



eDiscovery: Your Blueprint to Success

Morgan, Lewis & Bockius LLP
in association with ALM

Morgan Lewis
...Resources

Your Panel of Experts

- Tess Blair of Morgan Lewis
- Gerry Boccuti of Wyeth
- Kevin Esposito of Pfizer
- Karen Hendrickson of Morgan Lewis
- Laura Kibbe of Pfizer
- Mary Ann Kim of Office Tiger
- Amy Schuh of Hewlett Packard





The eDiscovery Landscape

Between a Rock and a Hard Place



A Rock . . .

- eDiscovery, *by its very nature*, is easier to get wrong than it is to get right
- Review of this volume of data is beyond human capability and growing exponentially
- Cost and disruption to normal business operations can be enormous





A Rock . . .

- Scope:
 - “Electronically Stored Information”
- Volume
 - Billions of emails sent daily in U.S.
- Cost:
 - An industry predicted to reach \$2.8 billion by 2007
- Litigation Risk
 - Casual mode of communication
 - Spoliation
- Evolving discovery rules and case law





A Hard Place . . .

- The *Zubulake* saga:
 - failure to preserve backup tapes
 - adverse inference instruction
 - \$29M verdict (\$20M in punitives)
- Morgan Stanley
 - failure to preserve and produce from backup tapes
 - burden of proof shifted
 - counsel sanctioned and fired
 - \$1.4 BILLION verdict





A Hard Place . . .

- Williams v. Sprint
 - Form of production
 - “Ordinary course of business”
 - Metadata
 - See also, *Nova Mfg.Instr. Ltd. v. Nanometrics, Inc.*, 2006 WL 524708 (N.D. Cal. March 6, 2006); *Hagenbuch v. 3B6 Sistemi Elettronica Industriali*, 2006 WL 665005 N.D. Ill., March 8, 2006)
- Hopson v. City of Baltimore
 - Proposed Amendments to F.R.C.P.
 - Inadvertant Disclosure
 - Clawback

