

Business Intelligence Associates, Inc.

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Colorado Association of
Litigation Support Professionals

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DEFENSIBLE DATA SOLUTIONS™

Predictability in E-Discovery Costs:

***How to leverage the left side of the
EDRM for legal strategy and cost-control***



About BIA

- Founded in 2002
- Pioneers in Computer Forensics and Electronic Discovery
- Offices located in NY, SF, MI, SE, DC
- Over 25 Fortune 500 customers
- Technology used in thousands of matters and in over 40 countries
- No successful challenges to proprietary tools and methods
- Over 120 employees
- Process Driven Solutions – ISO 9001 – Safe Harbor Certified
- Defensible and cost-effective data management solutions



What are E-Discovery Collections?

The gathering of identified Electronically Stored Information for use in discovery in litigation and/or regulatory matters. A part of the overall process to preserve, identify and gather ESI for further processing and review by attorneys and experts.

Sedona: http://www.thesedonaconference.org/dltForm?did=Glossary_2005

EDRM: <http://edrm.net/resources/guides/edrm-framework-guides/collection>

Wikipedia: http://en.wikipedia.org/wiki/Electronic_discovery



E-Discovery Collections

A broader definition

E-Discovery Collections means collecting and gathering data, intelligence and information which helps inform those parts of the process of discovery which occur early-on and which necessarily include custodian and IT systems (AKA people and technological dependencies outside of the attorney's (Legal Dept and OC) control).

Legal Hold - ESI Identification - ESI Gathering - ESI Cataloging

↑
Don't delete
because we
possibly will
need to gather

↑
Tell us what may
be relevant about
which may know

↑
Lock the data
down and/or
copy it
somewhere safe

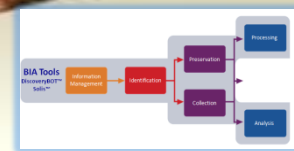
↑
Figure out
what you have
and
where/how it's
going next



