



It is no secret smaller law firms are getting bigger cases. The challenge is how to keep discovery costs down, while providing defensible results. In this seminar you will learn how to control discovery costs by making informed decisions from data collections (forensics) through production.

Speakers:

Justin Sher, Managing Partner, Sher LLP

Greg Cancilla, EnCE, Director of Forensics, RVM Inc.

Geoffrey Sherman, Director of Technology, RVM Inc.

Speaker Biographies

Justin M. Sher is the Founder and Managing Partner of Sher LLP. He represents executives, entrepreneurs, public officials and businesses of all sizes in complex commercial disputes, white collar criminal matters and regulatory investigations. Mr. Sher has handled criminal and regulatory matters involving allegations of insider trading, market manipulation, government corruption, accounting fraud, antitrust violations and tax fraud. In the civil context, Mr. Sher has represented clients in high-stakes litigation relating to complex contract disputes, claims of breach of fiduciary duty and allegations of securities fraud.

Greg Cancilla is a Certified Computer Forensic Engineer and the Director of Forensics at RVM, Inc. He is experienced in the preservation, identification, extraction, documentation and interpretation of computer data using computer forensic tools. He has completed computer forensics training programs conducted by New Technologies Inc., Access Data, and Guidance Software, the developers of Encase Forensics Software, among others. As a certified forensic engineer, he has performed countless computer forensics investigations since his inception into the field in 2003. Additionally, Mr. Cancilla has offered testimony on numerous occasions, including presenting a key piece of evidence in Ronald Luri v Republic Services, Inc., et al., which rendered the largest verdict in the State of Ohio history.

Geoffrey Sherman is the Director of Technology at RVM, Inc. He leads RVM's hosting and IT teams as well as provides professional services such as consulting to clients. Mr. Sherman earned a bachelor's degree from the University at Buffalo. Prior to joining RVM, Incorporated, Mr. Sherman has consulted in the information technology field for over 10 years.

Date: May 4, 2010

Time: 8:00 - 10:30AM

Location: ING Offices

230 Park Avenue, 14th Floor, New York, NY

Please RSVP by email to mcohen@signatureny.com

Preparing Small Law Firms to Handle Bigger Cases:

How to Navigate the E-Discovery Minefield While Controlling Costs

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Signature Bank / ING Offices – Tuesday May 4, 2010

Outline of Program

- Justin Sher - Overview of electronic data
- Greg Cancilla - Forensic Overview
- Geoff Sherman - Overview of Processing Data
Early Case Assessment Demo
- Questions & Answers

Bio of Justin Sher

- **Justin M. Sher** is the Founder and Managing Partner of Sher LLP. He represents executives, entrepreneurs, public officials and businesses of all sizes in complex commercial disputes, white collar criminal matters and regulatory investigations. Mr. Sher has handled criminal and regulatory matters involving allegations of insider trading, market manipulation, government corruption, accounting fraud, antitrust violations and tax fraud. In the civil context, Mr. Sher has represented clients in high-stakes litigation relating to complex contract disputes, claims of breach of fiduciary duty and allegations of securities fraud.
- **Justin M. Sher** graduated from Harvard College with honors with a degree in Social Studies. Following his graduation, Mr. Sher worked for the Frauds Bureau of the New York County District Attorney's Office, where he analyzed complex facts for high-profile white collar grand jury investigations and criminal prosecutions. Mr. Sher received his law degree, also with honors, from New York University, where he served as Staff Editor for NYU's Journal of Legislation and Public Policy and as a member of the Federal Defender Clinic.

Sources of Electronically Stored Information (ESI)

- Desktops/Laptops
- Networks
- Network Attached Storage (NAS)
- Storage Area Networks (SAN)
- Servers
- Emails
- Databases
- Backup tapes



- Flash Media/Thumb Drives
- Web-based contents
- Cell Phones/PDAs
- CD/DVD/Floppies
- Cameras



How Big is “Big”?

Megabyte (MB) = 1 Million Bytes

Gigabyte (GB) = 1 Billion Bytes (1,024 MB)

Terabyte (TB) = 1 Trillion Bytes (1,024 GB)

Petabyte (PB) = 1 Quadrillion Bytes (1,024 TB)

Exabyte (EB) = 1 Quintillion Bytes (1,024 PB)

Gigabyte = 75,000 pages

Terabyte = 50,000 trees printed into books

50 Petabytes = The entire written works of Mankind, since the beginning of recorded History, in all languages.

Rule 26 – General Provisions Governing Discovery; Duty of Disclosure

FRCP § 26(a)(1)(B) on initial disclosures now includes “electronically stored information” as a category of the required initial disclosures.

