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FEBRUARY 11–13, 2013 • HOUSTON , TEXAS

E-Discovery & ESI – Don't Leave Your Business Exposed

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- Full-service and leading defense litigation law firm with 24 offices in the United States
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- Jennifer S. Heitman, Partner
- Counsels and defends hotels, restaurants, property owners, and businesses related to liability claims and Title III ADA
- Experience includes Federal and State Court litigation, administrative hearings, and public agency investigations

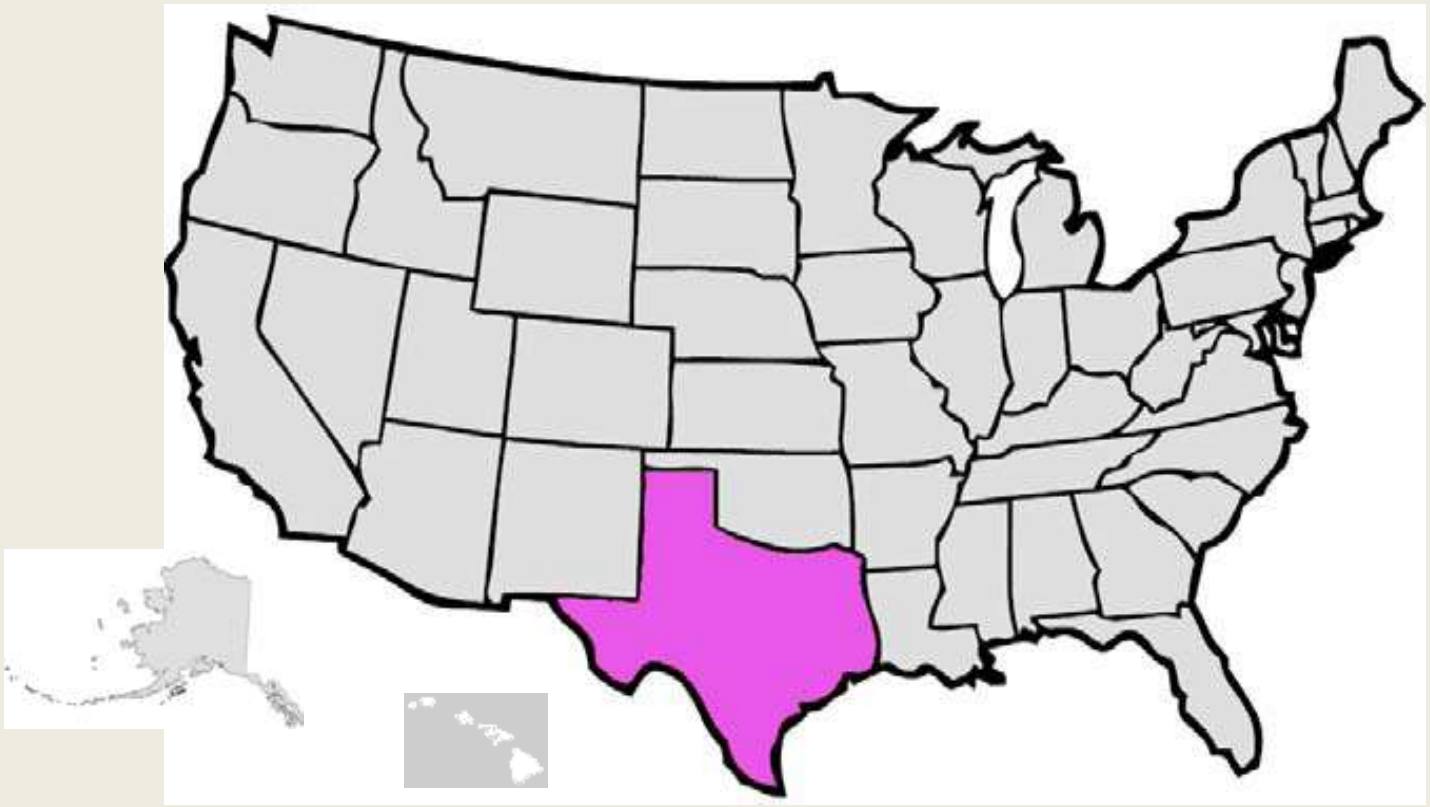
- Bruno W. Katz, Partner
- Litigation experience includes labor and employment, professional liability, corporate litigation and complex, multi-party litigation.
- Preferred counsel for the California Restaurant Association

