

ESI Protocols Workshop

ACEDS Midwest Chapters Series
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You receive notice via your alert system that a new complaint has been filed against XYZ Corporation, a client that you have represented previously, for breach of contract. Although you have not handled a litigation matter for the Company since before Covid (2020), in the previous matters that your Firm handled, you had a good understanding of the data sources the client maintained, You do not know what changes have been made to their infrastructure since 2020.

The Complaint alleges that Plaintiff ABC Corporation contracted with XYZ Corporation to design and implement a company-wide procurement and distribution system for all of ABC Corporation's factories and distribution facilities across the country. The project, bid on and run by XYZ, involved the design, development, configuration, and implementation of multiple SAP modules to create a unified procurement and distribution process following a merger that resulted in the newly formed ABC Corporation. The Complaint alleges the contract was signed in 2020, that the parties worked together (with additional third party subcontractors) for two years, and the implementation was abandoned in late 2022 following multiple issues with rollout. ABC Corporation paid XYZ Corporation in excess of \$50 million during the course of the work performed and seeks repayment for non-performance and the failure to hit milestones outlined in the contract. The original contract, attached to the Complaint as an exhibit, included payment terms in excess of \$100 million.

SAP is an enterprise resource planning software company that develops software modules that can be configured to the way a company does business. Multiple modules – in this case procurement and distribution – would be combined to allow for automation and management of the products needed to manufacture the products that ABC Corporation builds, sells, and distributes to its distributors for sale to retail locations, who then sell to the consumer.

As you are contemplating how best to reach out to the client, the client reaches out to you and tells you about the litigation, and that you are one of three firms that they are asking to talk with about representing the Company.

Questions:

- Do you have any questions or advice for the client during this call? What are they?
 - Discuss legal hold - make sure records are held for both merged companies
 - Have you sent out a legal hold
 - Do you have a current data map

- When did the duty preserve arise
 - What did the client know when, is the complaint the first time they learned of this
 - What steps have you taken to identify and preserve?
 - Third party contractors to be advised and potential legal hold
- Scope
 - Number of custodians
 - Number of locations
 - Do they know data sources at this point, have they identified them?
- What ediscovery issues jump out from the fact pattern?
 - Use of collaboration tools
 - Third party discovery
 - Scope of preservation
 - Cross-border issues – data in other countries
 - Cloud based data retention policies
 - Names for conflicts
 - Mobile devices? Retention?

Hypothetical Part #2

You and your team put together a proposal for the client and you are selected as counsel. (Congrats!!) You have 30 days to answer the complaint (yes, there was an extension). You attend an initial strategy meeting with the client that includes two attorneys from your team and a paralegal (it's a hypothetical), in-house counsel at XYZ, the procurement lead responsible for the contract for XYZ and the IT Director from XYZ responsible for the project and contract implementation.

The IT Director tells you that communications were done with the entire development team for the project using Slack, including multiple subcontractor third parties. A separate Slack instance was established for the project that had more than 150 users, included more than 100 channels, permitted direct messages and had more than 30 integrations with other applications including Google Apps and Microsoft Teams as well as project management, whiteboard, and other tools for managing the project. The Director tells you that the entire instance has been archived and maintained, but can be made active for counsel to review. XYZ maintains an Enterprise license to Slack and is widely used for almost all of their projects.

Correspondence with executives and others internally and at ABC Corporation was done via email, but when asked, he concedes that he texted with several members of his team and they used a WhatsApp chat to talk about the project "offline" from Slack so it was not part of the project documentation. The Director also informs you that XYZ Corporation moved from Microsoft Exchange to Microsoft email and Teams very quickly when Covid happened in Spring 2020 to better allow for remote work.

