A Litigator’s Guide to Negotiating eDiscovery Requirements

November 18, 2015
Webinars take place monthly

Cover a variety of relevant e-Discovery topics

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We are an Austin, TX based eDiscovery software and services provider, specializing in serving small & medium-sized law firms and organizations. We provide:

- **Cloud-based DIY eDiscovery processing & document review software**
- **High-speed ESI document processing and data conversion services**
- **Experienced eDiscovery specialists and expert consultants**

‘Cost-effective eDiscovery’

‘Secure, easy-to-use and a great review tool for consideration’

“A powerful litigation document management service”
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Gene Albert bio

- CEO of Lexbe LC, a provider of cloud-based litigation processing, review and document management software & eDiscovery services
- Frequent speaker/author on eDiscovery and legal technology issues
- Planning Committee, Electronic Discovery Institute, State Bar of Texas
- eDiscovery consultant & expert

**Education**
MBA, University of Texas
JD, Southern Methodist University
BA, University of Texas

Gene Albert
512-686-3460
gene@lexbe.com
https://www.linkedin.com/pub/gene-albert/0/88/ba1
Negotiating eDiscovery Requirements

Agenda

● What are ESI Agreements, etc.

● Why Increasingly Important

● Legal Requirements

● Particular Points for Inclusion
  ○ ESI collection activities
  ○ Review procedures: linear, search, TAR
  ○ Production Format
  ○ Privileged information
  ○ Miscellaneous items

● Reference Guide for Examples of Protocols, Requirements, etc.
What Are ESI Agreements

- Agreement between parties that governs the who, what, when and how of Electronic Discovery activities and electronic stored information (ESI)
- Sets out the expectations for both sides and is binding
- With or without Court/magistrate participation
- Called many things, including an agreement, ESI order, Rule 26 order, pretrial order, protocol, requirements, stipulations, etc.
- Can take many forms: e.g., signed agreement, part of your Rule 26(f) case management plan, stipulation filed with the court.
Negotiating eDiscovery Requirements

Why Increasingly Important

- Cases are getting bigger and electronic discovery and document management matters are becoming more important
- Natural outcome of a Rule 26 conference
- Required in many courts in standing orders, or court practices
- Judges and magistrates are increasingly knowledgeable and expect it
- Court unlikely to bail out a party who enters into a bad agreement or does not understand what was agreed to
- Doing poorly can impair one’s ability to get needed evidence into the case.
Legal Requirements

- No specific legal requirement *per se* for having an e-Discovery order, agreement, protocol, etc. in FRCP and most state laws. But many have standing orders, form protocols, guidelines, etc.

- FRCP obligations come from ‘Meet and Confer’ requirements
  - Parties must meet & confer 21 days before the scheduling conference or when a scheduling order is due (FRCP 26(f))
  - Scheduling conference must occur within 90 days of filing (FRCP 16)

- FRCP 26 ‘Meet & Confer’ Requirements:
  - Discuss ESI preservation, form of production
  - Develop a proposed discovery plan
  - Submitting to the court a written report outlining the plan

- Meet & Confer can lead to an ESI agreement, order, etc.
Negotiating eDiscovery Requirements

Preservation & Litigation Holds

- ESI Agreements may specify preservation activities. FRCP 26(f) includes requirement for discovery plan to address preservation of ESI.

- Narrowing the scope of preservation can significantly reduce time and cost. This can be achieved with a combination of subject matter limitations, specifying the relevant time frame, carving out identifying non-relevant or duplicative data sources, and excluding data sources that are not reasonably accessible.

- Hold Status - May address when a hold was issued, who received it, what subjects and data sources covered and auditing procedures.

- Other issues: preservation of time-sensitive sources, metadata, employee changes, software changes, automated archiving and deletions.
Collection Methodologies

- ESI agreements may specify acceptable collection methodologies.

