- Provide results of post culled data set to case team;
- After confirmation from case team; upload filtered data set into Relativity database for review
- After review is conducted, tiff and produce only responsive documents; 50% reduction and 45 GBs produced



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Workflow C: Transparent ECA – 82% Reduction



Project Specs:

- 7 Custodians
- 250 GBs of client data collected
- Content of data set is unknown
- Search terms have not been constructed



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What do Judges Want?

- Evidence of a comprehensive and defensible process and plan for handling ESI preservation, collection and production right from the start
- Evidence of compliance with the plan
- Active management of the execution, timelines and milestones associated with the plan



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