

Electronic Discovery

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Topics Not Covered

- Best practices for E-mail use and retention in the ordinary course of business
- Records Disposition Schedule specifics

Topics Covered

- E-Discovery Defined
- Important Changes to the Federal Rules of Civil Procedure
- Interim Measures to ensure good faith compliance

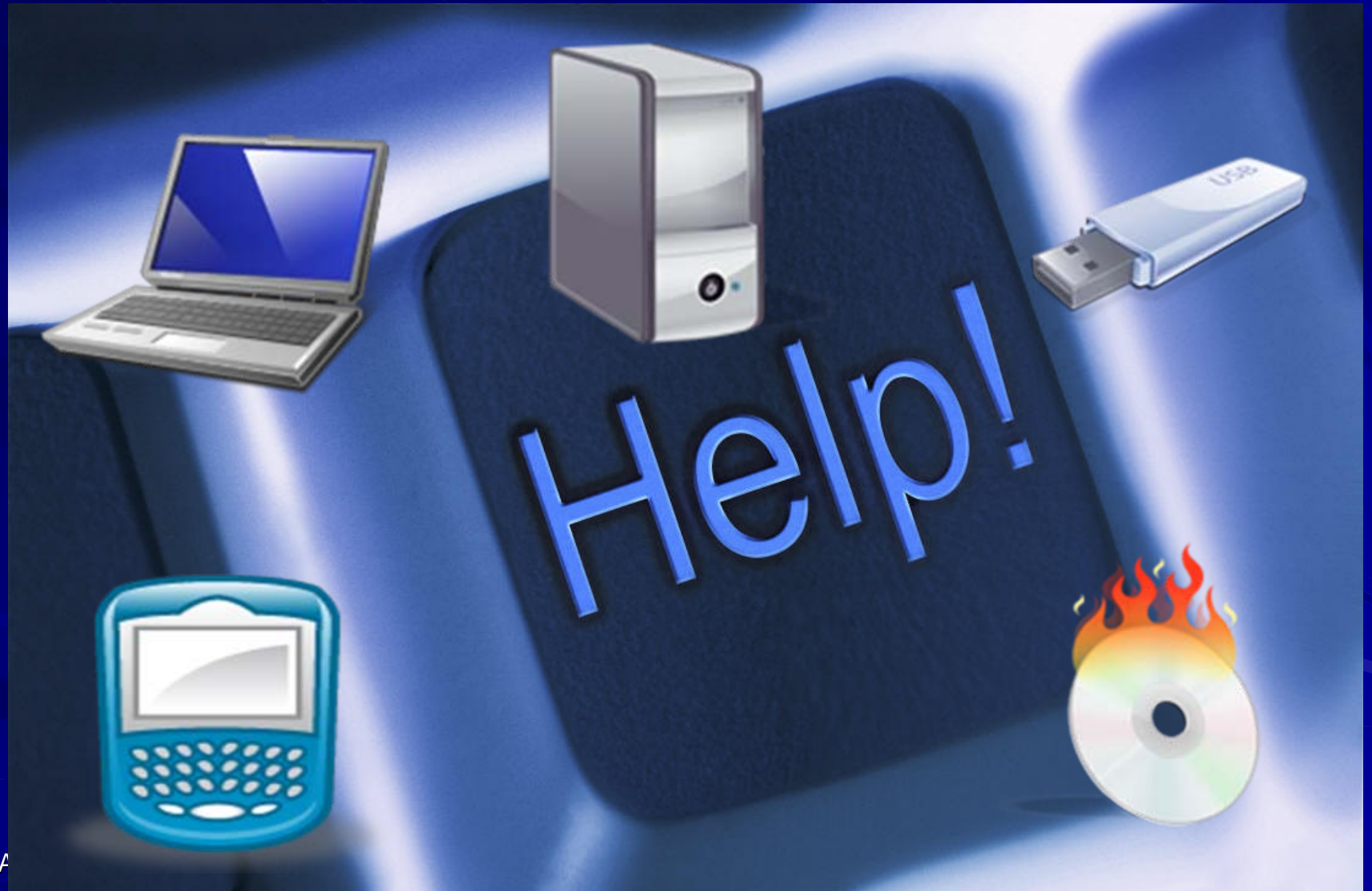
What is Discovery?

