

# **Electronic Discovery and Disclosure: Managing & Producing Electronic Information**

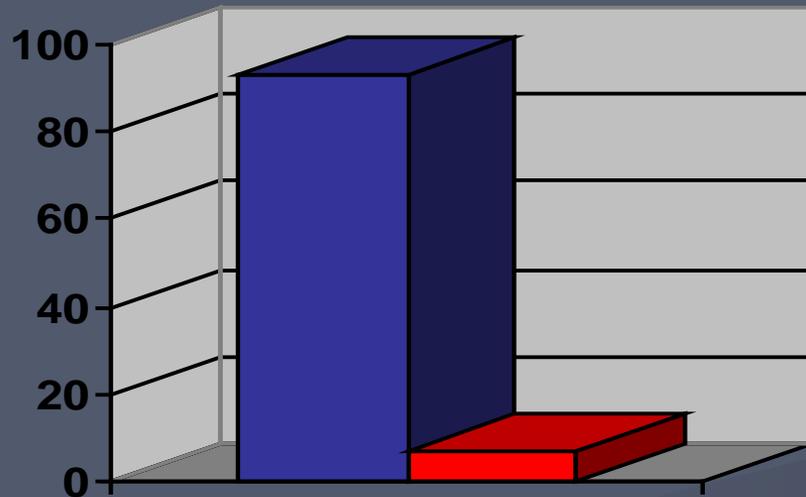
Washington State  
Office of the Attorney General

# Overview of Presentation

- "EDD" (Electronic Discovery and Disclosure)
- "ESI" (Electronically Stored Information)
- "E"-Evidence
  - What is it? How do I know when to save it? And Why Worry?
  - How and When to Produce
  - Spoliation
  - Costs of Producing

# How is Information Created?

- Over 92% of information is created electronically.



School of Information  
Management and  
Systems  
U.C. Berkeley

November 2003

■ Digital

■ Non-Digital

# How is Information Stored?



- 70% of electronic information is never printed.

# Why Does E-Evidence Matter?

- Retaining it
- Locating it
- Producing it
  - In response to a public records request
  - In response to a litigation related discovery request

# Types of Electronic Evidence

- Word processing documents
- E-mail and E-mail attachments
- Calendars and Planners
- Spreadsheets and Databases
- Instant Messages
- Audio (e.g., Voice Mail Messages) Files
- Network Logs
- PowerPoint Slide Shows
- Graphics Files

# Sources of Electronically Stored Information

- Desktop and laptop computers
- Network and E-mail Servers
- Palm Pilots/Blackberries/Cell Phones
- Storage devices: Backup tapes, Digital Storage, CDs, Thumb drives, diskettes, Offsite Storage
- Home computers

# States of Data: There is More than Meets the Eye

- Active data
- Metadata
- System data
- Backup tapes
- Deleted and altered files
- Legacy data

# Metadata: “Data about the Data”

- Classic e-mail metadata fields
  - From, To, Subject, Date, cc, bcc, Text of email
  - Date and time e-mail and/or attachment opened
- 50-60 other types of fields are available
- Embedded data (e.g., Excel formulas, Word Processing prior versions)
- Need to be aware it exists, could be requested to be produced

# Most obvious electronic records?

- E-mail and attachments are the most likely type of electronically stored information (ESI) that Board members will have
  - The majority of the Board's business is initiated by Board staff and staff has responsibility to retain and produce ESI when requested

# E-mail Cautions

- Use e-mail wisely
- When a record contained in an e-mail or an e-mail itself is no longer necessary or no longer needs to be retained remove do not keep it unless you need it
- Manage your e-mail and electronic records, including deleting old messages

# How do I know how if I need to save ESI?

- Board Members governed by DOL retention policies
  - DOL e-mail retention policy is being developed (still in progress)
  - General approach is originator is responsible for retention
  - Retention period depends on content (and attachments)

# What is DOL Retention Period?

- DOL also working on desktop guide to records retention
  - Can range from 30 days to 6 years, depends on content
  - Routine (substantive) correspondence to and between Board members 30 days
  - "Reference files" (memos, notes, copies of minutes, preliminary drafts etc) **may be destroyed when no longer needed**

