Data Mapping & Litigation Preparation

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for Strafford Publications

Background

- ESI is a “different creature”
- Enormous volume
  - Email
  - Multiple recipients
- Volatile media
  - Automated deletion
  - Dynamic data in databases
  - Metadata in documents
  - early preparation is critical

FRCP Amendments

- December 2006
- Existing rules were developed in "paper, file cabinet" world
- Prior rules did not address unique issues associated with electronic data – easily, and inadvertently, modified or destroyed

Changed Rules

- Rule 16 — Scheduling Order
- Rule 26(f) — Early Meeting of Counsel
- Rule 26(a) — Initial Disclosures
- Rule 26(b) — Duty to Disclose
  Limits on Scope
  Inadvertently Produced Material
- Rule 33 — Interrogatories to Parties
- Rule 34 — Demand for Documents
- Rule 37 — Sanctions
- Rule 45 — Subpoenas

Rule 26(f) Meet-and-Confer

- **Topics (see Advisory Comm. Notes)**
  - "issues related to disclosure or discovery of" ESI
  - "issues related to preservation"
  - information systems
  - scope of discovery
  - accessibility of sources
  - production format
  - privilege issues (claw back, quick peek)
  - metadata
  - discovery plan

Courts' Expectations

- Sedona Conference Cooperation Proclamation
  - Sedona generally
  - judicial approval
- "Open and forthright information sharing" and "dialogue"
  - "just, speedy, and inexpensive determination of every action"

Expectations

- Sophisticated counsel
- Ethical issue: NY Ethics Op. 782 (Dec. 2004)
  - Must exercise "reasonable care" to prevent the disclosure of client confidences in metadata
  - "Reasonable care" may require the attorney to "stay abreast of technological advances and the potential risks in transmission"
- Rule 26(g) certification

Consequences

- Default judgment, *Morgan Stanley*
- Adverse inference, *Nursing Home Pension Fund v. Oracle Corp., 2008 WL 4093497* (N.D. Cal. Sept. 2, 2008) *(Larry Ellison emails)*
- Exclusion of evidence
- Monetary sanctions, *Keithley v. Home Store.com, Inc*., 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008)
- Malpractice claims, *Celanese v. Kaye Scholer* (N.D. Tex June 26, 2008)
- Bar referral, *Qualcomm*

Preparation is Critical!

- Shorter timeframe
- More extensive disclosures
- Greater expectations
- Higher stakes

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