



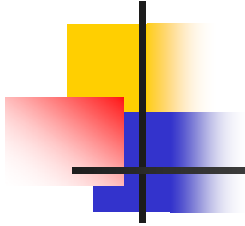
An eDiscovery Primer for Public Pension Plan Counsel

What you Need to Know and
How to Prepare

NAPPA Annual Conference

Austin, TX

June 24, 2015



The most valuable commodity I know of
is information.

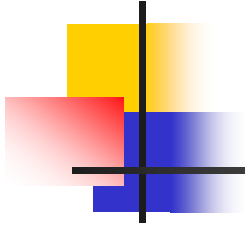
- Gordon Gekko



Topics

1. Overview of ESI
2. Why must you care?
3. ESI issues specific to pension funds
4. What to do when you get home
5. Questions

We will NOT talk about cases/statutes for 90 minutes. There is a lengthy selected appendix (enjoy!).

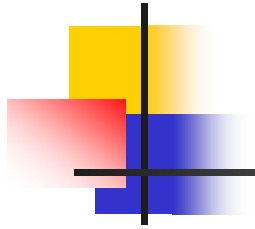


I. Overview



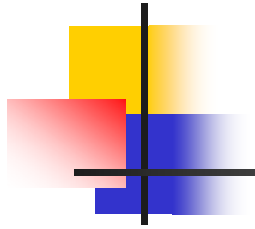
I. Overview

- **Electronically Stored Information**
- Any information that is created electronically
- The format (pdf, spreadsheet, database, text message, wave file) and the application (Word, Excel, Adobe) don't matter – it's ALL ESI



I. Overview – What is it?

blog entries Powerpoint presentations
photos Web pages videos Email
Texts Tweets
ELECTRONICALLY STORED INFORMATION
Code Cookies Facebook links
Word Docs Audio recordings Spreadsheets
Databases Instant Messages Metadata



I. Overview – Where is it?

Laptops	Network databases	Cell phones
USB drives	External hard drives	Private or local drives
Home computers	“the cloud”	Internet
TVs	Tablets	



I. How much is there?

Depends on numerous factors:

- Use rates (i.e., what % of your dept' s docs are scanned, created electronically, how much email is used?)
- Type of docs (i.e., wav files, cad files, excels, photos, graphics, etc. all create a LOT of data)



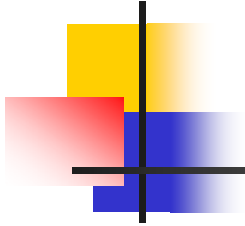
I. Perspective on how much

- Avg. email = 75 KBs (but can easily be as large as 1 MB with attachments)
- 1,024 KB = 1 megabyte (MB) = 13 avg. emails
- 1,024 MB = 1 gigabyte (GB) = appr. 20-25 boxes of documents (2,000-3,500 pages each) or 14,000 avg. emails
- 1,024 GB = 1 terabyte (TB) = 125 billion pages



I. Examples of how much

- Avg. user sends 43 emails/day and receives 130 emails/day
 - In one case, email for 12,000 employees over 20 month period = 79 million emails
 - Bush Whitehouse turned over 1.2 billion emails to National Archive
- Avg. cost to preserve, collect, review, and produce appr. 1 TB of email = \$1.4 million (and rising)



II. Why must you care?

ESI is rarely, if ever, “gone!”

CASE IN POINT

by Tom Fishburne

COURTHOUSE ROCK

I'M JUST AN EMAIL YES, I'M ONLY AN EMAIL
BUT I KNOW I'LL BE EVIDENCE SOMEDAY
AT LEAST I HOPE AND PRAY THAT I WILL,
BUT TODAY I AM STILL JUST AN EMAIL

GEE, EMAIL,
YOU MEAN
THAT EVEN IF
I DELETE YOU,
YOU'RE STILL
DISCOVERABLE?



OH YEAH!
ONCE I'M CREATED,
I LIVE FOREVER

CaseCentral



II. Why care?

The law requires it...

