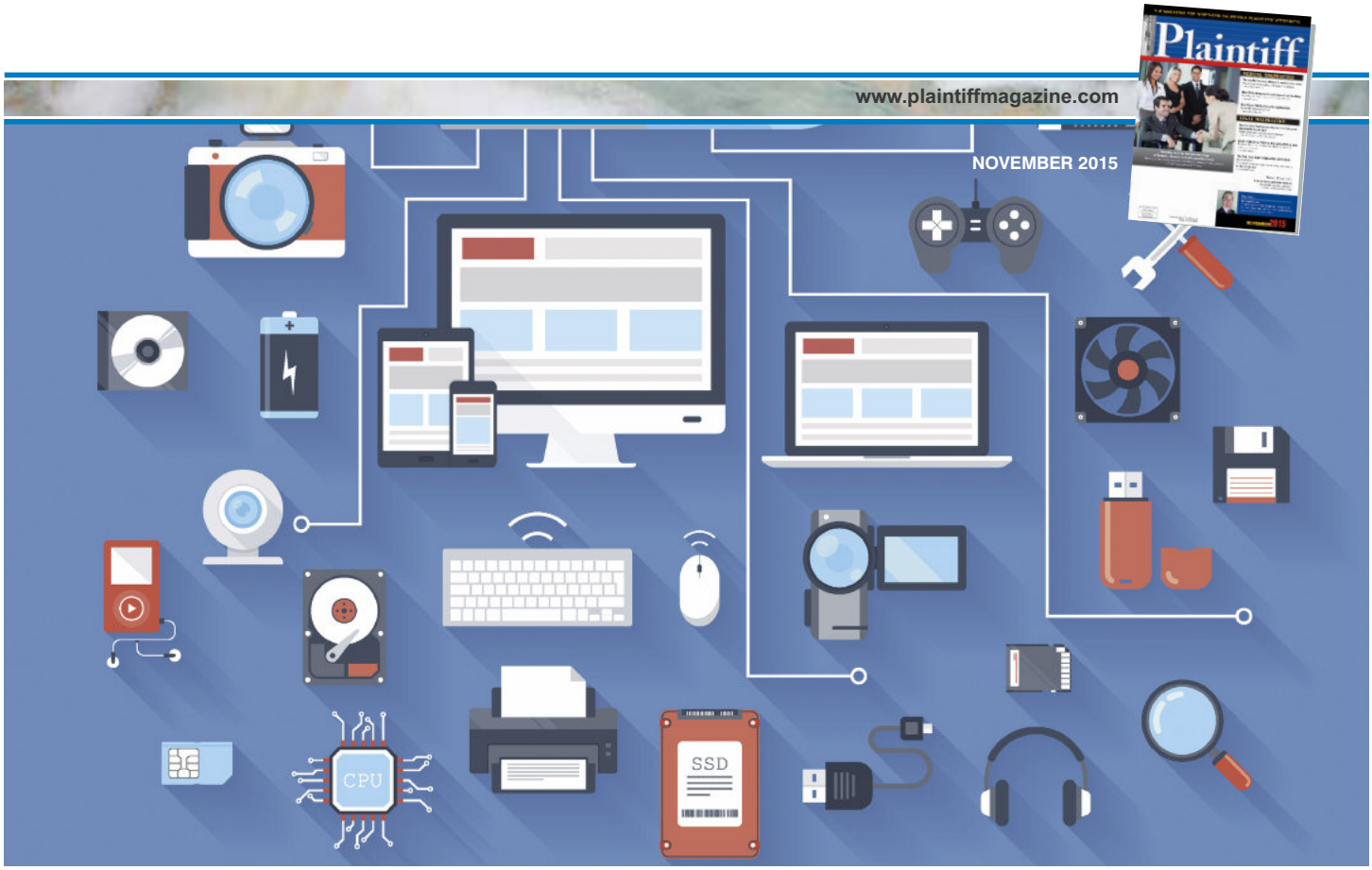


E-discovery for plaintiffs' lawyers

Basic tools to uncover the evidence you need to win your case

By Jayme L. Walker and Tilak Gupta

[*Article adopted from E-Discovery 101 given at CELA Conference 2015 with Judge Paul Grewal.*]

Love it or hate it, electronic discovery is here to stay. However, many good plaintiffs' lawyers are still putting their heads in the proverbial sand and ignoring the fact that they need to know the basics about electronic discovery. Whether you have an automobile accident case, an employment case, a products liability case, or a premises liability case, every case is a case where electronic discovery needs to be explored. This does not mean that you need an IT expert for every case. All it means is that you need a couple of basic tools in your toolbox to uncover the evidence that you need to win your case.

