

eDiscovery Competency & Ethics

A Review of the California Duty of eDiscovery Competency (Formal Opinion 2015-193), Meet and Confer Requirements, the Northern District of California eDiscovery Guidelines, and Updated Federal Rules of Civil Procedure.

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Agenda

- ▣ Terms of Art
 - ▣ Overview of California Professional Responsibility and Conduct Formal Opinion 2015-193
 - ▣ Meet & Confer Requirements in State Court
 - ▣ Northern District eDiscovery Guidelines, Check List and Model Order
 - ▣ Review Tips
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Overview of eDiscovery Terms

Understanding eDiscovery Competency

What is “eDiscovery”?

More than document
review

Every case has some
“electronic discovery”



Computer Forensics and Electronic Discovery

Computer forensics involves the identification, preservation, extraction, documentation, and analysis of computer evidence.



Electronic discovery is primarily the request, collection, review, production and management of electronic information.

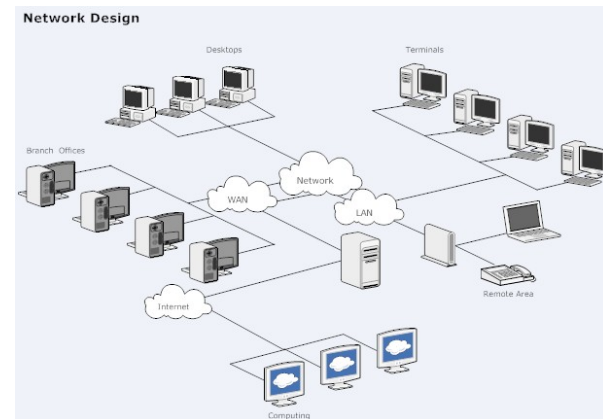


Image of ESI

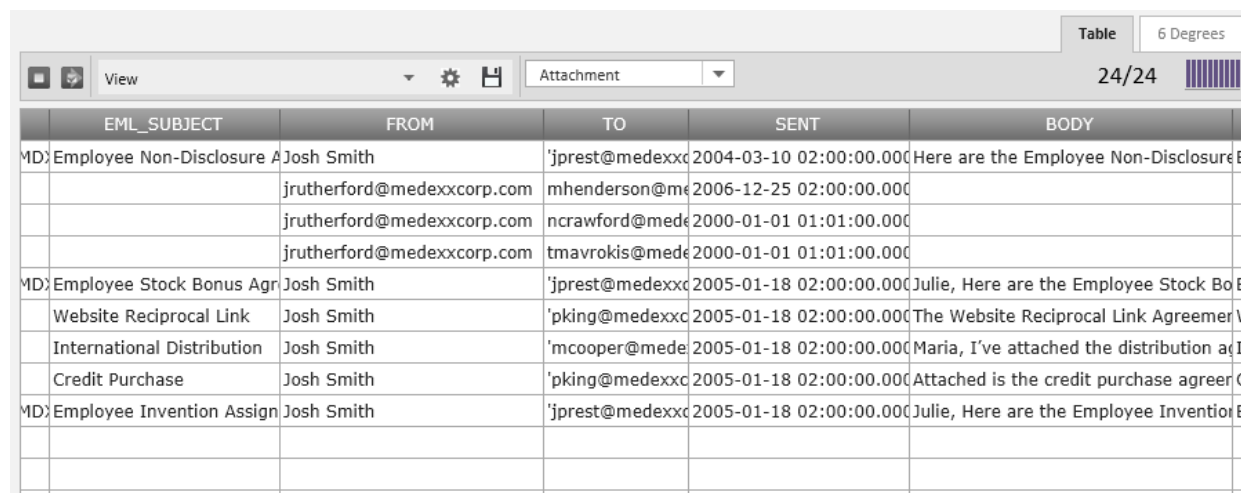
Static image
of a native
file, such as
in TIFF or PDF



Extracted Text

Document review becomes more productive as extracted text from the native files populates the “Custodian,” “Document Date” and other objective fields.