Rule 26(f) – Scheduling Conference and Discovery Plan

The Rule 26(f) Conference and Report directs parties to identify issues of “disclosure or discovery of electronically stored information, including the form or forms in which it should be produced” and “claims of privilege or of protection as trial-preparation material.”

Limits on e-Discovery - Reasonably Accessible Standard – What does it mean?

Rule 26(b)(2)(B) - Need not provide information that “the [producing] party identifies as not reasonably accessible because of undue burden or cost.” Requesting party may still obtain information that is not reasonably accessible if it demonstrates “good cause.” Court may, in such instances, require requesting party to pay for costs.

Rule 34(b)

Rule 34(b) sets the procedure for determining the format of production of electronically stored information - requesting party designates format; responding party objects and court resolves.

If no designation, must be produced in the form in which ordinarily maintained or in form or forms that are “reasonably usable.”

New York State Rule

22 N.Y.C.R.R. § 202.12(c)(3) (2009) directs the court to address “electronic discovery,” including:

- (a) retention of electronic data and implementation of a data preservation plan,
- (b) scope of electronic data review,
- (c) identification of relevant data,
- (d) identification and redaction of privileged electronic data,
- (e) the scope, extent and form of production,
- (f) anticipated cost of data recovery and proposed initial allocation of such cost,
- (g) disclosure of the programs and manner in which the data is maintained,
- (h) identification of computer system(s) utilized, and
- (i) identification of the individual(s) responsible for data preservation

ESI in White Collar Criminal Cases

From a recent Grand Jury Subpoena from the U.S. Attorney:

“As used herein, ‘documents’ means any and all records, documents, instructions, memoranda and papers, ***in whatever form, including electronic copies***, in your care, custody, possession or control.”

From a recent Summons from the Criminal Investigative Division of the IRS:

“You are hereby summoned . . . to produce the following books, records, papers ***and other data***. . .”

E-mails in White Collar Criminal Cases

Credit Suisse

“We strongly suggest that before you leave for the holidays you should catch up on file cleaning.” (Richard Char, 12/4/00.)

“Having been a key witness in a securities litigation case in south texas I strongly advise you to follow these procedures.” (Frank Quattrone, 12/5/00.)

E-mails in White Collar Criminal Cases

Arthur Andersen

“It might be useful to consider reminding the engagement team of our documentation and retention policy.” (Nancy Temple to Enron team, 10/12/01.)

“I recommended . . . deleting my name on the memo. . . . [I]f my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.” (Temple, 10/16/01.)

E-mails in White Collar Criminal Cases

Bear Stearns

The fund is an “awesome opportunity.” (Ralph Cioffi, 3/7/07.)

“I think this is a good opportunity.” (Matthew Tannin, 3/15/07.)

“[I]t may not be a meltdown for the general economy but in our world it will be . . . Dealers will lose millions and the CDO business will not be the same for years.” (Cioffi, 3/15/07.)

“Believe it or not – I've been able to convince people to add more money.” (Tannin, March 2007.)

What to Negotiate

- Timing of discovery, including IT personnel
- Scope of the search and production
 - Custodians
 - Locations
 - Date ranges
 - Keywords
- Method of Production and who bears the cost
- Reservation of privileges

Before the Rule 26(f) Conference or a “Meet and Confer”

Before the meet and confer, meet with your client:

1. Understand your case - who's involved, what are the issues
2. Determine what exists, who has it and where is it located (servers, hard drives, PCs, backup tapes) – requires input from IT Department – challenges
3. What are the important file types = are they still accessible; are they legacy or backups?
4. How long will discovery take? How much will it cost? (collect, filter, review, produce)

Collection and Culling

Data collected is culled to eliminate irrelevant and duplicate data

- Limit number of locations and custodians searched
- Date filtering – narrowing date ranges
- De-duplication – typically across all custodians
- Keyword Search – automated searching of data using keywords

Document Review

Targeted culling can greatly reduce review

- In-house review – using tools such as Concordance/Summation
- Hosted Image Review – using tools such as Iconect/Relativity

Attorney review is the most costly component of Discovery

Assertion of Privilege After Production

- Subsection 26(b)(5)(B) provides a procedure for a party to maintain “a claim of privilege or of protection as trial-preparation material” concerning any discovery, even after it is produced.
- “Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production.” It merely “provides a procedure for addressing these issues.” (Advisory Committee Note to 2006 Amendment.)
- For this reason, parties should still obtain stipulation and order that protects parties from inadvertent waiver.

