

# E-Discovery Principles

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March 19, 2010

# E-Discovery Principles

- What is ESI?
- ESI Retention Policy
- Discovery Conference
- E-Discovery Initial Disclosures
- “Document” Hold Orders
- Responding to ESI Discovery Requests
  - Process for ESI Production
  - Reviewing ESI Prior to Production
  - Inadvertent Production of ESI
- ESI Sanctions

# What is ESI?

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# E-DISCOVERY IS THE DISCOVERY OF “ELECTRONICALLY STORED INFORMATION” (ESI)

- Fed.R.Civ.P. 34 Committee Note: **ESI** “is intended to be broad enough to cover **all** current **types of computer-based information**, and flexible enough to encompass future changes and developments.”
- Fed.R.Civ.P. 34 Committee Note: “The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information.”

# SOME EXAMPLES OF ESI

- E-mail
- Word processing or excel files
- Electronic databases of any sort (including databases built on proprietary software)
- Data contained on a hard-drive
- Data contained on a server
- System backup tapes
- CD-ROMs, DVD-ROMs
- PDAs, Blackberry, Cell phones



# Importance of ESI

- **92% of all data is ESI.** Source: Berkley Study.
- **97 billion e-mails sent every year.** Source: IDC Study.
- **60% of “business-critical information” is stored in corporate e-mails.** Source: Berkley Study.
- **Less than 33% of ESI is printed.** Source: Berkley Study.
- International energy **company stores 800 terabytes of ESI - equivalent to 400 billion typewritten pages.** Source: 2007 press statement.



# ESI Retention Policy

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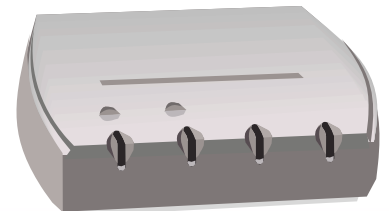
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# ESI RETENTION POLICY

- **ESI need not be retained forever.** Appropriate retention policies blessed per Arthur Andersen, LLP v. U.S., 125 S.Ct. 2129 (2005).
- Retention policy/protocol should cover, among other considerations:
  - ❑ **how long data remains** on an active server
  - ❑ how long it remains on a server backup (e.g., Legato)
  - ❑ how long it remains on back-up media
  - ❑ **automatic deletion processes**



# ESI RETENTION POLICY

- Be prepared to document and justify “**technical and business needs**” behind protocol, per Fed.R.Civ.P. 37 Committee Note.
- In assessing the retention policy, courts consider:
  - regulatory obligations and requirements
  - industry custom and practice
  - the needs of the organizational unit
  - the stated rationale for retention/destruction
- **Objective and consistent implementation of ESI retention policy**
  - Consider independent **auditing of ESI retention policy implementation.**

# ESI RETENTION PROTOCOLS

- Focus on Business Needs: **The more “routine” the protocol for retention of ESI, the more consistent with “routine, good faith” language of Fed.R.Civ.P. 37(f).**
- Action Plan in the Event of Litigation: Ensure that the retention protocol affords attorneys and IT staff easy access to all current ESI in the event of litigation, and the **ability to move promptly to a “document” hold order.**

# ESI RETENTION PROTOCOLS

- Fed.R.Civ.P. 37 Committee Note:
  - “The good faith requirement ... means that a **party is not permitted to exploit the routine operation of an information system to thwart discovery obligations** by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.”
  - “When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”

# ESI RETENTION PROTOCOLS

Resource for litigation analysis of the reasonableness of an E-Document Retention Policy:

The Sedona Principles: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age  
([www.sedonaconference.org](http://www.sedonaconference.org))

# Discovery Conference

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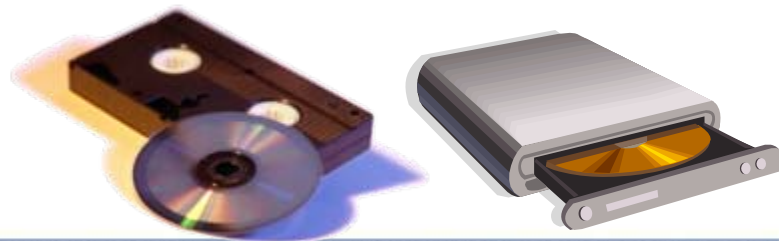
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# DISCOVERY PLANNING CONFERENCE