- In general, if my pension fund unit is served with an **OPEN RECORDS** request that specifically asks for ESI, I must produce it!
- In general, if my fund is sued, and the opposing party requests ESI during **DISCOVERY**, I must produce it!



2006 Amendments to FRCP

- Expressly provided for discovery of ESI
- FRCP have been applied to regulatory responses, gov' t investigations, litigation, etc.
- Duty to preserve potentially responsive ESI if you reasonably anticipate litigation (or investigation, etc.)
- Duty to produce ESI in reasonably usable form
- Failure = possible sanctions



Federal and state sunshine laws

- Generally, requires at a minimum review of ESI to identify information responsive to the request
- Some case law now requiring production in electronic format
- Applies to governmental vendors as well



Ethical Obligations

- ABA Model Rule 1.1 : Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary...
- Comment 8: ... a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ...
- Some states now have ethics opinions specific to eDiscovery (e.g., California - in Appendix)



II. Why care?

The ESI Challenge: if I must produce ESI when requested, how do I possibly FIND THE RIGHT INFORMATION when there is SO MUCH ESI out there?

You must (a) retain the information; and (b) cost-efficiently search, collect, review, and produce the information.



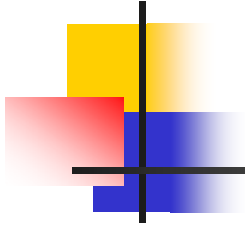
II. Why care? RISKS

- Poor ESI management leads to:
 - HIGHER costs to store, manage, search, collect, analyze, and produce ESI
 - HIGHER risk of error: courts will impose \$\$ penalties and/or “adverse inferences”
 - Miss potential cost-saving opportunities (why store hardcopy? why store all ESI?)
 - Miss tactics to end complex litigation quickly
 - Loss of good faith / transparency

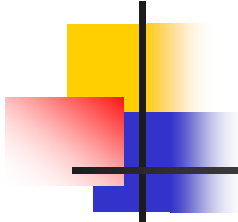


II. Why care? BENEFITS

- TRIAGE DATA for storage purposes – can't save everything indefinitely (must be done on reasoned basis). Leads to cheaper storage and cheaper management.
- MORE cases resolved earlier (e.g, dismissals where Pltf's documents are bad, earlier settlements, and better risk analysis)
- MORE transparency and good faith
- Searches done once and preserved - efficiency



III. ESI Issues Specific to Pension Funds



III. Pension Fund BIG Issues

- Litigation – ACK! What do I do? Can I manage outside counsel? If so, how?
- Open Records requests
- Subpoenas from third parties, regulators, extra-judicial requests
- Overall security and confidentiality

\$



III. Pension Fund Day-to-Day

- Do I know where my ESI is and how long it will be there?
- Staff
- Trustees
- Sponsors
- Vendors / third parties / IMs
- Problem children: private equity, etc.



III. Do I know my ESI?

- What are you creating? (emails, trading data, recordings, texts, home PC data, trustee data)
- Where is it being stored? For how long?
- What controls how long is it kept?
- What systems are in place to purge?
- What written policies exist?
- Security / disaster recovery?
- Benefit data / protected health information (disability, etc.)
 - What is and is NOT s.t. disclosure?
 - Are firewalls required to shield certain info from certain staff?



III. Staff Issues

- BYOD
- Social media
- Email policy, text policy
- Overall communications policy
- Recordings of counseling sessions/calls
- eDiscovery / open records



III. Board Issues

- BYOD
- Social media
- Emails
- Use of home PCs and personal mobile devices
- Different constituencies
- Confidentiality
- Recordings



III. Board Issues

TECH

More: [Snapchat](#) [Facebook](#)

Here's What Actually Happened When Snapchat Turned Down Billions Of Dollars From Facebook

Lesson: it is prudent to control (to the extent possible) how and in what way your Board members communicate electronically.



