



Electronic Discovery

Finding All The Pieces Of The Puzzle

Steven Brower

Buchalter Nemer

Orange County, Los Angeles and San Francisco, California

sbrower@buchalter.com

Sponsored by DW Harper Group

Healthcare Risk Roundtable

Costa Mesa, California

May 18, 2007



What Does The Legal System Expect Of Document Production?

- Rational Expectations

- The ability to produce potentially relevant documentary evidence, in a timely manner, in a form which provides credibility to the documents
- The ability to provide persuasive testimony confirming the above

- Extreme Expectations

- The ability to produce and explain all documentary evidence which the opposing party claims might theoretically be helpful to their case

What Is The Responsibility of Outside Counsel?

- Zubulake v. UBS Warburg, 229 FRD 422 (SDNY 2004) (sometimes “Zubulake V”)
 - “Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered”

How Does Outside Counsel Comply?

- “To do this, counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy. . . Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected . . .”



What About In The Real World?

- “To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. . . In short, it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take some reasonable steps to see that sources of relevant information are located.”



Electronic Data

- “Lots” of information is stored in electronic form
 - Some say 80%, some say 92%
 - Analysis is same if it is “only” 50%
- The important point is that there is no longer any “debate” regarding the materiality of data stored in electronic form
- Finding all of the potentially relevant data is a significant challenge, especially when it resides across a network

What Are Documents?

- Any Representation Of Information
 - Scanned Documents (and all earlier forms)
 - Fax
 - Email
 - Instant Messaging
 - Software
 - Voice Mail
 - Spreadsheets
 - Databases (from Quicken to Sabre)
 - Personal Information Devices

Document Retention - Napkins

- Text from FAQ on website of TFT:

7 Does the napkin really exist? And did Elkhart or TFT invent the Automatic nozzle?

Answer : Yes the napkin does exist, and is on the wall of the conference room at TFT. The napkin proves conclusively that TFT invented the automatic nozzle.



Document Retention Policies

- Document retention policies can't conflict with legal requirements
- Document retention should not be perceived as evidence destruction
 - Do the policies make sense? (Instant destruction of email, for example)
 - The cost of retaining the records isn't the problem
 - it is the cost of reviewing the records in litigation



Consistent Retention

- Standards should be enforced in a consistent manner
 - “Reminder” messages, which are first sent out once there is already a reason to suspect a problem, have been trouble in some cases
 - Cannot destroy documents after you know about issues, even if they “should have been” destroyed before



California Federal Bank

- California Court of Appeal, 2002 Cal.App. LEXIS 3077 (3/14/02 – Unpublished)
- Class action filed in 1997 regarding reconveyance practices and fees

More California Federal Bank

- “The trial court made certain findings concerning CalFed’s conduct during discovery. First, CalFed destroyed computer databases used to track the reconveyance process and collection of reconveyance fees for the period of October 1, 1991 through April 1, 1997. They destroyed these databases after claiming in sworn discovery responses and in meet-and-confer conferences that the databases did not exist. CalFed also destroyed other databases and withheld other information relevant to the litigation, and it provided false or misleading declarations and answers to interrogatories.”



Electronic Data Is A “Writing”

- Federal Rules of Evidence, Rule 1001
 - “For purposes of this article the following definitions are applicable:
 - (1) “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, **magnetic impulse, mechanical or electronic recording,** or other form of data compilation.”



Electronic Data Is Subject To Rule 34 Discovery

- Federal Rules of Civil Procedure, Rule 34
 - “Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor’s behalf, to inspect and copy, any designated documents (including . . . other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) . . .”



1970 Revisions to FRCP 34

- Advisory Committee Notes

“The inclusive description of “documents” is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovery party only through respondent’s devices, respondent may be required to use his devices to translate the data into usable form.”



2006 Federal Rules Revisions

- New rules for electronic discovery were effective as of December 1, 2006
 - More involvement, at an early time in the case, by information technology personnel
 - You are supposed to know what you have and where it is located and how soon it can be produced almost at the inception of the case, even if you are the defendant
 - You are supposed to state the format in which you want the data produced, at the outset



Corporate Document Retention

- Sarbanes-Oxley (S-OX) is often referred to as the baseline corporate retention statute
 - S-OX applies to all SEC reporting companies
 - Some state AG's have indicated an intention to apply the same standards to larger non-profit corporations, especially healthcare related

Retention Time

- S-OX requires 7 years for “audit papers”
- HIPAA requires 7 years for protected health information
- IRS requires 4 years post-filing for some records, 5 years from creation for other records (SCR under BSA), longer for others
- Industry specific regulations may also apply
 - Firearm sales – 20 years
 - Hazardous employment – 30 years (or more) post-employment
 - Insurance policies – unlimited(?)



Document Production Issues

- It Takes Far Too Long For The Truth To Be Revealed, Even When Truth Really Is The Goal
 - In-house counsel doesn't always have the necessary expertise
 - Document Retention Policy isn't always followed
 - IT doesn't always understand the request, and when they do, they don't always feel that they are getting adequate support



Lombardo v. Broadway Stores

- 2002 Cal.App. LEXIS 662 (1/22/02 unpublished)
 - Case study in mishandling of discovery request for electronic data
- Class action relating to payment of accrued vacation benefits

Broadway – Chronology

- 1/95 and 7/95 (before litigation) sent preservation letter
- 10/95 suit filed
- 11/95 Broadway responded to discovery saying that it would produce documents
- 2/96 got some payroll documents
- 2/97 new set of discovery requests

Broadway – Chronology

- 5/97 “Broadway provided unverified responses that consisted almost entirely of unmeritorious objections and a false statement all such documents had been provided”
- 6/97 Broadway agreed to produce in exchange for motions to compel being withdrawn
- 8/97 Broadway first admitted “problems” in retrieving records
- 9/97 Claimed HR was off-line for conversion

Broadway – Chronology

- 11/97 In response to motions to compel Broadway said it had been acquired by Federated and documents have been “lost, misplaced or destroyed”
- 1/98 Plaintiff sent new discovery requests, got boilerplate objections
- Parties went to mediation, given some pages of payroll records
- 10/98 Motions to compel granted with monetary sanctions now up to \$12,000

Broadway – Chronology

- 2/99 Broadway says that records had been sent to Georgia in 1996 and can't be located, didn't give other information
 - Broadway says there are about 5 million pages of records relating to 90,000 class members
- 7/99 Plaintiff wants Broadway to pay to reconstruct the computerized records

Broadway – Chronology

- 8/99 Broadway explains that records sent to Federated data center in Georgia in 2/96, then storage devices were reviewed in summer, “when it was determined they could not be read because they were damaged or the software to read them could no longer be obtained, they were destroyed.”

Broadway – Conclusions

- “Broadway urges the hard copy payroll documents were the same as the computerized data. Not so. The hard copy may have contained the same information, but that information was not equally accessible. As [plaintiff] notes in her motion, it would be virtually impossible to manually extract all of the necessary and pertinent information from five million pages of records.”



Broadway – Rest of the Story

- 4/02 Determined that Broadway was using different data than what had ever been provided to Lombardo's counsel
- 9/02 Discovery referee agreed that a “terminating sanction” was appropriate as to Broadway due to discovery abuse
- 11/03 Parties were getting ready for trial when case was finally settled
- Attorneys' fees were about \$6 million, plus over \$1 million in expenses

Questions And Answers

- We have discussed what the legal system expects of document production
- Hopefully we inspired you to think about this aspect of your profession in a new manner

