# **FUJIFILM Executive Seminar**

Overview and Best Practices for eDiscovery

February 6, 2009

# Topics

Introduction

- eDiscovery Primer
- Overview of eDiscovery process
- Key risks and highlights from significant cases
- Revised Federal Rules of Civil Procedure summary

#### Strategies to reduce risk & cost

- Top concerns of companies
- Common pitfalls and how to avoid them
- Leading practices for developing a response plan for eDiscovery

#### Question & answer

#### **Dilbert on eDiscovery**



# In the beginning, there was Paper

- 93% of all information created during 1999 was in digital form. University of California.
  - By 2013 IM will be used by 95 percent of employees as their de facto communications tool for voice, video and text. *Gartner Group*
- Americans send 2.2 billion e-mail messages a day. Gartner Group
- The typical company stores more than 50% of their business records and information in electronic format. Pricewaterhouse Coopers
- ► 15.8 MB of email sent/received per user each day by 2008. Email Discovery: Tape Is Not Enough, iLumin Software Services

#### eDiscovery Challenges & Issues

# Today, 80 percent of a company's information is unstructured data. (Gartner)



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# **Business Risk Events**

- Regulatory Inquiry/Audit
- Investigation
- Laptop theft
- Data migration
- Customer/employee Fraud
- Customer/employee Complaint
- Privacy breach
- Natural or man-made disaster
- Litigation
- Insurance claim
- Dispute



# **Discovery in the legal process**



"Company A sues Company B"

Both sides (plaintiff and defendant) are required to turn over relevant materials pertaining to the case, outside of privileged material.

This means all letters, memos, documents and emails pertaining to the case must be shared with each side.

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# What is Discovery?

- The process of identifying, preserving, collecting and producing information that may be used as evidence in a legal proceeding
- Information exchanged through discovery is subject to review and analysis
- The most common instruments of discovery are:
  - Interrogatories
  - Requests for production
  - Depositions
- While discovery is a civil litigation term, the basic processes of discovery (identification, preservation, collection, review and analysis) also apply to investigations and audits

## What is ESI? (Electronically Stored Information)

Information that is stored in a medium from which it can be retrieved and examined...from "reasonably accessible" sources

Federal Rules of Civil Procedure

# **Sources of Electronic Evidence**

# <image>



#### Servers

- Public Shares
- Private Shares
- Financial System
- Customer Data
- Employee Data

#### BlackBerry/PDA



#### Portable Media



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# **Sources of Electronic Evidence**

#### Informal forms of electronic communications



Instant messaging

- Public (Yahoo, AOL)
- Corporate (Lotus)







#### Virtual workrooms Bulletin boards

- Public (Yahoo)
- Private (Intranet)
   Chat rooms

## eDiscovery challenges

#### Higher degree of complexity than traditional discovery

- Ease of duplication
- Ease of dissemination
- Backups
- Portability
- Volume

Identification, preservation and collection are difficult

Collection, review and production are expensive

# **General Counsel Priorities**

According to GC Roundtable Research...

- Understand the universe of potentially responsive evidence
- Effective management of the collection and preservation process
- Minimize disruption to business and revenue generating employees
- Reduce the cost of eDiscovery

#### Issues

The courts are raising the bar...

US Courts/ Regulators reaching globally

Higher expectations to provide evidence

Shorter period of time to respond legal notice

Courts assume rational and effective internal controls

Courts imposing sanctions for late production missing records - incomplete responses



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# Qualcomm Inc. v. Broadcom Corp.

#### Patent infringement case

- Qualcomm had more than <u>46,000 e-mails</u> responsive to the discovery requests that it failed to produce
- Consequences for eDiscovery failure

#### Qualcomm ordered to pay Broadcom +\$8.5 million in attorneys' fees

Qualcomm's attorneys referred to State Bar of California for an investigation of <u>ethical violations</u>.