- New FRCP amendments emphasize that eDiscovery in general should be ‘proportional’ to the case. ‘Reasonably calculated to lead to discoverable information’ language removed. FRCP 26(b)

- Directed vs. Imaged
  - Imaged collection is a bit-by-bit forensic copies of Custodian drives. Replicates all data, including deleted files and fragments and information in the slack or unallocated space of the drive. This is the safest approach, but can be over-kill.
  - A directed collection is more cost-effective and targets sources likely to result in discoverable ESI.

- Who collects? Company IT vs. outside vendor/eDiscovery expert vs. individual custodians
A ‘Custodian’ is a person who has possession or control of discoverable ESI or other evidence.

ESI agreements/orders may tie down who are the Custodians in the case.

Shared drives, databases and other data sources can be an issue of custodian identification.

Major cost implications of custodians and data sources. Limiting the number of people whose data must be collected and reviewed can be the single biggest cost savings in e-discovery.
Collection Scope - Culling & Deduplication

- Most important when a broad collection has been undertaken, e.g., imaging custodian drives

- Date Limitations - ESI agreements may specify dates that ESI was collected (e.g. 1/1/2012 - 6/30/2015)

- File types - May specify file types that are searched, particularly if unusual file types will be important.

- Dedupe methodology may be specified. **Horizontal Deduplication**: Identification and removal of duplicate emails across all of the custodians within a case. **Vertical Deduplication**: The identification and removal of duplicate emails within each custodian’s collection. Vertical DeDupe maintains associations between emails and all relevant custodians.
Negotiating eDiscovery Requirements

Collection - Data Sources

- ESI Agreement or order may specify which data sources should be searched for relevant ESI.

- Data mapping of ESI sources by Custodian with an ESI Content Map may be needed or helpful to properly identify.

- Issues re handling of special data sources, e.g., accounting systems, databases, software/platforms unique to a litigant.
ESI agreements may specify what data is reasonably accessible. Under FRCP 26 provides that parties are not obligated to produce ESI that is “not reasonably accessible.” E.g., Presumed non-proportional. Application to particular ESI depends on particular case circumstances.

Most Accessible: Active online data, such as email accounts, computer hard drives in use, portable devices and cloud storage. Nearline data in storage systems and offline storage and archives may be reasonably accessible, depending on the circumstances.

Less Accessible: Backup tapes, erased, fragmented or damaged data, system files that log user activity, temporary files, cache files.

Agreement or court may provide for discovery of ESI not reasonably accessible with cost-shifting or cost-sharing.
Review procedures that are other than linear may be specified.

Review approaches:

- **Linear Review** - Read, review, and code all emails, one at a time. Linear review, of course, is usually not cost-effective with larger document collections.

- **Keyword Search** - Using search keywords to identify responsive and privileged email.

- **Technology Assisted Review** (aka TAR aka Predictive coding) - Manually review a seed set of documents to train predictive coding algorithm that will automatically code the remaining documents. Generate and review control sets to evaluate the results.
Negotiating eDiscovery Requirements

Review Procedures - Keyword Search

- Keyword search is most commonly used protocol for reviewing larger document collections and preparing productions.

- Approaches for ESI Agreements include no mention, agreed keywords and agreed keywords with testing procedures.

- Agreed Keywords - Parties may propose and agree to keyword terms to be used. Can be contentious and involve courts/magistrates.

- Testing Protocols - Keyword searches necessarily involve false positives (producing irrelevant documents) and false negatives (missing and not producing responsive documents). Keyword terms can be tested on small samples and keywords adjusted.
Concept Search: ‘Trade’ = ‘Swap’ = ‘quid pro quo’
Negotiating eDiscovery Requirements

Review Procedures - Transparency in TAR

- ESI Protocol may address use of technology assisted review aka predictive coding
- Transparency could include:
  - TAR algorithm used
  - Seed set size & contents
  - How seed set chosen
  - Control set size
  - F score (precision & recall)