What is E-discovery?

Electronically stored information, commonly referred to as ESI, refers to all information stored in computers and digital storage devices. This includes emails, voicemails, instant messages, text messages, surveillance videos, and social media communications. (See Cal. Civ. Proc. Code (herein CCP), § 2016.020.)

There are some key terms that you need to be familiar with when discussing ESI:

- *Active Data* – data that is immediately available at one's fingertips.
- *Backup Data* – data that is not immediately available but preserved for a certain length of time in the event of a disaster like a fire or a flood.
- *Legacy Systems* – ESI only available through now obsolete software.
- *Metadata* – "hidden" data stored on a computer, such as the author of a document, changes made to it, the date it was created, and the date it was altered. For emails, this is useful to see the "bcc" field.
- *Native Format* – ESI in its original form (e.g., original word, Excel or email file itself, as opposed to a PDF version of the original).
- *Load Files* – typically used to view the metadata, documents, and accompanying attachments (in an organized, searchable way) you requested in discovery on an e-discovery program, such as Summation or Concordance.
- *TIFF/PDF* – data formats when you cannot get the native file. Make sure it is searchable rather than an image!

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• *PST File* – an email file (e.g., Outlook)
• *Searchable vs. images* – images are not searchable!

Electronic discovery increases the value of your case

Many former defense attorneys have said that their clients hate electronic discovery, and when plaintiff's lawyers know what they are doing, e-discovery raises the value of the case. A savvy plaintiff's lawyer who alerts defense counsel early in the case that he or she will be seeking electronic discovery, and demonstrates knowledge of how to do so, automatically raises the value of their case.

If that reason alone does not move you to continue reading this article, the California State Bar recently issued an opinion that California lawyers are ethically required to be competent in dealing with electronic discovery. (See Formal Opinion 2015-193 (2015).) The State Bar summarized an attorney's ethical duties with regard to e-discovery as follows:

> An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. 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.

Meeting and conferring with defense counsel regarding e-discovery

It is important to meet and confer early and to send a preservation letter as soon as you take on a case. Some companies regularly overwrite data, sometimes as often as on a daily basis (e.g., where a company does 24-hour surveillance and maintaining those surveillance tapes would be too expensive). The more times data is overwritten, the more difficult and expensive it becomes to retrieve. If your case is an employment case, use your client to identify who the main witnesses are and contact the Defendant as soon as possible to tell it to preserve the computers of these witnesses. In personal injury cases, if you determine that there may be video of the incident, it is important to contact the persons who maintain the video and get a copy as soon as possible. There is almost always video surveillance available, but much of it is overwritten on a daily or weekly basis. That does not mean it is irretrievable months or even years later, but it may become quite expensive to retrieve it.

California Rules of Court, rule 3.724(8) requires counsel to meet and confer on the following electronic discovery issues 30 days prior to the first Case Management Conference:

• Preservation of discoverable ESI;
• The form in which information will be produced;
• The time within which the information will be produced;
• The scope of discovery of the information;
• Claiming privilege and whether such claims can be made after production;
• The method preserving the confidentiality, privacy, trade secrets, or proprietary status of information;
• How the cost of production of electronically stored information is to be allocated among the parties;
• Any other issues related to ESI

The earlier you do this, the better. Do not wait to meet and confer about how you are going to get electronic documents after they have been produced to you in a format that you do not want, as the general rule is that the responding party is not required to produce ESI in more than one form. (See CCP § 2031.280(d) (2).)