- Fed.R.Civ.P. 26(f)(3): discovery conference now must include a discussion of **“any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”**
  - Fed.R.Civ.P. 34 Committee Note: Rule 34 now **“permits a requesting party to specify the form or forms in which it wants electronically stored information produced.”**



# DISCOVERY PLANNING CONFERENCE (cont'd)

- Fed.R.Civ.P. 26(f)(4): discovery conference must also include a discussion of “any **issues relating to claims of privilege or of protection** as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order.”
  - Fed.R.Civ.P. 26(f)(4) designed to work in concert with Fed.R.Civ.P.s 16(b)(6) (privilege agreements) and 26(b)(5)(B) (inadvertent disclosure).

# THE DISCOVERY CONFERENCE: PREPARATION

- **Step 1**: Implementing first “document” hold order early in (or prior to) the litigation
- **Step 2**: Education of inside and outside counsel for e-discovery
- **Step 3**: Determinations of accessibility, production formats, custodians, burden
- **Step 4**: Consider need for production agreement
- **Step 5**: Tactical considerations



# THE DISCOVERY CONFERENCE: STRATEGY AND EXECUTION

- **E-discovery issues to be discussed at the discovery conference:**
  - Electronic storage systems with potentially discoverable ESI
    - Electronic storage systems that won't be searched
  - Form/format of production
  - Protective order
  - **Privilege and non-waiver agreements – Clawback!**
  - **Agreement for redactions**
  - Cost sharing
  - Assess whether to discuss methodology for limitation of the ESI set
    - Search topics
    - Keyword search terms
    - Boolean search

# E-Discovery Initial Disclosures

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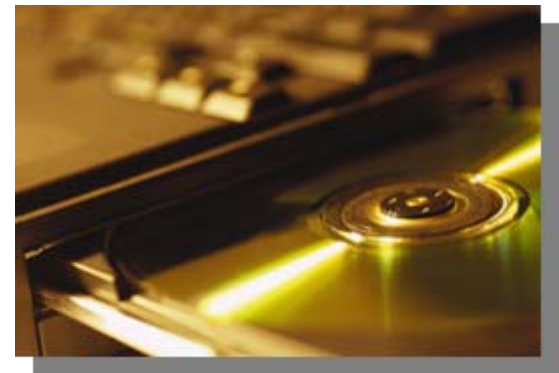
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# INITIAL MANDATORY DISCLOSURES

(Fed.R.Civ.P. 26) (14 Days After Discovery Conference)

- Fed.R.Civ.P. 26(a)(1)(B): a party must provide to other parties “a copy of, or a description by category and location of, all documents, **electronically stored information**, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses....”
- Fed.R.Civ.P. 26(a)(1) limitation: ESI “that the disclosing party may use to support its claims or defenses.”



# LIMITATIONS ON INITIAL DISCLOSURES (Fed.R.Civ.P. 26(b))

- **Understand your client's ESI systems.**
- Fed.R.Civ.P. 26(b)(2)(B): "A party **need not provide discovery** of electronically stored information **from sources** that the party identifies as **not reasonably accessible** because of **undue burden or cost.**"
  - **Burden is on the party resisting discovery** to prove undue burden or cost.

# LIMITATIONS ON INITIAL DISCLOSURES (Fed.R.Civ.P. 26(b)) (cont'd)

- Fed.R.Civ.P. 26 Committee Note: “The responding party must also identify, by category or type, the sources containing potentially responsive information that it is **neither searching nor producing.**”
- Fed.R.Civ.P. 26 Committee Note: “A party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence.”