III. Sponsor Issues

- Does the Plan sponsor have its own record retention rules or policies (even if just administrative rules that are not “the law”)?
- Is your network separate or mingled with the sponsor’ s?
- Does the Plan sponsor have its own communications/email/BYOD policies?
- Are you compelled to follow these? Are they good examples?



III. Vendors / Third Parties

- What does each contract say about ESI retention and dumping, incl. email (i.e., GAAP reqs are minimal vs. other reqs)?
- What does the law require?
- What do your policies require?
- Can you shift the expense of refusing to and litigation whether to produce documents requested under open records?
- Security/disaster recovery (ks, diligence)



III. Problem Children

- Blanket claims of confidentiality and trade secrets
- Do you know the specifics of your state's open records laws w.r.t. trade secrets?
- Have you analyzed what is being claimed as a trade secret?
- Liability for accidental disclosures.
- Who will be the market makers?



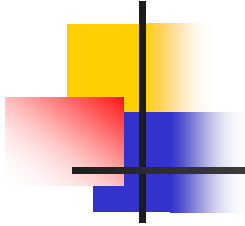
III. Litigation

- Legal hold notice
 - What is it?
 - When to send? To whom?
 - Does staff understand? (in particular, what NOT to do)
- How to qualify outside counsel?
- How to cost control outside counsel?



III. Open Records

- Was ESI specifically requested?
- Does your state law require review of ESI even if NOT specifically requested?
- Is the request routine or unique?
- Objective of requestor?
- Is negotiation possible to avoid expensive search?
- How can you preserve your work to avoid duplication if similar request likely in future (i.e., in litigation)?



IV. What to do when you get home ...



IV. When you get home ...

- Determine what ESI you have and where it is – be comprehensive (talk to your IT head, but they likely won't know the law)
- Assemble a team to assess ESI risks, evaluate strategy to minimize risk, and begin developing policies
- Bring the Board in early – get buy in!
- Understand systems within organization
- Develop policies and processes (legal hold, RIM, BYOD, communications, etc.)



IV. When you get home ...

- Understand the law
 - ESI obligations in litigation / open records
 - Open records (trade secret exception)
 - Retention reqs and dumping restrictions
- Review/amend your contracts
- Educate yourselves, staff, trustees
 - About ESI in general (early)
 - New policies (later)
- Consider periodic ESI audits / training



IV. When you get home ...

- Invest in CLE related to ESI – become your plan’s own internal expert
- Talk to your outside counsel about whether they have ESI specialists / training
- Consider an RFP for ESI consulting / legal
- Look for PRODUCT-NEUTRAL consultants (preferably who are lawyers)

In closing...we are not alone!

Management

Obama Directive Alters Federal Record Management And E-Discovery Landscape

By [Rob Hellewell](#)

Published: January 11, 2012

A Text Size



[Add a Comment](#)



David Pritcher/Flickr

2012 presidential memo requires 480 federal agencies to create a plan to begin the migration to electronic record keeping, creating better management systems for emails, social media, and cloud-based information for “**compliance with legal requirements related to the preservation of information relevant to litigation.**”



In closing ...

Information technology and business are becoming inextricably interwoven. I don't think anyone can talk meaningfully about one without talking about the other.

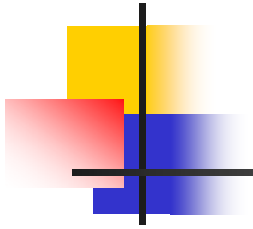
- Bill Gates



In closing ...

Information is a source of learning. But unless it is organized, processed, and available to the right people in a format for decision making, it is a burden, not a benefit.

