

# **Session 1: Civil Discovery**

**LBSC 708X/INFM 718X  
Seminar on E-Discovery  
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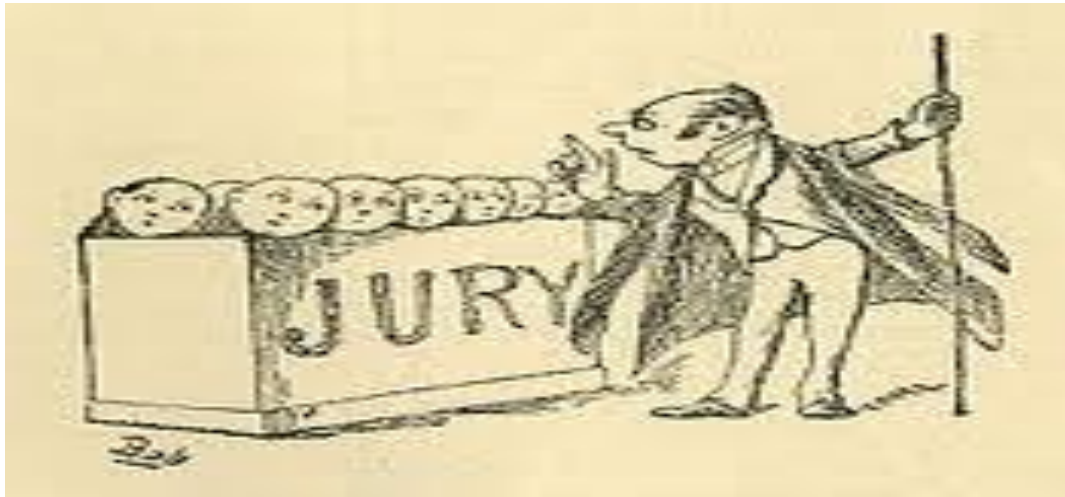
# In the beginning...



## Trial by Ordeal

# Progressing to...

In  
England...



And in the  
U.S. ...



# Leading to the present...

- Litigation by Ordeal (a/k/a) “e-discovery”



# Development of law and equity

- English common law in the courts
- Law of equity: appeals to the King
  - Court of Chancery
- Remedies (law=damages; equity=injunctions)
- Jury trial guaranteed by 7<sup>th</sup> Amendment in suits at common law
- Judge as trier of fact in equity
- Merger of law and equity in US in 1938 with promulgation of Federal Rules of Civil Procedure
- Remedies available today, including both damages and injunctive relief

# Major Stages of a Lawsuit

- Pre-lawsuit activity\* (Question: what might that be??)
- Complaint
- Answer
- Discovery
  - Depositions
  - Interrogatories
  - Requests to Produce
  - Requests for Admissions

# Stages of a Lawsuit (con't)

- Summary Judgment
- Trial
- Post trial motions
- Appeal(s)
- Possible remand to lower court for further proceedings
- Final Order

# Settlement and Compromise

- *Questions:*
  - under what circumstances does it make sense to settle a lawsuit?*
  - when should settlement take place?*



# Comprehensive list of stages of a Lawsuit

- Pleadings
  - Service of process
  - Complaint
  - Answer
    - Affirmative defense
  - Counterclaim
  - Crossclaim
  - Joinder
  - Indispensable party
  - Intervention
  - Other Motions
- Pre-trial procedure
  - **Discovery**
  - Initial Conference
  - Interrogatories
  - Depositions
  - Request for Admissions
  - Request for production
- Resolution without trial
  - Default judgment
  - Summary judgment
  - Voluntary dismissal
  - Involuntary dismissal
  - Settlement
- Trial
  - Jury
  - Judgment
    - Judgment as a matter of law
    - Motion to set aside judgment
    - New trial
    - Remedy
      - Injunction
      - Damages
      - Attorney's fees
      - Declaratory judgment
- Appeal
  - Mandamus
  - Certiorari

