


ESI Retention Policies, Litigation Holds and Managing eDiscovery Requests


Malcolm Wells
Certified Computer Examiner
Texas Licensed Private Investigator A13426
Summation Support Specialist



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lsilegal.com

Agenda


- What is ESI?
- The Importance of Retention Plans
- Litigation Hold Policies and Consequences
- eDiscovery Requests:
Be Careful What You Ask For



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lsilegal.com

What is ESI?

- **Types of Electronically Stored Information include:**
 - Emails
 - Microsoft Office files
 - accounting databases
 - CAD/CAM files
 - Websites
 - any other electronically stored information which could be relevant to the issues in a law suit.




© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lsilegal.com



Where is it?

Bit Stream Backup


IMAGING ONE DRIVE TO ANOTHER



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lsilegal.com

When should it be gathered?


CSI	CSI NY	CSI Miami
The Simpsons	Fringe	
Desp. Housewives		
American Idol	Burn Notice	
Grey's Anatomy		
Dancing w/ Stars		
Football		
1 hr.	2 hr.	3 hr.



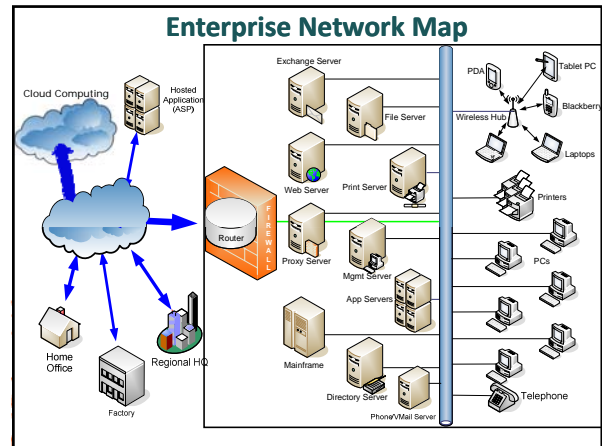
© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lsilegal.com

Understanding Retention

- **What is a Document Retention Plan?**
- **How long are Documents Retained?**
- **Considerations:**
 - Storage space
 - Government compliance
 - File formats




© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.litlegal.com




Why It's Important in Litigation

- **Federal Rule 26 (b)**
 - New rules do “not relieve a party of its common law or statutory duties to preserve evidence”
 - Litigation Hold supersedes Document Retention Plans



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.litlegal.com

Litigation Holds



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.litlegal.com

Litigation Hold Who Is Responsible?

- **Client:** When Litigation is Imminent
- **Attorney:** Must Insure LitHold is Properly Triggered and Compliance Met
- Disaster Recovery Plan for Litigation



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.litlegal.com

Lit Holds and ESI Preservation

When to preserve:
When Litigation is Imminent

Zubulake v UBS Warburg - The Court held that the duty to preserve began at the latest when Zubulake filed her EEOC charge, but that in this case, since the relevant people at UBS anticipated litigation in April 2001, the duty to preserve evidence essentially began at that time.



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.litlegal.com

Lit Holds and ESI Preservation

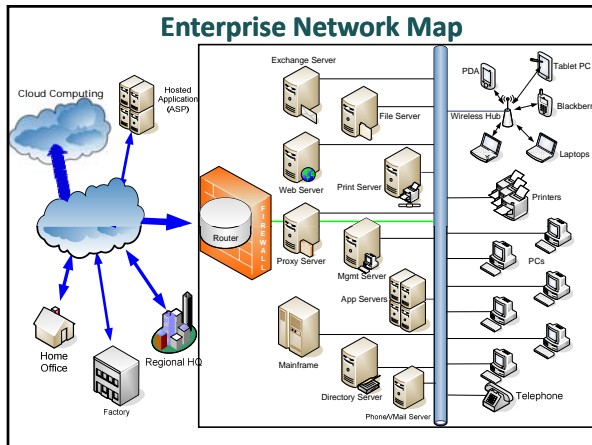
What to preserve

- While the potential defendant does not need to save every email or scrap of paper, the defendant must not destroy unique, relevant evidence that might be useful to an adversary.
- Generally the party is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request. (page 10 of Zubulake IV)



What To Preserve?

- Understand Client's Infrastructure
- What is "Reasonably Accessible"?
- What is "Unduly Burdensome"?