# “Document” Hold Orders

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# “Document” Hold Orders

- **Upon notice of litigation pending or threatened, the party must preserve – “hold” – the relevant ESI.** Zubulake v. UBS Warburg, LLC, 2003 U.S. Dist. Lexis 18771 (S.D.N.Y. 2003)(UBS sanctioned for noncompliance with hold order).
- **Counsel is responsible for compliance with party’s preservation obligations.** Heng Chan v. Triple 8 Palace, Inc., 2005 U.S. Dist. Lexis 16520 at \*16 (S.D.N.Y. 2005); Fayemi v. Hambrecht and Quist, Inc., 174 F.R.D. 319, 326 (S.D.N.Y. 1997); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 73 (S.D.N.Y. 1991).
- **Issue written “document” hold order ASAP.**
  - If available, consider **tracking the language of the discovery requests.**

# “Document” Hold Orders

- **Target “document” hold order to employees (“key players”) likely to be involved in the lawsuit**
  - ❑ Tailor reasonably to the circumstances, **but when in doubt, be overly inclusive**
  - ❑ **Be prompt**
  - ❑ Supervise personnel implementing hold order
  - ❑ Periodically **update or recirculate** the instruction
  - ❑ **Keep a written record of the directives (which you may have to produce)**
  
- Consider the need to **override broader ESI retention/destruction policy**
  - ❑ Suspension of routine destruction practices
  - ❑ Identification and preservation of back-up or disaster recovery systems containing potentially responsive data

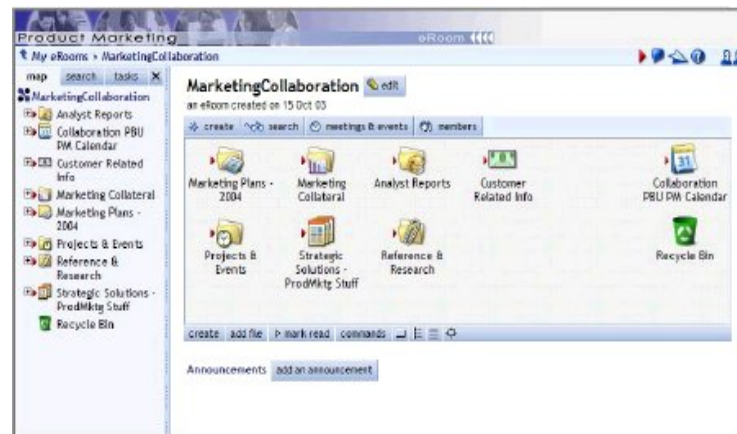
# “Document” Hold Orders

- **Identify custodians and Identify data sources**
  - *Zubulake Revisited* - Identify “key players”
- Useful to identify persons in advance with authority to implement litigation hold order.
  - See Fed.R.Civ.P. 26 and 34 Committee Notes discussing “litigation holds.”
- **Preserve ESI of a relevant, but previously discharged, employee**
- **Alert consultants and outside vendors to the extent that they are responsible for party's ESI, and to search/collect ESI**
  - *Zubulake Revisited* - **ESI search should not be delegated to inexperienced personnel**
- **Hold orders in 3<sup>rd</sup> party discovery**

# What must be preserved?

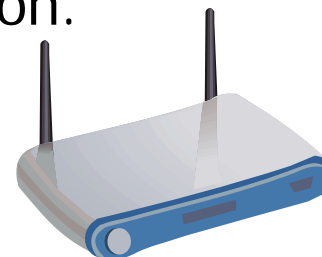


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# E-DOCUMENT RETENTION PROTOCOLS – SAMPLE AND TEST RIGHTS

- Fed.R.Civ.P. 34 and 45 “sample and test” rights: **A litigant has the right, subject to certain restrictions, to “sample and test” an opponent’s electronic storage system.**
- While primary focus of any protocol should be your technical and business needs, consider the possibility of tiered servers or discrete databases to minimize the risk of unreasonable intrusions in the event of litigation.



