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# **Emerging Trends in E- Discovery**

# Overview

- Preservation
- Privacy & Data Security
- Search & Review

# Preservation

## ● Pre-Litigation

- Data Map
- Litigation Hold Procedure
- Standardized Litigation Hold Notices

# Data Maps

- How can an organization place a litigation hold on ESI if it does not know where that ESI is, how it is stored, and who is responsible for the mechanics of executing the hold?

# Data Maps – Legal Requirements

## ● Case Law

- Zubulake: “[to institute a legal hold] counsel must make certain that all sources of potentially relevant information are identified and placed on hold...to do this **counsel must become fully familiar with her client’s document retention policies, as well as the client’s retention architecture**. This will invariably involve speaking with information technology personnel...”

## ● FRCP

- FRCP Rule 26(f) Committee Note: “When a case involves discovery of electronically stored information the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties information systems. It may be important for the parties to discuss those systems, and **accordingly important for counsel to become familiar with those systems before the conference.**”

# Data Maps





# Data Maps - Elements

- Identification of IT Systems
- Plain English Description of Purpose and Role
  - Whose data is stored on the system?
- Location Of System
- Retention/Deletion Cycles
  - Who is responsible for suspending such activity?
- Backups
  - Frequency
  - Location

# Data Maps - Benefits

- Education of IT Staff
- Education of Legal Staff
- Identification of Obsolete Systems
- Identification of Gaps in Processes
- Reduce Risk of Sanctions
- Reduce Cost of Discovery
  - Legal Hold Process
  - Rule 26(f) Conference
  - Not Readily Accessible Arguments



# Preservation

## ● Trigger - When Litigation Is Reasonably Anticipated

- Hotline calls
- Complaints to HR
- Complaints to supervisors
- Preservation letter
- Demand letter
- Administrative charge
- Lawsuit
- Statutory or regulatory requirements (e.g., record retention requirements)

# Preservation

## ● Key Elements Of An Effective Preservation Notice To Employees:

- Detailed description of the case
- Specific examples of types of data to preserve which is specifically tailored to the case.
- Specific examples of potential locations of data
- Track distribution
- Confirm compliance
- Issue reminder notices

# Preservation

## ● Key Elements Of An Effective Preservation Notice To IT Personnel:

- Copy Relevant E-mail Accounts
- Copy Other Sources Of ESI (Case Specific)
- Disable Auto-Delete As Necessary
- Retain Computers Of Departing Employees
- Maintain Activity Log Of Changes To System
- Preserve Copies Of Application Programs And Utilities

# Preservation - Scope

- Pension Committee v. Banc of Am. Secs, LLC, No. 05 Civ. 9016 (S.D.N.Y. January 15, 2010)
  - Back-up tapes need not be preserved unless they are the sole source of information
- Pippins v. KPMG, No. 11 Civ. 0377 (S.D.N.Y. May 16, 2013)
  - Court required forensic copies of approximately 2,500 hard drives
  - *However*, sampling could have avoided the issue

# Preservation - Obligations

- Pension Committee v. Banc of Am. Secs, LLC, No. 05 Civ. 9016 (S.D.N.Y. January 15, 2010)

- “Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, ...”
- It is gross negligence to fail:
  - ✓ to issue a written litigation hold (not universally accepted)
  - ✓ to identify the key players and to ensure that their records are preserved.
  - ✓ to cease the deletion of email or to preserve the records of former employees.
  - ✓ to preserve backup tapes when they are the sole source of relevant information ...

# Preservation - Obligations

● ***Rimkus v Cammarata***, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

- *Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable,*
- *and that in turn depends on whether what was done – or not done – was **proportional** to that case and consistent with clearly established applicable standards.*





# Preservation - Sanctions

- *Danis v. USN Communications*, 2000 WL 1694325 (N.D. Ill. 2000)
  - \$10,000 fine imposed against CEO personally for preservation errors.
- *Mt. Hawley Ins. Co. v. Felman Productions, Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010)
  - Mistake caused waiver of privilege.

# Data Privacy & Security

## ● High Level Concerns

- Who is the client?
- Where is the data?
- What kind of data is it?
- Who will we need to share with?
- How will it be transmitted and stored during the case?
- What happens when the case is over?