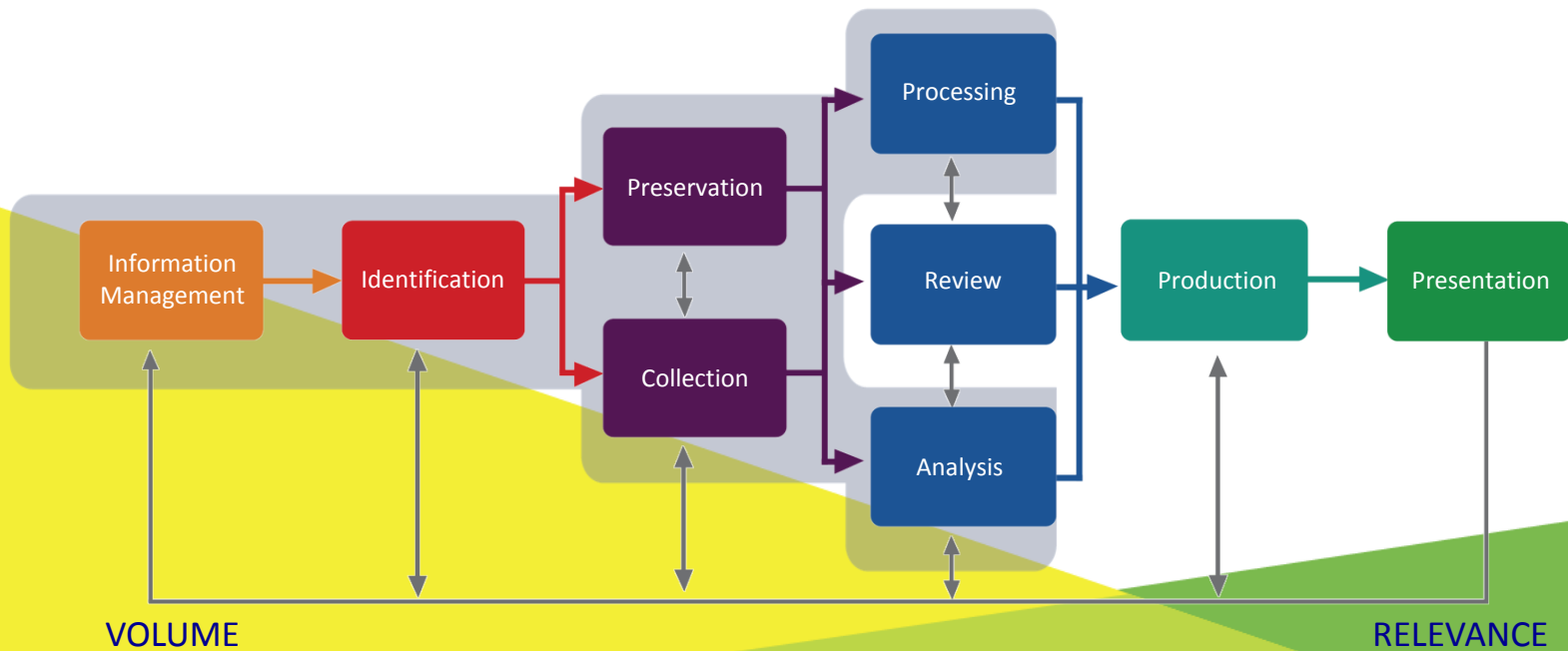
Left Side of the EDRM



Achieving Predictability in E-Discovery Costs



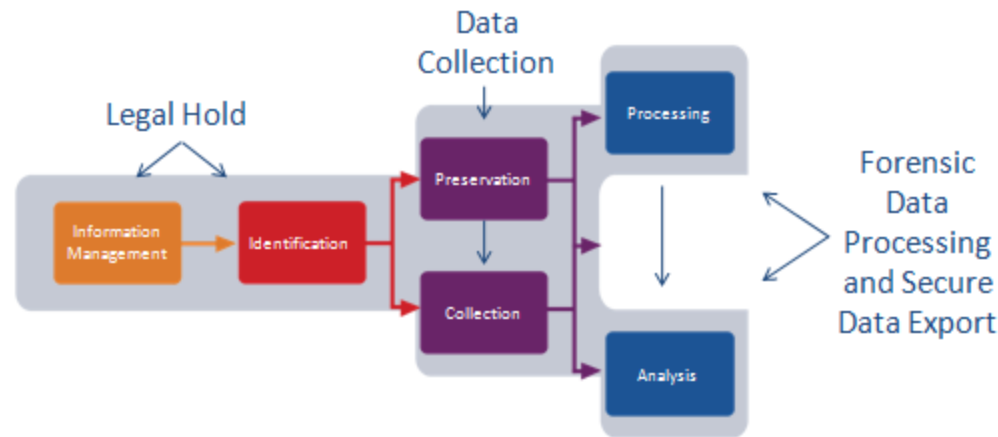
Electronic Discovery Reference Model



Electronic Discovery Reference Model / © 2009 / v2.0 / edrm.net

Left side of EDRM

Where it all begins with e-discovery



- Identify, collect and deliver ESI for review - most important (and affordable) parts of overall e-discovery process
- Much of the planning occurs here for the rest of the process
- Proper planning goes a long way to determine costs and timing for the remainder of the e-discovery process
- Process on Right side of EDRM relies on information gathered from Left Side of EDRM
- Many companies do not focus on the left side

THE SECRET TO GOOD E-DISCOVERY COLLECTIONS

DEFENSIBILITY



COSTS



BALANCING DEFENSIBLE PROCESS and COSTS

- Touch Custodians a minimum amount of times and procure as much information as possible, the first time.
- Plan well – have initial custodians in mind, systems and types of data identified, a set schedule and resources ready.
- Choose the relevant technology by depending upon the legal scope of the matter.
- Involve the appropriate knowledgeable people – attorneys, IT, experts, vendor resources, custodians.



DEFENSIBLE COLLECTIONS MINIMUM REQUIREMENTS

- Follow a Protocol: What to Collect? (file types, date ranges); From Where to Collect (storage areas and systems).
- Forensic Principles should Guide: To validate data and ensure evidentiary integrity.
- Involve Custodians: Legal Hold notification; Identification of possibly relevant ESI; Questionnaire.
- Attorney Supervision: Protocol development; Custodian interviews; Legal scheduling management; QC.