E-Discovery & ESI

- E-Discovery is over 13 years old
- You don't need to be a computer expert to understand e-discovery issues
- "E-Discovery" is just ordinary discovery, but of Electronically Stored Information ("ESI")
- E-Discovery applies to all litigation
- ESI-related issues arise in the course of ordinary business
- For years, litigants and the courts did their best to avoid E-Discovery issues
- Recent court decisions make it clear that E-Discovery and ESI-related issues are not going away

E-Discovery History

First e-Discovery Rules in 1999 → Enacted in One State

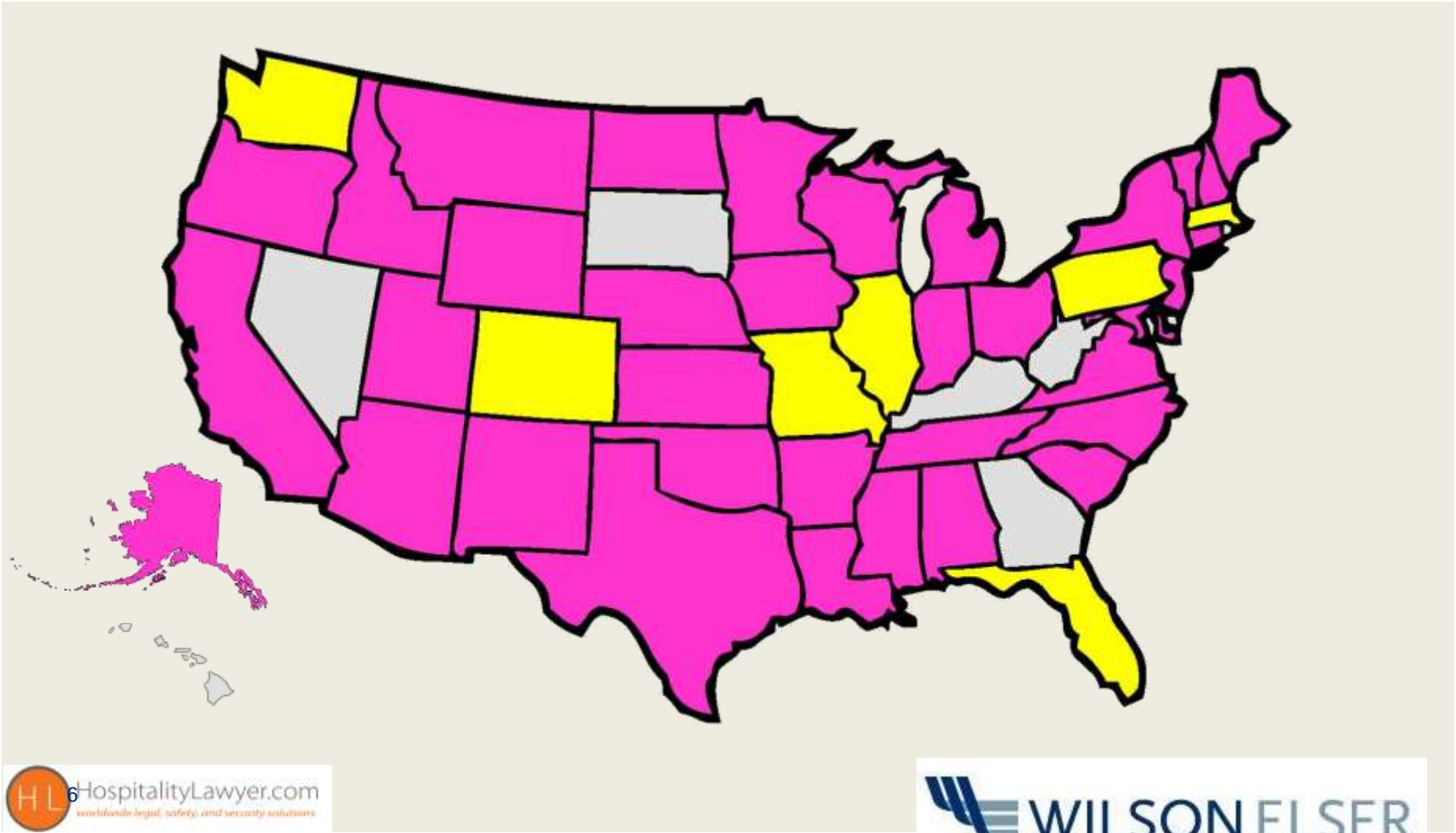


Federal E-Discovery Rules Amended on December 1, 2006

- Made e-discovery applicable to all cases in U.S. Federal courts
- Added the term "electronically stored information" to the definition of discoverable materials and business records
- Required early ESI discussion among all parties
- Set out proportionality as a factor for production
- Limited ESI to reasonably accessible sources
- Permitted parties to specify the form of ESI production
- Created a "safe harbor"

E-Discovery History

February 2012 → Enacted in 36 & Proposed in 7



Federal Rules of Civil Procedure Amendments (2006)

Rule 16(b)(3)(B)(iii) was amended to permit the scheduling order to address plans for disclosure or discovery of electronically stored information.

Rule 16. Pretrial Conferences; Scheduling; Management
(b) Scheduling.
(3) *Contents of the Order.*
(B) Permitted Contents. The scheduling order may:
(iii) provide for disclosure or discovery of electronically stored information

Federal Rules of Civil Procedure Amendments (2006)

Rule 26(a)(1)(A)(ii) added "electronically stored information" as its own category.

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(a) Required Disclosures.
(1) Initial Disclosure.
(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
(ii) a copy--or a description by category and location--of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment

Federal Rules of Civil Procedure Amendments (2006)

Rule 26(b)(2)(B)(ii) added "electronically stored information" as its own category, set up two-tier discovery for accessible and inaccessible data, and addressed cost shifting on inaccessible data.

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(b) Discovery Scope and Limits.

(2) Limitations on Frequency and Extent.

(B) Specific Limitations on Electronically Stored Information. 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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Federal Rules of Civil Procedure Amendments (2006)