- Dr. William Pollard



V. Questions?



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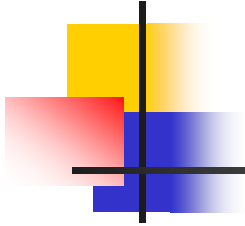
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Selected Appendix



The Law

- 2006: Federal Rules of Civil Procedure adopted rules requiring production of ESI
- Many states followed suit. For example, Wisconsin adopted ESI discovery rules as of 1/1/2011 and as of 1/1/13 (slides 71-78)
- Cases across the nation apply affirmative duties to parties, including gov' ts, to find and produce ESI in litigation and in response to open records requests



Key ESI Concepts of FRCP

- “Meet & Confer” – Early Attention by Parties on e-discovery Issues
- Form of Production Discussed
- Discovery of Information that is “Not Reasonably Accessible”
- Inadvertent Production & Waiver of Privilege
- “Safe Harbor” – Limit on Sanctions for loss of electronic information



Rule 16 – Early Attention

- Add ESI to the list of subjects to be considered in scheduling and case management conference orders. 16(b)(5)
- Permits inclusion of the parties' agreements regarding non-waiver and “claw back” of privilege material in case management and scheduling orders. 16(b)(6)



Rule 26 Changes

Rule 26(a) - Initial Disclosures

- Must disclose early on documents and “electronically stored information” that you may use to support your claims or defenses in the case

Rule 26(f) - Conference of the Parties

- Parties are directed to discuss e-discovery issues during their discovery planning conference. ***Must*** discuss issues related to the disclosure or discovery of electronically stored information (preservation, form of production, privilege and clawback)



Rule 26 - Limitations

- Defines the scope of ESI production and the nature of claw back protections. 26(b)(5)
- Requires initial disclosure and production of only “reasonably accessible” data. 26(b)(2)(B)
- Requires the responding party to identify ESI that will not be searched or produced on the ground that it is “not reasonably accessible”
- Requires the requesting party to move for the production of inaccessible data and places the burden of proving production unreasonableness on the responding party



Rule 26(b) - Limitations

- Permits the court to order production of inaccessible data “for good cause” in a manner that presumably balances the costs and burdens of discovery against the need for and relevance of such information
- Permits the Court to specify conditions for discovery such as cost shifting
- Requires the prompt return, sequestering or destruction of inadvertently produced privileged ESI if a request for the same is made within a reasonable time after disclosure



Rule 34 – Form of Production

- Requesting party may specify the form of ESI production;
- If responding party objects to the form of ESI production requested, it must state the form or forms it intends to use;
- If no form of production is specified by requesting party, responding party may produce ESI either:
 - in the form in which it is *ordinarily maintained*; or
 - in an electronically useable form and must also provide notice to the requesting party of the intended form of production.



Rule 37 – Safe Harbor

- Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system
- “**Good Faith**” is the test: This doesn’t mean that document retention or deletion policies should remain operable or will protect you under this provision once a litigation hold should be in place



Practical Implications of FRCP

- Discovery planning is front loaded under Rule 16 and 26.
- Electronic discovery takes time and costs money; proper planning is essential
- A well-informed attorney can better manage client costs without hurting the client's case



FRCP Changes 12/1/2015

- Rule 26(b)(1) – Discovery must be
“ . . . proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ”



FRCP Changes 12/1/2015

- Rule 26(d). Section added to allow delivery of discovery requests prior to 26(f) “meet and confer.”
- Rules 26(f) and 16(b). **Requires** identification of open preservation issues involving ESI in discovery plans and their resolution in scheduling orders.



FRCP Changes 12/1/2015

- 34(b)(2)(B) and (C) -
 - Objections to production must state grounds for the objection with specificity
 - must indicate if documents will be withheld on the basis of the stated objections
 - include a reasonable date for production (otherwise production must occur on the timeline of the requesting party)



FRCP Changes 12/1/2015

- 37(e) – Limitations on Sanctions
 - Two tier approach
 - Severe sanctions only if party acted with intent to deprive the other party
 - Lesser sanctions available *if* requestor proves prejudice from ESI loss



Foundational Cases

- *Zubulake v. UBS Warburg* (SDNY, 2003-2005)
 - case involving gender discrimination claims. Judge Schiendlin in a series of 5 decisions framed key precepts on ESI
- *Pension Committee of Montreal v. BoA* (SDNY, 2010). Judge Schiendlin again (very strongly worded – strongly penalizes Ps for failure to preserve)
- No Wis state court cases on e-discovery...yet