Roffe v. Eagle Rock Energy GP, et al

Roffe v. Eagle Rock Energy GP, et al., C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010)

In a class action and derivative lawsuit, the Vice Chancellor ruled that confirmatory discovery is discovery and held that attorneys have an affirmative obligation to be physically present to ensure proper collections after defense counsel informed the court that two of the three defendants self-collected and foldered documents relevant to the transaction.

Involve Custodians in the Collection Process → **Defensibility**

Minimize burden to the Custodians → **Cost Controls**

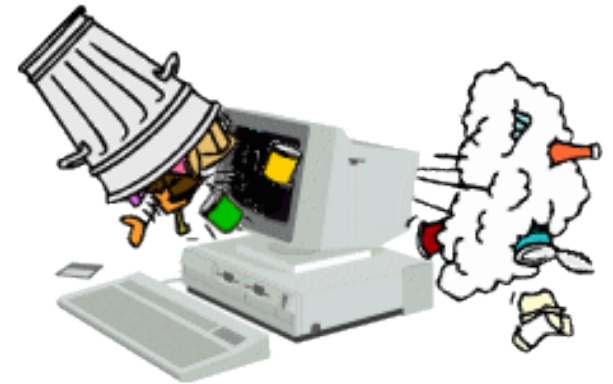


ESI Collection Methods & Practices

Garbage In, Garbage Out

If you do not gather and collect the data correctly, the rest of the legal/discovery/investigatory process does not matter

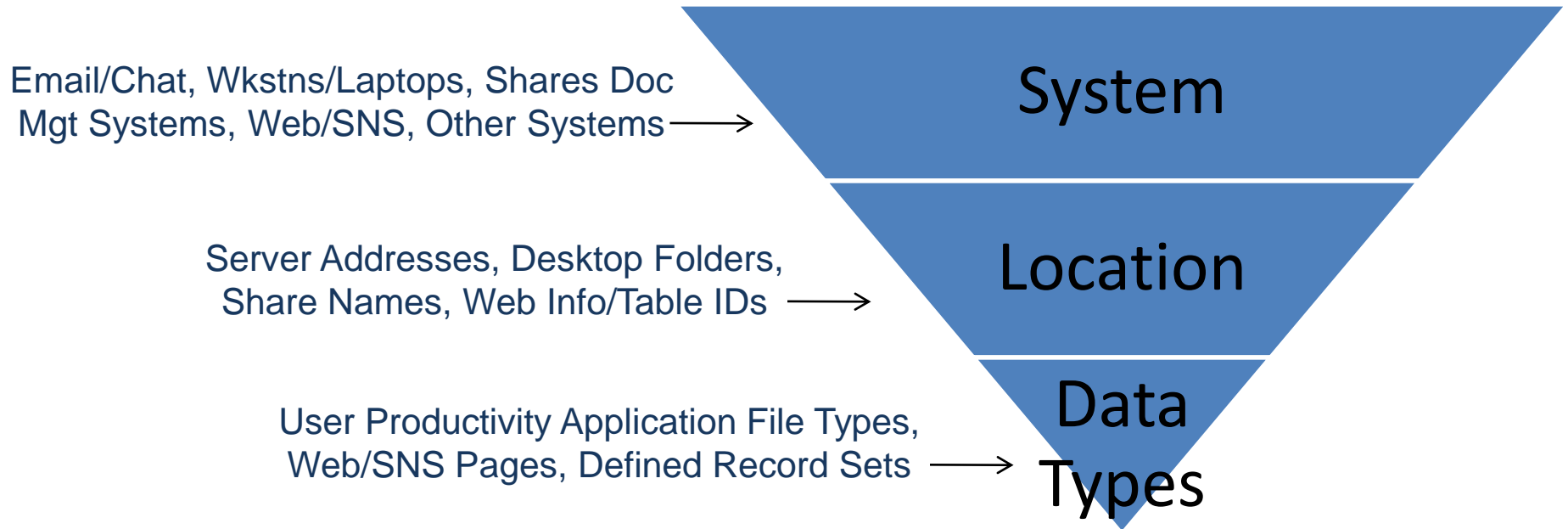
- Risk of Altering File System Metadata
- Not Using Industry Standards
- IT Staff Vulnerable to Witness Testimony
- Inefficient Collection Methods and Unnecessary IT Costs
- Weak Defensibility from Inconsistent Data Collection Methods



