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# Complex Discovery in Corporations and Law Firms

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Mark L. Smith is a commercial litigator whose practice covers antitrust, securities, class actions, government investigations, banking litigation, and compliance guidance.

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Mark has represented a wide range of clients, from multinational *Fortune* 500 companies to smaller product and service providers in both large and small litigation matters and provides ongoing counsel to several companies on securities, antitrust, international privacy, cross-border litigation, eDiscovery, and privacy matters.

Mark is a current and past recipient of the Rising Star Award for Southern California Attorneys and is a Central District of California Distinguished Service Award winner,

Mark provides training and has also published and spoken on eDiscovery and the substantive areas of law in which he practices numerous times over the last several years.

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Ryan is a founding partner of Baker Marquart Crone & Hawxhurst. He has successfully represented some of the world's largest companies in complex commercial litigation. Ryan's practice areas include entertainment, antitrust, securities and intellectual property. Ryan has extensive experience in all aspects of litigation. He has tried cases and argued motions in both state and federal courts. In addition to his trial court practice, Ryan has successfully practiced in front of the California and Ninth Circuit courts of appeal. Based on his experience and success, Ryan was named a "Rising Star" by Los Angeles magazine in 2009 and 2010.

Ryan has appeared on CNN's Burden of Proof. He has also been quoted in the Los Angeles Times and Daily Journal. Before practicing law, Ryan was chief operating officer of WebMediate, Inc., a company offering alternative dispute resolution over the Internet. While at WebMediate, Ryan served on a panel at a workshop co-sponsored by the Federal Trade Commission and the Department of Commerce - Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace.

# What is eDiscovery?

- EDD – electronic data discovery
  - 99% of all documents are created and stored electronically
  - 70% of an organizations documents exist **solely** as electronically stored information
  - 84% of organizations have been required to produce ESI in the last 2 years
  - 96% of companies are not prepared for an ESI request

- More to the point, eDiscovery is a statutory system of allocation of litigation costs and risk

# Goals

- Minimizing Costs and Risks, of course, but how?
  - Your eDiscovery methodology must be defensible
  - Your eDiscovery methodology must be efficient
  - Your eDiscovery approach must be rational
    - Know your client
    - Know your case
    - Know eDiscovery law
    - Know the technology
    - Know the relationship between the substantive law in your case and EDD

# Has the cost of eDiscovery tilted the scales of justice?

- "Unless you're going to limit [e-discovery] costs or where you look, then justice is determined by wealth, not by the merits of the case." (Supreme Court Justice Stephen Breyer)
- Discovery of electronic data that is disproportional to the amount in controversy is “crippling our civil justice system.” (Final Report on The Joint Project of The ACTL Task Force on Discovery and the IAALS)
- "The staggering price tag for harvesting, reviewing and producing vast amounts of electronic data has immeasurably increased the terrorism effect of meritless litigation." (Robert H. Gruenglas)

# The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process – April 2009

- **Principle 1.** In cases involving ESI of increasing scope and complexity, the attorney in charge should utilize project management and exercise leadership to ensure that a reasonable process has been followed by his or her legal team to locate responsive material.

- **Principle 2.** Parties should employ reasonable forms or measures of quality at appropriate points in the ediscovery process, consistent with the needs of the case and their legal and ethical responsibilities.

- **Principle 3.** Implementing a well thought out e-discovery "process" should seek to enhance the overall quality of the production in the form of: (a) reducing the time from request to response; (b) reducing cost; and (c) improving the accuracy and completeness of responses to requests.

- **Principle 4.** Practicing cooperation and striving for greater transparency within the adversary paradigm are key ingredients to obtaining a better quality outcome in e-discovery. Parties should confer early in discovery, including, where appropriate, exchanging information on any quality measures which may be used.