# Example of a Complaint

- From TREC Legal Track 2010, Complaint K
  - Hypothetical lawsuit: *New Searchland Resort & Spa v. Volteron, et al.* (S.D. New Searchland)

# Fed. Rule of Civil Procedure 1

- These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . They should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.
- *Question: how would you propose to define “just,” “speedy,” and “inexpensive”?*

# Requests to Produce Documents

- Rule 34 – A party may serve on any other party a request within the scope of Rule 26(b) . . . to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control ... any designated documents, or electronically stored information ... stored in any medium from which information can be obtained directly or, if necessary, after translation by the responding party into a reasonably useable form.
- *Questions: what is ESI? What constitutes possession, custody or control?*

# Selected Changes to the Federal Rules of Civil Procedure, 2006 Amendments: Definition of ESI

-A new term of art: “electronically stored information”:

*-The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of ESI...A common example [is] email ... The rule ... [is intended] to encompass future developments in computer technology. --Advisory Committee Notes to Rule 34(a), 2006 Amendments*

# Common Forms of ESI

Email with attachments (all kinds)

Text files, powerpoint, spreadsheets, images

Voice mail, instant and text messaging

Databases, proprietary applications

Internet, intranet, dashboards, wikis, blogs,  
tweets, RSS feeds, cache files, slack space  
data, cookies

Data on PDAs, cellphones

Videoconferencing & webcasting

Metadata

# Common Sources of ESI

Mainframes, network servers, local drives  
(including network activity logs)

DVDs, CD ROMs, floppy disks

Laptops

Backup tapes

External hard drives (e.g., flash, Zip, Jazz,  
ipods, ipads, etc.)

Third party storage including in “the cloud”

# Hot topic: Metadata

- What is it?
  - Email header information (possibly hidden)
  - Proprietary features of word processing (e.g. summary fields)
  - Embedded & shadow data
  - Deleted keystrokes
  - Tracking info
  - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: inadvertent production



# Kept in the Usual Course of Business

- Rule 34(b)(2)(E) “Unless otherwise stipulated or ordered by the Court . . . A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories of the request. . . . If a request does not specify a form for producing [ESI] a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably useable form or forms....

# Rule 26(g) Certifications

- Every disclosure . . . and every discovery request, response, or objection must be signed . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information and belief formed after a reasonable inquiry – with respect to a disclosure, it is complete and correct as of the time it is made.
- *Query: what constitutes “a reasonable inquiry”? What is meant by “complete and correct”?*

# Selected Changes to the Federal Rules of Civil Procedure, 2006: Discussing ESI at the Rule 26(f) Initial “Meet and Confer” and at the Rule 16(b) Pre-Trial Conference

New FRCP Rule 26(f) conference obligations: parties must have early meet and confer to discuss “any issues relating to preserving discoverable information,” including “any issues relating to disclosure or discovery of ESI, including the form or forms in which it should be produced.” Thus, meet and confers will necessarily include:

- + Scope of ESI holdings
- + Preservation issues
- + Formatting issues
- + Access issues

Similarly, Rule 16(b) provides for pre-trial disclosure of ESI

# Selected Changes to the Federal Rules of Civil Procedure, 2006:

## Two-Tier Rule on ESI “Accessibility”

- Rule 26(b)(2)(B) – Parties need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.

- *Question: what kinds of ESI are not reasonably accessible?*

# Selected Changes to the Federal Rules of Civil Procedure: Accommodation for Routine Deletion of ESI

- Rule 37(f): Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system.

- Advisory notes: Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. "Litigation hold" concept referenced.