Questions

- Do you anticipate wanting to have an ESI protocol in place for this matter? Why?
 - Yes
 - What is the scope of the ESI protocol? Need for form of production for sure, when go into more detail then negotiating for months and locking yourself in on what you have
 - Evaluate simple vs. complex protocol
- What issues does this fact pattern raise that should be considered when thinking about an ESI protocol for the case?
 - Privilege and clawback – add 502(d) to be in court ordered document
 - Should that be agreement among counsel or court approved and should it be a part of the protocol
 - If it's ordered, you could be subject to sanctions under Rule 37(b)
 - Judge Peck says don't enter as an order, enter 502(d) separately
 - Volumes can be huge
 - Data loss –
 - Migration of data via email, done very quickly during Covid, here from email to Microsoft cloud email
 - Mobile devices
 - Status of custodians?
 - For employees that left, exit interviews and preservation
 - What preservation done
 - WhatsApp?
 - Data retention/collection strategy
 - SAP collection
 - Source code
 - Slack
 - Links to external documents
 - Hyperlinked files
 - Emojis
 - Collection of what channels
 - WhatsApp
 - Potential spoliation
 - What data exists and where
- Given the large number of custodians, what do you need to do or flush out to approach the issue of custodians in the protocol? What are some approaches you can use?
 - Re-confirming legal hold obligations
 - Identify any sources of ESI that might be combined
 - Sampling and identification
 - Custodial interviews
 - Search terms for each individual platform/source of ESI

- What are the issues you see with search terms for the data here and how would you address those in a protocol?
- How would you handle mobile device data that is implicated in the protocol?
 - WhatsApp
 - Text messages
 - Targeted collection for certain data sources for date range
- What are the specific issues for each source of data that you know about?
- What are the implications of having third party subcontractors involved for data and the protocol? How would you handle them?
 - Understand the relationship with your client
 - Terms of the agreement, who owns data
 - What their access to the data is
 - Possession, custody or control
 - Who has access to the Slack
 - Audit logs

Hypothetical Part #3

You begin conducting custodian interviews of the most significant custodians and you review the Slack instance with the IT Director. Both tell you that the parties shared documents via links in Slack, Teams and email, that ABC Corporation uses Google Apps and that the parties had their own made up emojis that they uploaded to Slack and used to share responses to what was happening in the project. One custodian you speak to tells you that there were dumpster fire emojis and various other emojis involving flames and face palming that were shared in the last year of the project as it became apparent that timelines were not being met and the project was not going well.

Questions:

- What additional issues do these discussions bring to light?
 - What timeframe triggers the lit hold
 - Dumpster fire emojis as potential trigger
 - Determine meanings of emojis
 - Talk to custodians
 - Testing collection of emojis
- Should these be addressed in the ESI protocol? How?
 - Form of production
 - Emojis – dumpster fire may trigger duty to preserve
 - Slack
 - Hyperlinked Files
 - Search terms
 - Internal communications – producing party identifies

- External – ask your client what was used
- Narrow them down
 - Run search term report first – hit reports
- Identify date of preservation
- Process for custodians or leave out
- Metadata for each application
- Cooperation
- Get out of jail free card – good cause

Themes

- Start as early as possible to identify issues that will need to be addressed around data in the litigation, and what strategic decisions you need to make about whether to address them in a protocol.
- If the client does not already have one, use the information you learn in the litigation to develop a mini data map that includes Source of ESI, location, retention and liaison for each one you identify.
- Your protocol should fit YOUR case. Starting with a template is helpful for form, but content should always be re-evaluated and updated.
- Be sure to include a Get out of jail free pass. Include language that allows you to modify the protocol for good cause.

Sample Protocol to Review

- [In re Uber Techs., Inc. Passenger Sexual Assault Litig.](#)
- What I like about it
 - Very transparent
 - Easy to understand language
 - Establishes open dialogue between parties about what exists
 - Reduces potential for motions on process
 - It builds off of case law on issues already decided by courts – specifically hyperlinked files
 - Includes good cause language
- What it could have added
 - Dealing with search terms for different applications
 - 502(d) language directly in it