# Data Privacy & Security

## ● Regulatory overview

- Currently no broadly applicable federal law to safeguard.
- Federal alphabet soup: HIPAA, GLBA, FCRA, ECPA, SCA, CFAA, ADA/GINA/FMLA, FISMA, COPPA, FERPA
- HIPAA's broad reach
- POTUS' Executive Order on Cybersecurity (January 2013) may change this
- International privacy, security and cross border concerns

# Data Privacy & Security

## ● HIPAA Business Associate?

- *[T]he conduit exception is limited to transmission services ... A data storage company that has access to protected health information (whether digital or hard copy) qualifies as a business associate, even if the entity does not view the information or only does so on a random or infrequent basis. Thus, document storage companies maintaining protected health information on behalf of covered entities are considered business associates, regardless of whether they actually view the information they hold.*

# Data Privacy & Security

## ● “Cocktail Approach” in the States:

- Affirmative obligations to safeguard (e.g., MA, MD, CT, CA, TX, IL (biometric information))
- Data breach notification (46 states plus some cities, insurance commissioners)
- Require **vendors** with access to agree in writing to safeguard (e.g., MA, MD, CA, TX, OR)
- Various Social Security number protections and policy requirements (e.g., CT and MI)
- Data destruction requirements
- Website privacy statements and policies

# Data Privacy & Security

## ● Key contract provisions

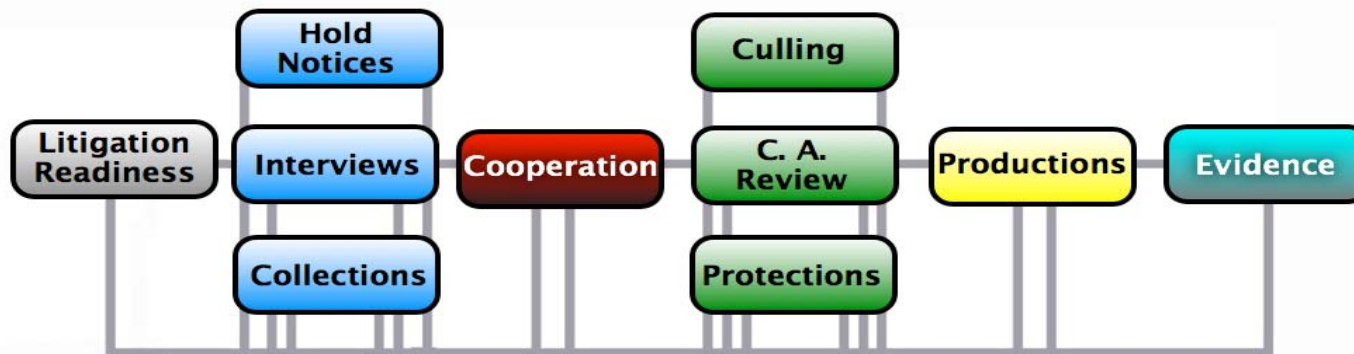
- Indemnity
- Right to audit
- Data incident/breach investigation and response procedures
- Limitations on use and retention of data
- Privacy and security safeguards incorporated by reference
- Definition of data



# Search and Review

e-Discovery Team ®

## Electronic Discovery Best Practices



### Pre-Suit Activities

- Policies for Hold Triggers & Implementation
- Email Retention Policies
- Information Governance
- ESI Maps with 26b2B ID
- Certified 37(e) Destruction

### Preservation Activities

- Notify Custodians & IT
- Preserve in Place
- Self Collection
- Bulk Collection by IT
- Witness Interviews
- Cross-Border Issues

### Cooperative Dialogues with Opposing Counsel & Judges

- 26(f) Conferences
- Proportionality
- Relevancy Dialogues
- 16(b) Hearings
- Requests for Production
- Form of Production
- Document Non-Cooperation
- Early Motion Practice

### Search & Review

- Bulk Culling by attorney designated criteria
- Computer Assisted Review (CAR)
- Hybrid Multimodal
- Predictive Coding
- Bottom Line Driven Proportional Review
- Quality Controls
- Privacy Protections
- Privilege Logs and Orders

### Multiple Productions

- Initial Disclosures
- Seed Set for CAR
- Planned Phases beginning with *low hanging fruit*
- Class-A Custodians First
- Rolling Productions

### Introduce Evidence

- Motions, Hearings, Mediations, Trials
- Grounds for Admission & Objection
- Spoliation and Sanctions

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# Search and Review

- You cannot review ESI the way you did paper.