Associates and paralegals no longer need to manually enter that information when the data can be extracted in ESI processing and used to auto-populate a review database.



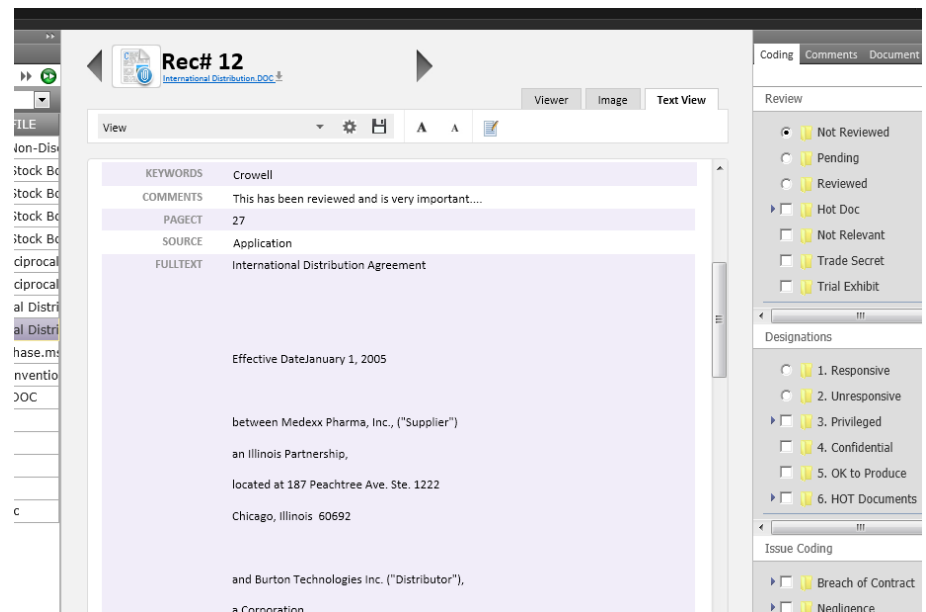
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	jrutherford@medexxcorp.com	mhenderson@me	2006-12-25 02:00:00.000	
	jrutherford@medexxcorp.com	ncrawford@mede	2000-01-01 01:01:00.000	
	jrutherford@medexxcorp.com	tmavrokis@mede	2000-01-01 01:01:00.000	
MD: Employee Stock Bonus Agr	Josh Smith	'jprest@medexxcorp.com	2005-01-18 02:00:00.000	Julie, Here are the Employee Stock Bo E
Website Reciprocal Link	Josh Smith	'pking@medexxcorp.com	2005-01-18 02:00:00.000	The Website Reciprocal Link Agreeer W
International Distribution	Josh Smith	'mcooper@mede	2005-01-18 02:00:00.000	Maria, I've attached the distribution ac Ir
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OCR & Auto Coding

OCR (Optical Character Recognition): A technology process that translates and converts printed matter on an image into a format that a computer can manipulate (ASCII codes, for example) and, therefore, renders that matter text searchable.

The Sedona Conference Glossary, 3rd Edition, 2010

Auto-Coding: Recognizing OCR text and populating corresponding fields in a review database.



Form of Production

How ESI is produced, such as in native file format or TIFF



Collection

Expert using
specific
software to
collect ESI from
computers



Hosted Review

☆ (Contents «"Catalytica Energy Systems"» or «"\$56 million"») and Date fro... 1 of 72 Unique Version Groups

Group Refresh Refine Batch Export Assign Share

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<input checked="" type="checkbox"/>			EASY1703686.000001	RFP002			7e29fc607a3ac510	2001/07/29 4:39 pm			

Processing Defined

Processing Data: An automated computer workflow where native data is ingested by any number of software programs designed to extract text and selected metadata and then normalize the data for packaging into a format for the eventual loading into a review platform.