Rule 26(f)(3)(C) requires parties must meet and confer at least 21 days before holding the scheduling conference to create a discovery plan and was amended to include raising issues as to the form of production for electronic discovery.

Rule 26. Duty to Disclose; General Provisions Governing Discovery
(f) Conference of the Parties; Planning for Discovery.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced

Federal Rules of Civil Procedure Amendments (2006)

Rule 33(d) was amended to include ESI as part of the business records related to interrogatories.

Rule 33. Interrogatories to Parties

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Federal Rules of Civil Procedure Amendments (2006)

Rule 34(b) allows the party requesting electronically stored information to specify the form to be used in production. This can range from native file formats to proprietary.

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes
(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;
(b) Procedure.
(1) Contents of the Request. The request:
(C) may specify the form or forms in which electronically stored information is to be produced.

Federal Rules of Civil Procedure Amendments (2006)

Rule 37(e) was amended to provide "safe harbor" when electronic evidence is lost and unrecoverable as a matter of regular business processes.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions
(e) Failure to Provide Electronically Stored Information. 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.

Federal Rules of Civil Procedure Amendments (2006)

Rule 45(a)(1)(A)(iii) was expanded to permit subpoenas to include ESI.

Rule 45. Subpoena

(a) In General.

(1) Form and Contents.

(A) Requirements--In General. Every subpoena must:

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises

CASE ANALYSIS

- Proportionality
- Predictive Coding
- Cost-Sharing
- Litigation Holds & Triggers
- Format of Production
- Spoliation & Sanctions
- Inadvertent Disclosure

Case Analysis

Pippins v. KPMG LLP

2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011)

- KPMG sought an order clarifying its obligation to preserve computer hard drives for accountants previously employed in its audit department. KPMG wanted random sampling of a relatively small number of hard drives instead of preserving thousands of hard drives, arguing that the burden was disproportionate to the potential benefit.
- The plaintiffs were amenable to a random sample, but could not agree about the method.
- The court stated that the proportionality test "may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle" and ordered KPMG to continue preserving the hard drives, despite the extraordinary cost and the plaintiffs' apparent willingness to conduct a random sample. The court held "prudence favors retaining all relevant materials."