# Cost Control Through Scope Control

- **The Basic Elements of Project Management in eDiscovery**

**Inputs**

- A Well Defined Defensible Process
- Retention Policies, Technology, Resources, Laws, Budgets, Time, Knowledge, Tools

**Criteria**

- Pleadings or other Papers
- Facts and Circumstances
- Legal Obligations
- Negotiated Agreement

**Outputs**

- Defined Scope of Discovery
  - Relevant Custodians
  - Relevant Systems
- Project Manager Assignment
- Clearly Defined Constraints
- Clearly Defined Assumptions

# Project Resource Management

- **Collection**
  - Can Company Self Collect?
  - Should Company Self Collect?
  - What Tools are Available?
  - Targeted Collections vs. Full Collection
  - Custodian Self- Identification and Collection
  - What Is the Goal of Collection:
    - Early Case Assessment
    - Preservation
    - Review and Production

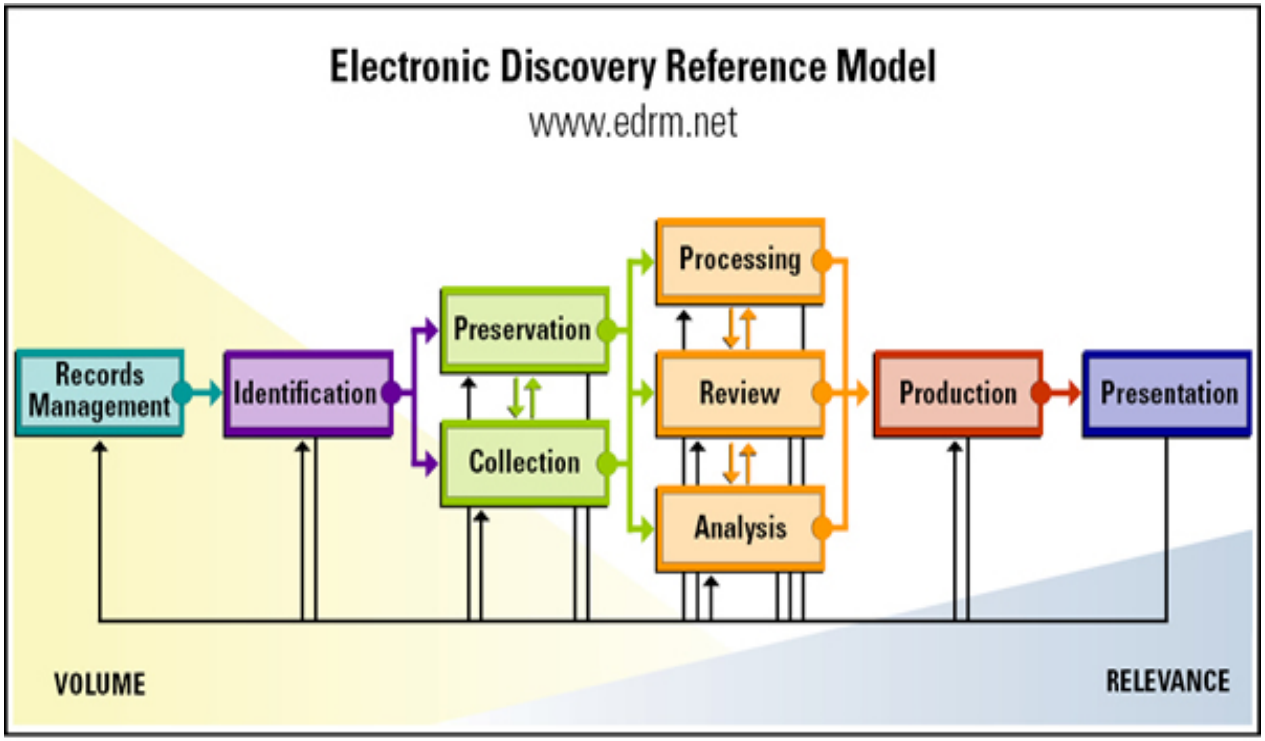
- **Review**
  - Who will Review
  - What will be Reviewed
  - Appropriate Tools
  - Responsive Review or Just Privilege Review?
  - Use of Search Terms:
    - Potentially Responsive
    - Responsive
    - Privileged

# Project Time Management and Cost Control

- **Time Management:**
  - Fire drills are almost always riddled with cost overruns.
  - Fire drills are almost always avoidable with good litigation management
  - Fire drills are inevitable – Plan for them
- **Identify Realistic Project Time Lines**:
  - Review Discovery Deadline and Plan (avoid “discovery due tomorrow!!”)
  - Allow 48 hours between “data up” and “review start” to test systems, cull data
  - Allow ample time between review and production for quality, etc. (*e.g.,* 5 days)
  - Anticipate review duration (docs in set / docs per hour = hours needed)

# Developing a Rational, Efficient, Defensible eDiscovery Plan

- Plan Upfront for Each Stage of Discovery and Understand How the Phases Integrate With Each Other and Beyond



