



CONFERENCE  
PRESENTS

**What Risk Managers Should Know –  
Managing e-Documents in Canada & the U.S.**

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**What Risk Managers Should Know –  
Managing e-Documents in Canada & the U.S.**

RIMS Canada Annual Meeting  
St. John's, Newfoundland  
September 15, 2009

**Tim Buckley**

Borden Ladner Gervais – Canada

**Tom Tobin**

Wilson Elser Moskowitz Edelman & Dicker – U.S.

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- Do we have to save those e-mails?
- Why? For how long?
- What's the risk in just deleting them?
- We'll just say we didn't know....



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## **This Afternoon's Goals:**

1. Spot the issues . . . e-Awareness!
2. Understand the scope of the problem!
3. Experience the sense of urgency!
4. Appreciate related cultural issues....



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## Types of ESI

- E-Mail
- Word Proc. Files
- Spreadsheets
- Databases
- Web Pages
- CAD Drawings
- System Files
- Instant messages
- Videos (MP4's)
- Voice Mail
- PDF's
- Image Files
- Social Networks
  - FaceBook ...
  - Twitter ...



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## Locations of ESI

- Servers
- Desktop PCs
- Home PCs
- Laptops
- CD-ROMs
- Flash Drives
- Back-Up Tapes
- Cell Phones, PDAs, iPods
- Web-Based E-Mail Systems
- Archive Systems
- External Hard Drives
- Hidden or Deleted Data
- ?????
- ???



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## Characteristics of ESI

- Ease of Creation
- Persistence of Data
- Fragility of Data
- Routine Destruction
- Forms of Production
- Complexity
- Potential High Costs
- Volume!



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## VOLUME (!) of ESI

- ~ 100 billion e-mails sent each day
- Average Fortune 1000 Company
  - 2004: 190 Terabytes of data
  - 2007: 1,000 Terabytes of data ( x 4 increase)
- Average Midsize Company
  - 2004: 2 Terabytes of data
  - 2007: 100 Terabytes of data ( x 50 increase!)



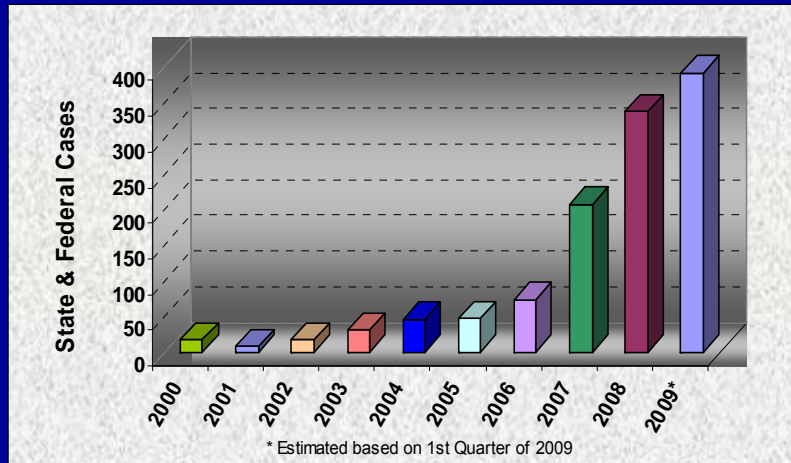
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## U.S. ESI Cases Since 2000

State & Federal



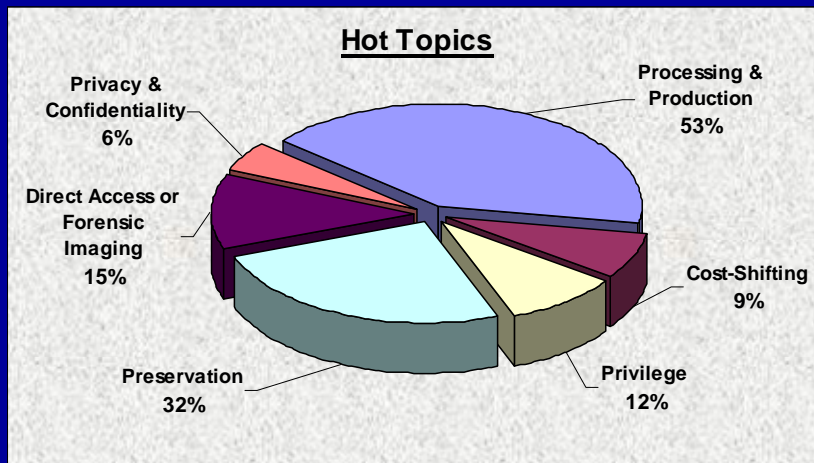
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## ESI U.S. Federal Caselaw Review

290 Cases from 12/1/06 to 2/28/09



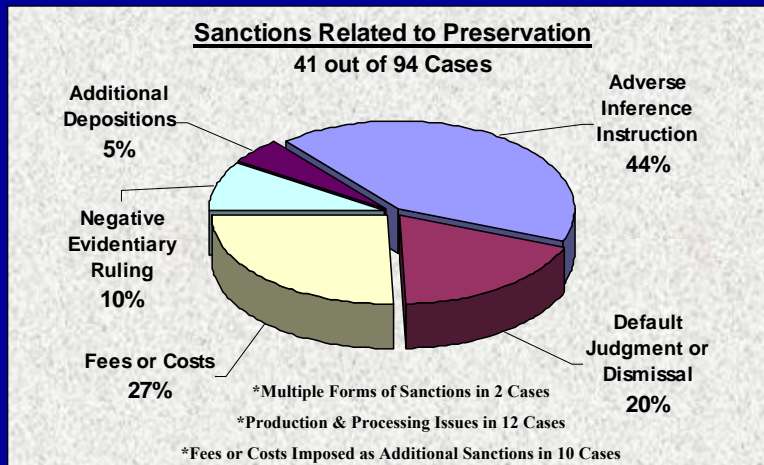
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## ESI Federal Caselaw Review