Creating and Using Defensible Protocols Must be Guided by Forensic Principles

- **LH Recipients Identified and Notified – Acknowledgements Tracked**
- **Custodians Identified and Queried – ESI Questionnaires**
- **What ESI should be gathered? – Defaults (decided by Legal and IT; Identified by Custodians; Other – identified by IT (usually system level)**
- **Gathering methods to use?**
- **Refresh Plans, Exception Handling, Validation Process, QC**
- **Definition of Roles and Responsibilities (Attorney Supervision)v**

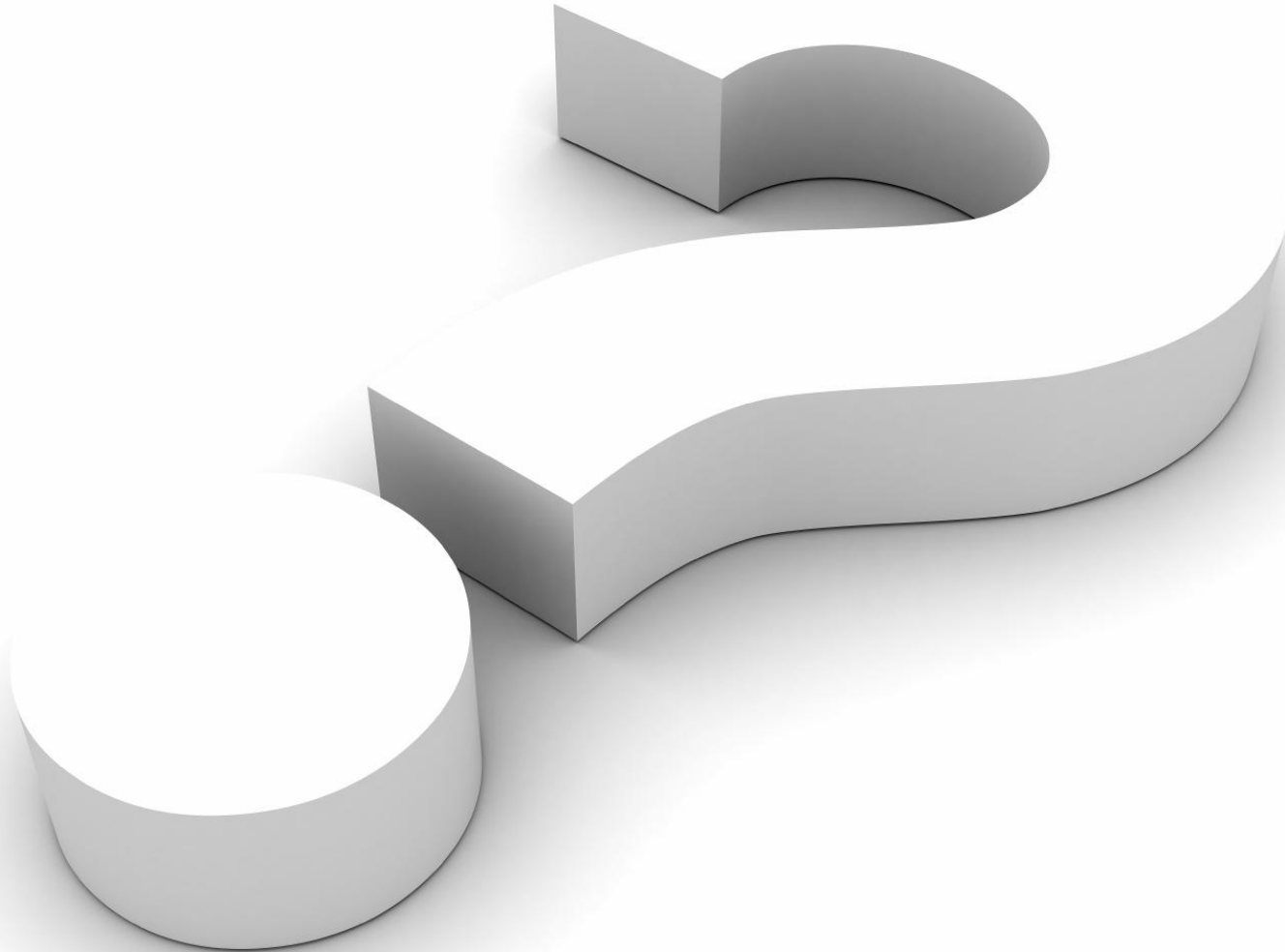
Relevant ESI to Gather/Capture



As Described in Collection Protocol



Q & A



BIA Guiding principles

**Defensible
Results**

Cost Controls

**With everything we design and implement,
these two principles are always followed.**



E-DISCOVERY CASE LAW

Backup Tapes and Restoration of Data

***Makrakis v. Demelis*, 2010 Mass. Super. LEXIS 223 (Mass. Super. Ct. July 13, 2010).**

Compromise was struck in case where Plaintiff requested discovery from back-up tapes dating back to 1987; Court limited collections to a shorter span due to burdensome nature of the proposed collection, but allowed for Plaintiff, at Plaintiff's expense, to obtain a random sampling from the various tapes dating back to 1987.

***Takeda Pharm. Co. Ltd. v. Teva Pharm. USA, Inc.*, 2010 WL 2640492 (D.Del. June 21, 2010)**

Defendants sought ESI for an 18 year period, despite 5 year period previously imposed in the case. Plaintiffs demonstrated that ESI was not reasonably accessible and would cost \$1-\$1.5 million for outside vendor to retrieve data, not including review. Court found the information was relevant, potentially unavailable from other sources, ordered production of additional 13 year period and ordered defendants to pay 80 percent of the costs incurred by the plaintiffs if they employed an outside vendor.

Claims of Privilege and Clawback

