



204 Practical Solutions to e-Discovery & Records Retention

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Faculty Biographies

Ellen Rice

Ellen Rice is senior employment counsel at EMC Corporation, the world leader in information storage and management, with headquarters in Hopkinton, Massachusetts. Her responsibilities include advising EMC on employment and corporate compliance issues, actively litigating commercial and employment law cases, conducting internal investigations, and managing outside counsel.

Prior to joining EMC, Ms. Rice worked in the Washington, DC Metropolitan area. She served as assistant general counsel in the United States Department of Justice's Executive Office for United States Attorneys, assistant general counsel at a nationwide food distribution company, and as a labor and employment law associate with the law firm Paul, Hastings.

Ms. Rice received her B.A., summa cum laude, from Tulane University and her J.D., cum laude, from Harvard Law School.

Robert R. Robinson

Robert R. Robinson is senior vice president and group counsel-international for Affiliated Computer Services, Inc., a global outsourcing company based in Dallas, Texas. His primary responsibilities include coordination of substantially all legal work outside the U.S. for ACS, supporting the efforts of over 15,000 employees in more than 30 countries.

Prior to joining ACS, Mr. Robinson was general counsel and vice president of business development of Renew Data Corp., an electronic evidence company based in Austin, Texas. Before that, he was vice president and general counsel-Americas for Vignette Corporation, a publicly traded enterprise software company also headquartered in Austin, Texas.

Mr. Robinson earned a S.B. from M.I.T. and a J.D. from U.C. Berkeley, Boalt Hall School of Law.

Daniel A. Wentworth

Daniel A. Wentworth is senior legal counsel in the legal department of Fidelity Investments in Boston. His responsibilities include coordination of e-mail retrieval and production matters and advising on electronic document retention issues. He also advises Fidelity business units on retirement account distribution matters, powers of attorney, custodial and trust account issues, and estate planning and administration topics.

Prior to joining Fidelity, Mr. Wentworth worked as an associate at the law firm of Nutter, McClennen & Fish, LLP, in Boston, in the trusts and estates department, advising on estate planning and trust and estate administration matters. He served as the co-chair of the legislative committee of the Boston Bar Association's trusts and estates section.

Mr. Wentworth received his B.A. from Tufts University and his J.D. from the University of Michigan Law School.



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Framing the Business Issues

- What Are We Dealing With?
- Technology/Strategic Issues
- Costs and Cost Shifting



What is out there

- Forms of Data
 - “Enterprise User Information”
 - Email
 - Applications (Word, Excel, etc.)
 - Voicemail
 - Fax server
 - Database files
- Locations
 - File cabinets/desks
 - Desktop machines
 - Laptops
 - Home machines
 - Servers
 - Email server
 - Vmail server/system
 - Web server
 - User backups
 - Server backups
 - Email backups
 - Palm pilots/PDAs



The Three-Headed Monster

PCs & Servers
+ E-mail system
+ Backup system
= A de-facto data repository!



Electronic – Better Than Paper

- Searchable
 - Keyword searches are essential
 - More certain, costs less & saves time
- More information than just the text
- Efficient for sharing and copying
- Can be protected from alteration
- Candid behavior
- Often recoverable!



Technology Basics

- Sectors & Clusters
 - What are deleted files?
 - What can be undeleted?
 - Deleted files & fragments searchable
 - History/record of deletions is important
- Hard drive data constantly changes as the machine is used
 - Take a forensically sound “image” right away to avoid data alteration and destruction



Time Is Of The Essence

note for the discovering party

- Key – get the producing party to preserve data as soon as practicable, with proper forensic techniques
 - Applied Telematics v. Sprint, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. Sept. 17, 1996)
 - Gates v. Bando, 167 F.R.D. 90 (D. Colo. 1996)
 - Taylor v. State, 2002 WL 31318065 (Tex. App. Oct. 17, 2002)
- Crucial factors:
 - *Get the forensic image of each hard drive*
 - *Get them to stop recycling backup tapes*



Time Is Of The Essence

note for the discovering party

- Immediately send a letter to ask opposing counsel for preservation
 - Forensic image duplicate
 - Stop recycling backup tapes
 - Don't delete files
 - Don't defragment or compress any hard drives
 - Don't add new software or operating systems
 - Don't access subject files until imaged
- If you get one of these letters, watch out!