<table>
<thead>
<tr>
<th>Predictive Coding</th>
<th>Seed Set</th>
<th>Control Set</th>
<th>Predicted Set</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>#</td>
<td>%</td>
<td>#</td>
<td>%</td>
</tr>
<tr>
<td>Responsive:</td>
<td>753</td>
<td>30%</td>
<td>1,242</td>
<td>50%</td>
</tr>
<tr>
<td>Non-responsive:</td>
<td>1,747</td>
<td>70%</td>
<td>1,258</td>
<td>50%</td>
</tr>
<tr>
<td>Total:</td>
<td>2,500</td>
<td>100%</td>
<td>2,500</td>
<td>100%</td>
</tr>
</tbody>
</table>

Statistics
- Final F: 88%
- Precision Percent: 90%
- Recall Percent: 87%
- Margin of Error (%): +/- 24%

Assisted Review Report

Case Name: Assisted Review +
Title: Lexbe
Date Completed: 10/13/2014 4:19:15 PM
Run By: assistedreview@lexbe.com
Comments:
If No Agreement - Requires that ESI be provided in a form in which it is ordinarily maintained or a form that is reasonably usable. \(E.g.,\) native format

If Specific Request, No Objection - If the requesting party specifies a different form, and the receiving party does not object, the receiving party may be bound to the requested form of production.

If Specific Request, With Objection - If the requesting party specifies a different form, the producing party can object and propose its own form.

Specifics of ESI delivery of delivery formats is the meat of many ESI Agreements or orders. Note: No right under FRCP to have the common TIFF/loadfile delivery, absent an agreement or an unobjected request.
- **Review Software Used.** It’s important to know what document review technology/software will each party be using? This will drive what the form of production will be for that party.

- **Litigation eDiscovery Document Review Applications** - Designed to organize, search, code & produce large data sets. Some work best or only with some data types (e.g., TIFF with load files); some with several or many types (natives, PDFs, TIFFs). Some can load and work with native files and some require pre-processing and conversion. Applications can be workstation, firm server or internet/cloud-based.

- **Options for Small Document Sets** - Some review small email data sets directly in Outlook. Other natives files may simply be reviewed on a local computer. Some convert everything to PDF and review on computer without a Litigation Review Application.
### Blended Productions

**What is it?**
Delivery in multiple formats as needed: Native, PDF & TIFF/text, with multiple load file formats

**Advantages**
- Lessens format discussions/delays
- Flexible for multiple platforms
- PDFs available for easy transfer; Natives for backup and review; TIFFs for review systems that require it (if needed)
- Versions linked for easy comparison

**Disadvantages**
- If TIFFs produced, larger hosting space required

**Notes**
- Multiple version of load files provided for system flexibility
<table>
<thead>
<tr>
<th>What are they?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Structured text or database type file that references document files and associates metadata and other information, for use in Litigation review software</td>
</tr>
<tr>
<td>May Be Included</td>
</tr>
<tr>
<td>● Document and email metadata</td>
</tr>
<tr>
<td>● Document breaks (for single page TIFFs)</td>
</tr>
<tr>
<td>● Email family associations</td>
</tr>
<tr>
<td>● Map to multiple versions of files (e.g., TIFF, Text, PDF, Native)</td>
</tr>
<tr>
<td>Formats in Use</td>
</tr>
<tr>
<td>● DAT (Concordance, Ringtail, Relativity)</td>
</tr>
<tr>
<td>● DII (Summation)</td>
</tr>
<tr>
<td>● LFP (iPro)</td>
</tr>
<tr>
<td>● Excel XLSX (Lexbe can import all loadfile types)</td>
</tr>
<tr>
<td>Notes</td>
</tr>
<tr>
<td>● Production may include multiple load files formats</td>
</tr>
<tr>
<td>● Can be used in TIFF, PDF and Native productions</td>
</tr>
<tr>
<td>● Some systems can load multiple formats</td>
</tr>
</tbody>
</table>
Load File in Excel (Lexbe) Format

