eDiscovery Planning for Trial Attorneys

Plaintiff lawyers must carefully and continually evaluate their case, budget their time investment and manage client expenditures. This is particularly true for document- or discovery-intensive cases and when contingency representation is involved.

The following checklist offers practical advice for trial lawyers on obtaining the evidence needed to successfully build their case and effectively advocate for their clients.

For a free consultation with a Lexbe eDiscovery professional, call **+1 800-401-7809 x22** or email us at sales@lexbe.com.

Strategy & Planning

- ☐ **Establish your theory of case early.** From your theory, you can strategize and map your key players, case timeline/events chronology, relevant location(s) and what kind of documents and other ESI (electronically stored information) you need to locate in order to build your case.
- ☐ **Identify key players.** Your case boils down to people - the key players - whose words, deeds and/or actions need to be proven to win your case. Identify these parties and whether they are "custodians" (i.e., holders or owners of relevant documents and other ESI) and determine which device(s) might hold that data.
- ☐ **Identify relevant events and intervals.** Beyond knowing key dates, understand that ESI will have dates associated with it that may not necessarily indicate when it was used.
- ☐ **Identify any non-parties holding potentially responsive ESI.** Relevant case data is not limited to parties and their employees and agents. Identify early on any additional companies or individuals that may be custodians of important ESI, including service providers and contractors such as the party's internet service providers.

Evidence Preservation & Collection

- ☐ **Establish when the duty to preserve ESI begins and document in a hold letter.** Preservation dates and hold expectations should be clearly identified and communicated to opposing counsel. Hold letters should be specific to ESI relevant to the case (not boilerplate).
- ☐ **Pinpoint which data is at greatest risk of alteration or destruction.** Many companies have document retention policies in place that could destroy ESI, such as automatic email deletion schedules and rotating backup archives. Identify procedures for replacing computers, smartphones and other hardware, and ensure that ESI will be preserved.
- ☐ **Determine whether any ESI requires forensically sound preservation.** Depending on the type of case you are working on, and particular case or custodian circumstances, a "forensically sound" preservation may be appropriate. While more expensive to implement, this collection process preserves an exact, reliable, bit-by-bit copy of a computer drive, including deleted materials.
- ☐ **Identify and address any legacy systems.** Often old, damaged computers end up on an IT shelf rather than discarded and could contain relevant ESI. Clarify how these systems will be identified and processed.
- ☐ **Clarify how VM (voicemail), IM (instant messaging) and other challenging ESI will be handled.** Producing parties often ignore transitory data such as IM and VM unless they are specifically requested.

eDiscovery Planning for Trial Attorneys

Lexbe eDiscovery Checklist

- ☐ **Identify important metadata and expressly state how it is to be preserved, extracted and produced.** Metadata can contain crucial evidence such as the author of a document, creation date, alteration date(s), and Bcc: email addresses. Be aware that the "created" date of a document may refer to the date it was collected or copied, rather than the date on which the original file was written.

- ☐ **Look beyond data retention policies and practices.** Do not blindly trust that stated document retention policies have been followed to the letter when trying to determine whether data relevant to your case may still exist. There may yet be backup servers, personal devices or drives that contain the ESI you need.

- ☐ **Identify current and prior email and business applications used.** Email is often where the most valuable ESI can be found. Familiarize yourself with the details of how the most common business email clients store data and be sure to request the best form of production for that particular client or business application.

- ☐ **Identify relevant databases and clarify how their content will be discovered.** Databases are often integral to a company's function and discovery could interrupt systems. Be specific about what ESI you need, why you need it, and in what format. Database discovery is often handled by running specific reports.

- ☐ **Identify the process for dealing with ESI considered "*reasonably not accessible*".** Identify this type of ESI early in your case and be prepared to offer techniques or negotiate cost sharing. In the event that court intervention is needed, secure a commitment from opposing that the data will be preserved until the court is able to rule.

Culling, Processing & Production

- ☐ **Identify and agree (if possible) on keywords the producing party will use to cull documents.** Search should be an iterative process and can take several passes to identify relevant keywords, especially company jargon or industry abbreviations. Factor in adequate time for understanding and negotiating the filtering process that is used.

- ☐ **Agree on the removal of duplicate data.** Deduplication is important in reducing the size of the production you receive. Having opposing counsel manage deduplication saves you time and money.

- ☐ **Clarify the search techniques that will be used to identify responsive or privileged ESI.** Test the search and filtering mechanisms the producing party will use. If flawed, you can and should change the method.

- ☐ **Determine what forms of production are offered and sought.** The requesting party has the right to designate the form of production, but the producing party can object. Ensure that the form(s) you select are searchable and contain relevant metadata. Keep in mind the capabilities of your review platform.

- ☐ **Request natives if necessary.** Requesting documents in their native format is important for ensuring that all relevant information is received. Native files can be Bates numbered to correspond with imaged TIFFs or PDFs.

For more information, see "*Piecing Together the eDiscovery Plan: A Plaintiff's Guide to Meet and Confer*" by Craig Ball (originally published by Trial Lawyer Magazine). Mr. Ball is a legal tech educator and a noted authority on eDiscovery and computer forensics.