# Responding to ESI Discovery Requests

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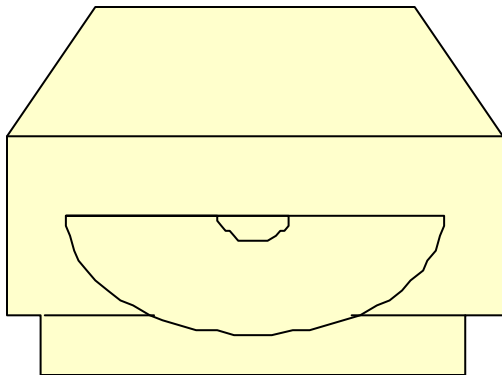
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# RESPONDING TO DISCOVERY REQUESTS: DOCUMENT (ESI) PRODUCTION ISSUES

- Fed.R.Civ.P 34: **Requesting party can specify form in which ESI should be produced.**
  - Need to be able to articulate reasons for resisting such requests.
- **Production formats:**
  - PAPER (“Hard Copy”)
  - PDF (Portable Document Format)
  - PST (Microsoft Outlook Folders)
  - TIFF (Tagged Image File Format)
  - NATIVE FORMAT (Contains Metadata)

# RESPONDING TO DISCOVERY REQUESTS: DOCUMENT (ESI) PRODUCTION ISSUES

- If requesting party does not specify format, what is a “reasonably usable format?”



# NATIVE FORMAT PRODUCTION ISSUES

- Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., 2006 WL 665005 (N.D. Ill. Mar. 8, 2006) – Court **compelled production of ESI in native format** despite defendant's production in TIFF format.
- Northern Crossarm Co., Inc. v. Chemical Specialties, Inc., 2004 WL 635606 (W.D. Wis., Mar. 3, 2004) – “Rule 34(a) specifies that electronic data falls within the definition of ‘documents,’ and requires that the respondent must, if necessary, translate that information into reasonably usable form, but this **does not require the respondent to present its evidence in the format in which the respondent stores it.**”
- In re Priceline.com Securities Litigation, 233 F.R.D. 88 (D. Conn. 2005) – Court ordered **production of all files in either PDF or TIFF format with searchable metadata database.**

# METADATA ISSUES

- **What is metadata?**
  - Information about the ESI
  - Automatically generated (accurate and reliable)
  
- **Benefits of Metadata**
  - Authenticity verification
  - May show edits made
  - Provides tract of the file
  - Allows for objective coding
  - Advanced searchability
  
- **Is metadata relevant to the litigation?**
  
- **Metadata is maintained in the ordinary course of business. BUT is it processed in that ordinary course?**

# METADATA ISSUES (cont'd)

- In re Verisign, Inc. Securities Litigation, No. C 02-2270 JW, 2004 WL 2445243, \*1 (N.D. Cal. Mar. 10, 2004) – “Production of TIFF version alone is not sufficient,” and “[t]he **electronic version must include metadata** as well as be searchable.”
- Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640 (D. Kan. 2005) – cites Sedona Principle 12 that “**unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata.**”
  - But then finds certain metadata relevant to inquiry and orders production.
- **Relevance and Privilege are the main issues.**
- **“Cleaning” the ESI (removal of metadata)**
  - **Permissible in the ordinary course of business**

# INTERROGATORIES – OPTION TO PRODUCE BUSINESS RECORDS (Fed.R.Civ.P. 33(d))

“Where the answer to an interrogatory may be derived or ascertained from the business records, ***including electronically stored information***, of the party upon whom the interrogatory has been served ... it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained ....”