Lesson Learned: With regard to preservation, a proportionality analysis favors discoverable information over the extraordinary cost of ESI. To minimize ESI costs, make efforts to work with counsel to reach an agreement on preservation.

Case Analysis

Thermal Design, Inc. v. Guardian Bldg. Prods, Inc.

2011 WL 1527025 (E.D. Wis. Apr. 20, 2011)

- Plaintiff moved to compel a search of Defendant's archived email accounts and shared networks after Defendant produced more than 1.46 million pages of ESI at a cost of approximately $600,000. Defendants estimated the cost at an additional $1.9 million plus $600,000 for review.
- The court held that the cost made the requested ESI "not reasonably accessible" and that Plaintiff did not show the additional ESI was "justified in the circumstances of the case."
- The court rejected argument that there was no undue burden or cost because Defendants were large companies with extensive resources.

Lesson Learned: Proportionality test will be applied to production of ESI. Where production of ESI is not justified and costs are extraordinary, proportionality test will favor party opposing the production.

Case Analysis

Da Silva Moore v. Publicis Groupe

2012 WL 607412 (S.D.N.Y. Feb. 24, 2012)

- Defendants proposed use of predictive coding to cull more than three million electronically stored documents. Plaintiff initially agreed, then expressed concerns about methodology.
- The court held that predictive coding was appropriate for this matter because: The parties initially agreed. The amount of ESI case justified computer-assisted review. Computer-assisted review found superior to the available alternatives and promoted Rule 26's proportionality objectives. Transparent process proposed by defendant supported the use of this technology. Since the ESI protocol contained standards for measuring reliability of the process and built in levels of participation by Plaintiffs, there was insufficient evidence to conclude that predictive coding software would deny Plaintiffs access to liberal discovery.

Lesson Learned: The use of predictive coding highlights cost-savings potential compared with the inefficiency of traditional key-word searches and manual reviews. Computer-assisted review is not appropriate for all cases, but should be considered as one possible method for large-scale ESI document reviews.

Case Analysis

Clean Harbors Environmental Services, Inc. v. ESIS, Inc.

2011 WL 1897213 (N.D.Ill. May 17, 2011)

- Issue of cost-sharing was raised when inaccessible data (from back up drives) was sought.
- Magistrate held cost-sharing exception available when inaccessible data is sought; relying heavily on the proportionality and cost control factors (financial burden, proportion to value of case, resources to bear cost of production).
- Cost-shifting factors include: The likelihood of discovering critical information. The availability of information from other sources. The amount in controversy as compared to the total cost of production. The parties' resources as compared to the total cost of production. The relative ability of each party to control costs and its incentive to do so. The importance of the issues at stake in the litigation. The importance of the requested discovery in resolving the issues at stake in the litigation. The relative benefits to the parties of obtaining the information.

Lesson Learned: Cost-shifting exception available for inaccessible data based on proportionality test. Chances of cost-shifting increase where all parties are involved with vendor selection, development of search terms, and pre-search discussion of cost-sharing.

Case Analysis

U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc.

2012 N.Y. Slip Op. 01515 (N.Y. App. Div. Feb. 28, 2012)

- Plaintiff appealed decision requiring it to bear the costs incurred with the production of discovery it requested, which was at odds with *Zubulake* (producing party bears cost).
- The Court followed the cost-shifting analysis in *Zubulake* and held that when party's bear their own costs of discovery, it favors resolution on the merits of a claim.

Lesson Learned: In New York, the parties will bear their own cost of search and production of discovery including ESI. *Zubulake*'s standards for preservation and spoliation, as well as its cost-shifting analysis, has been widely followed.