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
<th>E</th>
<th>F</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>BEGDOC</td>
<td>ENDDOC</td>
<td>BEGATT</td>
<td>ENDATT</td>
<td>PARENTID</td>
</tr>
<tr>
<td>2</td>
<td>ENRON 000001</td>
<td>ENRON 000001</td>
<td>ENRON 000001</td>
<td>ENRON 000002</td>
<td>ENRON 000001</td>
</tr>
<tr>
<td>3</td>
<td>ENRON 000002</td>
<td>ENRON 000002</td>
<td>ENRON 000001</td>
<td>ENRON 000002</td>
<td>ENRON 000001</td>
</tr>
<tr>
<td>4</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
<td>ENRON 000001</td>
</tr>
<tr>
<td>5</td>
<td>ENRON 000004</td>
<td>ENRON 000004</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
</tr>
<tr>
<td>6</td>
<td>ENRON 000005</td>
<td>ENRON 000005</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
<td>ENRON 000003</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>G</th>
<th>H</th>
<th>I</th>
<th>J</th>
<th>K</th>
<th>L</th>
<th>M</th>
<th>N</th>
<th>O</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>DATE SENT</td>
<td>TIME SENT</td>
<td>DATE RECEIVED</td>
<td>TIME RECEIVED</td>
<td>FROM</td>
<td>TO</td>
<td>CC</td>
<td>SUBJECT</td>
</tr>
<tr>
<td>2</td>
<td>05/26/2000</td>
<td>10:19:00 AM</td>
<td>05/26/2000</td>
<td>10:19:00 AM</td>
<td>John J Lavorato</td>
<td>John Zufferli{John Zufferli}</td>
<td>Molson ad</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>05/26/2000</td>
<td>10:19:00 AM</td>
<td>05/26/2000</td>
<td>10:19:00 AM</td>
<td>John J Lavorato</td>
<td>John Zufferli{John Zufferli}</td>
<td>Molson ad</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>09/20/2000</td>
<td>08:33:00 AM</td>
<td>09/20/2000</td>
<td>08:33:00 AM</td>
<td>John J Lavorato</td>
<td>Beverly Stephens{Beverly Stephens}</td>
<td>trading day 9/19</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>W</th>
<th>X</th>
<th>Y</th>
<th>Z</th>
<th>AA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>PAGES</td>
<td>VOLUME</td>
<td>ORIGINAL SPATH</td>
<td>TEKTPATH</td>
</tr>
<tr>
<td>2</td>
<td>1</td>
<td>VOL01</td>
<td>\ORIGINALS\0001\ENRON 0000001.msg</td>
<td>\TEXT\0001\ENRON 0000001.txt</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
<td>VOL01</td>
<td>\ORIGINALS\0001\ENRON 0000002.mov</td>
<td>\TEXT\0001\ENRON 0000002.txt</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>VOL01</td>
<td>\ORIGINALS\0001\ENRON 0000003.msg</td>
<td>\TEXT\0001\ENRON 0000003.txt</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>VOL01</td>
<td>\ORIGINALS\0001\ENRON 0000004.xls</td>
<td>\TEXT\0001\ENRON 0000004.txt</td>
</tr>
<tr>
<td>6</td>
<td>26</td>
<td>VOL01</td>
<td>\ORIGINALS\0001\ENRON 0000005.xls</td>
<td>\TEXT\0001\ENRON 0000005.txt</td>
</tr>
</tbody>
</table>
From: John J Lavorato  
Sent: Friday, May 26, 2000 10:19:00 AM  
To: John Zufferli, John Zufferli  
Subject: Molson ad  
Attachments: molson-canadian-i-am.mov.1

05/26/2000  
09:16 AM  

Foreword by John J Lavorato/Corp/Enron on

Field Delimiter

BEGDOC|ENDDOC|BEGATT|ENDATT|ATTACHMENT|PARENTID|RECORDTYPE|DATESENT|TIMESENT|DATERECEIVED|TIMERECEIVED|FROM|TO|CC|BCC|SUBJECT|DATECREATED|TIMECREATED|DATEMODIFIED|TIMEMODIFIED|FILENAME|FILEEXTENSION|SOURCEFILEPATH|PAGES|VOLUME|ORIGINALSPATH|TEXTPATH|PDFPATH|ENRON 0000001