# Process for ESI Production

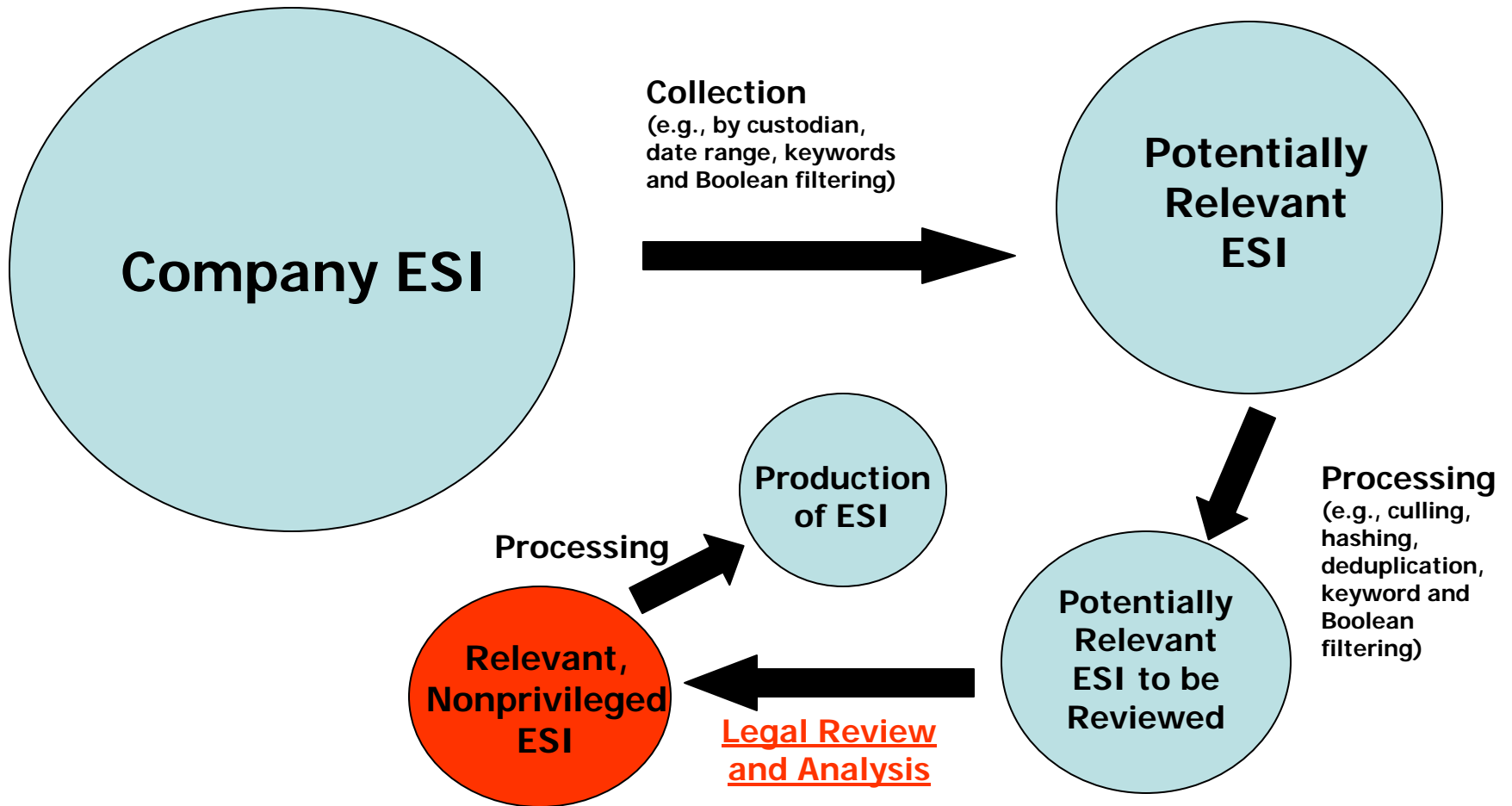
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# ESI Work Flow



# Collection Protocols

- **Broad Collection** (more costly objective coding)
  - Collect it ALL
  - Cull After Collection
- **Narrow Collection** (less costly objective coding)
  - By Custodian
  - By Date Range
  - Documents Pulled by Keywords

# Processing Protocols

- **Objective** processing of ESI for review and production:
  - **Filters** to remove certain data, using metadata.
  - **Keyword and Boolean searches** to limit and narrow scope of production.
  - **“De-duping”** – weeding out all duplicate copies.
  - **“Hashing”** or “Hashmarking” – applying a “hash value” to electronically mark document (the evolution of the Bates stamp).

# Cost Shifting Analysis

- **General Rule** = Cost shifting only available for ESI not reasonably accessible. IO Group, Inc. v. Veoh Networks, Inc., 2007 U.S. Dist. LEXIS 31639 (N.D. Cal. 2007).
  - Zubulake v. UBS Warburg LLC ("Zubulake III"), 2003 U.S. Dist. LEXIS 12643, \*\*9-10 (S.D.N.Y. 2003)(Judge Shira Scheindlin) - "[W]hen a discovery request seeks accessible data - for example active or on-line data - it is typically inappropriate to consider cost-shifting."
  - **2006 Amendment to Fed.R.Civ.P. 26(b)(2)(B)**: (1) No duty to provide discovery of ESI from sources "not reasonably accessible because of undue burden or costs"; (2) requirement that motion (for protective order or to compel) show that the ESI "is not reasonably accessible"; and (3) Court discretion to order discovery per good cause; and, per Fed.R.Civ.P. 26(b)(2)(C), limit and specify the conditions for the discovery.
- **Current Battleground** – whether storage devices containing active ESI are deemed "not reasonably accessible" if production is cost-prohibitive. Ameriwood Industries, Inc. v. Lieberman, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo. 2006).