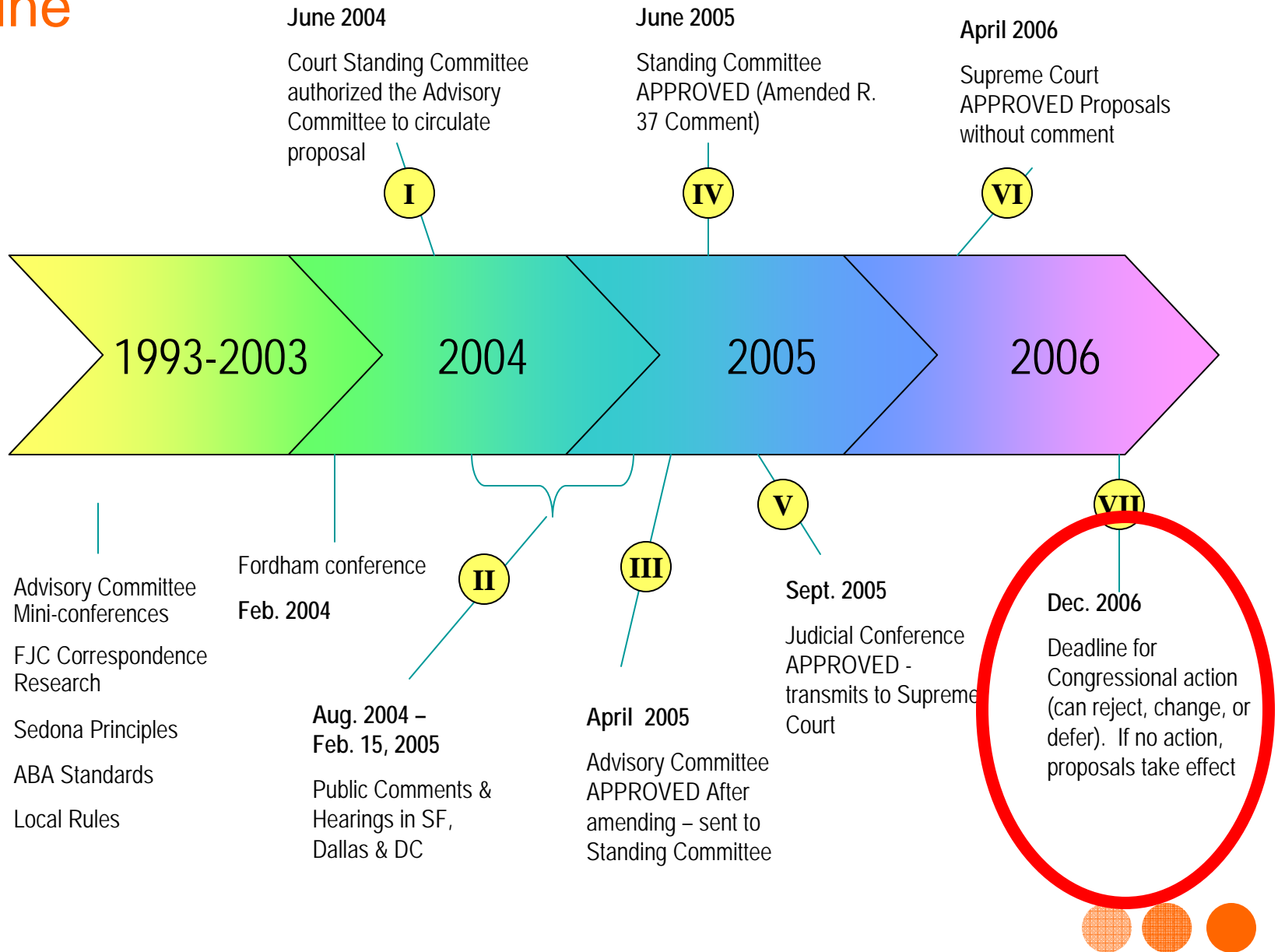




Proposed Amendments to the Federal Rules of Civil Procedure

Timeline

www.uscourts.gov/rules/index.html





The Proposed Revisions of the Federal Rules:

Overview

- **“Electronically stored information” (ESI)**
- **Early meet and confer on e-discovery issues**
- **Forms of electronic production**
- **Two-tier production scheme: accessible v. inaccessible**
- **Inadvertent production and waiver of privilege**
- **“Safe Harbor” – Limit on sanctions for loss of electronic information in routine, good faith programs**





“Electronically stored information”

- Electronic records are distinct from “documents”
- No substantive definition is provided
- Scope of the meaning is flexible and inclusive





Potential Impact





Early Meet and Confer

- Rule 16(b) – court and parties to address ESI discovery issues in 16(b) orders
- Rule 26(f) – requires parties to confer regarding, and develop a discovery plan addressing, ESI:
 - Include “form or forms” of production
 - Include waiver of privilege issues





Potential Impact





Two Tier Discovery: Accessible v. Inaccessible

- Rule 26(b)(2)(B)
 - Party may object to discovery of ESI “not reasonably accessible because of undue burden or cost”
 - If confronted with a motion to compel, party must then demonstrate inaccessibility and, for good cause, may still be subject to judicial discovery order
 - Obligation to preserve inaccessible remains





Potential Impact





Protecting Privilege

- Rule 26(b)(5)(B) Clawback:
 - Producing party may give notice that records are privileged despite production
 - Receiving party must destroy or sequester the records until judicial disposition
 - *But see Hopson, above*





Potential Impact





“Safe Harbor” for Routine Operations

- Rule 37(f)
 - (f) Electronically stored information. 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.