***United States v. Textron Inc. and Subsidiaries*, Case No. 07-2631 (August 13, 2009)**

The First Circuit ruled that a public company's internal documents prepared for financial reporting purposes, commonly referred to as tax work papers, were not protected under the qualified privilege available for litigation materials under the work product doctrine. The Court concluded that work product protection is not triggered merely when the subject matter of a document relates to a subject that might conceivably be litigated; nor is it enough that the materials were prepared by lawyers or represent legal thinking. Instead, it is only work done in anticipation of or for trial that is protected, as opposed to materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation or for other non-litigation purposes—thereby creating a "prepared for" test.

***Rajala v. McGuire Woods LLP*, 2010 WL 2649582 (D. Kan. July 22, 2010)**

Bankruptcy Trustee sued law firm; Law firm wanted Clawback, Trustee did not. Court entered clawback protective order reasoning a large amount of ESI existed, defendant's duty to protect the privilege of all of its clients, and without a clawback, disputes regarding inadvertent production would slow discovery and increase costs.

***Mt. Hawley Insurance Company v. Felman Production, Inc. v. Industrial Risk Insurers, Westport Insurance Company, and Swiss Reinsurance America Corporation*, Case No. 3:09-cv-00481, U.S. Dist. Ct., S.D. W. VA (May 18, 2010)**

Upheld the "clawback" of certain produced documents that had been inadvertently produced by the plaintiff to the defendants. The court found that the plaintiff had complied with the parties' stipulation requiring notice of recall of the document, and further found that the defendant receiving the inadvertent production had failed to comply with the provisions in the stipulation requiring that the parties meet and confer in order "to determine appropriate steps under this circumstance and consistent with this Stipulation to return the document, redact the document or withdraw the claim of privilege."