Requesting electronic discovery

In all of your requests for production, you should specify that you are seeking ESI and the form in which you want it produced. (See CCP § 2031.030(a)(2).) If you are seeking emails or Excel spreadsheets, it is best to get these in their native format. The last thing you want is an Excel spreadsheet in a useless PDF format that otherwise could have given you key insight into mathematical formulas used if you had properly requested the Excel spreadsheet in its native format! Try adding the following to your inspection demands:

> Pursuant to CCP § 2031.030(a) (2), electronically stored information responsive to PLAINTIFFS' demands must be produced in the format in which it is ordinarily maintained or in a form that is reasonably useable. Further, PLAINTIFFS demand that DEFENDANTS produce and permit PLAINTIFFS, or someone acting on their behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of DEFENDANT, pursuant to CCP § 2031.010(e). Plaintiff requests that Defendant produce electronically stored information:
> • in its native format with all accompanying metadata.
> OR
> • in searchable PDF/TIFF with a load file for [Summation, Concordance, etc] including all accompanying metadata.
>
> Also, when you request ESI, "deduplication" is important, so that you do not get 20 or 30 copies of the same exact document. Make sure to include the following instructions when you request ESI: "PLEASE DEDUPLICATE THE RESPONSIVE ESI BEFORE IT IS PRODUCED."

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A responding party must produce electronically stored information as it is kept in the usual course of business or organized and labeled to correspond with the categories in the demand. (CCP § 2031.280(a).) Irrespective of how the responding party chooses to produce the ESI, either by category of request or as it is kept in usual course of business, all ESI must be produced in a reasonably useable format. See CCP § 2031.280(d).

Paper copies are not reasonably useable. (*Vasquez v. California School of Culinary Arts, Inc.* (2014) 230 Cal.App.4th 35, 43; see also *Rowe Entertainment, Inc. v. William Morris Agency, Inc.* (S.D.N.Y.2002) 205 F.R.D. 421, 428; *Playboy Enterprises v. Welles* (S.D.Cal.1999) 60 F.Supp.2d 1050, 1053.) A CD full of unsearchable PDFs also may not be reasonably useable. (See *Ellis v. Toshiba America Information Systems, Inc*. (2013) 218 Cal.App.4th 853, 862.)

Dealing with objections to production of ESI

If the Defendant objects to the format that was requested, it must state the format that it is willing to produce the documents. (See CCP § 2031.280(c).) If a party contends that electronic discovery is not reasonably accessible, it must specifically identify the sources of ESI that are not reasonably accessible. (CCP § 2031.210.)

Again, it is important to meet and confer with the defendant. Defendant must explain to you how the documents are kept in the usual course of business and why the documents cannot be produced as you have requested. Sometimes, it may be reasonable for the responding party to refuse to produce native format documents. For instance, if the responding party needs to redact part of an email string as attorney-client privilege, it cannot produce the metadata or native file because the redaction will not appear on those files. Keep this in mind if you need to redact privileged information in emails.

If a Defendant claims that the requested documents are not reasonably accessible or are too expensive to produce, courts may allocate the expense of discovery even if it is not reasonably accessible. (See CCP § 2031.060(e); CCP § 2031.280(e) ("If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form."). The statutes restrict the costs to those that are necessary and reasonable and the trial court may make whatever orders justice requires to determine what is necessary and reasonable upon a motion for protective order. (*Toshiba America Electronics Components, Inc. v. Superior Court* (Lexar Media, Inc.) (2004), 124 Cal.App.4th 762, 772.)

The cost-shifting analysis comes into play more often with backup data, rather than active data, as backup data will more likely have to be "translate[d]." Because they have to be translated "through detection devices," backup tapes are expensive and courts are more reluctant to order the production of them. Thus, you should first ask for less expensive ESI (e.g., ESI in active email exchange rather than those emails contained on backup tapes). The general rule is that active data will be produced at the responding party's request and the main dispute arises with backup data, like backup tapes:

> Assuming a precise and detailed demand has been tendered by the propounding party – and a claim for any and all "documents" will rarely suffice – *active* ESI and its metadata is discoverable and producible at the requested party's expense…. To obtain this ESI at the other's expense, the requesting party must demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing this provably inaccessible [backup] information.