# Retention and Holds

- In one case, DuPont reviewed 75 million pages of text during the three-year period of a case and found that more than 50 percent of the documents reviewed had been kept beyond their retention period. The cost of reviewing those documents past their retention periods was more than $12 million.
- Less data retained means less to deal with in litigation.
  - Internal conflict for companies
    - Spoliation risk
    - Loss of exculpatory data
    - Loss of business information
- Safe Harbor for compliance with a reasonable data retention program exists under both Federal and California rules

# Retention and Holds (cont.)

- Tailor litigation holds to the people and types of documents that will be needed for the litigation through both analysis of the claims and meeting and conferring with opposing counsel.
- Use of Programs that automatically identify, hold, collect, filter and de-dupe data
  - Are these practical for anyone other than the largest potential litigants?

# Collection

- Build a protocol that maintains chain of custody to avoid spoliation issues
- Phased collections where possible
- Limit collection to custodians and types of data dictated by the case; meet and confer on this issue with opposing counsel
  - Problem areas always include
    - databases and spreadsheets
    - back-ups
    - legacy systems
- Negotiate limitations on metadata
- Are forensic collection specialists necessary or can this be performed internally or by a law firm?

# Processing

- Some vendors are charging as much as $1,500 to $2,000 per GB for processing and $1,000 per GB for "quick peek" EDD processing which is just flattening and converting the data into a format that can be read by one of the electronic document review platforms.
- Choosing efficient processing and review tools and methodologies
  - Be sure to consider potential tagging, redaction, long-term storage during the pendency of the litigation, and production format issues at this stage
- Pre-process by eliminating any data possible before hard processing
- De-duplication and repopulation
- Organize documents for ease of review and in conjunction with agreed means of production

# Processing (cont.)

- How to deal with paper documents
  - Review paper separately; review it in paper format?
  - When to OCR and when not to OCR?
- Common problem areas:
  - Inaccessible data
  - Data on proprietary software systems
  - Encrypted data
  - Data in foreign languages

# Review

- Can software replace people?
- Searching
  - Key word searches
  - Concept searching
  - When do you need to get buy-in from parties and court before using searching as a culling tool?
- Statistical Sampling
- Semi-automated review techniques like data clustering
- Can logarithms eliminate the need to review?
- Does "software" review comply with ethical standards, discovery rules, and FRE Rule 502?

# Production

- Negotiate form of production up front
  - Native formats vs. tif or pdf formats with accompanying load files for metadata
- Negotiate clawbacks in advance and incorporate into standing protective orders
  - Be wary of FRE Rule 502 rulings that require showings concerning good faith efforts to prevent inadvertent disclosure in order to avoid waiver

# Other Potential Sources of Savings

- **Lack of Resources**
  - Can parties limit their electronic discovery obligations by arguing they do not have adequate financial, manpower or technical resources to comply?
  - Compare:
    - *Williams v. Taser International*, the responding party was a relatively small company with about 245 employees. When faced with electronic discovery obligations, Taser hired and trained a technology employee to manage the discovery process. The judge said this was enough. He maintained that the company still had to make all reasonable efforts, including the retention of additional information technology professionals to get the job done.
    - In 2009, Office of Federal Housing Enterprise Oversight spent >$6M responding to a third-party subpoena (9% of agency's budget); Judge wouldn't let the OFHEO out of it and didn't award cost-shifting

# Other Potential Sources of Savings (cont.)

- **Cost shifting**
  - More often than not, however, parties are required to pay for their own costs when producing electronic information.
  - Responding parties have argued that costs of complying with electronic discovery demands should, under certain circumstances, be shifted to the propounding parties. While both the rules and case law provide some basis for this argument, the likelihood of cost-shifting is relatively low.
  - Under the balancing test in *Zubulake*, costs are more likely to be shifted where the costs associated with electronic discovery are expected to be high as a result of low data accessibility and the probative value of the discovery sought is relatively low.
  - *In PSEG Power New York v. Alberici Constructors*, the responding party argued that it should not have to pay an extraordinarily high and even disproportionate costs of producing a large volume of a relatively accessible form of data -- e-mails along with attachments. The court disagreed.
  - Third parties have the best chance of getting a cost-shifting order.

# Other Potential Sources of Savings (cont.)

- Proportionality
  - The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable. (Seventh Circuit Electronic Discovery Pilot Program, Principle 1.03 (Discovery Proportionality))
  - "Proportionality should be the most important principle applied to all discovery." (Final Report on The Joint Project of The ACTL Task Force on Discovery and the IAALS)
  - Critical for smaller and mid-size cases.