# Additional Selected Changes to the Federal Rules of Civil Procedure and Federal Rules of Evidence

- Rule 26(b)(5) FRCP: “Claw back” procedures are available in the event of inadvertent production of privileged documents
- Rule 502 FRE (see handout)

# Selected hot topics, 2012

- Scope of parties' duty to preserve ESI in anticipation of litigation
  - What constitutes adequate triggers?
  - Requirement of written legal holds
- Handling of social media/web 2.0 apps
- Defensibility of technology-assisted review methods (in contrast to traditional linear, manual review)

## *Case Study: U.S. v. Philip Morris* – Overall Discovery

- 1,726 Requests to Produce propounded by tobacco companies on U.S. (30 federal agencies, including NARA) for tobacco related records
- Along with paper records, email records were made subject to discovery
- 32 million Clinton era email records – government had burden of searching



*Case Study: U.S. v. Philip Morris (con't)* –  
Employing a limited feedback loop

- **Original set of 12 keywords searched unilaterally**
- **After informal negotiations, additional terms explored**
- **Sampling against database to find “noisy” terms generating too many false positives (Marlboro, PMI, TI, etc.)**
- **Report back and consensus on what additional terms would be in search protocol.**

## Example of Boolean search string from *U.S. v. Philip Morris*

- (((master settlement agreement OR msa) AND NOT (medical savings account OR metropolitan standard area)) OR s. 1415 OR (ets AND NOT educational testing service) OR (liggett AND NOT sharon a. liggett) OR atco OR lorillard OR (pmi AND NOT presidential management intern) OR pm usa OR rjr OR (b&w AND NOT photo\*) OR phillip morris OR batco OR ftc test method OR star scientific OR vector group OR joe camel OR (marlboro AND NOT upper marlboro)) AND NOT (tobacco\* OR cigarette\* OR smoking OR tar OR nicotine OR smokeless OR synar amendment OR philip morris OR r.j. reynolds OR ("brown and williamson") OR ("brown & williamson") OR bat industries OR liggett group)

## *U.S. v. Philip Morris E-mail Winnowing Process*

- 20 million → 200,000 → 100,000 → 80,000 → 20,000
  - email hits based relevant produced placed on
  - records on keyword emails to opposing privilege
  - terms used party logs
  - (1%)
- 
- → A PROBLEM: only a handful entered as exhibits at trial
  - → A BIGGER PROBLEM: the 1% figure does not scale

# A Hypothetical

- 1 billion emails, 25% with attachments
- Reviewed at 50 per hour
- Would take 100 people, 10 hrs per day, 7 days a week, 52 weeks a year ....

54 YEARS TO COMPLETE

- At \$100/hr, \$ 2 billion in cost
- Even 1% (10 million docs) ... 28 weeks and \$20 million in cost .....

**Overview of the PROFS Case:**  
***Armstrong v Executive Office of the President***

## The Original Email Case... Armstrong v. EOP, 1 F.3d 1274 (DC Cir 1993)

Govt Computer News 7/1/93

# How e-mail almost halted an inauguration

*Journalist makes a federal case out of preserving President Reagan's e-mail as government records*

BY CHRISTOPHER J. DODDER  
GOS Staff

As Ronald Reagan spent his last night in the White House in January 1989, veteran journalist Scott Armstrong sat in a nearby federal courthouse. There, lawyers argued that Armstrong was preventing George Bush from moving in.

Armstrong had filed suit to preserve e-mail stored on White House systems, but Justice

this information in order to inaugurate a president of the United States," Armstrong said. "That night, they were going to destroy everything."

Barrington Parker, the judge who, within hours, would issue the initial but pivotal order barring Reagan administration officials from destroying the electronic files, responded with a "deep, bellowing laugh," Armstrong recalled.

But Justice lawyers continued to argue that the issue was similar to a landlord-tenant dispute. If the judge sided with Armstrong, it would be as if a tenant planned to move out but the court had ordered that the furniture be kept there and the new furnishings couldn't be moved in, the lawyers argued.

### Eve of destruction

That night, Parker issued a temporary restraining order preventing destruction of the e-mail and forced the two sides to reach an accommodation. The White House would copy the data and maintain it pending resolution of the case.

At the time, few would have expected that electronic documents would block an inauguration, but few observers then foresaw how

importance of e-mail," said Miriam Nisbet, special counsel for the Archivist of the United States. "There's nothing like a federal case to get your attention."