Foundational Cases

- *Zubulake*
 - 217 FRD 309
 - 216 FRD 280
 - 220 FRD 212
 - 229 FRD 422
- *Pension*, 05 Civ. 9016 (SDNY Jan. 11, 2010)



Discovery

- NYPD sued for unconstitutional use of loitering statutes; alleged failure to preserve and produce criminal summons issued to violators over period of three years. *Casale v. Kelly*, 2010 WL 1685582 (S.D.N.Y. 2010)
- Delayed lit hold led to destruction of text messages btwn FBI agent and cooperating witness. Court applied adverse inference. *U.S. v. Suarez*, 2010 WL 4226524 (D.N.J. 2010)



Discovery

- City of St. Paul sued re: enforcement of its housing code; dispute over destruction of email files and other ESI. *Gallagher v. Magner*, 619 F. 3d 823 (8th Cir. 2010)
- City of Indianapolis sued by adult bookstore for lost profits caused by enforcement of regulated hours of operation; City obtained order to compel plaintiff to produce ESI. *Annex Books, Inc. et al v. City of Indianapolis*, 2011 U.W. Dist. Lexis 84963 (S.D. Ind. 2011)



Discovery

- In suit brought by employee, at D' s request, court ordered production of claimant' s social networking site content. *EEOC v. Simply Storage Mgmt. LLC*, 2010 WL 3446105 (S.D. Ind. 2010)



Discovery

- City of Detroit sued for police failure to investigate a murder case; text messages were destroyed; adverse inference allowed. *Flagg v. City of Detroit*, 2008 WL 787061 (E.D. Mich. 2008)
- Defendant municipality sanctioned for failure to preserve ESI including imposition of adverse and fees and costs for motion. *Plunk v. Village of Elwood, IL*, 2009 WL 1444436 (N.D. Ill. May 20, 2009)



Discovery

Mirbeau of Geneva Lake, LLC v. City of Lake Geneva, 2009 WL 3347101 (E.D. Wis. 2009)

- Plaintiff land developer alleged unconstitutional denial of zoning change permit through a series of back room deals. P itself wanted to forensically search City's computer system and other storage devices and sequestration of data
- Judge denied request, but required production of ESI



Discovery (*Mirbeau* con.)

- “discovery of [ESI] stands on equal footing with discovery of paper documents.”
- ESI must be produced, “translated, if necessary by the respondent into a reasonably usable form.”
- It is not a valid ground for objection that “relevant, non-privileged, electronic data can be produced in paper form, when the requesting party has specified product in an electronic format.”
- ESI must be produced in the form in which it is “originally maintained.”



Discovery (*Mirbeau* con.)

- “if the moving party can actually prove that the responding party has concealed information or lacks the expertise necessary to search and retrieve all relevant data, including metadata or residual data, is it proper for the moving party to initiate the searches of the other party's ESI”
- “Nearly one-third of all electronically stored data is never printed out. . . . the defendants should not assume that providing the plaintiff with a paper print off of select emails is sufficient.”



Discovery (*Mirbeau* con.)

- “[T]here has been no formal, organized attempt by the [City] to procure electronic communication...This is particularly noteworthy given [the allegation that City defendants] conspired in secret, including through private electronic communication.”
- “Discovery of electronic communication is at the heart of this matter. The current process of having individual defendants ‘click through’ their emails to search for communications related to the litigation does not meet the level of diligence required for a fair discovery process.”



Discovery (*Mirbeau* con.)

- “Neither party has submitted anything to the court that indicates the parties discussed in detail any compromises regarding a myriad of issues that in the final analysis are better left for resolution by the parties, rather than the court. . . . [O]pen and candid discussions need to begin forthwith regarding the completion of discovery of the defendants' ESI.”
- “[T]he court expects counsel and their respective clients to seize the opportunity and develop a meaningful discovery plan related to the defendants' ESI.”
- “[I]f relevant evidence is being destroyed, . . . such activity [will require] severe penalties to be imposed by this court including the potential for default judgment.”