# I have ESI, now what?

- If you have ESI either because you are obligated to retain it or because you chose to you must:
- Retain it in its native format (word, outlook etc)
- Search and produce it when requested
- Refrain from destroying it when a request for it is pending (litigation discovery request or public records request\_

# Rules for ESI: Litigation and Public Records Requests

**For litigation recent Federal Court Rules updates dramatically change the way we...**

Locate, Preserve and Disclose

Electronically Stored Information (ESI)

**Trends suggest electronic public records requests will be analyzed much as litigation**

# Key Elements of New Federal Court Rules Effective December 1, 2006

- Parties/lawyers are to meet and confer about ESI even without a discovery request and provide each other with:
- List of relevant people with ESI
- Description & location of all ESI that will be used to support a claim or defense
- Discuss any issues relating to preserving discoverable information
- How are you going to produce it? (paper, electronically?)

# Policies and Procedures Over ESI

- DOL policies and procedures would govern Board Member response to attorney requests in litigation, such as
  - Informing attorneys who at DOL has ESI (including Board Members)
  - Where and how is the ESI located and stored
  - How is Board/Board Member/DOL capable of producing ESI
- DOL management is being trained in these processes

# Samples of ESI Policies and Procedures

- Agency adopts an ESI "response plan" for use when ESI is requested or anticipated to be requested

# Sample ESI Response Plan (For Litigation , May be applied to Public Records Requests Soon)

- SUSPEND Any Document Destruction Policy (even if retention schedule would allow)
- DISTRIBUTE Litigation Hold Notice
- IDENTIFY ESI Response Team
- CREATE An Inventory of ESI
- IDENTIFY Employees likely to have relevant ESI
- IDENTIFY The Historical Timeframe
- DEFINE The Scope of the ESI
- CAPTURE The ESI

# How do Board Members know when to apply elements of ESI Response Plan?

- DOL will be informed by Attorney General or OFM of a lawsuit against agency (new lawsuit letter), Board staff will notify Board
- Board or Board Members learn by another way of a lawsuit against it
- Public Records Office informs DOL of a records request calling for ESI, Board staff informs Board

# Agency Retention Policy Helps Minimize ESI Production Issues

- DOL is working on e-mail retention policy – will apply to Board members
- Retention policy helps to know when to stop “automatic destruction of ESI”
- Failure to at least understand need to retain ESI makes it more difficult to defend against claims of intentional or inappropriately negligent destruction

# Litigation (Public Records) Hold Notice

- Comes to DOL Board staff from agency head or designee
- Informs DOL employees of obligation to identify and preserve all recorded information, including information that exists only electronically and including information created or saved after the notice
- Duty extends only to that information that could be reasonably indentified as potentially relevant to the subject matter described in lawsuit letter or public records request
- Informs of obligation to save in original form (e.g. if electronic only, don't save on CD and then delete/remove ESI)
- Informs employees to suspend any applicable document retention schedule
- Board staff extends instructions to Board members

# After Notice to Employees of Obligation, Preservation & Verification Checklist Will Follow

TO: LCB Employees  
FROM: AAG, Agency Head or Designee

- Employees must take reasonable steps to identify and preserve records
- You are **not obligated to examine every single document**
- Your obligation is to search places and review documents where you think ESI might exist....
- You **must exercise diligent efforts** to think about where documents might exist and to review...
- One way to do this is to look at the titles of the ESI folders...
- jog a memory then you should exercise additional diligence and review the documents
- **Other methods you use to find ESI**
- **Summarize the steps** you took to locate potentially relevant information. This includes identifying where you looked and how much total time you spent looking for records.
- Please identify that information here: **Time spent:** \_\_\_\_\_ **Steps Taken:**
- **I have diligently reviewed my records...I have information ...relevant to this matter ...I have made a note to not destroy these records...I will continue to preserve ESI... and will let the Attorney General's Office know if I located additional ESI after this date:**
- Signed: \_\_\_\_\_  
Printed Name: «Employee name »

# ESI Checklist to Identify Information Located

- To help us identify this information, please complete the following checklist, print your name, and sign and date your response at the bottom.
- Review each item on the checklist. On the line next to it, identify whether in doing any of your work, you use the ESI file type or location designated. **Each line should have a response. So, on each line indicate "Y" for yes, "N" for no, and "DK" for don't know, or "NA" for not applicable.** For example, if you use Microsoft (MS) Word, then put a "Y" on that line, if you don't know what a "tiff" is, then put "DK," and if your unit does not have employees in Regional Offices, then put "NA."