Collections

***Roffe v. Eagle Rock Energy GP, et al.*, C.A. No. 5258-VCL (Del. Ch. Apr. 8, 2010)**

In a class action and derivative lawsuit, the Vice Chancellor ruled that confirmatory discovery is discovery and held that attorneys have an affirmative obligation to be physically present to ensure proper collections after defense counsel informed the court that two of the three defendants self-collected and foldered documents relevant to the transaction.

***Cherrington Asia Ltd. v. A&L Underground Inc.*, 263 F.R.D. 653, 663 (D. Kan. 2010)**

The court sanctioned a party for failing to prepare a witness to discuss their collection efforts under Rule 30(b)(6).

Improper Application of Searches or Search Terms

***Multiven, Inc. v. Cisco Sys., Inc.*, 2010 WL 2813618 (N.D. Cal. July 9, 2010)**

The court ordered the parties to retain a third party vendor to assist with discovery efforts after the parties failed to use search terms to narrow the volume of ESI to be reviewed and declined the assistance of a third party vendor due to costs.

***URS Corp. v. Isham*, 2010 WL 2428841 (D.S.C. June 11, 2010)**

Court granted plaintiff's motion for preservation and inspection of defendant's relevant hardware but called for more targeted searches using terms proposed by plaintiff and provided a more reasonable time frame for the production of documents and privilege logs; parties to split the cost.

***In re A&M Florida Properties II, LLC et al., v. American Federated Title Corp.*, Bkrtcy. No. 09-15173, 2010 WL 1418861 (Bankr. S.D.N.Y. Apr. 7, 2010).**

Plaintiffs were forced to pay for Defendant's forensic searches when their multiple ESI collections failed to produce an email that Defendant knew existed as a result of Plaintiff not searching archived folders during initial sweeps.

***Read v. Teton Springs Golf & Casting Club, LLC*, 2010 WL 2697596 (D. Idaho July 6, 2010)**

Where defendant attached to a motion an email not previously produced and where plaintiff sought an explanation for the source of the email, the court ordered defendant to identify the source of the email at issue and all other hard drives containing responsive documents in its possession; where a custodian represented his hard drive had been replaced in 2006, but produced no email prior to 2007, court ordered production of his hard drive to be mirrored.

***GFI Acquisition, LLC v. Am. Federated Title Corp.* (In re A&M Fla. Props. II, LLC), 2010 Bankr. LEXIS 1217 (Bankr. S.D.N.Y. Apr. 7, 2010)**

The court imposed monetary sanctions against counsel for not properly finding all relevant documents or sources in a timely manner.

Improper Litigation Holds resulting in Spoliation

***In Siani v. State Univ. of New York at Farmingdale*, 2010 WL 3170664 (E.D.N.Y. August 10, 2010)**

The court denied the pro se plaintiff's motion for spoliation sanctions, despite finding defendants were at least negligent in their preservation efforts, where plaintiff failed to present extrinsic evidence "tending to show that the destroyed emails would have been favorable to his case."

***Peal v. Lee, et al.*, 2010 Ill. App. LEXIS 760 (Ill. App. Ct. 1st Dist. July 30, 2010)**

Appellate court in this action affirmed the dismissal of a lawsuit because plaintiff used wiping programs to permanently delete over 20,000 computer files the day before the defendants' expert was to inspect the computer.

***Aliki Foods, LLC v. Otter Valley Foods, Inc.*, 2010 WL 2982989 (D. Conn. July 7, 2010)**

Court orders dismissal with prejudice of plaintiff's tainted food action as sanction for egregious discovery violations which included plaintiff's failure to produce computers it was ordered to produce, voluntary transfer of its computers to a third party without making any effort to have a forensic examination conducted beforehand, and extremely lengthy delay in complying with discovery order.

***Union Pac. R.R. Co. v. United States Env'tl. Prot. Agency*, 2010 WL 2560455 (D.Neb. June 24, 2010)**

Plaintiff sought TRO and preliminary injunction against EPA claiming EPA supervisor ordered employees to destroy information responsive to FOIA request. Court granted TRO and ordered defendant to produce all relevant data and designate "an individual well acquainted" with its technology, electronically stored information systems and management structure to ensure proper enforcement of the order.