John J Lavorato|John Zufferli|John Zufferli  
Molson ad  
John J Lavorato|John Zufferli|John Zufferli  
2000-05-26 10:19:00 AM - Molson ad.msg  
1  
VOL01  
ORIGINALS  
0001  
ENRON 0000001

Attachment

molson-canadian-i-am.mov

05/26/2000 10:19:00 AM - Molson ad.msg/molson-canadian-i-am.mov.1  
1  
VOL01  
ORIGINALS  
0001  
ENRON 0000002

Attachment

molson-canadian-i-am.mov
Negotiating eDiscovery Requirements (ESI Agreements, Orders, etc.) | eDiscovery Webinar Series | Nov 18, 2015

Form of Production - DII loadfile details

Load File in DII (Summation) Format

Field Token

:Record 1
@T ENRON 0000001
@MEDIA eEmail
@C ENDDOC# ENRON 0000001
@C PGCOUNT 1
@D @I\IMAGES\0001\ENRON 0000001.tiff

:Record 5
@T ENRON 0000005
@PARENTID ENRON 0000003
@MEDIA Attachment
@C ENDDOC# ENRON 0000030
@C PGCOUNT 26
@D @I\IMAGES\0001\ENRON 0000005.tiff
ENRON 0000006.tiff
ENRON 0000007.tiff
ENRON 0000008.tiff
ENRON 0000009.tiff
ENRON 0000010.tiff
ENRON 0000011.tiff
ENRON 0000012.tiff

Record Token

:Record 2
@T ENRON 1000 0000002
@PARENTID ENRON 0000001
@MEDIA Attachment
@C ENDDOC# ENRON 0000002
@C PGCOUNT 1
@D @I\IMAGES\0001\ENRON 0000002.tiff
## Negotiating eDiscovery Requirements