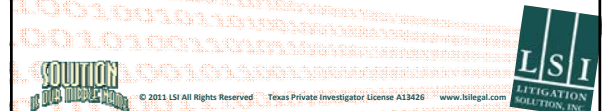


Lit Holds and ESI Preservation

How to Preserve

Evidence Needs to Be Preserved in a

- Forensically Sound
- Admissible
- and Defensible Manner



Lit Holds and ESI Preservation

What Does "Forensically Sound" Mean?

- Metadata and Hashes are Intact and Unaffected
- Proper Procedures are Followed and Documented
- Uninterrupted Chain of Custody



Case law

- *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 2007 WL 684001 (D.Colo. March 2, 2007)
lit hold is not enough; efforts must be made by counsel to insure compliance.
- *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (D.N.J. 1997)
didn't meet pre-trial orders; \$1,000,000 sanction
- *ACORN v. County of Nassau*, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009)
gross negligence



Who should gather it?

Self-Collection Issues

- How are they gathering?
- Who told them?
- What are their procedures?
- Is it documented?
- Is the software licensed?
- Where is the Chain of Custody?



Who should gather it?

Self-Collection Issues

- How was it secured?
- Who had access to it?
- Are there any criminal records?
- What assurances that relevant files not destroyed or missed?
- Are they properly certified/licensed?
- Do you want them on the stand?



Who should gather it?

Self-Collection Disadvantages

- Insufficient instructions
- Utilizes existing resources – typically not trained appropriately
- Typically inadequate tools



Who should gather it?

Self-Collection Disadvantages

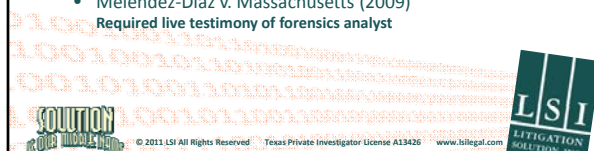
- Poor documentation
- Job “security”?
- Post-collection security
- Do you want them on the stand?



Who should gather it?

Case Law on Self-Collection

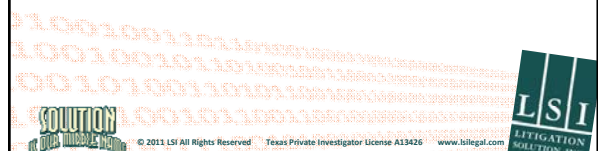
- Wachtel v. Healthnet (2006)
Reliance on self-collection may be insufficient
- Lorraine v. Markel Am Ins (2007)
FRE 902 ESI materials must be authenticated
- U.S. v. O’Keefe (2008)
FRE 702 expert testimony re: search terms
- Melendez-Diaz v. Massachusetts (2009)
Required live testimony of forensics analyst



Who should gather it?

Third-Party

- Unaffiliated/Unbiased
- Everyday business
- Typically properly Certified and Licensed




Who should gather it?

Is the Vendor Certified?




Is the vendor properly licensed by the state?





© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests




© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests

#1 Know What NOT to Agree To

- Understand Your Client's Data Infrastructure and Policies
- What is Reasonably Accessible and What is NOT




© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests

#2 Don't Make Promises You Can't Keep

- Don't Offer Anything "Off the Cuff"
- Understand the Request and Its Consequences BEFORE Agreeing



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests

#3 Keep the "Spirit of Cooperation"

- Judges Increasingly Frustrated with Feuding Counsel
- Desire of Courts to Create Cooperation
- "Co-opertition"




© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests

#4 Be Knowledgeable and Reasonable in Your Requests

- No "Fishing" Allowed
- Be Relatively Specific
- What's Good for the Goose...



© 2011 LSI All Rights Reserved Texas Private Investigator License A13426 www.lilegal.com

Managing eDiscovery Requests

#5

Have Production Request Plans B, C, D, E, F, etc. Ready

- Producing Party Does NOT Have to Agree to Your Requested Formats
- There Are Ways to Get What You Want...



Bottom Line...

- Learn ESI Nuances
- Understand the FRCP, and Use the Rules to Your Advantage
- Making the Right Moves at the Beginning of the Case Pays Dividends Throughout
- Use the Right Tool for the Right Job
- Ask for Help When Needed



Thank You For Your Time!

Malcolm Wells

mwells@lsilegal.com

214-939-9700