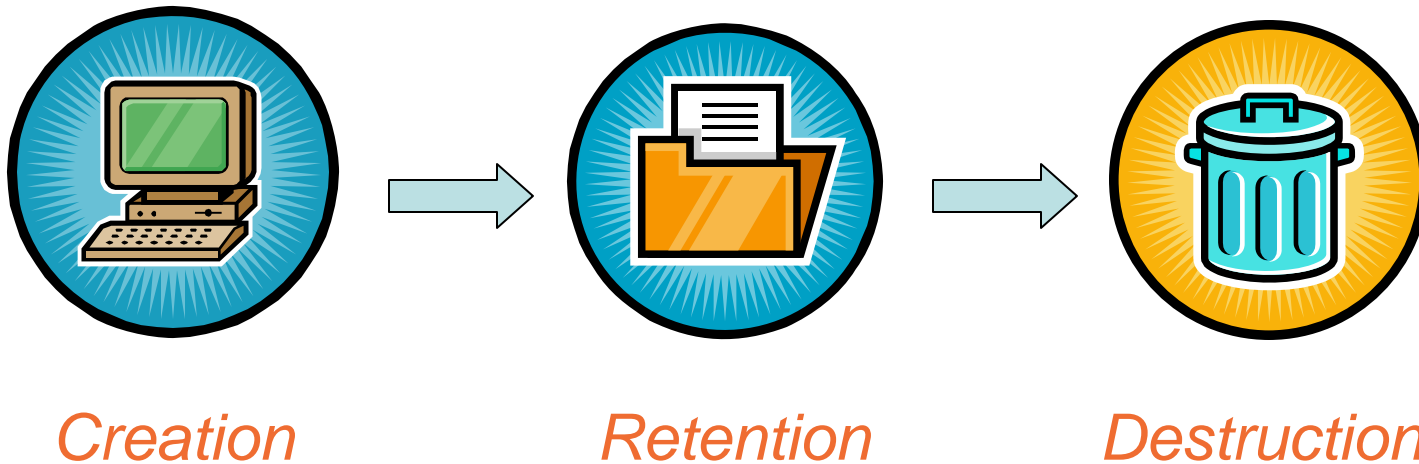
Potential Impact





Pre-Litigation Risk Management

Lifecycle of a Record



Risks at every stage



Creation

- Smoking Guns
- Privilege Waiver
- Duplicates

Retention

- Storage
- Organization
- Management

Destruction

- Statutory and Regulatory Obligations
- Legal Hold
- Corporate Assets





Creation

- Employee Training is Key
- Training program should include:
 - Litigation Primer
 - Best Practices
 - Record Retention Program Implementation





Creation

- Employee Training Programs
 - HP's "Documents on Trial" Training
 - Pfizer's "Write Right" Program
 - Morgan Lewis' "Savvy Business Communications" Training





Record Retention as a Defensive Weapon

- When failure to produce records in litigation is result of comprehensive and consistently enforced record retention program, program can be used as a defense to claims of spoliation
 - *United States v. Arthur Andersen*, 125 S. Ct. 2129 (2005)
 - *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002)
 - *Lewy v. Remington Arms Co., Inc.*, 836 F.2d 1104 (8th Cir. 1988)
 - *Cf. Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173 (1st Cir. 1998)





Retention

- Policy should be designed to meet business needs and legal obligations
- Policy should be comprehensive, yet simple
 - Must address both electronic data and paper
 - Clearly state rationale for policy
 - Include retention/destruction schedules
 - Include an exception for litigation hold





Retention

- An effective record retention policy should be:
 - widely communicated
 - easily accessible
 - simple to follow
- The ideal policy provides for the shortest retention periods legally and operationally possible
- A cutting edge policy is automated
 - To take the guesswork and compliance out of employees' hands

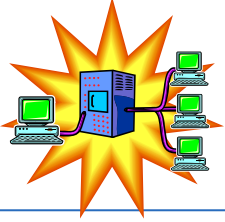




Retention

- Caution:
 - Do not use format to determine retention period
 - ie. Delete all email after 45 days
 - A policy ignored is worse than no policy at all
 - Develop a mechanism for auditing and compliance

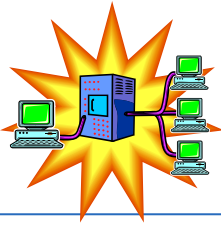




Proactive Management of IT Architecture

- Inventory and document the storage and retention of:
 - Email - Current System and Migration History
 - Network Drives - Home/User Drives, Share/Project Drives
 - Hard Drives - Desktops, Laptops, Home, Stand-Alone Computers, PDAs, portable drives
 - Backup Architecture – Current and Off-line, Rotation, Retention Policy

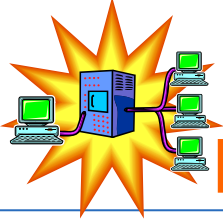




Proactive Management of IT Architecture

- Inventory and document format, access and use of all content applications:
 - Email
 - Where and How – VPN, Webmail, 3rd Party Mail systems.
 - Policy on 3rd party mail system access
 - Archiving Policy – Server and Local Access
 - Mailbox Size Restrictions
 - Policy Regarding Former Employees Email Retention.
 - Word Processing
 - Databases
 - Calendaring Systems
 - On-Line Review Tools
 - Proprietary Applications
 - Financial/Business Management Applications