**Production - Sample DOJ Metadata Requirements**

<table>
<thead>
<tr>
<th>Field</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>COMPANIES</td>
<td>Company submitting data</td>
</tr>
<tr>
<td>PHYSICALMEDIA</td>
<td>The unique identifier on the physical piece of media (e.g., ABC001)</td>
</tr>
<tr>
<td>VOLUMENAME</td>
<td>Production volume number (e.g., ABC001-001)</td>
</tr>
<tr>
<td>CUSTODIAN</td>
<td>Custodian(s) / source(s) -- format: Last, First or ABC Dept</td>
</tr>
<tr>
<td>TIMEZONE</td>
<td>The TimeZone from which the native file was collected.</td>
</tr>
<tr>
<td>SPEC#</td>
<td>Subpoena/request paragraph number to which the document is responsive</td>
</tr>
<tr>
<td>HASHMD5</td>
<td>Document MD5 hash value (used for deduplication or other processing)</td>
</tr>
<tr>
<td>HASHSHA</td>
<td>Document SHA1 hash value (used for deduplication or other processing)</td>
</tr>
<tr>
<td>SEARCHVALUES</td>
<td>List of search terms used to identify record as responsive (if used)</td>
</tr>
<tr>
<td>BEGDOC#</td>
<td>Start Bates (including prefix) -- No spaces or special characters</td>
</tr>
<tr>
<td>ENDDOC#</td>
<td>End Bates (including prefix) -- No spaces or special characters</td>
</tr>
<tr>
<td>DOCID</td>
<td>Must equal the value appearing in the BEGDOC# field and be UNIQUE</td>
</tr>
<tr>
<td>NUMPAGES</td>
<td>Page count</td>
</tr>
<tr>
<td>PARENTID</td>
<td>Parent record's BEGDOC# including prefix (populated ONLY in child records)</td>
</tr>
<tr>
<td>ATTACHMENTIDS</td>
<td>Child document list: BEGDOC# of each child (populated ONLY in parent records)</td>
</tr>
<tr>
<td>FAMILYRANGE</td>
<td>Range of the BEGDOC# value of the parent record to the ENDDOC# value (including prefix) of the last child record (for example, ABC-JD-00001201 - ABC-JD-00301220), populated for all documents in the group. Empty if the record is NOT in a family grouping</td>
</tr>
<tr>
<td>EPROPERTIES</td>
<td></td>
</tr>
<tr>
<td>RECORDTYPE</td>
<td></td>
</tr>
<tr>
<td>COPY</td>
<td></td>
</tr>
<tr>
<td>NOTATION</td>
<td></td>
</tr>
<tr>
<td>FOLDLABEL</td>
<td></td>
</tr>
<tr>
<td>FROM</td>
<td></td>
</tr>
<tr>
<td>CC</td>
<td></td>
</tr>
<tr>
<td>SUBJECT</td>
<td></td>
</tr>
<tr>
<td>DATE_HC</td>
<td>Date of hard copy documents, if coded. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>DOCDATE</td>
<td>This is a multipurpose date field. Populate with: DATESAVED for E-Docs; DATESENT for Emails; DATEAPPTSTART for calendar appointments; DATE_HC for hard copy documents, if available. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>DATEDCREATED</td>
<td>Date electronic file was created. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>DATESENT</td>
<td>Date the Email was sent. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>TIMESENT</td>
<td>Time Email was sent -- Format: HH:MM:SS (use 24 hour times, e.g., 13:32 for 1:32 pm; timezone indicators cannot be included)</td>
</tr>
<tr>
<td>DATERECEIVED</td>
<td>Date Email was received. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>TIMERECEIVED</td>
<td>Time Email was received. Format: HH:MM:SS (use 24 hour times, e.g., 13:32 for 1:32 pm; timezone indicators cannot be included)</td>
</tr>
<tr>
<td>HEADER</td>
<td>The internet header information for Email sent through the internet;</td>
</tr>
<tr>
<td>INTERNETMSGID</td>
<td>Proprietary email database/mailstore/post office file associated with centrally managed enterprise email servers. Microsoft Outlook PST EntryID, the UniqueID (UNID) for Lotus Notes, equivalent value for other proprietary mailstore formats.</td>
</tr>
<tr>
<td>MESSAGEID</td>
<td>Internet message ID of the Email replied to</td>
</tr>
<tr>
<td>IMPORTANCE</td>
<td>Email flag indicating priority level set for message</td>
</tr>
<tr>
<td>DELIVERRECEIPT</td>
<td>Delivery receipt request notification for Email messages</td>
</tr>
<tr>
<td>READRECEIPT</td>
<td>Read Receipt request notification for Email messages</td>
</tr>
<tr>
<td>SENSITIVITY</td>
<td>Sensitivity field from Email messages</td>
</tr>
<tr>
<td>REVISION</td>
<td>Revision number extracted from metadata of native file</td>
</tr>
<tr>
<td>DATESAVED</td>
<td>Date native file was last modified. Format: YYYYMMDD.</td>
</tr>
<tr>
<td>DATEPRINTED</td>
<td>Date native file was printed (metadata derived from Word documents, etc.)</td>
</tr>
<tr>
<td>FORGANIZATION</td>
<td>Company field extracted from the metadata of a native file</td>
</tr>
<tr>
<td>EAUTHOR</td>
<td>Author field value extracted from the metadata of a native file</td>
</tr>
<tr>
<td>LASTAUTHOR</td>
<td>Last Saved By field value extracted from metadata of a native file</td>
</tr>
<tr>
<td>ESUBJECT</td>
<td>Subject field value extracted from metadata of a native file</td>
</tr>
<tr>
<td>FILESIZE</td>
<td>File size in Bytes (integer value only - do not include unit of measure or decimal places - e.g., 563)</td>
</tr>
<tr>
<td>FILENAME</td>
<td>File name of native file (E-Docs or attachments to Email)</td>
</tr>
<tr>
<td>APPLICATION</td>
<td>Application used to create native file (e.g., Excel, Outlook, Word)</td>
</tr>
<tr>
<td>FILEEXTENSION</td>
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<td>FILEPATH</td>
<td>File path to native file as it existed in original environment</td>
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<td>DOCLINK</td>
<td>File path location to the current native file location on the delivery medium</td>
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<td>Start date of calendar appointment  Format: YYYYMMDD.</td>
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<tr>
<td>TIMEAPPTSTART</td>
<td>Start time of calendar appointment  Format: HH:MM:SS  (use 24 hour times, e.g., 13:32 for 1:32 pm; timezone indicators cannot be included)</td>
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<td>End time of calendar appointment  Format: HH:MM:SS  (use 24 hour times, e.g., 13:32 for 1:32 pm; timezone indicators cannot be included)</td>
</tr>
</tbody>
</table>