- **ESI File Types:**

\_\_\_\_\_ MS Word (.doc)      \_\_\_\_\_ Database Use      \_\_\_\_\_ PowerPoint (.ppt)

- **ESI Locations:**

\_\_\_\_\_ **Servers** (Describe what kind, their purpose, how many, and do the regions have different servers from headquarters?)

- **Backup Media:**

\_\_\_\_\_ **Current backup system** (What is it, when is it accessed, and why is it accessed, if it is accessed)

\_\_\_\_\_ **Changes to computer settings** (have you **knowingly and purposely** changed any of the settings on your computer from what your central ISD Department originally set?)

Date: \_\_\_\_\_ Employee: \_\_\_\_\_

Print Name: \_\_\_\_\_

# Examples Only

- Each situation is different
- Board Members can rely on Board Staff and AG for guidance
- Once Board Member has been asked for a certain level of information employees must cooperate, no second guessing

# What happens if the ESI is deleted?

- Electronic data can easily disappear or be destroyed
  - Important questions:
    - Was data deleted after instruction to retain?
    - Was data deleted purposefully with intent to prevent disclosure?
- Destruction of evidence is "spoilation"
  - Can generate serious consequences

# What is "spoliation"?

- the destruction or significant alteration of evidence, or the failure to preserve ...evidence in pending or **reasonably foreseeable** litigation
- Don't always wait for lawsuit or request to preserve evidence
- Use judgment to preserve

# Spoliation Sanctions in Litigation

- **\$2,750,000** For loss of electronic records. *U.S. v. Phillip Morris*
- **\$1,000,000** & 52 Depositions in 4 days *In re Prudential*
- **\$1.45 BILLION** (“inescapable that the defendant sought to thwart discovery by not finding “back-up tapes.”) *Coleman Holdings v. Morgan Stanley*
- **\$29 million** (adverse instruction for willful destruction of relevant e-mails by defendant's employees in defiance of explicit instructions by counsel not to do so) *Zubulake V. UBS Warburg*
- **\$1.5 million** litigating the sanctions issue. *Danis v. USN Communications*

# Sanctions in General

- Courts Must tailor the sanction/remedy to the transgression
- Court looks at:
  - Relevance and whether adverse party has adequate time to examine ESI
  - Bad faith or conscious disregard or
  - Innocent explanation
  - Was there a violation of the duty to preserve (even if not done in bad faith)

# How Do We Produce ESI

- Native Format (word, outlook, pst)
- Tiff images
- PDF images
- JPEG images
- Print it out

# How much is it?

STORAGE UNIT	WORD PROCESSING (# OF PAGES)	EMAIL (# OF E-MAIL)	EMAIL (# OF PAGES) <sup>a</sup>	BANKER BOXES <sup>b</sup>
1 MB	100	21	62	1
Floppy Disk	140	30	90	1
CD-ROM (640 MB)	64,000	13,650	40,950	26
1 GB (about 1.5 CD's)	100,000	21,000	63,000	34
Laptop (20 GB)	2,000,000	420,000	1,260,000	680
Desktop (40 GB)	4,000,000	840,000	2,520,000	1,360
Network (80 GB)	8,000,000	1,680,000	5,040,000	13,440
1 TB	102,400,000	21,504,000	64,512,000	34,816

<sup>a</sup>Email = 3 pages per e-mail (includes attachment)

<sup>b</sup>2500 pages per box.

# Ten Email Tips

- Never write anything you don't want on the front page of the newspaper or the headlines on the evening news
- Send email to as FEW people as possible
- Never use Instant Messaging
- Avoid using email for sensitive discussions & never express an opinion in email that you violated the law...
- Every badly written email will be used against you

# Email Tips (cont.)

- Make sure you are accurate...do not trust that someone can decipher the "email codes"
- Always close the loop of an unfortunate email chain to preserve the record, use the phone...but still finish the email to close the issue
- Never forward privileged information from the AGO
- Delete does not always mean delete -most of the time it will be found and if not, the ramifications are significant
- **THINK TWICE. CLICK ONCE.**

# Questions?