# Reviewing ESI Prior to Production

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# Document Review and Analysis

- **Cost**
  - Complexity of the ESI (e.g., competition document analysis)
  - Structuring the project (e.g., first vs. second level review)
  - Rate of review metrics
    - Native review faster than images
  - Advanced review platforms (e.g., conceptual, relational)
  - Corrective measures problem
  
- **Quality Assurance (e.g., for FRE 502 purposes)**
  - Training and reference materials (assume potential production)
  - Training, management, and over-the-shoulder monitoring
  - Daily analysis of representative sample of work performed
  - Immediate corrective action

# Document Review and Analysis

- **Coordination with client and litigation counsel**
  - Review as a component of legal process and strategy
  - Daily coordination with litigation counsel
    - Weekly project status meeting
  - Daily progress reports (versus budget and schedule)
    - Status alert upon reaching 75% of budget
  - Daily delivery of “hot” documents/ESI
  
- **Defensibility of the review**
  - U.S. standard: “reasonable efforts”
    - Trend to counsel certifying completeness
  - EDD processing vs. reviewers’ analysis

# Training Given to Reviewers

- **Techniques for reviewing documents/ESI efficiently and reliably**
- **Identification of privileged documents/ESI and preparation of privilege logs**
- **Confidentiality classification of documents/ESI**
- **Detection of important (“hot”) documents/ESI**

# Training Given to Reviewers

- **Uniform parameters for tagging/coding documents/ESI**
- **Handling of “close-call” documents/ESI**
- **Use of review software platform**
  - **Recommend relational platforms**
- **Substantive parameters of the review, guided by litigation counsel**

# Inadvertent Production of ESI

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# INADVERTENT DISCLOSURE OF PRIVILEGED OR WORK PRODUCT DOCUMENTS (Fed.R.Civ.P. 26(b)(5))

- Fed.R.Civ.P. 26(b)(5)(B):
  - **“If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it.**
  - **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.**
  - **A receiving party may promptly present the information to the court under seal for a determination of the claim.”**

# INADVERTENT DISCLOSURE OF PRIVILEGED OR WORK PRODUCT DOCUMENTS (Fed.R.Civ.P. 26(b)(5))

- Fed.R.Civ.P. 26(b)(5) is not a safe harbor to avoid waiver.
  - Fed.R.Civ.P. 26 Committee Note: “**Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production.** The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.”
- Fed.R.Civ.P. 26(b)(5) is not limited to “electronically stored information.”

# INADVERTENT DISCLOSURE OF PRIVILEGED OR WORK PRODUCT DOCUMENTS (Fed.R.Civ.P. 26(b)(5))

- Fed.R.Civ.P. 26 Committee Note:
  - “When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.”
  - **“Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.”**

# FRE 502 CLAWBACK

- **Applies to actions commenced after, or as “just and practicable” pending on, September 19, 2008.**
- **FRE 502(d)-(e): Enforcement of clawback agreements.**



# FRE 502 CLAWBACK (Cont.)

- **FRE 502(b): Inadvertent disclosure will not effect waiver of privilege, if:**
  - disclosure was inadvertent;
  - reasonable steps taken to prevent disclosure; and
  - prompt and reasonable efforts to rectify disclosure.
- **FRE 502(a): Inadvertent disclosure of a document will not effect subject matter waiver of privilege as to others.**



# ESI Sanctions

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# SANCTIONS UNDER FED.R.CIV.P. 37

- Electronic document retention protocols developed **now** will have an impact on the possibility of sanctions in a **later** litigation.
- A well-conceived protocol will also help avoid the risk of inadvertent destruction of ESI when the possibility of litigation arises.