Case Analysis

Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011)

Hynix Semiconductor Inc. v. Rambus Inc., 645 F.3d 1336 (Fed Cir. 2011)

- Rambus allegedly destroyed documents and evidence, destroyed backups tapes, and erased emails, while simultaneously formulating its litigation strategy.
- In *Micron*, the District of Delaware sanctioned Rambus for spoliation of documents since litigation was foreseeable when Rambus's vice president presented a timeline and litigation strategy to the company.
- In *Hynix*, the Northern District of California ruled in favor of Rambus holding that it did not actively contemplate litigation before negotiation failed; that its document-retention policy was a permissible business decision; and destruction of documents did not constitute spoliation.
- The Federal Circuit Court of Appeals held that the duty to preserve arises when "litigation is pending or imminent, or when there is a reasonable belief that litigation is foreseeable."

Lesson Learned: Courts may disagree about when the duty to preserve is triggered. Therefore, companies should take an objective and conservative view of their preservation obligations.

Case Analysis

Steuben Foods, Inc. v. Country Gourmet Foods, LLC

2011 WL 1549450 (W.D.N.Y. Apr. 21, 2011)

- Defendant moved for spoliation sanctions when Plaintiff failed to institute a written litigation hold directing employees not to destroy ESI. Plaintiff argued that a litigation hold was implemented orally through conversations with senior management officers.
- Distinguished the holding in *Pension Committee of the University of Montreal Pension Plan*, which found that the absence of a written litigation hold supported the conclusion that plaintiffs had been grossly negligent in their efforts to preserve ESI.
- The court declined to hold that implementation of a written litigation hold notice is required to avoid an inference that relevant evidence has been presumptively destroyed by the failing party. In small companies, a written litigation hold may be unnecessary or counterproductive. Since requested documents were provided, the issue was moot.

Lesson Learned: Best practice to issue a written litigation-hold letter as soon as litigation appears reasonably foreseeable. Not issuing a written hold requires a conscious decision based on considerations of your business operation.

Case Analysis

National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency

(10 Civ. 3488)(SAS), 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011)

- Dispute involving Freedom of Information Act (FOIA) request, where response required production of millions of pages. Parties reached an agreement about production. Plaintiffs sent a proposed formatting protocol, which included a demand for load files and metadata fields. Government's response consisted of five PDF files totaling less than 3,000 pages, an unusable format.
- Court held under Rule 34 "certain metadata is an integral or intrinsic part of an electronic record" and that "such metadata is 'readily reproducible' in the FOIA context." Production of a collection of static images without any means of permitting the use of electronic search tools is an inappropriate downgrading of ESI.

Lesson Learned: Format of production must be considered. Metadata is now "considered to be an intrinsic part of the client's record, which attorneys are expected to understand and produce."

Case Analysis

Abu Dhabi Commercial Bank v. Morgan Stanley & Co.

2011 WL 3738979 (S.D.N.Y. Aug. 18, 2011)

- Addressed the issue of whether parties should produce attachments separately or together with parent emails.
- The Court found that the prevailing practice is to produce parent emails together with attachments, if any one document in the "family" is relevant.

Lesson Learned: Applying *Abu Dhabi* to other situations creates a significant risk of overproduction. Reduce this risk by addressing form of production issues during the initial conference and agreeing to review and produce responsive emails and attachments separately. Early and meaningful cooperation among counsel is essential to limiting the expense of ESI and avoiding wasteful overproduction.

Case Analysis

Daynight, LLC v. Mobilight, Inc.

248 P.3d 1010 (Ut. App. Jan. 27, 2011)

- Rather than creating a forensic image of a company laptop, KK Machinery destroyed the machine, and commented in a company-produced video about their destruction of potentially harmful evidence that might link them to any sort of lawsuit.
- The court affirmed sanctions against KK Machinery, finding the conduct unquestionably demonstrated bad faith and a general disregard for the judicial process.

Lesson Learned: Given the disregard for preservation obligations, it is surprising that the Court did not impose harsher sanctions.

Case Analysis

Green v. Blitz U.S.A., Inc.

