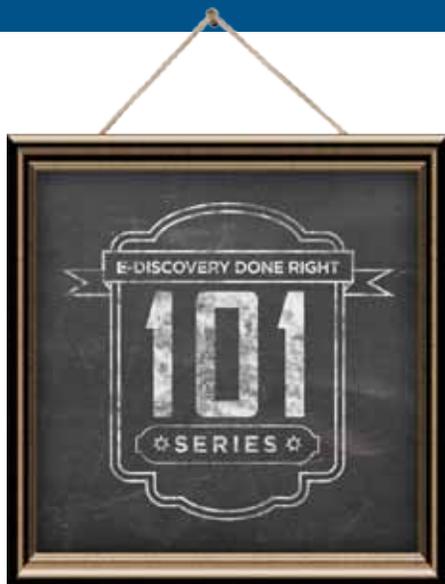


101: Document Review and Production



Discovery is the backbone of civil litigation. The mutual disclosure of documents and, to a large extent, electronic documents makes review imperative. In the electronic environment in which we live and conduct business there is absolutely no way to start, defend, or litigate a case without conducting a review of electronically stored information (ESI). There is one maxim you should always remember with review:

"The objective of review in ediscovery is to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible."

Judge Andrew Peck

Da Silva Moore v. Publicis Groupe & MSL Group (2012)

Request for Production

Attorneys review ESI for two main reasons: they are responding to a discovery request or they are reviewing a discovery production.

A party can request ESI pursuant to Federal Rule of Civil Procedure Rule 34(a). ESI can include data found on anything electronic from smartphones to social media to hard drives in cars.

Discovery requests should request relevant material that is reasonably particular and narrowly tailored. No attorney wants to review eight years' worth of e-mail from an opposing party. Take the time to define the issues that relate to the causes of action in the case and to determine the scope of the request, the relevant timeframe, and key players before drafting your own requests.

Form of Production

Under Federal Rule of Civil Procedure Rule 34(b) the form of production of ESI can be specified by the requesting party in a request, or thereafter by a responding party in a response. If you don't specify, it must be produced in the form in which it is ordinarily maintained.

E-discovery productions can come in three basic flavors:

- Native files
- Static images
- Blended productions that contain both formats

Native Files - Requesting ESI in native file format will ensure that the requesting party gets the "original" data that contains substantive and embedded metadata. Native file data can be used to great benefit in litigation support review applications for basic searches to advanced analytics.

Static Images - Static images are typically used if a party needs to redact information. Converting native files to a static image such as a TIFF or PDF increases the cost of production. Some e-discovery service providers will triple the cost of a TIFF production over a native one. The other major negative to static images is that any advanced analytic software, such as faceted search or concept clustering, is ineffective in working with the format. Trying to use advanced analytics on a static image would be like trying to play a Betamax tape on a Blu-ray player.

Blended - Blended productions usually have specific file types to produce in native file format, such as Excel. Other, agreed-upon file types that have areas that must be redacted--such as Social Security Numbers, HIPAA information or other personally identifiable information--would then be produced as static images. However, one way to avoid the increase in costs is to enter into a protective order, so that any privileged or confidential information is protected, thus eliminating the need for redaction.

No Degrading Searchable Features

If no form of production is stated, the default rule on productions is to produce the ESI in the form it is ordinarily maintained. That almost always will be in native format.

The Advisory Committee Notes to the Amendments to the Federal Rules of Civil Procedure and following case law prohibits parties from degrading searchable features of native file formats if no form is stated.

One of the best examples of this is a case in which a producing party printed ESI as paper and then scanned the documents as non-searchable PDFs. The Court held that the ESI was not produced in a reasonably usable form because it was non-searchable. Indep. Mktg. Group v. Keen, (2012).

How Do You Review?

Reviewing ESI should not be treated like rummaging through a box of paper. ESI in an e-discovery review platform can be sorted by dates, custodians, control numbers comparable to Bates numbers and with advanced search features.

Consider the following before starting review:

- What are the causes of action in this case?
- What are the defenses my client has against any claims of wrongdoing?
- Who are the key players in the case?
- What is the relevant timeframe of the case?