May also entail identification of duplicates/deduplication and rendering of data into delimited format.

The Sedona Conference Glossary, September 2010



Formal Opinion 2015-193

The Duty of eDiscovery Competency

Why eDiscovery Competency Matters

An attorney lacking the required competence for e-discovery issues has three options:

- (1) **Acquire sufficient learning and skill** before performance is required;
- (2) Associate with or consult **technical consultants or competent counsel**;
or
- (3) **Decline the client representation.**

Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality.

Formal Opinion 2015-193

List of Competencies

- ▣ *Initially assess eDiscovery needs and issues, if any;*
- ▣ *Implement/cause to implement appropriate ESI preservation procedures;*
- ▣ *Analyze and understand a client's ESI systems and storage;*
- ▣ *Advise the client on available options for collection and preservation of ESI;*
- ▣ *Identify custodians of potentially relevant ESI;*
- ▣ *Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;*
- ▣ *Perform data searches;*
- ▣ *Collect responsive ESI in a manner that preserves the integrity of that ESI; and*
- ▣ *Produce responsive non-privileged ESI in a recognized and appropriate manner*

Initially assess eDiscovery needs and issues, if any;

Conduct a Client Interview. How do they use technology?

Do they use a computer? Do they email? What kind of email service do they use?

Ask what types of information they have created that could be relevant? Word? Excel? Apple Pages? Office 360?

Do they use social media? What kind? Have they posted anything relevant to the case?

Do they use **text messaging**? Have they texted about the case?

Implement/cause to implement appropriate ESI preservation procedures;

Ethics Opinion does not directly address ethics and legal holds (Footnote 8).

Step 1: Identify the Triggering Event

Step 2: Analyze Preservation Duty

Step 3: Define the Scope of the Litigation Hold

Step 4: Implement the Legal Hold

Step 5: Enforce and Examine the Effectiveness of the Legal Hold

Step 6: Modify the Hold (If Necessary)

Step 7: Monitor and Remove the Legal Hold

See, [7 Steps For Legal Holds of ESI and Other Documents](#), John J. Isaza, Esq., and John J. Jablonski, Esq.

Analyze and understand a client's ESI systems and storage;


- ▣ How is the data stored?
- ▣ Is there an archive?
- ▣ Cloud data?
- ▣ Did they turn off auto-delete?



Advise the client on available options for collection and preservation of Electronically Stored Information;

- ▣ Identify ways to lesson business interruption
 - ▣ Collect data after hours? Over the weekend?
 - ▣ Collections can be done directly with the device, off servers, remotely, or with self-executing technology.
-

Identify custodians of relevant ESI;



Should I Tell
My Lawyer All
the People I
Emailed?

- Part of client interview.
- When issuing litigation hold, include custodian questionnaire on how types of software used, communication methods, and data created that is potentially relevant.

Engage in competent and meaningful meet and confer with opposing counsel concerning an eDiscovery plan; and

- ▣ California Rules of Court on the Duty to Meet and Confer
- ▣ Northern District of California Standing Order



Perform data searches;

- ▣ Not like legal research.
- ▣ “Search” can be done in ***ESI identification, preservation, collection, case investigation (Rule 11 obligations), document review for production, and reviewing document productions from opposing party.***
- ▣ Many types of “search” technology: Complex Boolean, Concept, Latent Semantic Indexing, word lists, dictionaries, linguistic, clustering
- ▣ Advanced Analytics: Identify communication patterns, predictive coding, and other ways to analyze information.

Collect responsive ESI in a manner that preserves the integrity of that ESI;

- ❑ Avoid self-collection
- ❑ Hire an expert
- ❑ Types of collections:
physical (mirror image)
or targeted



Produce responsive ESI in a recognized and appropriate manner.

- ▣ ESI must be produced as it is ordinarily maintained or in a reasonably useable form.