The National Archives and Records Administration in late August issued guidelines to agencies about how to deal with preserving e-mail as records. "This guidance was issued as part of an overall response to the Armstrong case," Nisbet said.

"But we certainly would have issued guidance on the management of electronic records," she said.

"That would have included the management of e-mail. It's hard to say what we would have done" if there hadn't been a suit.

The very idea that electronic documents are records was forced upon the federal government by this case," said Michael Tankersley, a lawyer with the Public Citizen Litigation Group in Washington who has handled the Armstrong case.

### Changed position

But some observers suggest that the case

"There has been an evolution in the use of e-mail. Because of that, there has been a consensus to have record-keeping guidance," said Jim Hastings, a NARA employee who educates other agencies' employees about electronic records management.

There has been a meeting of the minds regarding e-mail, Justice lawyer Jason R. Baron said recently. "In 1995, it is clearly the

case that there is just an explosion of use of e-mail in the federal government," he said. "It is clear that e-mail can be federal records."

**"It's hard to say what we would have done" if there had not been a suit, Nisbet said.**

Many involved with the Armstrong case see the admission that electronic messages can be records as a victory in itself.

On a basic level, Armstrong said the case has done what it set out to do: save Reagan and Bush administration documents.

Although still critical of the government's propensity to operate behind closed doors, he said the case has changed the "bizarre, Luddite" way the government had been dealing with information.

"They now understand that records are born



# THE THREE ARMSTRONG INJUNCTIONS

- The initial temporary restraining order covered Reagan Admin. PROFS tapes (1989)
- The second temporary restraining order covered Reagan and Bush era PROFS and All-in-1 tapes (1992)
- The district court's permanent injunction covered all “electronic communications systems” and their backups (1993)

# THE ARMSTRONG ORDER

## January 6, 1993

“ \* \* \* ORDERED that Defendants are enjoined from removing, deleting, or altering information on their electronic communications systems until such time as the Archivist takes action pursuant to . . . the Federal Records Act to prevent the destruction of federal records, including those records saved on backup tapes.”





# TYPES OF BACKUP MEDIA CAPTURED IN THE ARMSTRONG LITIGATION

- Open reel
- 4 mm
- 8 mm
- DLT
- 3480 cartridges
- Pinnacle drives
- Hard drives

# ISSUES ADDRESSED IN ARMSTRONG

- E-mail messages can be federal records
- Agencies must manage the unique “electronic” e-mail record, as it is only a “kissing cousin” of a hard-copy printout
- Agencies must provide for some form of periodic monitoring by records managers to ensure correct application of guidance

To: List A

From: ON

Date: April 11, 1987

Re: Email: paper vs. electronic copies

Unless the software defaults to a different configuration, neither the name of the sender nor the names of the the recipients are provided in an intelligible form. Is this all that the storm and furor have been about? What other data & metadata existing on the “live” electronic version must be captured?

cc: John Smith, Jane Doe, Gary ....

# ISSUES ADDRESSED IN ARMSTRONG (cont'd) “Who Knew What When”

- Transmission and receipt data must be managed along with content
  - Names of senders, recipients
  - Distribution Lists
  - User Directories
  - Receipt data, including acknowledgements of receipt, where requested

# How the EOP Implemented Armstrong

- Issued recordkeeping guidance covering applications on existing e-mail systems
- Customized existing proprietary software to perform electronic recordkeeping functions
  - Introduced front-end ‘prompts’
  - Built in automatic monitoring functions
- Restored and reconstructed e-mail residing on backup tapes

# In class exercise

- You have been appointed Records Officer for a large cabinet Department in the Obama Administration.
- A lawsuit against the Department has been pending for a few months which would affect several agencies and bureaus in the Department (but not all of them).
- Tomorrow, when you walk in to work, you will find out that a federal magistrate judge (the Hon. Judge Grimmer) issued a preservation order late yesterday requiring that all documents, records, and evidence in any form be preserved relevant to the lawsuit.
- A senior lawyer in the General Counsel's office called you just now to ask what your plan of action is for dealing with this litigation crisis. What do you tell him?