***Major Tours, Inc. v. Colorel*, 2010 WL 2557250 (D.N.J. June 22, 2010)**

Court finds that defendant's culpability in allowing evidence to become inaccessible was a factor for consideration when deciding whether to compel production for good cause when plaintiffs sought to compel production of inaccessible data which had been deleted from defendants' active servers and was available only on backup tapes and, despite a duty to preserve the information at issue, the defendants failed to properly issue a formal litigation hold for almost four years.

***Medcorp, Inc. v. Pinpoint Tech., Inc.*, 2010 WL 2500301 (D. Colo. June 15, 2010)**

Finding "willful" spoliation of 43 hard drives "in the sense that Plaintiff was aware of its responsibilities to preserve relevant evidence and failed to take necessary steps to do so", a special master ordered a jury instruction which allowed the jury to infer that the destroyed evidence was unfavorable to plaintiff and for the parties to split the cost of defendants' litigation of the spoliation issue.

***Language Line Servs., Inc. v. Language Servs. Assocs., LLC*, 2010 WL 2764714 (N.D. Cal. July 13, 2010)**

The court granted plaintiff's motion for an injunction precluding defendants from using plaintiff's confidential information and from erasing such information; the court also appointed a Special Master to preside over all proceedings regarding the preservation of plaintiff's information in the possession of defendants, and the forensic imaging of defendant's servers to determine the extent of plaintiff's information in their possession.

***Genworth Financial Wealth Management, Inc. v. McMullan*, 2010 U.S. Dist. LEXIS 53145 (D. Conn. June 1, 2010)**

In a trade secrets action against former employees, the court ordered the defendants to pay 80% of the cost for a neutral forensic expert to image the hard drive on one of the defendant's personal laptops after that defendant admitted to throwing out his personal computer onto which he had downloaded client information from the plaintiff.

***Jones v. Bremen High School Dist. 228*, 2010 WL 2106640 (N.D. Ill. May 25, 2010)**

In an EEOC case where plaintiff alleges employment discrimination, defendant failed to issue a litigation hold and instead asked three individuals whose conduct was at issue in the case to identify and preserve relevant evidence. Finding this behavior "reckless and grossly negligent," the court ordered sanctions against the defendant.

***Diocese of Harrisburg v. Summix Development Co.*, (M.D. Pa. May 18, 2010)**

The court sanctioned plaintiff with an adverse jury instruction after plaintiff's continued to overwrite backup tapes for over fourteen months, including eight months after filing its complaint and held that it was "more probable than not" that the defendants were prejudiced by the lost files that may have contained information with evidence directly relevant to the defendant's theory.

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

The court required a showing of bad faith before imposing severe sanctions on a spoliating party. The court viewed this "bad faith" standard as 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. The court acknowledged that the First, Fourth, and Ninth Circuits do not require bad faith to impose sanctions if there is severe prejudice, although it noted that these cases often emphasize the presence of bad faith. And, in the Third Circuit, courts "balance the degree of fault and prejudice" to decide whether to impose severe sanctions. In *Rimkus*, the court did not instruct the jury that the defendants engaged in intentional misconduct. Instead, the court asked the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation and, if the jury found such misconduct, the jury was instructed to decide whether to infer that the lost information would have been unfavorable to the defendants.

***Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, No. 05 Civ. 9016 (SAS), 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)**

Held that 13 of the plaintiffs were either negligent or grossly negligent for failing to preserve and produce documents and, in some cases, for submitting false and misleading declarations regarding their document collection and preservation efforts. In addition, the court determined that the spoliating parties' actions in failing to timely institute written litigation holds, failing to execute a comprehensive search for documents and/or failing to sufficiently monitor their employees' document collection were grossly negligent. As a result, the court imposed adverse inference sanctions, reasonable costs, including attorneys' fees, and left open the possibility of further discovery of backup tapes that had not been searched.