Method of Production

Natural File State – severe limitations

- Cannot bates stamp
- Cannot redact

Hard copies – lose all the metadata; have to be rescanned in order to manage

In re: Honeywell International Securities Litigation, 2003 WL 22722961 (S.D.N.Y. 2003) (producing party gave hard copy; court gave them the option of converting the material into a nonproprietary format at a cost of \$30,000 or providing the software).

Searchable – can be relatively cheap if pdf, with load file

- Adequate method of production, *Zakre v. Norddeutsche Landesbank Girozentrale*, 2004 U.S. Dist. LEXIS 6026 (S.D.N.Y. Apr. 9, 2004). (no need to cull, although 6,000 documents were produced on CDs).
- *In re Lorazepam and Clorazepate Antitrust Litig.*, 300 F. Supp. 2d 43, 46 (D.D.C. 2004) (no need to index).

Additional Resources

- The Sedona Conference
(www.thesedonaconference.org)
- The Electronic Discovery Reference Model
(EDRM) (edrm.net)



Greg Cancilla

- Forensic Overview

Greg Cancilla Bio

- **Gregory M. Cancilla** is the Director of Forensics of RVM, Inc (“RVM”). RVM provides legal technology consulting, data forensics and litigation support services to law firms and corporate clients. Its forensic practice focuses on computer forensics, electronic data harvesting, data recovery, electronic data discovery, network security and the development of custom applications and solutions. RVM’s client base includes United States and international law firms and companies.
- **Mr. Cancilla** is a Certified Computer Forensic Engineer and the Director of Forensics at RVM. He is experienced in the preservation, identification, extraction, documentation and interpretation of computer data using computer forensic tools. He has completed computer forensics training programs conducted by New Technologies Inc., Access Data, and Guidance Software, the developers of Encase Forensics Software, among others. As a certified forensic engineer, he has performed countless computer forensics investigations since his inception into the field in 2003. Additionally, Mr. Cancilla has offered testimony on numerous occasions, including presenting a key piece of evidence in *Ronald Luri v Republic Services, Inc., et al.*, which rendered the largest verdict in the State of Ohio history.

What is Electronically Stored Information (ESI)?

- Information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software”

- Kenneth J. Withers, Managing Director, The Sedona Conference®

*NORTHWESTERN JOURNAL OF TECHNOLOGY AND
INTELLECTUAL PROPERTY*

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Why is ESI important?

- ESI has evidentiary value!

Some examples...

“Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?”

Email message in American Home Products
Fen-Phen litigation

Acquisition

- **Photograph**
- **Maintaining Chain of Custody (Data Storage Location)**
- **Logging**
- **Utilize Sanitized Drives**
- **BIOS/CMOS Time**
- **On-Site Option**
- **Off-Site Option**

Types of Data Acquisitions

- **Encase Image**
 - **Write Blocker**
 - **Crossover**
 - **USB**
- **DD Image**
- **Clone**
- **Network Shares/Department Shares**
- **E-Mail on Server**
- **Server Acquisition (On/Off)**
- **Cell Phone/PDA**
- **Thumb/External Media**

How to Choose your Expert

- Tips For Dealing With Your Forensics Analyst
- What to Expect From A Forensics Analyst
- Certifications
- Training
- Experience

Types of Cases where Forensics is useful

- General Litigation
 - Commercial Litigation
 - Product Liability
- Corporate
- Regulatory (SEC, Second Requests, FTC)
- Mergers/Acquisitions
- Intellectual Property
 - Theft of Intellectual Property
 - Temporary Restraining Order (TRO)
 - Permanent Injunction

Types of Cases where Forensics is useful continued...

- Labor/Employment
 - Violation of Non-Compete Agreements
 - Sexual Harassment
 - Age Discrimination
 - Fraud/Embezzlement
 - Other Violations of Company Policy
- Domestic Relations
 - Divorce
 - Custody
- Corporate Criminal
 - Other Criminal

Demo

- Geoff Sherman to demo Clearwell

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- **Geoffrey Sherman** is the Director of Technology at RVM, Inc. He leads RVM's hosting and IT teams as well as provides professional services such as consulting to clients. Mr. Sherman earned a bachelor's degree from the University at Buffalo. Prior to joining RVM, Incorporated, Mr. Sherman has consulted in the information technology field for over 10 years.

Q & A

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