# Other Potential Sources of Savings (cont.)

- Hold outside legal defense counsel accountable as a partner in managing e-discovery costs
- Internalize costs
- Negotiate volume discounts as a repeat customer of eDiscovery services.
- Set and follow data retention policies
- Meet & Confer with opposing counsel to negotiate cost-effective solutions to eDiscovery problems
  - What about asymmetrical discovery situations?

# Other Potential Sources of Savings (cont.)

- Outsourcing overseas, is it practical, ethical, feasible, and client-friendly?
- Early Case Assessment and Pre-litigation Discovery
  - Is it possible to know 80% of the information about a case in the first sixty days?
  - Is it possible to forecast litigation and conduct internal discovery with the goal of reaching early settlements?
  - How does this approach affect undue burden and "Inaccessibility" arguments?
- Risks associated with Evidence Elimination software
- Are agreements not to ask one another for electronic data a good approach? Are they ethical?
- While these principles deal largely with responding parties' production of information, how can these ideas also apply to the handling of information received in response to discovery requests?

# Managing Risks . . . Sanctions

- Courts are imposing a wide range of sanctions against corporations, including:
  - Spoliation instructions
  - Monetary fines
  - Default judgments
  - Referrals to U.S. Attorney for criminal investigation
- Case analysis:
  - Granted sanctions 65% of the time
  - Defendants being sanctioned four times (81%) as often as plaintiffs (19%)
  - Behavior most often involved the non-production of documents (84%)

# Study of Key 2009 eDiscovery Opinions

- 39 % of cases addressed sanctions
  - 66.67 % of sanctions involved preservation and spoliation issues
  - 16.67 % of sanctions involved production disputes
  - 16.67 % of sanctions involved other discovery abuses
- 27 % of cases addressed various production considerations
- 12 % of cases addressed privilege considerations and waivers
- 12 % of cases addressed various procedural issues (such as searching protocol)
- 4 % of cases addressed cost considerations
- 4 % of cases addressed computer forensics protocols and experts
- 2 % of cases addressed preservation and spoliation issues (but not sanctions)
- 1 % of cases addressed discoverability and admissibility issues

Source – Kroll Ontrack

# 2010 eDiscovery Sanctions Trends

- For the first half of 2010, 103 sanctions opinions were issued with litigants seeking sanctions 30% of the time (compared to 42% in 2009).
- Litigants received sanctions 68% of the time roughly the same as in 2009 (70%).
- The most frequently awarded sanction this year has been costs and fees associated with the discovery dispute.
- The most widely reported sanctions cases during this period have been the imposition of adverse inference sanctions for failure to preserve relevant evidence.

*From Gibson Dunn 2010 Midyear eDisc. Update

# Sample Monetary Sanctions

- $75,000 in sanctions in addition to partial dismissal of damage claim in *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co*., 2010 WL 55595 (M.D. Fla. Jan. 5, 2010).
- $26,382.29 in sanctions in *Cherrington Asia Ltd. V. A&L Underground Inc*., 263 F.R.D. 653 (D. Kan. 2010).
- $150,000 discovery costs and adverse inference sanctions imposed against SanDisk in *Harkabi v. SanDisk Corp.*, 2010 U.S. Dist. LEXIS 87483, because of negligence and "concatenation of omissions" by a sophisticated company touted for its electronic data storage expertise that had significant discovery failures including failure to timely collect and produce crucial hard drive email only discovered using forensic expert.

# 2010 eDiscovery Sanctions Judicial Criteria

- Heavy hitters of e-discovery have just handed down four significant decisions:
  - Judge Shira Scheindlin
  - Judge Lee Rosenthal
  - Magistrate Judge John Facciola
  - Magistrate Judge Paul Grimm

# *Pension Committee of Univ. of Montreal v. Banc of America Sec, LLC, et. al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)

- Judge Scheindlin - "crystal clear that the breach of the duty to preserve" is well established and arises when a party "reasonably anticipates litigation" requiring the party to "suspend its routine document retention/ destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Pension Committee* at *4.
- The failure to timely issue a written litigation hold impacts the court's determination of a party's culpability for failing to preserve documents.
- "Definitely after July, 2004, when the final relevant *Zubulake IV* was issued, the failure to issue a *written* litigation hold constitutes gross negligence" and could result in substantial sanctions if such breach resulted in the destruction of relevant information. *Pension Committee Id*. at *3.
- Spoliating party's actions in failing to timely institute written litigation holds, failing to execute a comprehensive search for documents and/or failing to sufficiently monitor their employee's document collection were grossly negligent.

