



H3 CONSULTING

YOUR TRUSTED LPO PROVIDER

In 2011, the most prominent (and most controversial) electronic discovery opinions concerned (1) preservation and spoliation issues – frequently involving sanctions for a failure to preserve – and (2) search/privilege protocols and cooperation among parties.

Compiled by H3 Consulting from online public domain resources, **eDiscovery Year in Review** is a collection of eDiscovery-specific cases and news designed to inform and educate legal professionals.

Victor Stanley II - Judge Grimm Imposes Prison Sanction for Spoliation by a Defendant.

The facts of this case are so bizarre that Judge Grimm invoked the title of the comedic novel by Jimmy Breslin called The Gang That Couldn't Shoot Straight: this is the case of the "gang that couldn't spoliolate straight." <http://www.mdd.uscourts.gov/Opinions/Opinions/Victor%20Stanley%20R&R%20FINAL%20Mem%20090910.pdf>

N.D. Cal. Relies on Federal Circuit's Model eDiscovery Order to Craft Search Protocol Significantly Narrowing Third-Party Subpoena

U.S. Magistrate Judge Paul S. Grewal relied on the Federal Circuit's recently-released model eDiscovery order for guidance in crafting a limited search protocol that significantly narrowed the terms of a subpoena served by plaintiff Software Rights Archive LLC ("SRA") on non-party Kleiner Perkins Caufield and Byers ("KPCB"). In re Google Litig., Case No. C 08-03172 RMW (PSG), 2011 U.S. Dist. LEXIS 140656 (N.D. Cal. Dec. 7, 2011). <http://esininja.com/blog/2011/12/15/court-relies-on-federal-circuits-model-ediscovery-order-to-craft-search-protocol-significantly-narrowing-third-party-subpoena/>

To Preserve and Protect: *The obligation to preserve potentially relevant documents is an important component of the U.S. judicial system and a key piece of the eDiscovery process. All too frequently, however, it is also the source of confusion, significant costs, intrusion into (and disruption of) business and personal affairs, and a wide range of sanctions.* <http://esininja.com/blog/2011/08/01/79/>

Key preservation issues addressed in 2011:

- *When is the duty to preserve triggered?*
- *Must a litigation hold include written notice to custodians?*
- *What sorts of ongoing monitoring, supervisory and other duties are required as part of the litigation hold process and on whom are these duties imposed?*

Using "Special e-Discovery Counsel" To Gain a Litigation Edge *"...most litigators are ill-equipped to deal with the nuances and technical complexity of e-discovery issues."*

<http://www.metrocorpocounsel.com/articles/8797/using-special-e-discovery-counsel-gain-litigation-edge>

Federal Circuit Addresses eDiscovery Cost Recovery by Prevailing Parties *In a Nov. 23, 2011 decision that adds to the growing body of case law supporting the recovery of eDiscovery costs by prevailing parties under Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920(4), the Court of Appeals for the Federal Circuit held that although "the costs of producing a document electronically can be recoverable under section 1920(4)," the parties' cost-sharing agreement precluded the prevailing parties' claim for \$234,702.43 of the \$235,281.03 in costs they paid to Stratify for use of its ESI-review software. In re*

[Ricoch Co., Ltd. Patent Litig.](http://esininja.com/blog/2011/11/30/federal-circuit-addresses-ediscovery-cost-recovery-by-prevailing-parties/) <http://esininja.com/blog/2011/11/30/federal-circuit-addresses-ediscovery-cost-recovery-by-prevailing-parties/>

The Google v. Oracle Email Slip: Case in Point for Creative Analytics & Work Flow PC World and other media outlets reported on the legal wranglings surrounding the accidental production of critical emails that should have (apparently and clearly) been withheld as protected by an attorney/client communication. <http://postmodern-ediscovery.blogspot.com/2011/10/google-v-oracle-email-slip-case-in.html>

Need a Reason to Hire E-discovery Counsel? Here Are \$6 Million. Not having knowledgeable e-discovery counsel can be costly -- a lesson the Office of Federal Housing Enterprise Oversight (OFHEO) found out the hard way. <http://ediscovery.quarles.com/2009/02/articles/case-law/need-a-reason-to-hire-ediscovery-counsel-here-are-6-million/>

When Preservation Requests Are Wielded as Weapons Cooperation in e-discovery doesn't mean bowing to your opponent's demands for over-preservation. <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202533297313&slreturn=1>

Legal Experts: Attorneys Have an Affirmative Duty to Address Social Media Evidence ...the widespread importance of social media evidence to just about every type of litigation and investigation matter, it is incumbent on attorneys and their hired consultants to understand and address social media evidence as a standard practice. <http://blog.x1discovery.com/2011/12/12/legal-experts-attorneys-have-an-affirmative-duty-to-address-social-media-evidence/>

A Growing Trend: Use of E-Discovery 'Special Masters' The use of e-discovery "special masters" -- who help parties frame and execute the discovery of electronically stored information -- is a growing trend... <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202533274953&slreturn=1>

Justifying the Investment of an eDiscovery Consultant -- Why bringing an outside expert can help bolster your legal-team. <http://www.insidecounsel.com/2011/12/23/e-discovery-justifying-the-investment-in-an-e-disc?t=e-discovery>

About H3 Consulting: For law firms with a temporary need for eDiscovery counsel to provide expert guidance in a litigation or investigation, H3 Consulting provides legal and electronic discovery expertise unmatched by temporary lawyers supplied by staffing agencies -- and more cost-effective than retaining separate outside counsel. When seasoned help is required for matters involving electronically stored information ("ESI"), H3 Consulting provides the affordable alternative to engaging outside counsel or hiring additional permanent staff. Learn more at www.h3lpo.com.

Contact H3 for a FREE consultation at (415) 902-3532 or email us at info@h3lpo.com.
