Everything You Wanted to Know About ESI and E-Discovery but Were Afraid to Ask

Presented By:

Jason M. Pistacchio
Attorney
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, Oregon 97205
503.323.9000
jpistacchio@cvk-law.com

Gregory S. Johnson
Attorney/Legal Technologist
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201
509.455.6000
greg.johnson@painehamblen.com

CVK ATTORNEYS COSGRAVE VERGEER KESTER LLP

PAINE HAMBLEN LLP ATTORNEYS

What is ESI?

(Electronically Stored Information)

- Information Stored on:
  - Desktop computers
  - Network computers
  - Voicemail systems
  - Telephones
  - Cell phones
  - PDAs or Blackberries
  - Home computers
  - Laptops
  - Electronic time clocks
  - Portable storage devices
  - Web sites / blogs

- Data Such as:
  - Documents
  - Spreadsheets
  - PDF files
  - Emails
  - Metadata
  - Voice mail messages
  - Text messages
  - Telephone logs
  - “Deleted” data
  - Data fragments
  - Vehicle black boxes

What is ESI?

(Electronically Stored Information)

- Vital Statistics
  - 31 billion emails are sent daily
  - 95% of all company data exists only as ESI – i.e., no hard copy
  - Typical desktop computer includes an 80GB hard drive (80,000,000,000 Bytes); Typical laptop hard drive is 40GB

Data Size	Pages	Boxes	Feet	Example
1 MB	80			
CD (~700 MB)	56,000	11.20	18.6	
DVD (~4.7 GB)	376,000	75.2	125.3	
Hard Drive (80 GB)	6,400,000	1,280	2,133	New World Trade Center Tower = 2,000 feet
Hard Drive (250 GB)	20,000,000	4,000	6,667	Mt. St. Helens = 8,300 feet
Hard Drive (1 TB)	80,000,000	16,000	26,667	Mt. Everest = 29,000 feet

Why Does ESI Matter?

- Federal Courts
  - The Federal Rules of Civil Procedure have incorporated new definitions and standards for discovery of ESI
  - Amended rules: FRCP 16, 26, 33, 34, 37, and 45, as well as Form 35
  - New rules became effective 12/1/2006

- State Courts
  - State courts are adapting the standards set by federal cases and rules
  - Most states already account for ESI or are modifying procedural rules to account for ESI discovery

- *Zubulake* Cases (*Zubulake I,* 217 FRD 309 (S.D.N.Y. 2003); *Zubulake IV*, 220 FRD 212 (S.D.N.Y. 2003); *Zubulake V*, 229 FRD 422 (S.D.N.Y. 2004))
  - Federal court cases that set the stage for changes in federal and state procedures for dealing with ESI

Why Does ESI Matter?

- ESI Contains Information That Hard Copy Does Not
  - Creation dates
  - Access dates
  - Versions
  - Comments
  - Login information
  - Web tracks
  - Email access lists
  - Audit trails
  - Computer logs
  - Gateways

What Must Be Done
(Pre-Notice of Claim)

- Develop a Document Retention Program and Stick to it
  - Consider how your ESI is maintained (servers, desktop computers, backup media, web site backed data)
  - Consider the types of ESI you maintain (e.g., active vs. archived data vs. legacy data)
  - Consider ESI *creation* and *destruction*
  - Consider the appropriate period and storage medium for your ESI based on the type of data, type of business and industry practice/standard
  - Consider methods for protecting confidentiality if needed (e.g., drug testing records, medical information)
  - Administer the program consistently and ensure employee compliance

What Must Be Done
(Pre-Notice of Claim)

- Develop a Defensible ESI Discovery Plan
  - Responsive and timely
  - Cost-effective
  - Risk-effective
  - Demonstrates good faith
  - Strategically advantageous
  - Takes into account the key players within and outside of the company who have key knowledge about the company's ESI

What Must Be Done
(Post-Notice of Claim)

