



Finding Holes in Productions

*Best Practices in Testing & Reporting on
ESI Adequacy Using Modern Analytics*

September 30, 2015

**eDiscovery
Webinar Series**

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About Lexbe

Lexbe is an Austin, TX based eDiscovery software and services provider.

At Lexbe, we develop and implement technology that helps small and medium-size law firms, corporations, and organizations cost-effectively manage increasingly data intensive litigation document management and discovery. We do this via our web-based document review software, Lexbe eDiscovery Platform, high speed ESI processing and conversion services, and a team of experienced technical specialists and expert consultants.



'Lexbe cost advantages, SaaS convenience and search capabilities appeal to many small firms. . . to handle large amounts of data – without investing in an IT infrastructure.' 451 Research



Lexbe is recognized as a 'Top 100' eDiscovery Provider by ComplexDiscovery, a leading electronic discovery and information governance firm.



Lexbe infrastructure provider AWS recognized as the Leader in Cloud Security by Forrester Research

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Karsten Weber bio

- **Current**
 - CTO of Lexbe LC
 - Principal Architect of Lexbe eDiscovery Platform and Lexbe eDiscovery Services
- **Prior Experience**
 - Consulting Expert, Lumin Expert Group
 - Director of Software, nLine Corporation
 - Software Engineering Manager, KLA-Tencor
- **Education**
 - MBA, University of Texas
 - M.S. Engineering, Danish Technical University



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Finding Holes in Productions

Plaintiff's Complaints about Productions

- Important ESI sources were missed or hidden.
- Culling and responsive searches were awful and missed clearly responsive documents.
- Important documents emerged only after depositions.
- Defendant produced a largely irrelevant document dump.
- Defendant used insane eDiscovery vendor estimates to justify proportionality claims.
- No understanding of forms of production and problems.

From Craig Ball, Is There a Right to Fail in E-Discovery?

<https://ballinyourcourt.wordpress.com/>

It's critical for Attorneys and Paralegals to understand the IT side in order to assess production quality



Finding Holes in Productions

Increased Scrutiny of Productions

"Litigants have been ignoring e-discovery obligations with impunity for so long they've come to think of it as an entitlement. . .

[N]ow that opponents and courts are waking to this failure, those who've failed to adapt are feeling exposed."

From Craig Ball, Preservation & Proportionality
<https://ballinyourcourt.wordpress.com/>

Finding Holes in Productions

Increased Scrutiny

- Receiving parties (usually Plaintiffs) can raise doubt about production quality more easily than ever.
- Judges are more educated and taking complaints more seriously.
- Producing party time and money will be spent on defending productions rather than preparing for depositions.
- Problems validated can undermine producing party credibility with the court.
- Possible sanctions for egregious behavior.

But how does one demonstrate that a production may be inadequate?

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Bates Gaps

Searching for Bates Gaps should be one of the first steps in locating gaps in a production in general. Note that this gets more difficult with rolling productions. A privilege log will cause gaps in docs produced and needs to be taken into account.

Refer to the range below which outlines a very large Bates gap that was located during the eDiscovery process.

Bates Start	Bates End
64352	66007
68200	68227
68200	68219
68220	68221
68220	68221
93929	93929
126629	126637
126629	126637
127413	127414



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Possible Areas of Examination

- Gaps in Time Periods
- Missing Data for Specific Custodians, or Lack of Expected Communications between Custodians, or Missing Aliases
- Missing Data Sources, File Types or Metadata
- Production Does Not Include ESI that Receiving Parties or Third Parties Possess
- Missing Hits for Keywords Expected in Case

Looking for Systematic Evidence of Under-Production



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Possible Causes (Excluding Intention)

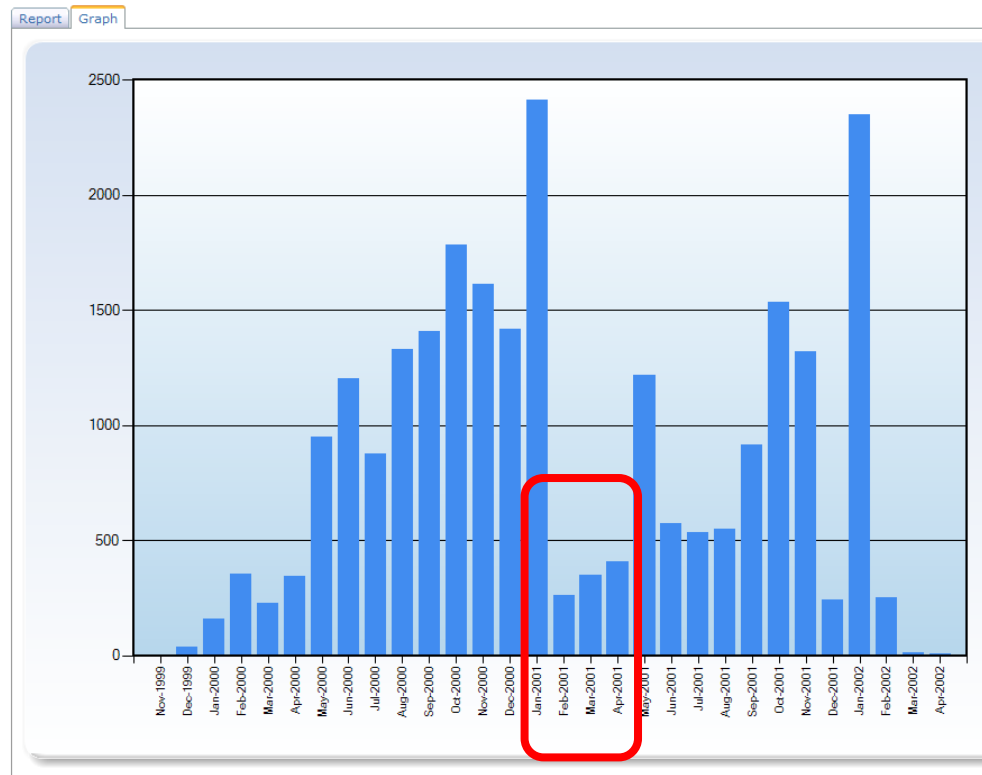
- Failure to Identify and Collect From All Data Repositories
- Failure to Institute a Litigation Hold
- Failure to Get Data from All Sources in a Custodian's Possession
- Poor Processing or OCR
- Poor Keyword Searches or TAR
- Failing to Maintain Document Date (last modified) during collection)

