





Business Litigation 2010:
Unlocking Successful Strategies
for Wisconsin Companies

**10 Strategies for Getting
E-Discovery Under Control**
Jim McKeown & Rich Young

FOLEY
FOLEY & LARDNER LLP

©2010 Foley & Lardner LLP

 **Business Litigation 2010:** Unlocking Successful Strategies for Wisconsin Companies



FOLEY
FOLEY & LARDNER LLP

10

©2010 Foley & Lardner LLP



Electronic Records Have Exacerbated the Discovery Burden

- Employees (custodians) are typically pack rats for electronic documents
 - Results in keeping many more documents
 - More to find, more to review, more to produce
- Nature of electronic records and server limits/retention policies mean that documents are expected to be deleted
- Most courts do not yet appreciate the burden and cost of what they have ordered



Courts Have Imposed Significant Fines and Penalties for Lost Data

- Monetary fines (\$2.75 million in one case)
- Recent decision ordering possible “non-criminal” two year prison term
- Allowing jury to infer that missing documents would prove “guilt”
- Public reprimand of all involved counsel
- Higher standard applied to “sophisticated” companies



Standards of What is Required Remain a Moving Target

- Case law is being created in cases with “bad facts”
- Some groups have attempted to be “ahead of the curve” to define expectations
 - The Sedona Conference
 - Federal Judicial Center Handbook
- Broad, generalized rules are developing
 - 2006 Amendments to Fed. R. Civ. P.
 - 7th Circuit E-discovery Pilot Program



Tips To Survive E-Discovery (a/k/a Avoiding Nightmares)



Tip 1

- Issue an early litigation hold to the relevant custodians.
 - Do not wait for an electronic document litigation hold demand from opposing counsel.
 - Identify scope of dispute, time frame and involved employees.
 - Be overbroad in determining the list of employees who will receive the hold notice.
 - Do not adopt an unreasonably narrow interpretation of what might be relevant.
 - Schedule a call or meeting so the memo is not overlooked.



Tip 2

- Make sure that you understand the IT system and procedures.
 - Determine the options that employees may have to save or store electronic documents.
 - Does the company use outside servers or cloud computing? Separate schedule for deletion?
 - Ask each custodian whether he/she uses flash drives, zip-drives, CDs, home computer, iPads.
 - DO involve the company's IT department.
 - DO NOT forget the officers' materials.



Tip 3

- Meet early with opposing counsel to seek to define the scope of electronic discovery.
 - Adverse party may have similar electronic record issues and may also want some reasonable limits.
 - Set time frames for preserved data.
 - Back up tapes off the table?
 - Do you really need the metadata from native file production? Why not just produce tiff files?
 - Agree on custodian limits and search terms?
 - Be prepared to address issues with court early in the process if opposing counsel is unreasonable.
- Note – This is key aspect of 7th Circuit Pilot



Tip 4

- Remember the Principle of Proportionality
 - Rule 26 standard that need for information sought should be weighed against the burden and expense
 - 7th Circuit Pilot Program – Principle 1.03
 - “The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.”



Tip 5

- Retain an independent firm to collect and preserve electronic files.
 - Typically provides greater experience and less susceptible to charge of improper motive if something is lost.
 - Take bids from multiple vendors
 - Have estimate of likely amount of data
 - Bids will vary in pricing methodology
 - Need to evaluate costs of initial imaging, processing, production and storage.



Tip 6

- Process only what you need and not all that you have.
 - Processing electronic data for review by attorneys is an expensive task.
 - Ability to process only the documents “hit” by search terms can save significant money.
 - Work with vendor to understand significance of search term concessions in negotiations with opposing counsel.



Tip 7

- Determine the scope of review for documents that have search term “hits”
 - Extremes are (1) review of every document, and (2) document dump with no attorney review (i.e., the “Are you feeling lucky?” model)
 - Some categories of documents may need little or no attorney review (financial records, calendars).
 - Even if you do not do a full review of every page, you may want a full page-by-page review of documents from the files of key employees and executives.



Tip 8

- Develop a thorough search for privileged documents.
 - Apply a list of search terms to pick up all documents with the words “attorney,” “privileged,” “counsel” and similar words.
 - Include in the search term list the names (and common misspellings) of attorneys – some e-mails may refer to in-house counsel by first name.
 - Don’t forget former attorneys.
 - Search for e-mails from outside counsel by using the root of e-mail address (foley.com).



Tip 9

- Plan in advance for an organized “second search.”
 - Work with outside vendor to ensure that data is tracked by what is collected, processed, and produced.
 - If you later agree (or are ordered) to conduct a further search, you need to be in position to avoid another collection and merely apply search terms, etc.



Tip 10

- Meet and confer with an eye toward reasonableness.
 - Understand the cost/effort needed to comply with requests of other party.
 - Document the information needed to show the judge that you have undertaken a good faith (and expensive) effort.
 - Amount of data collected and processed
 - History of negotiations with opposing counsel
 - Number of pages produced
 - Cost of production (both vendor costs and attorney costs)
 - Identify the cost of complying with the opposing party’s additional demand so the judge can weigh directly the cost/burden of the request against the likelihood that anything new is discovered.



Closing Thought

- Manage Expectations
 - Electronic document production involves a lot of work and it is expensive
 - Some disruption/inconvenience to employees
 - Executives need to understand the importance of compliance (easier on them to comply fully up front)
 - BUT
 - No reason to panic
 - Apply the same type of principles you would to a very large document production in the pre-electronic era
 - Can be handled effectively with a reasonable plan and implementation
 - Just apply some judgment, forethought and common sense