# *Pension Committee of Univ. of Montreal v. Banc of America Sec, LLC, et. al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)

- Conduct likely to be deemed grossly negligent includes the failure to issue an adequate written litigation hold, the intentional destruction of relevant records after the duty to preserve has attached, and the failure to collect records from key players and former employees. Id. at *3.
- Following missteps are likely to be deemed simply negligent by the court: failure to assess the accuracy and validity of selected search terms; failure to obtain records from all employees likely to have relevant records; and failure to take all appropriate measures to preserve ESI. *Id.*
- Judge Scheindlin instructed the jury that the plaintiffs were grossly negligent in failing to preserve evidence after the duty to preserve arose, and, therefore, informed the jury that they could presume that such lost evidence was relevant and would have been favorable to the innocent party. *Id.* at *23.

# *Rimkus Consulting Group Inc. v. Cammarata*, H-07-0405 (S.D. Tex. Feb. 19, 2010) (Judge Lee Rosenthal)

- Judge Rosenthal is well known in e-discovery circles as she chairs the Judicial Conference Committee on Rules of Practice and Procedure
- **Preservation**: "[i]t can be difficult to draw bright-line distinctions between acceptable and unacceptable conduct in preserving information," she reiterated that the relevant standard is reasonableness which "in turn depends on whether what was done – or not done – was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus* at 12-13.
- **Sanctions**: Required a showing of bad faith before imposing severe sanctions. *Rimkus* at 14-16.
  - This "bad faith" standard is consistent with federal court decisions in the Seventh, Eighth, Tenth, Eleventh and D.C. Circuits which also appear to require bad faith rather than negligence. *Id.* at 14-15.
  - Judge Rosenthal acknowledged that the First, Fourth, and Ninth Circuits do not require bad faith to impose sanctions if there is severe prejudice, although she noted that these cases often emphasize the presence of bad faith. *Id*. at 15.
  - Judge Rosenthal noted that the Third Circuit did not require bad faith but rather "balance[s] the degree of fault and prejudice." *Rimkus* at 614-15.

# *D'Onofrio v. SFX Sports Group, Inc., et al.* 2010 WL 3324964 (D.D.C. Aug. 24, 2010)

- In *D'Onofrio v. SFX Sports Group, Inc., et al*., 2010 WL 3324964 (D.D.C. Aug. 24, 2010), Magistrate Judge Facciola struggled to determine what, if any, sanction was appropriate when the responding party failed to preserve all relevant evidence, but made significant efforts to belatedly restore and produce what could be found.
- Since defendants spent over $1 million to find and restore missing data, awarding costs, or dispositive sanctions to dismiss, were not warranted.
- Judge Facciola noted that to justify an adverse inference sanction the moving party must prove: 1) a duty to preserve what was altered; 2) destruction was accompanied by a "culpable state of mind"; and 3) destroyed evidence was relevant to the moving party's claims, to the extent that a reasonable factfinder could reach this conclusion. D'Onofrio at p. 11.
- The Judge concluded that an adverse inference instruction was not warranted because Plaintiff could not establish by clear and convincing evidence bad faith;
- Preclusion may be the most appropriate sanction since the amount, and relevance, of lost date is still under dispute so the court ordered an evidentiary hearing to address factual issues necessary to determine if preclusion would be ordered.

# *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*., cv-MJG-06-2662 (D. Md. Sept. 9, 2010) ("Victor Stanley II")

- For four years, with a succession of defense attorneys, and "during which Defendant…had actual knowledge of his duty to preserve" defendant "deleted, destroyed, and otherwise failed to preserve evidence, and repeatedly misrepresented the completeness of their discovery production…substantial amounts of the lost evidence cannot be reconstructed." *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*., cv-MJG-06-2662 (D. Md. Sept. 9, 2010), at p. 2.
- The court found that defendant's "pervasive and willful violation of serial Court orders to preserve and produce ESI evidence be treated as contempt of court, and **the he be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs** that will be awarded to Plaintiff as the prevailing party…" *Victor Stanley* at p. 3 (emphasis added).
- The court also recommended default judgment for Count I of the complaint,