# SANCTIONS UNDER FED.R.CIV.P. 37

- Sanctions can be devastating. See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005):
  - Defendant failed to locate and produce ESI.
  - Defendant failed to abort routine 12-month overwrite of backup data.
  - Adverse inference ruling against defendant

# SANCTIONS UNDER FED.R.CIV.P. 37

- Since Morgan Stanley, litigants have sought to use ESI issues to obtain significant litigation advantages. Exemplary cases:
  - Consolidated Aluminum Corp. v. Alcoa, Inc., 2006 WL 2583308 (M.D. La., July 19, 2006) (discussion of standards for imposing adverse inferences, availability of less severe sanctions)
  - General Medicine, PC v. Morning View Care Centers, 2006 WL 2045890 (S.D. Ohio, July 20, 2006)
  - Larson v. Bank One Corp., 2005 WL 4652509 (N.D. Ill., August 18, 2005)

# SANCTIONS UNDER FED.R.CIV.P. 37

## Factors That Courts Consider:

- ❑ Proof of Willfulness and Bad Faith
- ❑ Proof of a Culpable State of Mind
- ❑ Relevance of the lost ESI to a party's claims or defenses
- ❑ Prejudice to the opposing party
  - Increased litigation expense
  - Loss of relevant evidence

# SANCTIONS UNDER FED.R.CIV.P. 37

- Other Available Sanctions:
  - ❑ Monetary (recovery of attorney's fees; fines)
  - ❑ Re-open depositions at cost of party at fault
  - ❑ Permission to pursue additional discovery
  - ❑ Barring introduction of certain evidence on a particular issue



# SANCTIONS UNDER FED.R.CIV.P. 37

- Fed.R.Civ.P. 37(f): “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the **routine, good-faith operation** of an electronic information system.”



# SANCTIONS UNDER FED.R.CIV.P. 37

- Fed.R.Civ.P. 37 Committee Note: “[R]outine operation of an electronic information system” is “the way in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs.”



# TRENDS IN ASSESSING SANCTIONS - *Zubulake* Revisited

- Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities, Case 05-Civ9016 (S.D.N.Y. 2009)(Judge Shira Scheindlin)
  - 84-page Amended Opinion and Order, entitled "*Zubulake* Revisited: Six Years Later"
  - 13 plaintiffs sanctioned for loss of ESI despite hold orders.
- **New Rule:** Severity of sanctions for ESI spoliation depends on the degree of "culpability" of the party who destroyed the data.
  - 3 standards of ESI spoliation: (1) **Negligence**, (2) **Gross Negligence**, and (3) **Willful** spoliation.

# TRENDS IN ASSESSING SANCTIONS - *Zubulake* Revisited (Cont.)

- Legal Presumption: If the party who destroyed ESI acted “**willfully**” or with “**gross negligence**,” the lost ESI is presumed relevant to the merits.
  - **But**, if the party who destroyed the ESI was merely “**negligent**,” the party seeking spoliation sanctions must show that the lost ESI was relevant.

# TRENDS IN ASSESSING SANCTIONS - *Zubulake* Revisited (Cont.)

- Failure to issue written document hold order
  - Zubulake – Gross Negligence
  - Pension Committee - Negligence
- Failure to supervise proper implementation of hold order
  - Zubulake – Gross Negligence
  - Pension Committee - Negligence
- Inexperienced employee searched for responsive ESI without guidance from counsel
  - Inconsistency in Pension Committee: One plaintiff found “gross negligent”; another with similar circumstances held “negligent.”
- In-house counsel delegated to paralegal, who e-mailed order to employees to search for responsive ESI
  - Pension Committee - Negligence

# TRENDS IN ASSESSING SANCTIONS - *Zubulake* Revisited (Cont.)

- Not searching the ESI of all employees
  - Pension Committee - Negligence
- Not identifying key players vis-à-vis the dispute to preserve their ESI
  - Pension Committee – Gross Negligence
- Failure to seize and preserve ESI of former employees
  - Pension Committee – Gross Negligence
- Failure to preserve backup tapes that are the “sole source” of ESI
  - Pension Committee – Gross Negligence



EXIT