(*U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 238-39 (S.D. Cal. 2015); see also *Zubulake v. UBS Warburg LLC*, (S.D.N.Y. 2003) 217 F.R.D. 309, 324 ("For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes.")

In conducting the cost-shifting analysis, the *Zubulake* court came up with the following factors, weighted more-or-less in the following order:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

(*Ibid.*)

The *Zubulake* court noted that the first two factors were the most important. (*Id.* at 323.) For this reason, it is crucial that you craft your discovery requests with more detail and attention to your particular case than just requesting "any and all documents".

Managing and using e-discovery

There are many databases that can be used to manage e-discovery. Produced emails obtained as PST files can simply be uploaded for searching in Outlook, making it appear as though you have the witness's Outlook account. Summation, Concordance and Thomson West all have electronic discovery database programs. Adobe Pro can also be used to run searches on electronic discovery. We have to update our thinking when it comes to electronic discovery. Sometimes if you get a document production of hundreds of thousands of documents, you may need

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to obtain an expert to help you sift through it. There are vendors that will help you "deduplicate" documents, as discussed above. In most cases, you will get a manageable number of documents, but it is conceivable to get well over 500,000 pages of documents in even employment and product defect cases. At this point, an attorney should refer to his or her ethical obligations. If you do not have the capacity to deal with this kind of ESI, you should associate counsel or hire a consultant.

Responding to ESI

Many clients now use social media and Defendants are sometimes going so far as to ask for your client's username and password. It is important to protect our client's privacy while still producing relevant ESI. Remember, there is a constitutional right to privacy in California and Defendant must show a compelling need to get discovery that would violate the constitutional right to privacy. The party seeking discovery must show a particularized need for the confidential information sought. The broad "relevancy to the subject matter" standard is *not* enough here. The court must be convinced that the information is *directly relevant* to a cause of action or defense … i.e., that it is *essential* to determining the truth of the matters in dispute. (*Britt v. Sup.Ct.* (*San Diego Unified Port Dist.*) (1978) 20 Cal.3d 844, 859-862; *Harris v. Sup.Ct.* (*Smets*) (1992) 3 Cal.App.4th 661, 665.)

We must also be careful to protect privileged and confidential information. (See Formal Opinion 2015-193, *supra.* CCP. § 2031.285 provides a claw back procedure for inadvertently produced privileged information. However, it may be advisable to get an expert if your client's computer needs to be forensically analyzed and preserved (for instance where clients email themselves documents that Defendant contends are confidential or proprietary as we are seeing more and more in employment cases) or if you need to inspect computers or other servers, digital storage devices of defense witnesses.

Moving to compel ESI/sanctions

If you have followed the preceding steps of this article and you still need to move to compel, you will be in a good position to get sanctions for having to do so. If a Defendant has not complied with its duty to preserve ESI or has not responded with reasonably useable forms of ESI, courts have been more willing to impose sanctions, including costs for filing the motion, costs of retrieving deleted discovery, and giving adverse jury instructions. (See *Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2004) 229 F.R.D. 422.) However, in order to win a motion to compel, you must have a thorough knowledge of ESI obligations and the requirements of the law. (See *Venture Corp. Ltd. v. Barrett*, 2014 WL 5305575 (N.D. Cal. Oct. 16, 2014).) In *Venture Corp. Ltd.*, the Court ordered a party that tried a document dump of 41,000 pages to re-do the production. (See *Id.* at *1.)

Note that California has very little authority on e-discovery and California courts liberally defer to federal rules and case law. (See *Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal.App.4th 853, 862 n. 6 (2013), quoting *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1288; see also Formal Opinion 2015-193 ["there is little California case law interpreting the Electronic Discovery Act, and much of the development of e-discovery law continues to occur in the federal arena"].

Conclusion

Electronic discovery can present substantial challenges to plaintiffs' lawyers who traditionally work in small firms. Thus, it is important to have some basic knowledge of e-discovery to allow you to explore the key discovery you need to leverage settlements as well as avoid document dumps from opposing counsel and prepare your case for trial.


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