# *Fharmacy Records v. Nassar,* 2010 WL 2294538 (6th Cir. June 7, 2010)

- Other federal circuit courts affirmed dismissal or default judgment sanctions for deliberate and prolonged violation of discovery orders including spoliation of electronic data.
- In *Fharmacy Records v. Nassar*, 2010 WL 2294538 (6th Cir. June 7, 2010), The district court applied a four factor test and concluded the discovery abuses by the responding party were "a campaign of fraud" so egregious that dismissal was warranted. The test includes: 1) whether the conduct was willful, bad faith or fault; 2) whether the adversary was prejudiced; 3) whether the responding party was warned that their failures could lead to dismissal; and 4) whether less drastic sanctions were considered or imposed. The Sixth Circuit noted that in order to impose the inherent power for sanctions, a finding of conduct "tantamount to bad faith is required" and affirmed the district court's dismissal order.

# *Southern New England Tel. Co. v. Global Naps Inc.*, No. 08-4518-cv (2nd Cir. Aug. 25, 2010)

- In *Southern New England Tel. Co., v. Global Naps Inc*., No. 08-4518-cv (2nd Cir. Aug. 25, 2010), the Second Circuit affirmed the district court's contempt order awarding discovery costs for obstructive conduct, and also affirmed the order granting a default judgment against all defendants for willful violation of the court's discovery order by deliberately withholding, and spoliating, relevant evidence. The court applied these factors: 1) willfulness or reason for non-compliance; 2) efficacy of lesser sanctions; 3) duration of non-compliance; and 4) whether party was warned then ruled the record fully supported that defendants acted "willfully and in bad faith". The court noted Rule 37 sanctions are appropriate not only for prejudice, but also to penalize, and/or to deter conduct. *Southern* at p. 39.

# Changed Circumstances

- Inadvertent destruction or loss (automatic deletion program not turned off; custodian ignore litigation hold instructions, etc.)
- Active data becomes inaccessible on backup tapes
- Vendor mishaps such as hard drives lost in transit, missed data source collection, or keyword search errors;
- Common Client mishaps include failure to identify all key custodians, failure to preserve hard drives of employees who leave, failure to supervise litigation holds, and failure to verify thoroughness of collection;
- Inability to meet prior commitments due to changing conditions (file formats, production deadlines, etc.)
- Unanticipated or unaddressed issues (employee destroys data, HR reassigns hard drive of departed custodian, IT overwrites tapes)

# Considerations

- **Judge**
- **Your opposition**
- **Case:**
  - Nature of case and opposing party
  - Risk profile of case
- **Client:**
  - Budget
  - Risk tolerance
  - History of sanction cases
  - Internal resources
  - Search and retrieval capabilities
  - Indexing capabilities

# Investigate & Remediate

- "If you don't know where you are going, you are going to be lost when you get there." Yogi Berra
  - As soon as any potential eDiscovery problem arises, immediately investigate it
  - If evidence is lost, determine:
    - How it was lost?
    - When it was lost?
    - Whether duplicates exist from another active or inactive sources?
    - Whether the information is material?
  - Consider restoring the evidence?
  - Practice pointer: imperative you document your actions and decisions in written firm, but a judgment call as to how much detail?

# Transparency – Notification

- Duty of candor with the Court
- Duty not to obstruct opposition's right to legitimate discovery
- Questions:
  - Do you have a duty to notify the Court?
  - Do you have a duty to notify the other side?
  - If so, practical questions of:
    - When to disclose?
    - Who to disclose to first?
    - What to disclose?

# The Expert Issue

- Should you bring in an expert?
- Timing?
- Role?
- Consulting vs. testifying? (Do you need both)

# Referral to A Special Master

- Should you ask for a referral?
- What should be the scope of the referral?
- Should he/she be an e-discovery expert?
- What are the downsides of a special master?

# Dealing with a Difficult Opposing Counsel

- Many opposing counsel still do not understand the Federal and many state rules were changed – mandating electronic discovery
- Rather than using the Rule 26(f) and 16(a) process to streamline discovery, they either:
  - Have no interest in addressing e-discovery;
  - Want to use e-discovery as a weapon to raise the nuisance value of the case
- Cannot treat all adversaries the same but:
  - Should try to educate them to the changed realities
  - If the remain unable to unwilling to cooperate, set them up:
    - State out a reasonable position
    - Persuade the court to adopt your position

# Any questions?

# Thank you.