Costs of Production

- Cost elements
 - Imaging of hard drives and servers
 - Restoration/retrieval of backup data
 - Restoration/recovery of deleted files
 - Searching tapes & hard drives, sorting, de-duplicating and other processing work
 - Costs for on-site work (per diem, etc.)
- Expert Costs



Costs of Production - Zubulake

- See Zubulake v. UBS Warburg, 2003 WL 21087884 (S.D.N.Y. 2003)
 - Most influential series of opinions in electronic evidence today
- Court's objective was to prevent unfair cost shifting away from a large defendant to a small plaintiff



Cost of Production – Zubulake (con't)

- *Two part test:*
 - First, is the request unduly burdensome?
 - If so, then use the following factors to weigh cost shifting:
 - The specificity of the discovery requests
 - The availability of same info from other sources
 - Cost of production vs. amount in controversy
 - Total cost vs. relative resources of the parties
 - The relative ability of each party to control costs and its incentive to do so
 - The importance of the issue in the case, and
 - The relative benefits to the parties of getting the info



Recent Legal Trends

- Massive volumes versus inadvertent destruction dilemma



Recent Legal Trends

- Government investigations
- Civil cases
 - Morgan
 - Pressed for inaccessible information
 - Obtained judge's approval of certification
 - Warehouses of tapes
 - Lack of communication between outside counsel, and inside counsel and inside IT people
 - Result – adverse inference then devastating default judgment



Recent Legal Trends

- Zubulake
 - Negligent spoliation and litigation hold
 - Obligations on inside counsel
- Andersen
 - Lessons
 - Impact of Supreme Court decision in light of Sarbanes?
- Document preservation requests and rulings
- Privilege and inadvertent disclosures



Recent Legal Trends

- Status of the proposed federal rules amendments and the safe harbor
- The Sedona Conference Principles and Guidelines, and what's next (e.g. best practices developments in email archive, content management and international legal developments) – www.thesedonaconference.org



Technology

- “Papers on the case room floor”
- Pain points: notice, collect (\$), inspect (no tools and huge universe “over the wall”), hold (“save everything?”) and produce (disjoined process)
- At its core, the problem to be addressed is improved management of information - reactive versus proactive (and litigation ready)



Technology

- Proactive – get to the core of the issue
 - Archive versus disaster recovery
 - Policy management of unstructured content
- Email archive
 - Challenges
 - Wide variations in content
 - Focus of e-discovery
 - Huge volumes
 - Tapes
 - Three considerations – Business (how much are you willing to impact/involve users?), Operational/Cost (de-duplication), Legal/Compliance (policy management, and search)
 - Solutions/Strategies
 - Content management



Responding to Data Requests

- Themes:
 - Credibility
 - Communication
 - People
 - You need to think about all the people who handle the data in the retrieval and production processes



Responding to Data Requests

- Initial steps following request
 - Holding or harvesting data that would otherwise be altered or deleted
 - Identify and turn off relevant automatic deletions
 - Who needs a retention notice?
 - The individual employees
 - Managers of individual employees?
 - IT support for the individual employees?
- Negotiation of scope
 - What is the context of the request?
- Establish your people and process



Your internal legal team

- Legal point person
 - Understands process
 - Time and sequencing
 - Calendars and prioritization
 - Decisions: when to make and when to escalate or consult
 - Understands technology
 - Needs to “get it” at some level
 - Has the ability to work and communicate with different groups
 - Internal/outside counsel; IT team; Records management; requesting parties



Your IT team

- Your IT team point person
 - Understands the importance of this work
 - Someone hired to operate messaging or document management systems may not be the right person for the retrieval task
 - Understands the importance of communication
 - Proactive communication of issues and problems
 - Education of internal and outside counsel
 - Needs to have contacts/resources available to provide information on all systems throughout the company

Your outside counsel

- Understands electronic records
 - Firms vary in level of expertise in this area
 - Attorneys vary widely in expertise in this area
 - You should request a savvy counsel
- Has technical resources to assist you
 - Like your IT team, your firm's IT team needs to consist of good communicators
- Advises and assists on your process
 - If significant manual review of electronic documents is required or desired, the firm should offer cost-effective processes
 - Contract attorneys



Third party consultants

- Consider whether you need one for your case
 - Volume
 - Experience level
 - Significance of case
- What they can offer
- What they may not be able to offer
- How much autonomy do you want to give them?