# **Emerging Issues**

Privacy

#### International Privacy laws

Safeharbor, Data Protection Contracts, Binding Corporate Rules for exceptions to data privacy requirements

Definition of "personal data" varies by country

# **Emerging Issues**

**Global View** 

Different Languages/Cultures

► IT outsourced across the globe

Cross-border data flow



# Revised federal rules of civil procedure: overview

- 16(b): Parties have 120 days from date of complaint to provide plan for e-discovery and production at scheduling conference
- ▶ 16(b)(5): Court can include E-Discovery agreement in scheduling order
- Rule 26(a)(1)(B): Mandatory disclosure re categories and locations of electronic information
- Rule 26(b)(2)(B): Standard of "reasonably accessible;" cost and burden considerations; cost-shifting
- Rule 26(b)(5)(B): Inadvertent production ("claw-back")
- 26(f): Parties must meet 21 days before scheduling conference to discuss e-discovery process and agree on protocol
- Rule 34: Form of production ("ordinarily maintained" or "reasonably usable")

# What is a Legal Hold?

A communication suspending the normal disposition or processing of records

- Issued in connection with:
  - Litigation (or reasonable anticipation thereof)
  - Regulatory and internal investigations
  - Third-party subpoenas

# Legal Hold Challenges

Suspension of deletions overwhelms computer systems

- Frequently no formal procedures to communicate, implement and document the Hold Order
- Legacy data and systems often represent real challenges
- Multiple overlapping Legal Holds may apply to documents and disposition must wait for all relevant Holds to lift

# **The Electronic Discovery Process**

#### The electronic discovery process and associated tasks.

Notice or Subpoena	Preserve	Collect	Review	Produce
<ul> <li>Define the criteria that "trigger" the need to preserve electronically stored information</li> <li>Process to Scope: people, data sources, dates, retrospective, prospective, etc.</li> <li>Notify stakeholders</li> <li>Compliance monitoring</li> <li>Tracking System</li> </ul>	<ul> <li>Determine method(s) of preservation and criteria for decision making</li> <li>Systems inventory and routine preservation / destruction schedules</li> <li>Frequency of preservation</li> <li>Preservation Notice</li> <li>User Response</li> <li>IT Responses</li> <li>Vendor Responses</li> <li>Strategy to identify scope &amp; disclose issues</li> <li>Compliance monitoring</li> <li>Tracking System</li> </ul>	<ul> <li>Determine method(s) of collection and criteria for decision making</li> <li>Collection Notice <ul> <li>Define scope</li> <li>Communicate</li> <li>Track</li> </ul> </li> <li>Processes for collection: <ul> <li>User Collection</li> <li>IT Collection</li> <li>Outsourced collection</li> </ul> </li> <li>Supporting Technology</li> <li>Strategy to disclose collection process &amp; issues</li> </ul>	<ul> <li>In-house</li> <li>Outside counsel</li> <li>Third-party</li> <li>Standardized protocols: <ul> <li>Processing for review</li> <li>Privilege Review</li> <li>Culling (keyword, intelligent search)</li> <li>Technology</li> <li>De-Duplication</li> </ul> </li> <li>Quality Control</li> </ul>	<ul> <li>Standardized protocol: <ul> <li>Format</li> <li>Technology</li> <li>Tracking</li> <li>In-house role</li> <li>Outside counsel role</li> </ul> </li> <li>Position related to preprivilege review: "quick peek" and "clawback" agreements</li> <li>Quality Control</li> </ul>

# eDiscovery: What Can Go Wrong

- No preservation notice
- Exclusion of admin assistants of top execs as custodians
- No changes of IT procedures to comply w/ preservation order
- Non-forensic collection of data
- Focus on eMail only insufficient collection of other media
- No consideration of backup tapes
- Comingling of eMail and other data types on backup tape media

# **Benefits of a Discovery Response Program**

- Understand the universe of data
- Timely, effective preservation and collection
- Minimize disruption to employees
- Reduce cost without increasing risk
- Reduce document review fees
- Reduce risk of sanctions