Improper Productions and Production of Non-Responsive Documents

***Nycomed US Inc. v. Glenmark Generics Ltd.*, 08-CV-5023 (CBA)(RLM) (E.D.N.Y. August 11, 2010)**

In a breach of contract case, the Court issued discovery sanctions against Glenmark for unjustifiably withholding documents and ordered Glenmark to pay a \$100,000 fine to the Plaintiff and a \$25,000 fine to the Clerk of the Court.

***St. Paul Fire & Marine Ins. Co. v. Schilli Transp. Servs., Inc.*, 2010 WL 2629485 (N.D.Ind. June 28, 2010)**

Plaintiff requested physical and electronic evidence from defendant corporation dissolved in 2003, Court granted production of evidence sought because defendant, "failed to demonstrate any substantially justifiable reason for withholding discovery". Court ordered defendant to pay the fees and costs associated with the motion.

***Covad Commc'ns Co. v. Revonet, Inc.*, 06-1892, 2010 WL 1233501, at *3 (D.D.C. Mar. 31, 2010) (Facciola, Mag. J.).**

Court required re-production in native format, showing little patience for a party that had produced spreadsheets and emails in a printed format "for no apparent reason other than to make searching their content much more difficult."

Preservation

***Harkabi v. Sandisk Corp.*, 08 Civ. 8203 (WHP) (S.D.N.Y. August 23, 2010)**

In a breach of contract employment case, the court ordered monetary sanctions against the defendant in the amount of \$150,000 and an adverse inference instruction in plaintiff's favor as a result of defendant's failure to adequately preserve and produce data from laptops that plaintiffs worked on while employed by defendant.

***Phillip M. Adams & Assoc. LLC v. Winbond Elec. Corp.*, Civil No.1:05-CV-64 TS., (D. Utah N.D August 17, 2010)**

The Court found that it was adequate to preserve evidence having the business emails and documents preserved by Plaintiff's business manager as printed copies.

***In re vFinance Investments Inc., SEC, Admin. Proc. File No. 3-121918* (July 2, 2010)**

SEC held company and the firm's former chief compliance officer liable for willfully aiding and abetting the company's failure to preserve and produce electronic communications requested by the SEC.

Social Networking and Personal Email

***Masters Software, Inc. v. Discovery Communs., Inc.*, 2010 U.S. Dist. LEXIS 79584 (W.D. Wash. July 16, 2010), summary found [here](#), order found [here](#).**

A reverse confusion trademark infringement case involving a software company with product named CakeBoss and the TLC show Cake Boss; evidence in the form of social media, including Facebook, will likely be sought; a blogger points out that collection in this case could be as simple as "printing to PDF" from Facebook.

***Schill v. Wisconsin Rapids School District*, 2010 WI 86 (July 16, 2010)**

Held that a public school teacher's personal e-mails are not necessarily deemed to be government "records" under the Public Records Law merely because they may have been sent and received on computer systems owned by the government, if the messages are not related to a governmental function.

***City of Ontario v. Quon*, No. 08-1332, 560 U.S. ____ (June 17, 2010)**

Text messages on an employer/city-owned pager with a formal policy of email and internet usage monitoring accompanied by an informal policy that text messages would not be audited provided all fees were paid for by the employee were ruled searchable under the Fourth Amendment but left the door open regarding employees' right to privacy in their electronic communications on employer-provided technologies – particularly emerging technologies.

***Crispin v. Christian Audigier, Inc.* (C.D. Cal. Case No. CV 09-09509)**

May 26, 2010 ruling in U.S. District Court of Central California quashed subpoenas to third-party social networking companies for private messages but did not resolve the question of whether wall postings available to a broader audience on the social networking sites were protected as well.

***EEOC v. Simply Storage Mgmt., LLC*, No. 1:09-cv-1223-WTL-DML (S.D. Ind. May 11, 2010).**

Plaintiffs alleging sexual harassment were compelled to collect and produce relevant social networking site (SNS) content from Facebook, MySpace, etc. (news feeds, status updates, photos, etc.) that could be understood to involve or reflect their emotional and mental states, as well as the timing of the feelings.