- There is too much of it to review it all.
- You need to see the metadata.
- You need to search and cull before you review.

- New Strategies

- Phased Discovery
- Sampling
- Computer Assisted Review (C.A.R.)

# Search and Review

## ● Proportionality

- Moody v. Turner Corp. Case No. 1:07-cv-692. (S.D. OH, Sept 21, 2010)
  - “...the mere availability of such vast amounts of electronic information can lead to a situation of the ESI-discovery-tail wagging the poor old merits-of-the-dispute dog.”
- Rimkus Consulting Group v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tx. 2010)
  - “The Rules require that the parties engage in “reasonable efforts” and what is reasonable “depends on whether what was done—or not done—was proportional to that case...”

# Search and Review

## ● Proportionality (cont.)

- Wood v. Capital One Services, LLC, 2011 U.S. Dist. LEXIS 61962, \*10 (N.D.N.Y. April 15, 2011)
  - Denying request for discovery where the “minimally relevant” information sought was outweighed by the burden associated with the requested search and production.
- Convolve Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 167-68 (S.D.N.Y. 2004)
  - Denying request for discovery based on proportionality given the “marginal value” of the materials to the litigation.

# Search and Review – Sampling Case Study

- First and Last Name – 7,192 docs
- Last Name Only – 1,499 docs
- Review of first 50 docs:
  - 10 Relevant
  - 9 out of 10 would have been found anyway.
  - 1 remaining document was not “hot”
- Random Sample of 394 docs
  - 4 Relevant
  - 4 out of 4 would have been found anyway
- Savings -- \$6,000 v. \$30,000



# Computer Assisted Review

● *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process* 10 SEDONA CONF. J. 299, 302 (2009)

- “The legal profession is at a crossroads: the choice is between continuing to conduct discovery as it “always has been practiced” in a paper world – before the advent of computers [and] the Internet ... or, alternatively, embracing new ways of thinking in today’s digital world.”



# Computer Assisted Review

● *National Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement Agency*, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012) (J. Scheindlin)

- “Simple keyword searching is often not enough. ...
- [P]arties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents.
- Through iterative learning, these methods (known as “computer-assisted” or “predictive” coding) allow humans to teach computers what documents are and are not responsive...”

# Computer Assisted Review

- Keyword Searching and Human Review is Highly Ineffective.
  - 1986 Blair & Maron Study
    - 75% v. 20%
  - 2007-2008 TREC Legal Track Study
    - 7 million document database: **22% relevant found**
  - 2009 TREC Legal Track Study
    - Human review is not the gold standard – human reviews missed between 20% and 75% of all relevant documents.
  - 2010 TREC Legal Track Study
    - Relevancy determinations consistent among reviewers 50% of the time.

# Computer Assisted Review

- *Da Silva Moore v. Publicis Groupe*, Case No. 11 Civ. 1279 (S.D.N.Y. Feb. 24, 2012)
  - “This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.”
  - “The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the court needs to examine.”