- The exchange of information during litigation
- Documents, things, witnesses

Life As We Knew It



The World Today



Electronically Stored Information (ESI) is Everything Electronic

- Email
- Word processing
- Calendars
- Instant Messages
- Spreadsheets
- Video/Photos
- Voice recordings

Lawyer's Duties



- Familiar with document retention policies
- Familiar with IT architecture



Changes to the Federal Rules

- Identify ESI
- Produce ESI
- Safe Harbor



Identifying ESI

Rule 26(a) Initial Disclosures

- A party must provide to the other parties a copy of, or description by category and location of, all documents, *electronically stored information*, and tangible things in its possession, custody, or control that may be used to support its claims or defenses

Identifying ESI Cont.

- Rule 26(f) Conference of Parties
 - Early meeting to discuss discovery
 - Preserving discoverable information
 - Disclosure or discovery of ESI
 - Form in which ESI will be produced

Identifying ESI Cont.

Rule 34(a) Request for Production

- A party may request production of documents, *including ESI*
- This covers evidence beyond Rule 26 disclosures
 - Anything potentially relevant to the claim

Identifying ESI Cont.

Rule 26(b)(2)(B)

- A party need not produce ESI that is not reasonably accessible because of undue burden or cost
- But, we may still need to preserve the ESI!

Reasonably Accessible Data



- “Regularly and routinely available in a party’s business operations.”
- Accessible data is generally stored in a readily usable format that need not be restored or otherwise manipulated to be usable

Not Reasonably Accessible



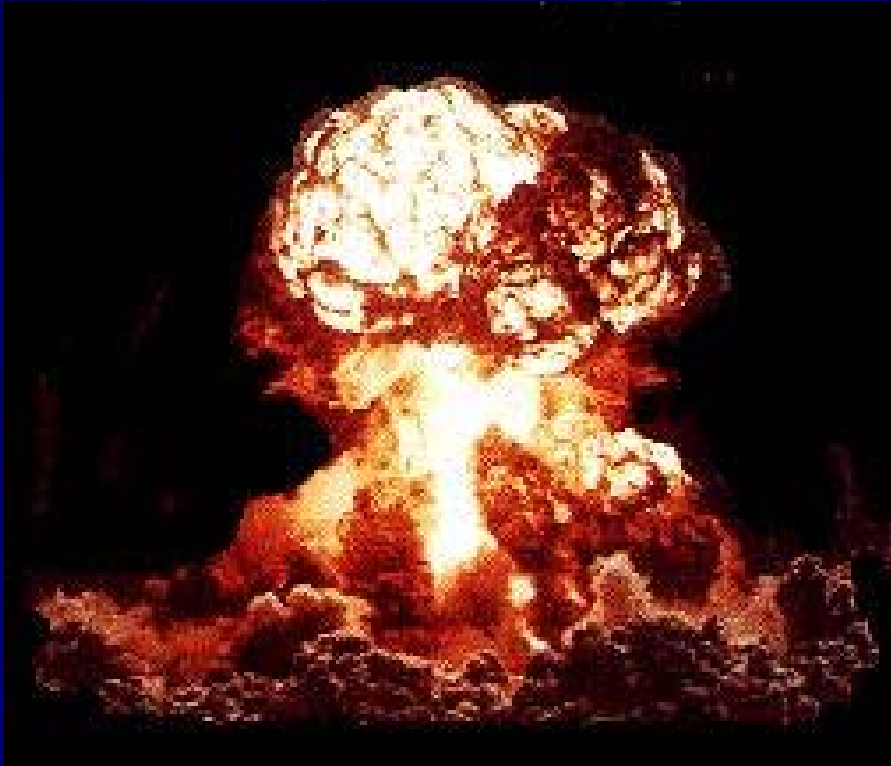
- Back up tapes for disaster recovery only
- Don't use back up tapes for archival purposes
- Only store back up tapes for the shortest time necessary to restore services in the event of a true disaster
- Legacy data from obsolete systems

Safe Harbor

■ Rule 37(f)

“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system.”

What's the Worst That Can Happen?



- Judgment
- Adverse Finding
- Adverse Inference
- Money

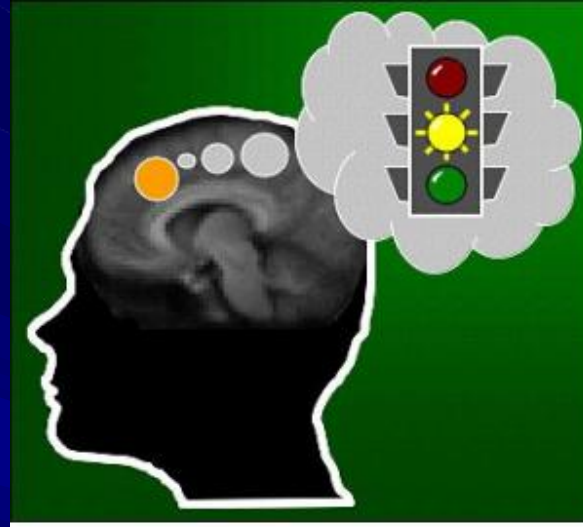
What Now?