- Litigation Hold
  - Issue a litigation hold when litigation is *reasonably anticipated*
    - Distribute the litigation hold to all relevant personnel
      - Initial notice must be followed by multiple reminders
    - Meet with key IT personnel to determine what ESI exists and how ESI is maintained
  - Suspend the destruction of potentially relevant records (electronic and hard copy)
  - *Zubulake* decisions make clear an attorney's obligation to ensure that the client protects and preserves relevant information

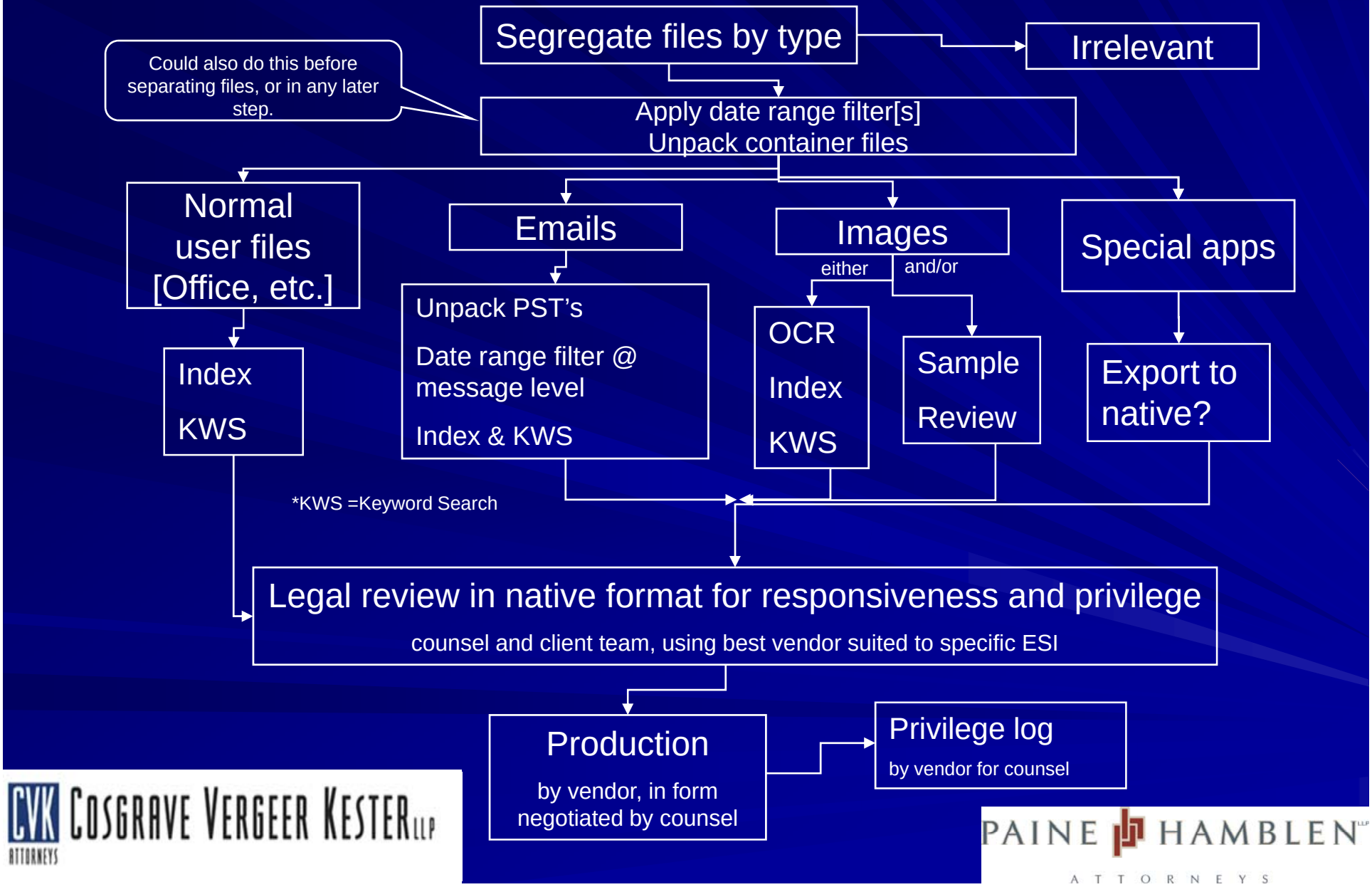
What Must Be Done
(Post-Notice of Claim)