# Computer Assisted Review

## ● EORHB, Inc. v. HOA Holdings, No. 7409-VCL (Del. Ch. Oct. 15, 2012)

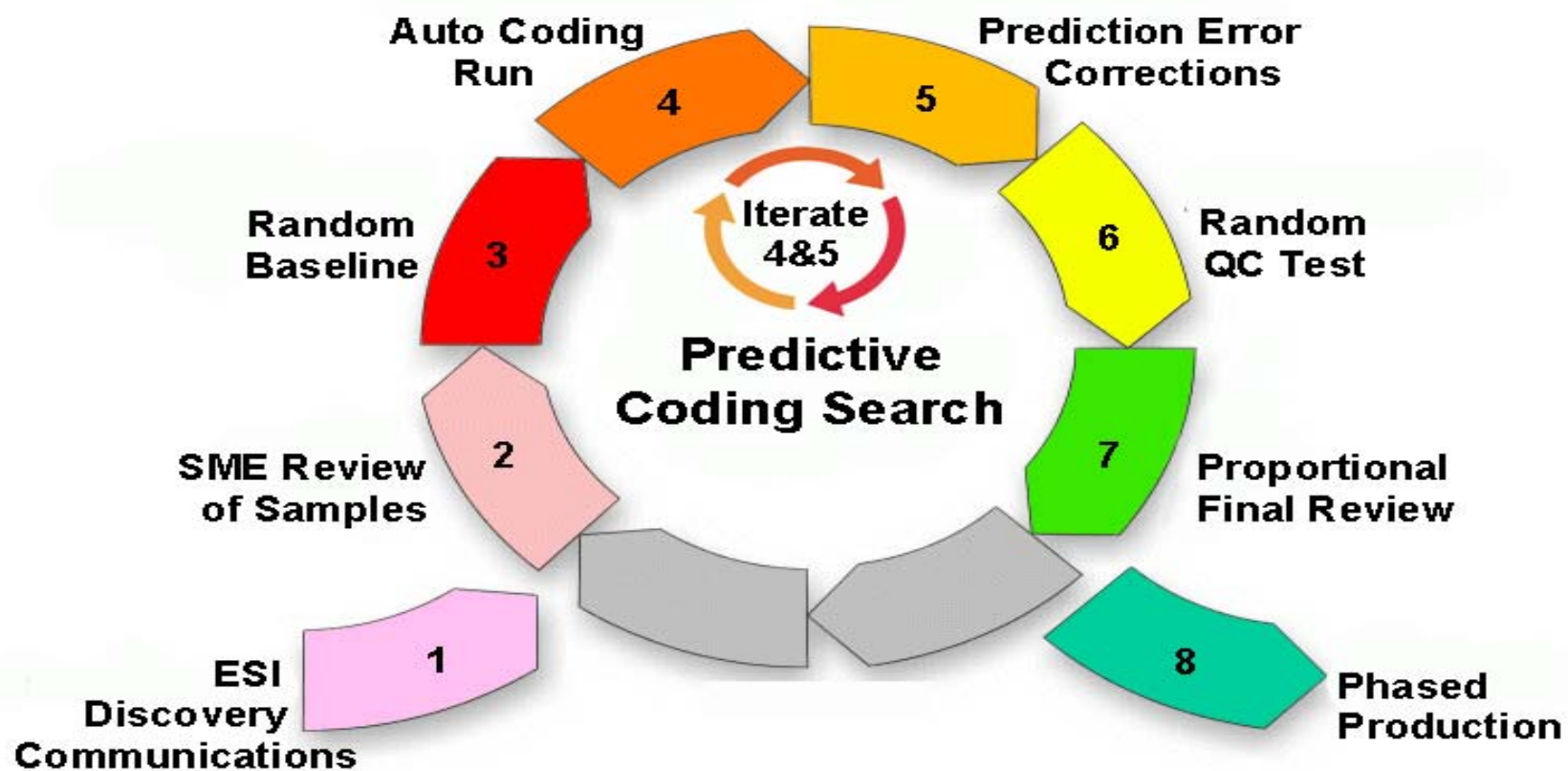
- Parties disputed the meaning of indemnity provisions negotiated in the sale of a restaurant
- Court ordered predictive coding
- *“This seems to me to be an ideal non-expedited case in which the parties would benefit from using predictive coding. I would like you all, if you do not want to use predictive coding, to show cause why this is not a case where predictive coding is the way to go.”*



Vice Chancellor J. Travis  
Laster in Delaware Chancery  
Court



# Computer Assisted Review



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# Cost Shifting/Sharing

● *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316 (3d Cir. March 16, 2012)

- 28 U.S.C.S. § 1920 (4) does not state that all steps that lead up to the production of copies of materials are taxable.
- Only scanning and file format conversion could be considered making copies under 28 U.S.C.S. § 1920 (4), not processing.



# Cost Shifting/Sharing

● Country Vitner of NC v. E& J Gallo., No. 12-2074 (4th Cir. April 29, 2013)

- Only the conversion of native files to TIFF and PDF formats, and the transfer of files onto CDs, constituted "making copies" under 28 U.S.C.S. §1920 (4)

# Cost Shifting/Sharing

● *Boeynaems v. LA Fitness International*, 2012 WL 3536306 (E.D. Pa. Aug. 16, 2012)

- Court adopted cost-shifting where a large volume of discovery was probative as to the issue of class certification.
- Plaintiffs should be responsible for the cost of additional ESI discovery pre-class certification
- Designed to give the plaintiff some skin in the game.

# Thank You!



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