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Evaluation of Received Production

Selected: Group By='Master Date' Options='Year And Months', 'Doc Count'
Filter Applied: Master Date Start=11/1/1999 Master Date Before Date=6/1/2002 [View All](#)

Pivot	Total
Nov-1999	4
Dec-1999	39
Jan-2000	158
Feb-2000	354
Mar-2000	227
Apr-2000	343
May-2000	950
Jun-2000	1,201
Jul-2000	875
Aug-2000	1,330
Sep-2000	1,408
Oct-2000	1,782
Nov-2000	1,615
Dec-2000	1,418
Jan-2001	2,415
Feb-2001	261
Mar-2001	350
Apr-2001	407
May-2001	1,216
Jun-2001	572
Jul-2001	537
Aug-2001	550
Sep-2001	917
Oct-2001	1,533
Nov-2001	1,318
Dec-2001	242
Jan-2002	2,349
Feb-2002	252
Mar-2002	14
Apr-2002	6
Total	24,643



Look at data over time, how much data exists during a specific time period, is there an unexplained gap?

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Example

- Assume production spans 10 custodians. A 10% drop in volume could be normal fluctuation. However, it could also be caused by a 100% drop for a single custodian.
- Custodians for which no data was collected at all
 - Response identifies 12 people that are relevant to case, you cannot do a production with only 10.
- Existing business correspondence, when available, can be used to find holes in productions.
- Without metadata, these tasks becomes much more difficult

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Metadata Use in Production Analysis

Metadata is field-level file information often delivered with a production as part of a load file (Concordance/Relativity DAT, Summation DII and Lexbe XLSX)

Key Metadata Fields & Use

Metadata Field Name	Type	Use in Production Analysis
Date/Time Sent, Date/Time Received	Email	Show when emails sent and received
Sender, Recipients, CC and Bcc	Email	Show who sent and received emails
Doc Source, File Path, Custodian	Email & Native	Custodian and chain of custody
Date Last Modified	Native	Usually best date field for files collected normally (without a forensic collection)
File Extension / File Type	Email & Native	Show type and quantity of ESI produced

For a full listing of standard loadfiles: <http://lexbe.com/support/technical-resources/>



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Email Mapping

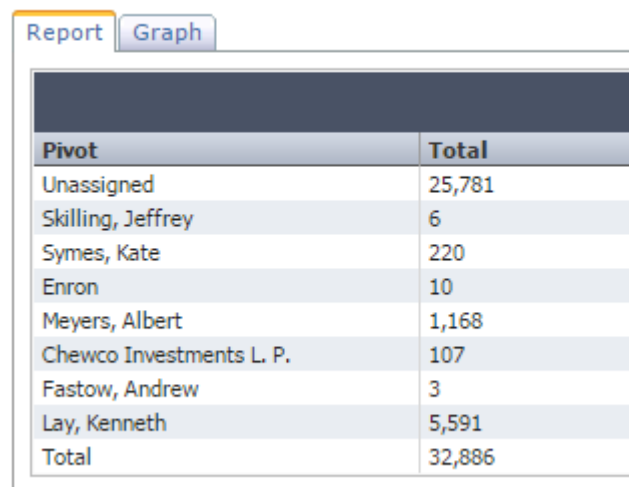
Mapping of a Particular Custodian

- Must be done to find variations to link all names to a single individual.
- Identify all alias names

Different Permutations of a Custodian's Name

- FirstName LastName
- John Smith
- LastName, FirstName
- Smith, John
- Email
- jsmith@lexbe.com
- Nickname
- Johnny
- etc.

Selected: Group By='Custodian' Options='Year And Months', 'Doc'



Pivot	Total
Unassigned	25,781
Skilling, Jeffrey	6
Symes, Kate	220
Enron	10
Meyers, Albert	1,168
Chewco Investments L. P.	107
Fastow, Andrew	3
Lay, Kenneth	5,591
Total	32,886

Finding Holes in Productions

Summary

- ESI data size is increasing and are increasingly difficult to analyze by hand.
- Judges are more educated in eDiscovery and applying more scrutiny.
- Production holes are not always obvious initially. The entire production must be thoroughly reviewed.
- If holes/gaps exist, the receiving party can shift the burden to the producing party to prove that this collection was done without holes. If even one production is incomplete, it's enough to raise reasonable doubt for the entire case.

Thank You

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