Open Records

Nat'l Day Laborer Org. v. ICE, DHS, FBI, & OLC, 10-cv-3488
(S.D.N.Y. July 13, 2012)

- Protracted dispute over FOIA request involving tens of thousands of records and a 21 page request
- FOIA standard = “show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents. An agency is not expected to take extraordinary measures ..., but only to conduct a search reasonably designed to identify and locate responsive documents.” (Dkt. 197 at 7)
- “evidence that relevant records were not released may shed light on whether agency’s search was inadequate” (at 9)



Open Records

Nat'l Day Laborer Org. v. ICE, DHS, FBI, & OLC, 10-cv-3488
(S.D.N.Y. July 13, 2012) (con.)

- “Govt not required to search only files of custodians ‘most likely’ to have responsive records; must also search other locations that are reasonably likely to contain records” (at 14)
- “Given that the [unit] only asked 22 employees to search their files, the failure to search the files of 7 former employees was not *de minimus* and made the unit’s search inadequate.” (at 22)
- Court ultimately ruled that ICE, FBI, & DHS failed to meet burden to show they did an adequate search (analyzing on person to person and division/subunit basis in detail)



Open Records

- Electronic version of a record, including any embedded metadata, is subject to disclosure under Arizona's Public Records Law. *Lake v. City of Phoenix*, 218 P.3d 1004
- Metadata includes info describing the history, tracking or management of an electronic document which may include creation and edit dates, authorship, comments, and edit history.



Open Records

- Metadata associated with a public record is subject to disclosure. *Irwin v. Onondaga Co. Resource Recovery Agent*, 72 A.D.3d 314
 - Metadata is “secondary information” not apparent on the face of a document that describes an electronic document’s characteristics, origins and usage. Defined 3 types (increasing in complexity)
 - All are “records” subject to New York’s open records laws.



Open Records

- Supreme Court of Washington ruled that metadata associated with e-mail and other electronic records is a public record subject to disclosure. *O'Neill v. City of Shoreline*, 240 P.3d 1149 (2010)
 - Electronic version of a record, including its embedded metadata, is a public record
 - Court required city to inspect the record creator's home computer hard drive for the requested metadata.



Open Records

- Metadata not specifically referenced in the statute but may be referred to in the definition of a computer program. Wis. Stat. § 19.32(4). *McKellar v. Prijic*, Outagamie County Circuit Court Case No. 09-CV-61
- Noting that no Wisconsin court has ruled on whether metadata is a public record subject to disclosure, the court held that metadata not part of the public record.



Other notable cases

- *1100 West LLC v. Red Spot*, 2009 WL 1605118 (S.D. Ind. 2009): court granted motion to compel and sanctioned outside counsel for fees and costs for not properly guiding client's disclosure of ESI
- *Grochocinski v. Schlossberg*, 2009 U.S. LEXIS 19523 (N.D. Ill. 2009): default judgment granted as sanction where defendant used data wiping software while under preservation order



Other notable cases

- *Jacobeit v. Rich Township High School District*, 2011 WL 2039588 (N.D. Ill. 2011): duty to preserve breached and costs and fees awarded when Def school district failed to preserve relevant emails and destroyed an audio tape



Other notable cases

- *Lewis v. School District #70*, 2006 WL 2506465 (S.D. Ill. 2006): P sought additional production of emails and court denied request because D had made reasonable attempt at providing relevant records



Other Recent Cases – TX

- *Rimkus Consulting Group v. cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)
- *Ashton v. Knight Transp., Inc.*, 722 S. Supp. 2d 772 (N.D. Tex. 2011)
- *T&E Inv. Grp. LLC v. Faulkner*, 2014 WL 550596 (N.D. Tex. 2014)