- UCOP/OGC E-Discovery Task Force
- UCLA Interim Measures
 - Evolving

UCLA's Interim Measures

1. Identify when duty to preserve arises
2. Inquire regarding “key players” and existing data
3. Provide notice of duty to preserve
4. Decide what to retain
5. Collect and retain data
6. Create and maintain written records of efforts

1. The Duty to Preserve Evidence



“reasonably should know that the evidence may be relevant to *anticipated* litigation”

Reasonably Anticipated Litigation

- Employee complaints or threats - **Sometimes**
 - Example: Employee told employer's EEOC officer she was "fed up" with alleged sex discrimination and was contemplating class action; and officer advised attorney of possible class action. *Capellupo v. FMC*, 126 F.R.D. 545 (D. Minn. 1989)
- Potential termination of employee - **Sometimes**
 - Example: Employee's supervisor and co-workers discussed in Emails marked "attorney-client" privilege potential termination of employee. *Zubulake IV*, 220 F.R.D. 212 (S.D. N.Y. 2003)
- Accidents on campus
- Work with appropriate campus offices to make determination
 - Human Resources, Labor Relations, Risk Management, Counsel

Reasonably Anticipated Litigation Factors to Weigh

- Court complaint filed
- Threat with some degree of specificity
- Individual's litigation history
- Press or industry interest
- Demand letter received
- Specific and repeated inquiries/complaints
- Complaint with EEOC, DFEH, OCR

2. Conduct Inquiry

- Who are the “Key Players”
 - Not just in the department
 - HR, Benefits, Workers’ Comp, Whistleblower Office
- Who are the relevant IT representatives
- What active data exists with key players
- What are the back-up tape use and retention procedures
- Decision made about retention of ESI

3. Provide Notice of Duty to Preserve

- Send letters to all identified people
- Send letters to relevant IT representatives
- Receive confirmations from all recipients
- Send reminder notices periodically

4. Decide What to Retain

- Save all potentially relevant ESI on active systems
 - Local Area Network (Desktop)
 - Email Server
 - Hard-drive
 - Portable storage

4. Decide What to Retain Cont.

- Back-up tapes [Case-by-Case assessment]
 - Duplicative of active data:
 - If active data is already being preserved, then recycling of tapes can continue
 - *SOLE* source of potentially relevant data:
 - If ESI on back up tapes is not available from readily accessible sources, then tapes may need to be preserved
 - Used as archive:
 - If data on tape is made available upon request, it is similar to active data
- Preserving does not necessarily mean producing

5. Collect and Retain Data

■ Current Procedure

- Each person conducts search for ESI and hard-copy files
 - Segregate active data into identified folders
 - General communications
 - Privileged communications
 - Any newly created data related to the potential claim is moved into these identified folders periodically
 - IT representative preserves folders and notifies designated record-keeper
 - If back-up tapes must be preserved, IT representative will remove the relevant tape(s) from rotation and preserve
- **Caution:** Procedures may need to be altered to accommodate different IT architectures

Safe Harbor

- Before litigation is reasonably anticipated, routine operations that destroy ESI are okay
 - If recycling of back-up tapes is part of routine operations, its okay
 - If deleting accounts is part of routine operations, its okay

Safe Harbor Cont.

- After litigation is reasonably anticipated:
 - Case-by-case determination for historical back up tapes
 - If measures to preserve active data are implemented, new back-up tapes can be recycled according to routine operations
- **CAUTION:** When employee under duty to preserve is separated, you must ensure that the ESI continues to be preserved!

6. Create and Maintain Written Record

- Maintain written record of:
 - Retained reasonably accessible ESI
 - Retained ESI not reasonably accessible
 - ESI not retained and reasons for decision
 - Notices and receipts of preservation requests
 - Confirmations of preservation
 - Notices of release from preservation duty

Conclusion

- Know your current ESI retention practice
- Implement sensible ESI retention practices
- Preserve ESI and hard-copies
- Work as a team



Interim Measures Link

- Administrative Policies and Procedures Manual (APPM)
- Other Policies, General Administration
- <http://www.adminvc.ucla.edu/appm/public/ESI.pdf>