2011 WL 806011 (E.D. Tx. Mar. 1, 2011)

- The key issue in discovery was Blitz's failure to preserve and produce documents relating to a "flame arrester" in this products liability action.
- A jury returned a verdict for Blitz and the case was closed in 2008. Same plaintiff's attorney pursued other cases against Blitz, and learned of the existence of documents concerning flame arresters that were not produced in the prior case. Plaintiff's counsel then sought to recover sanctions in the prior case for the failure to produce these documents.
- The court ordered Blitz to file the court's sanctions opinion against it in every case in which the company is or will become a party for the next five years. Judge Ward also issued a $250,000 monetary sanction for civil contempt.

Lesson Learned: By compelling Blitz to pay $250,000 and file the decision sanctioning the company in every case in which Blitz appears over the next five years, the court designed a severe sanction that highlights the court's expectation that the company will take its e-discovery responsibilities seriously and discharge them competently.

Case Analysis

United Central Bank v. Kanan Fashions, Inc.

2011 WL 4396912 (N.D.Il. Mar. 31 2011)

- The suspicious circumstances of a computer server's abrupt sale during litigation resulted in sanctions for the defendant, but not its attorneys, in this commercial case.
- The court found that Defendants knowingly abandoned the server at the warehouse and repeatedly ignored their attorneys' instructions to regain custody and control of the warehouse server. There was strong circumstantial evidence that Defendants actually orchestrated the disappearance of the warehouse server and then went to great efforts to cover their tracks.
- The sanctions included: fees and costs associated with the defendants' motion for sanctions, defendants precluded from introducing evidence related to data on the server, an adverse inference instruction. The court agreed that defendant's counsel could have and should have done more to ensure preservation of the server.

Lesson Learned: To avoid sanctions, it may not be enough to remind a client of the duty to preserve and, reliance on a client's assurances may be unjustified.

Case Analysis

Thorncreek Apartments III, LLC v. Village of Park Forest

2011 WL 3489828 (N.D. Ill. Aug. 9, 2011)

- Defendant's attorneys reviewed and produced about 250,000 pages of documents, of which 159 were privileged and inadvertently disclosed. The parties agreed to the status of all, but six of the privileged documents.
- The court agreed that documents were privileged and disclosure was inadvertent, but there no evidence of reasonable precautions and defendants took nine months to rectify the error.
- The court permit plaintiff's to have continued access to the challenged documents to teach Defendants a lesson.

Lesson Learned: Take care to prevent disclosure of privileged documents. In the event of inadvertent disclosure, act swiftly to remedy the error.

Case Analysis

J-M Manufacturing Co. v. McDermott Will & Emery

No. BC462832 (Cal. Super. Ct. filed Jun. 2, 2011)

- Defendant hired e- discovery vendors to cull the data for responsive documents and then produced 3,900 privileged emails allegedly without reviewing for privilege. Defendants then filtered the responsive documents through a second key-word list to identify privileged material. Contract attorneys reviewed, identified and categorized potentially privileged documents. Defendants allegedly only spot-checked on a limited basis.
- The case is still pending with no reported decisions. Efforts were made to remove the action to Federal Court, but the parties subsequently stipulated to remand the action to State Court.

Lesson Learned: Inadvertent disclosure in ESI may leave attorneys exposed to legal malpractice claims. This action emphasizes the significance of training and supervising contract attorneys to control the quality of the ESI production. It offers a warning to all law firms conducting electronic discovery reviews to carefully screen and educate contract attorneys, develop clear review procedures, and conduct careful quality assurance and privilege reviews.

TIPS FOR E-DISCOVERY AND ESI SUCCESS

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- **Know the nature and scope of your ESI.**
- **Have a sound records-management policy**
  - Know your document retention policy
  - If deviating from document retention policy, maintain records basis for conscious, justifiable business decisions.
- **Know your network architecture, including legacy systems.**
- **Know when your obligation to issue a litigation hold is triggered, and follow through.**
  - Claim Letter or Lawsuit
  - Filing of an Administrative charge
  - Personal Injury to employee or third-party (report generated)
  - Preparation for litigation or retention of counsel
  - Catastrophic Incident
  - Unresolved business dispute
- **Have a good policy related to issuing written hold letters**
  - Who are the players?
  - Is your written hold letter sufficiently tailored to the facts?
  - Are holds being monitored and enforced?
- **<u>Always</u> respond to preservation letters**

QUESTIONS?