Other Recent Cases – CA

- *Vasquez v. Cal. Sch. Of Culinary Arts, Inc.*, 230 Cal. App. 4th 35 (2014)
- *Digital Music News, LLC v. Superior Ct.*, 226 Cal. Ct. App. 4th 216 (2014)
- *Olney v. Job.com*, 2014 WL 5430350 (E.D. Cal. 2014)
- *Melian Labs, Inc. v. Trilogy, LLC*, 2014 WL 4386439 (N.D. Cal. 2014)
- *Boston Scientific Corp. v. Lee*, 2014 WL 3851157 (N.D. Cal. 2014) (3rd party subpoena, metadata)



Other Recent Cases

NEW YORK

- *Armstrong Pump v. Hartman*, 2014 WL 6908867 (W.D.N.Y. 2014)
- *Rio Into PLC v. Vale, S.A.*, 2015 WL 872294 (S.D.N.Y. 2015) (predicative coding)

FLORIDA

- *Nucci v. Target Corp.*, 2015 WI 71726 (Fla. Dist. Ct. App. 2015) (admissibility of Facebook)



State Statute: Wis. Stat. § 802.10(3)(jm) – Scheduling Order

- The scheduling order may address. . .
(jm) the need for discovery of electronically stored information.
- Early attention to eDiscovery issues
- Refers to 805.06 (referees/special master can be used specifically for ESI)



Wis. Stat. § 804.01(4m) – Discovery Conference

- Discovery conference
- At any time after commencement of an action, on the court's own motion or the motion of a party, the court may order the parties to confer by appropriate means, including in person, regarding any of the following, except with the discovery of electronically stored information, where the parties must confer unless excused by the court.



Wis. Stat. § 804.01(7)– Clawback Rule

- Permits recovery of inadvertently produced privileged ESI:
 - Producing party notifies of inadvertent production
 - Receiving party must return, sequester, or destroy and cannot otherwise use info
 - Receiving party must try to retrieve any copies
 - Can dispute privilege claim to court
 - Applies to third party productions too



Wis. Stat. § 804.08(3)–
Business Records

- Option to produce or allow access to business records in response to an interrogatory
- Burden of deriving the answer from the information must be substantially the same for either party
- See FRCP 33(d)



Wis. Stat. § 804.08(3) –
Business Records

- Option to produce or allow access to business records in response to an interrogatory
- Burden of deriving the answer from the information must be substantially the same for either party
- See FRCP 33(d)



Wis. Stat. § 804.09(1) and (2)

- Includes production of “electronically stored information”
- Requesting party may specify “form” of production of ESI
- If no form is requested, information must be produced in the form in which it is ordinarily maintained or in a “reasonably usable form”
- Responding party may object to form of production



Wis. Stat. § 804.12(4m)

- “Safe Harbor” – be careful
- Applies to information lost as a result of “routine operation” of an information system
- Loss must be in good faith
- Intervention may be necessary after duty to preserve arises



Wis. Stat. § 805.07(2)

- Subpoena
- Parallel to FRCP 45(a) and (d)



California Ethics Opinion

Duty of competence in eDiscovery requires at a minimum:

- Basic understanding of eDiscovery issues
- On a case-by-case basis, may require a higher level of technical knowledge and ability, depending on the issues involved
- Lawyers w/o requisite knowledge **MUST** 1) get up to speed, hire someone to assist, or decline the representation



California Ethics Opinion

Attorneys must be able to...

- Initially assess eDiscovery needs
- Implement appropriate ESI preservation including advising client and 3rd parties
- Analyze and understand client's ESI systems
- Identify custodians of relevant ESI
- Perform appropriate searches



California Ethics Opinion

Attorneys must be able to ... (con.)

- Collect responsive ESI
- Advise client on options for collection and preservation
- Engage in meaningful meet and confer with opposing counsel on eDiscovery plan
- Produce ESI in a recognized and appropriate manner