



**Hardening your systems
against litigation**

LISA '07

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Overview

- Why litigation should be considered an IT risk
- Overview of litigation
- How you can help or hurt
- Some examples
- What works and doesn't work

Disclaimer

- I don't work for Microsoft
- While I am an attorney, I'm not **your attorney**
 - **This is not legal advice**
 - **This talk is for informational and entertainment purposes only**
- **Names have been changed to protect the guilty**
- **U.S. Federal law will be discussed. Your local jurisdiction may have different rules**
- **This area of law is in flux. What is good law today may not be next month.**

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Civil Litigation as IT risk

- Allows outsiders to access sensitive information
- Exposes you and your organization to potential financial losses
- Litigation tends to distract organizations

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Quick overview of litigation

- Civil lawsuit
 - Some dispute
 - Starts with a complaint
 - Which lists all legally supported claims
 - Discovery
 - Each side produces all 'responsive' information in their hands
 - Good faith & sanctions if not followed
 - Overreach and mistakes are common
 - Each side gets to depose (interview under oath) selected individuals from the other side
 - Subpoena (information from third parties with relevant info)_
 - Settlement/trial/arbitration

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I'm not a lawyer, what's all this to do with me?

- Federal Rules of Civil Procedure
 - Ground rules for civil suits in Federal System
 - State courts borrow or adopt Federal rules
- FRCP 26 (Discovery) (named party)_
 - Automatic disclosure for all facts supporting claims & defenses
 - Disclosure of all 'custodians' and sources of 'Electronically Stored Information'
- FRCP 45 (Subpoena) (third party)_
 - Court backed demand to a third party
- Limitations
 - 'overly burdensome' in relation to controversy
 - privileged information

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What is ESI?

- Still open to interpretation
 - Firm rulings on:
 - Email
 - Digital documents (Office, PDF...)_
 - Voicemail (if stored)_
 - Backup tapes (may be unduly burdensome)_
 - slack/unallocated/deleted space on drives
 - Some precedent on
 - Contents of RAM
 - Forced logging on public servers
 - *Torrentspy*

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How lawyers think about ESI

- 'Custodian' based
 - What people have control over/created what?
- Email & Edocs
 - Email- self explanatory
 - Edocs- all human understandable files
 - MS Office, Pdf...
- Presumption of printability
 - But- Sometimes lawyers get creative
 - Litigation tactics
 - Relevant info might be there

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So, what happens with discovery?

- Litigation hold
 - Preserve all potentially responsive documents & data
- Collections
 - Identify who may have what documents
 - Copy and collect
 - Very broad sweep
- Rule 26 discovery conference
 - Each side discusses the sources and people they have, sets schedule and format(s)_
- Privilege & responsiveness review
- Production
- Substantive review

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Why is litigation so expensive?

- Every document, email or file gets reviewed
 - Once for privilege & responsiveness
 - Once again for substance
 - Substantive documents are re-reviewed in preparation for depositions/trial
- Review is performed by attorneys or J.D.s
 - \$90-\$150/hour
 - Supervised by more senior attorneys & partners (more \$)_
- Not much incentive to reduce costs
 - Risk adverse lawyers
 - High stakes litigation
 - Cost-plus billing

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Why litigation is expensive, continued, or the \$120 email

- Alice sends an email with a three page .doc attachment to five people
- Alice's company is in litigation, and Alice & her group is relevant to the suit
- Each email and attachment reviewed for responsiveness
 - Responsiveness review ($1 * \$1.50/\text{min}$)(4 pages)(6 people)=\$36
 - Marked responsive- sent to substantive coding ($1.5 * \$1.50/\text{min}$)(4 pages) (6 people)= \$54
 - Re-reviewed by senior associate ($6 * \$5/\text{min}$)= \$30
- I'm not including the costs of any responses to Alice's email, or if the email was actually important.

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That was the mundane, now the terrifying

- Discovery sanctions
 - Failure to produce or preserve discoverable material
 - Depending on severity can result in
 - Some of other side's legal fees
 - Other side's expert fees to recover data
 - Fines
 - Adverse inference
 - Dismissal of claim or defense
 - Dismissal of lawsuit (or loss of suit)_

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Discovery as privacy/security risk

- Unclear borders between personal and business
 - Working from home
 - Personal at work
- Broad discovery sweep to law firm
 - Law firm may have inadequate security
 - Third and fourth party vendors may have inadequate security
 - The loyalty of short term contractors may be questionable
- Humans make mistakes
 - Personal info slipping past privilege/responsiveness review

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Ok, you have my attention. But what can I do?

- Prelitigation
 - ESI audit
 - Identify all sources of ESI and determine their likely contents
 - Consider everything
 - Retention/destruction policy
 - This is harder than it sounds
 - Field's law of unintended consequences
 - ex- Stupid retention policies means printed email
 - Following your own policy
 - Use policies
 - Remote access with personal PCs
 - use of personal email accounts for work

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More pre-litigation ideas

- Implement a collection plan or system
 - End-user PCs
 - Remote collection is nice
 - You may already have the tools
 - Forensic systems can be clunky and unreliable IMHO
 - Consider security risks- anything that can collect can be exploited
 - File servers
 - Search and collection packages out there to fit all sorts of budgets
 - But if you're creative, you can go cheap
 - Consider security risks- index capability has to be able to access all user files

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Even more pre-litigation ideas

- Backup systems
 - Consider creating lit hold/collections routines
 - Apply document retention policy to backups
 - Including those one-offs only you know about
- New equipment purchases
 - Consider ease of preservation/collection

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Next stage- Litigation likely or filed

- Litigation hold
 - You'll have to test and enforce it
 - Cooperate with the lawyers (but make sure everyone's realistic)
 - Now may be the time to ask for some additional storage capacity- doesn't have to be high performance or availability
- Rule 26 conference
 - Determine cost & time estimates to pull data from obsolete/odd formats/backups
 - Assist in working out technical plan for producing info
 - Be prepared to call bullshit on opposing side
- Select third party vendors
 - Security audit if you're paranoid

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Litigation commencing

- Collections
 - Locate sources of responsive ESI
 - Collect with minimal intrusiveness
- Interact with third party vendor for cost-cutting measures
 - De-duplication of identical files
 - Consider scope limitation on your end as well
 - Simplifying forensics if necessary
 - Assist with unusual formats
- Identify and quantify 'unduly burdensome' issues
 - Restoration of old PCs
- Depositions
 - Explain what you did to collect ESI

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A few cautionary tales

- ABC Insurance Co.
 - Class action suit filed in '05
 - Running EMC² SAN with Tivoli Storage Manager at 30% capacity
 - Overbroad and vague lit hold order
 - Work groups and disk shares not 1to1
 - Individual users have multiple and inconsistent shares
 - Legal team says save & preserve all of it- repeated weekly full backups
 - Lead sysadmin quits
 - Sees writing on wall
 - What could have fixed this?
 - Ongoing dialog between IT & Legal

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A few things that work...

- Preparation
 - Add discovery prep to your existing audits
 - Save user & permissions lists
 - Build systems to search against existing shares and test
- Sensible and enforceable document retention policies
 - Decommissioning procedures are now important
- Two way communication with regulatory and legal departments
 - Try walking over and introducing yourself
- Documentation and policies
 - If you actually do so

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...and don't

- Fiefdoms within and around the organization
- 'Leaving things be'
- Documentation and policies
 - If they aren't followed

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Questions?

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