Proactive Management of IT Architecture

- Modify storage and retention of edata to address business needs and minimize litigation risk
 - Policy on limiting local installations.
 - Policy on hard drive access to administrative personnel.
- **Bottom Line: Know where your records are before litigation strikes**





Blueprint for Success

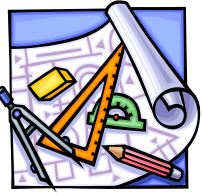
eDiscovery Best Practices



The Blueprint for Success: eDiscovery Best Practices

- ↓ Define
- ↓ Identify
- ↓ Preserve
- ↓ Interview
- ↓ Harvest
- ↓ Process
- ↓ Review
- ↓ Produce





The Blueprint for Success: eDiscovery Best Practices

- Define
 - scope of requests





The Blueprint for Success: eDiscovery Best Practices

- Identify
 - location(s)
 - custodians





The Blueprint for Success: eDiscovery Best Practices

- Preserve
 - litigation hold notice
 - Need to standardize practice and content of hold company-wide
 - ensures policy suspended for litigation purposes
 - allows employees to focus on substance, as opposed to process
 - Need to update them annually (at the very least)
 - good fact if spoliation is ever an issue
 - ensures that everyone involved in the litigation has received the hold over time
 - allows for narrowing of hold over time

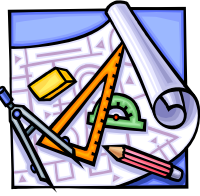




The Blueprint for Success: eDiscovery Best Practices

- Interview
 - IT Personnel
 - Key Players





The Blueprint for Success: eDiscovery Best Practices

- Harvest
 - Emails and attachments, electronic documents, spreadsheets, presentations, databases, blackberries, pdas, home computers, backup tapes, internet cache files, cookies, favorites. . .





The Blueprint for Success: eDiscovery Best Practices

- Process
 - **Establish Communication with Client's IT Group to determine:**
 - What pre-processing of data set is required (NSF to PST conversion, EML roll-up to PST).
 - Custodians identification.
 - **Establish Litigation Hold and Properly Notify Custodians.**
 - Establish Proper Chain of Custody
 - Proper server-based process for creating custodian collections.
 - Establish validity of tools to use to perform date restriction and key term searches.
 - **Early Analysis Tools – Inventory of Key Terms, Users, Phrases**
 - Minimize Processing Costs
 - Maximize Document Review





The Blueprint for Success: eDiscovery Best Practices

- Process
 - Deduplication
 - Within or Between Custodians?
 - Near-Deduplication (Friend or Foe?)
 - Determine Review Format (Native v. tiff)
 - Caveat on Native Review – Attachments Not Searchable, Bates Stamping Limitations.
 - Identify Software Required for Native Review
 - Output: Native v. Tiff v. Combined
 - Document Control
 - Bates stamping
 - Combo and Piecemeal Production.

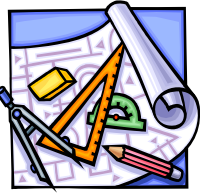




The Blueprint for Success: eDiscovery Best Practices

- Review
 - Review Platform
 - Review Team
 - Quality Control





The Blueprint for Success: eDiscovery Best Practices

- Produce
 - Format - paper or plastic?
 - PST Files
 - Database (Version Control)
 - Load Files with Native Attachments
 - Load Files with Tiff Images
 - All of the above
 - Native or tiff?
 - Bates Stamping Native Files?
 - Accessories - produce OCR, coding?





Putting the Pieces Together

Implementation of the Blueprint



The People You Need

- Outside Counsel
- In-house Counsel
- Corporate IT Personnel
- Vendors
- Business Units
- Record Custodians





The Tools You Need

- Hardware and Software
- Storage Space
- Workstations for document review





Trends

Hopes and Fears . . .



Trends

- Magnitude of eDiscovery
 - Data Sets Continue to Grow
 - Vendor Costs are Coming Down
- Litigants More Savvy About
 - Rules
 - Costs
 - Process
 - Pitfalls
- Regulators More Demanding





Trends

- Software Tools
 - Early Analysis Tools
 - Artificial Intelligence
- Review Trends
 - Repopulation tools
 - Native Redaction
- Production
 - Tiff is Out – Native is In
 - Metadata
- Legal Process Outsourcing





Q & A



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