- ▣ Forms of Production:
 - ▣ Native File
 - ▣ Static Image (TIFF or PDF)
 - ▣ Near Native





California Rules of Court

Since 2009!

CRC 3.724(8)

Any issues relating to the discovery of electronically stored information, including:

- (A) Issues relating to the **preservation** of discoverable electronically stored information;
- (B) The **form or forms** in which information will be produced;
- (C) The time within which the information will be produced;
- (D) The scope of discovery of the information;



CRC 3.724(8) Continued

- (E) The method for **asserting or preserving** claims of **privilege or attorney work product**, including whether such claims may be asserted after production;
- (F) The method for asserting or preserving the **confidentiality**, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;
- (G) How the **cost of production** of electronically stored information is to be **allocated among the parties**;
- (H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.





Northern District eDiscovery Guidelines

Check List and Model Order

- The ranges of creation or receipt dates for any ESI to be preserved.
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, should not be preserved.

Rule 26(f) Conference

Northern District of California Standing Order

Northern District Checklist Examples

II. Liaison

- The identity of each party's e-discovery liaison.

IV. Proportionality and Costs

- The amount and nature of the claims being made by either party.
- The nature and scope of burdens associated with the proposed preservation and discovery of ESI.

V. Search

- The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.



Amendments to FRCP

Chief Justice on the FRCP

Chief Justice John Roberts' Year End Report on the Federal Judiciary states the 2015 FRCP Amendments were intended to:

- (1) Encourage greater *cooperation* among counsel;
- (2) Focus discovery—the process of obtaining information within the control of the opposing party—on what is *truly necessary to resolve* the case;
- (3) *Engage judges in early and active case management*; and
- (4) *Address serious new problems* associated with vast amounts of electronically stored information.

Rule 1 Now includes Parties!

Requires *parties*, as well as *courts*, to construe, administer, and employ the Rules in a manner "to secure the just, speedy, and inexpensive determination of every action and proceeding."

Proportionality is Always Relevant

“Proportionality is part and parcel of just about every discovery dispute.”

Magistrate Judge Paul Grewal

Corning Optical Communs. Wireless v. Solid, Inc., 2015 U.S. Dist. LEXIS 49069, 7 (N.D. Cal. April 14, 2015).

Proportionality Front & Center

Rule 26(b)(1) requires Courts to consider:

The **importance of the issues** at stake in the action;

The **amount in controversy**;

The parties' **relative access to relevant information**;

The parties' **resources**;

The **importance of discovery** in resolving the issues, and

Whether the burden or expense of the proposed discovery outweighs its likely benefit.

Kissing Camels Surgery Ctr., LLC v. Centura Health Corp. (D.Colo. Jan. 22, 2016, Civil Action No. 12-cv-03012-WJM-NYW) 2016 U.S. Dist. LEXIS 7668, at *5-6.

Early Discovery

Rules 26(d)(2) and 34(b)(2)(A): Early requests for production –**prior to the 26(f) conference**– may be served. However, the **responding party has 30 days after the first 26(f) conference to respond** instead of the usual 30 days after service of the requests.

Specific Objections!



New Rule 34(b)(2)(B)-(C) requires parties to object with “**specificity**” and “***an objection must state whether any responsive materials are being withheld on the basis of the objection.***”

Preservation & Sanctions

*Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed **to take reasonable steps to preserve it**, and it cannot be restored or replaced through additional discovery, the court:*

- (1) Upon finding prejudice to another party from loss of the information**, may order measures no greater than necessary to cure the prejudice; or*
- (2) Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:***
 - (A) Presume that the lost information was unfavorable to the party;***
 - (B) Instruct the jury that it may or must presume the information was unfavorable to the party; or***
 - (C) Dismiss the action or enter a default judgment.***

USCS Fed Rules Civ Proc R 37(e).

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Tips for Document Review

Thank You

Questions?

Thank You

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