If you represent the plaintiff or have a cross-complaint, identify the jury instructions that correspond to your causes of action. Break down the elements of your cause of action for issue tagging your review--simply tagging a file as "relevant" or "fire-engine-red hot" has little value. If you have five causes of action, knowing which files pertain to each cause of action will expedite preparing for depositions, motions, and trial.

If you represent a defendant, identify your defenses. Base your review strategy on attacking any support the plaintiff has against your client in his or her cause of action.

Privilege Review

Pursuant to Federal Rule of Civil Procedure Rule 26(b)(5), a privilege log must:

1. Expressly state the privilege
2. Describe the nature of the information not being disclosed, without revealing the information, which will enable other parties to assess the claim.

You and your team can review ESI and build their privilege log in your database. This requires the following:

- Identify the possible privileges in the case
 - Examples include: Attorney-Client Communications, Marital Communications, Clergy Privilege, etc.
- Create issue tags on the prospective privileges, including sub-issues
- Prioritize privilege searches by term type
- Names in case
- Firms on case
- Other attorneys
- Other firms
- Vendors on case
- Other vendors
- Explicit privilege markers
- Legal keywords

When reviewing an e-mail that is a communication from a client to the attorney seeking legal advice, select the relevant privilege tags. You should include additional information explaining the privilege in order to complete it.

Thanks to e-mail threading, your return e-mail can be issue coded as an e-mail from an attorney to the client providing legal advice. Again, additional information likely must be added to complete the privilege log.

Once privilege review is completed, export the relevant fields of information to an Excel file for production.

Conclusion

The review and production of e-discovery is the blending of art and science. Attorneys must understand the spirit of the law as well as how to use technology to meet discovery obligations.

A discovery request that is overly broad may not only result in motion practice, but it may ensure the nightmare of actually placing years' worth of ESI, e-mail, text messages, and social media into a very expensive review and production cycle. Worse yet, if inexperienced team members are governing your meet and confer, ESI may be produced as static images, rendering all of the advanced analytics tools that can reduce your review costs completely useless.

The key to success in e-discovery review is simple; Be smart, know what you want, know what supports the claims and defenses in a lawsuit, and have a strategy for how you will review that ESI.

To learn more about how EnCase eDiscovery can help turn review into a fast, accurate and repeatable business process, please visit www.encase.com/ediscovery.

Our Customers

Guidance Software's customers are corporations and government agencies in a wide variety of industries, such as financial and insurance services, technology, defense contracting, pharmaceutical, manufacturing and retail. Our EnCase® customer base includes more than 100 of the Fortune 500 and over half of the 50, including: Allstate, Chevron, Ford, General Electric, Honeywell, Northrop Grumman, Pfizer, UnitedHealth Group and Viacom.

About Guidance Software (GUID)

Guidance Software is the worldwide leader in digital investigation solutions. EnCase® Enterprise platform is used by numerous government agencies and 65 percent of the Fortune 100 to conduct network-wide digital investigations. Built on the EnCase Enterprise platform are EnCase® eDiscovery, EnCase® Analytics, and EnCase® Cybersecurity, which help organizations respond to litigation discovery and compliance requests, derive security intelligence from Big Data on endpoints and conduct rapid security incident response.

©2013, Guidance Software Inc. All rights reserved. Information described herein is furnished for informational use only, is subject to change without notice, and should not be taken as a guarantee, commitment, condition or offer from Guidance Software. EnCase® and Guidance Software™ are registered trademarks or trademarks owned by Guidance Software in the United States and other jurisdictions and may not be used without prior written permission. All other product or company names are property of their respective owners.



Citations

ⁱ Da Silva Moore v. Publicis Groupe & MSL Group, 2012 U.S. Dist. LEXIS 23350, at *2 (S.D.N.Y. Feb. 24, 2012)

ⁱⁱ *Indep. Mktg. Group v. Keen*, 2012 U.S. Dist. LEXIS 7702 (M.D. Fla. Jan. 24, 2012).