Negotiating eDiscovery Requirements (ESI Agreements, Orders, etc.) | eDiscovery Webinar Series | Nov 18, 2015
Negotiating eDiscovery Requirements

Form of Production - Other Issues to Address

- Production of email/attachments with parent-child relationships maintained
- If documents are imaged (to TIFF) will native versions also be produced. If so, automatically or on special request?
- Production of Proprietary Files; Hard Copy Documents; If TIFF, how will color documents be handled?
- How deduplication is handled; how exceptions (placeholders) are handled
- Staged (rolling) or one-time production
- Exact specifics and formats of files and load files
- Protective orders for confidentiality, AEO documents (usually separate agreement)
Negotiating eDiscovery Requirements

Privileged and Work Product Documents

- FRCP 26(b) requires privilege log preparation and case law traditionally has required specific logging requirements that can be burdensome in complex cases.

- An ESI agreement or order can define and narrow the privilege logging requirements, including:
  - Schedule of log delivery
  - Limiting dates of logging (e.g., once litigation commences) or with particular counsel (e.g., litigation counsel)
  - Automate creation with document management software from metadata
  - Logging email by thread group
  - Categorical logs that describe withheld categories instead of listing withheld records
Privileged Log Auto-Creation
- Metadata extracted from natives
- Email date/time, sender, receiver, subject
- Privilege and Work Product coding used
- Privilege log automatically generated for review

<table>
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<th>Bates</th>
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<th>To</th>
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<td>Dynegy-ICE VOL May30</td>
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</tbody>
</table>
Privileged - Clawback

- ‘Clawback agreements’ are commonly included in ESI Agreements and Agreed orders in cases involving any substantial volume of ESI. Clawback agreements are authorized by FRCP 26(b)(5)(B) and FRE 502 (2007 explanatory note).

- A clawback agreement provides that inadvertent disclosure of privileged information does not operate as a waiver of the attorney-client privilege if the holder of the privilege takes reasonable steps to prevent disclosure and rectify the error.

- Not a panacea as the disclosed information possibly may be independently developed elsewhere once known.
Some ESI Agreements will appoint an e-Discovery Liaison for the parties.

Some courts encourage parties to designate e-Discovery liaisons.

A eDiscovery liaison is an electronic discovery expert or technical consultant and serves as point person for communications between parties over eDiscovery matters.

An e-Discovery Liaison can attend Rule 26 Meet and Confers’ as a technical expert, as well as assist in collaborative communications throughout the discovery process.
Thank you for Attending

We’ll be making the following available to webinar attendees:

- ESI Protocol Resource List with sample protocols and agreements
- A recorded streaming version
- MP3 podcast
- Webinar slide-deck
- Transcript

Please let us know if you have any questions or comments about this webinar or suggestions for future topics. This webinar is part of the Lexbe eDiscovery Webinar Series. For notices of future live and on-Demand webinars as part of this series please email us at webinars@lexbe.com or Follow us on LinkedIn.

For further information about Lexbe, a demo or a consultation, please contact us at 800-401-7809 x22 or via email at sales@lexbe.com
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- ‘Lexbe cost advantages, SaaS convenience and search capabilities appeal to many small firms’
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