#### **Discovery Response Program – People Insights**

#### **Challenges**

- Legal lacks understanding of IT limitations
- IT lacks understanding of Legal's discovery obligations and risks of evidence destruction
- No central coordinator of discovery requests

#### **Solutions**

- Take back responsibility for electronic discovery
- Create a Discovery Response Team comprised of IT, Business, and Legal
- Establish a Discovery Liaison
- Identify and prepare witnesses to testify regarding Discovery Response Program and systems

# **eDiscovery Project Stake Holders**

#### **Leading Practices**



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#### **Discovery Response Program – Process Insights**

#### **Challenges**

- Legal Holds preserve too much or too little
- Lack of a coordinated Discovery Response plan
- Lack of training and monitoring on preservation procedures
- Inadequate Records
   Management infrastructure and policies

#### **Solutions**

- Prioritize business lines with high discovery risk
- Develop a data preservation plan
- Procedures to communicate and monitor the success of the preservation plan
- Establish standard process for collection and review
- Define production protocol
- Uniform approach for records management

#### **Discovery Response Program – Technology Insights**

#### **Challenges**

- Inconsistent internal response to discovery requests
- Inadequate electronic information inventory
- No plan for preserving and collecting emerging data sources
- Difficulty retrieving data from obsolete systems or media

#### **Solutions**

- Program to respond to global scope of preservation orders
- Centralized electronic information repositories
- Identify data sources at risk of discovery
- Evaluate ability of systems to support discovery
- Develop standard response to data interrogatories

# What is an ESI map?

#### An overview of "electronically stored information" that exists within the enterprise

- High-level or very detailed
- Includes information outside of retention schedules

#### For use in "meet & confer" discovery planning discussions

- Provides a high-level overview of potentially relevant systems and data to meet F.R.C.P. disclosure obligations
- May be used by outside counsel and excerpts may be provided to parties in litigation
- Identifies retrieval cost & burden to produce "Not Reasonably Accessible" sources

# What can be achieved with an ESI map?

#### Risk reduction

- Know what information you have and don't have Prevent sanctions as a result of overlooked data sources
- Identify "excess" data that is not needed for business or regulatory requirements

#### Cost reduction

- Reduce the cycle time to identify and preserve potentially relevant ESI
- Identify 'go-to' sources of ESI (e.g., system of record) and exclude redundant data sources

# Approach to developing an ESI map

Confirm the design of the map with key stakeholders, then populate the map through interviews and/or surveys with legal, IT and business users. Develop a process to update and enhance the map.



# Approach to developing an ESI map

#### 'Class A' sources

- ESI sources most often requested and determined to be relevant
- Many attributes collected such as owner, location, date range, volume, summary description, and analysis for "not reasonably accessible" sources

#### 'Class B' sources'

- ESI sources that may be discussed during discovery planning discussions, but unlikely to be produced
- Limited number of attributes collected such as owner and location

#### 'Class C' sources

 Sources of ESI that would not be requested or produced (e.g., SMTP server)

# Integrate the ESI map into your processes

Establish roles and responsibilities for key processes.



Roles	1	2	3	4	5	6
General Counsel	I	Α	I		I	Α
Outside Counsel	I	С	С	I	A/R	I
Discovery Coordinator	I	R	Α	Α	С	R
Records Manager		R	R			
IT Manager		R	R			
Vendor A, B, C				R	С	R

Legend	
Responsible	R
Accountable	Α
Consult	С
Inform	

# **ESI Mapping Summary**

- Confirm design with key stakeholders, prepare prototype
- Focus efforts on 'Class A' sources
- Confirm completeness and accuracy of map with legal, IT and business personnel
- Develop means for updates and enhancements to map
- Integrate ESI map into discovery, records management and information governance processes

#### **Contact Details**

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# **Thank You**