- Preserve ESI
  - Local hard drives/removable drives
  - Assigned network space
  - Common network space
  - Email/Voicemail
  - Cell phone/Blackberries/iPhone, etc.
  - Assistant's computer
  - Home computer
  - Take backup tapes out of rotation

What Must Be Done
(Post-Notice of Claim)

- Prepare for Collection of ESI for Eventual Production
  - Formulate an ESI collection strategy and develop a discovery plan – prior to FRCP 26 meet and confer
    - Consider a litigation strategy for eventual production of ESI
    - Consider potential confidentiality and/or privilege issues
  - Develop an ESI quantity/cost reduction strategy
    - Date range
    - File type
    - Keyword search
    - Keyword hit report may be an essential tool in negotiating
  - Determine what ESI will not be searched and why
  - Determine the intended form of production and the form in which you want ESI produced (e.g., electronic, paper, native)

Post-Claim Collection/Segregation Flow Chart



CVK ATTORNEYS COSGRAVE VERGEER KESTER LLP

PAINE HAMBLEN LLP ATTORNEYS

ESI Costs

- Collection 5-10%
- Processing 10-25%
- Legal Review 50-80%
- Production 5-15%

CVK ATTORNEYS COSGRAVE VERGEER KESTER LLP

PAINE HAMBLEN LLP ATTORNEYS

Who Pays?

- Accessible vs. Inaccessible Data
  - "Accessible data" is stored in a readily usable format (i.e., it does not need to be restored or otherwise manipulated to be usable).
  - "Inaccessible data" is not readily usable (e.g., backup tapes, deleted data, fragmented data)
  - Cost of producing otherwise discoverable data is paid by the producing party, unless doing so imposes an "undue burden or expense"
    - Turns on whether the information is kept accessible or inaccessible – depends on the media

Who Pays?

- *Zubulake I* Cost Shifting Factors
  1. Extent to which request is specifically tailored for relevant information
  2. Availability of information from other sources
  3. Total cost of production compared to amount in controversy
  4. Cost of production compared to resources available to each party
  5. Relative ability and incentive of each party to control costs
  6. Importance of issues at stake and litigation
  7. Relative benefits to the parties obtaining information
     - Factors are not weighted equally – still a question of importance of information versus cost – first two factors most important

Sanction Examples

- *Coleman v. Morgan Stanley* (Florida)
  - Morgan Stanley failed to produce emails pursuant to a motion to compel – court entered partial default judgment as to liability ($604M in compensatory, $850M in punitive damages)
- *Magana v. Hyundai*, 123 Wn App 306 (2004)
  - Plaintiff filed 2000 discovery requests, including all documents relating to incidents of alleged seatback failure
  - Court granted plaintiff's motion for default where Hyundai failed to properly and timely search its computers until just prior to second trial
  - Court specifically noted Hyundai's in-house and outside counsels' failure to ensure compliance with discovery orders
- *United States v. Phillip Morris*, 327 F Supp2d 21 (D DC 2004)
  - Defendant continued to delete e-mails despite its own document retention program
  - Court imposed monetary sanction of $2.75M and precluded all individuals who failed to comply with doc retention program from being called at trial as fact or expert witness

Questions

Jason M. Pistacchio
Attorney
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, Oregon 97205
503.323.9000
jpistacchio@cvk-law.com

Gregory S. Johnson
Attorney/Legal Technologist
Paine Hamblen LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201
509.455.6000
greg.johnson@painehamblen.com