The process begins

- Step 1: Negotiation of scope
 - Reducing the scope of the request
 - Is the request based on persons or topic?
 - What sources of data have been requested?
 - If e-mail, where might it be available?
 - Format
 - Time frame
 - Schedule for rolling production



The process – “IT Phase”

- This Phase requires periodic communication with IT team
- Step 2: Retrieval
 - Are all relevant sources identified?
 - Data repositories of all required types
 - Backup tapes
- Step 3: Data Processing
 - Date ranges
 - Search terms
 - Attention to search term methodology
 - Content searching
 - Deduplication
 - Who is doing the recordkeeping?



The process continues

- Step 4: Document review
 - Goals of document review
 - Review for attorney/client and work product privileges
 - Relevance tests/tagging
 - What will be excluded on the basis of relevance?
 - Who will do the review?
 - Quality checks
- Step 5: Production
 - Format
 - Who is keeping the records?



What can you do now?

- Establish your teams
 - Internal counsel
 - IT team
- Understand your company's systems
 - Communicate with your IT department – learn what they are doing
 - Systems built today are data repositories of tomorrow
 - What data are you outsourcing and where is it?
 - What are your archiving policies?
 - Track IT costs for possible later use
- Familiarize yourself with technology to help you
 - Retention, collection/retrieval and search tools



Document Retention: Planning

- First: define business drivers
 - Legal – existing and potential litigation
 - Regulatory requirements
 - Other business factors
 - Consult with counsel!
- Second: Get *EMPHATIC* executive support!



Document Retention: Planning

- Perform Cost/Benefit Risk Analysis
 - Helps define and justify the scope of the program
- Cost/Benefit Drivers:
 - Litigation (preservation/spoliation avoidance, production in litigation)
 - Investigations (obstruction avoidance)
 - Regulatory requirements
 - Business needs



Document Retention: Planning

- Overriding Principle: KISS!
 - *Be ever mindful of the cost & person-hours required for implementation*
- Appoint Records Coordinators
- Develop a Retention Schedule
 - Define a series of “buckets”
- Build in a litigation hold process



Document Retention: Planning

- Plan for storage of electronic data
- Paper lasts “forever,” but bits don’t.
 - Be sure your data format is going to be accessible. Not all formats will be in 5 – 7 years.
 - Make sure it is stored in an accessible, usable location (such as a database on a server, but not on backup tapes).
 - See Claire Tristram, Data Extinction, Technology Review (Oct. 2002)



Document Retention: Implementation

- THE THREE-HEADED MONSTER IS REALLY BIG!
- Initially, bite off only what you can chew!
- One department or one system at a time



Document Retention: Implementation

- Take inventory
 - You must know both type and location
 - Use of 3rd party can help, especially if comprised of former/retired employees
- Establish a “difficult” exception policy
- Assign areas of responsibility
 - Executive, managerial, line employees
- Train *everyone*



Document Retention: Technology

- Technology can help or hurt
- Example of hurt: network administration software can be used to delete files over X days old on all machines connected to the network
 - Can reach docs on hard drives if employees regularly back up to/copy from the server
 - Cannot reach docs sent home or stored on disks
 - The date-only deletion regime creates a risk of a sanction for spoliation, or worse



Document Retention – The Ideal Solution

- Ideal solution: a system that will delete all files over X days old, except for those that contain certain defined attributes, and that maintains the forensic quality of the data
 - Attributes will match retention criteria
 - Must reach archived email, not just active



What to do now

- **Get rid of old backup tapes!**
- Shop around – look at the available technology
- Implement data retention practices
 - Enforcement/implementation is critical!
- Move quickly on EE preservation to avoid spoliation/obstruction charges



Resources – For more information

- General background and recommendation resources
 - The Sedona Principles and Guidelines – www.thesedonaconference.org
- Examples of production issues in case law
 - Metropolitan Opera Assoc. v. Local 100, 212 F.R.D. 178 (S.D.N.Y. 2003)
 - Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002)
 - Coleman Holdings, Inc. v. Morgan Stanley & Co., Inc., No. CA 03-5045 AI, (Fla. Cir. Ct. Palm Beach County 2005)
- Articles discussing e-discovery production issues
 - Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions In the Twenty-First Century*, U. Mich. Telecomm. Tech. L. Rev. 71 (Fall 2004)
 - David K. Isom, *Electronic Discovery Primer for Judges*, 2005 Fed. Cts. L. Rev. 1 (Feb. 2005)
 - Scott M. Gawlicki, *e-Discovery Grows Up*, Corporate Legal Times, Feb. 2005, at 46