290 Cases from 12/1/06 to 2/28/09



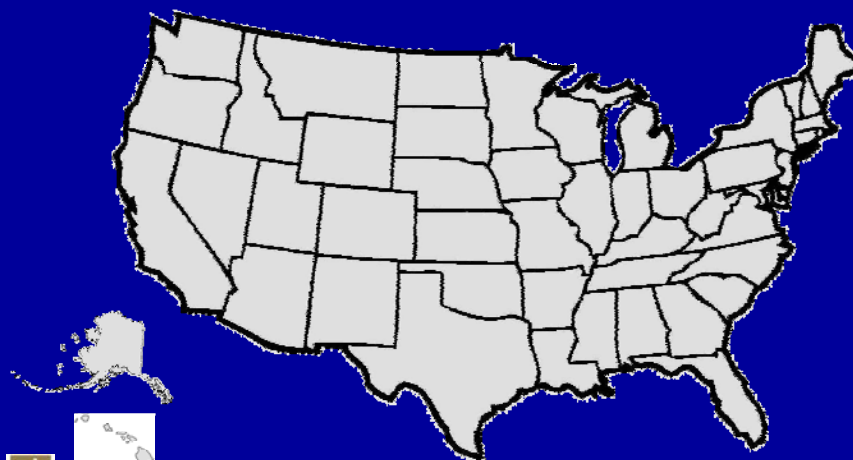
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## State e-Discovery Rules

Pre-1999 → Enacted in Zero States



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## State e-Discovery Rules

As of the end of 1999 → Enacted in One State



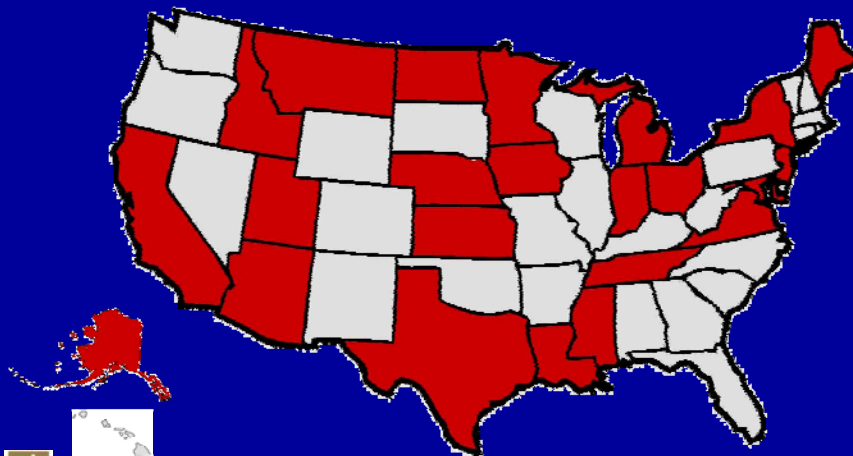
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## State e-Discovery Rules

As of April 1, 2009 → Enacted in 22 States



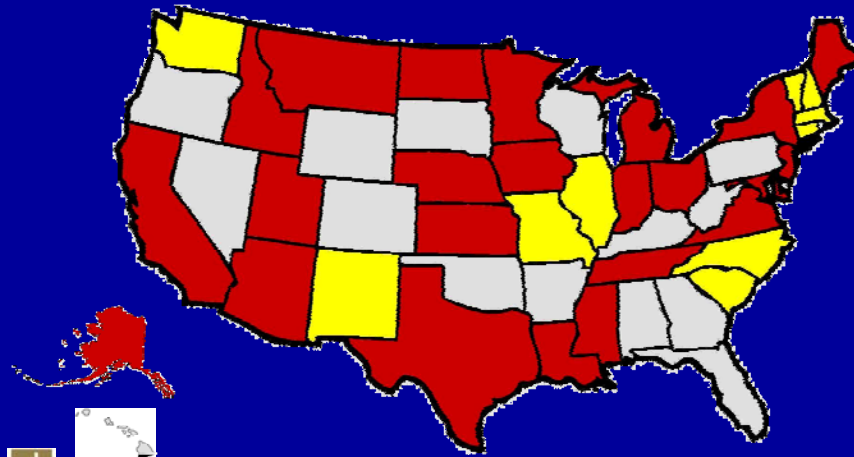
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## State e-Discovery Rules

As of April 1, 2009 → Enacted in 22 & Proposed in 10 States



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## Canadian Developments: The Sedona Canada Principles

- Arizona-based law and policy forum
- Representatives from practice, academia & judiciary
- “Working group” format: *dialogue*, not *debate*
- *Sedona Canada Principles for Electronic Document Production* published in January 2008
- [www.thesedonaconference.org/publications](http://www.thesedonaconference.org/publications)



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## ESI Must Be Produced in Canada

- Common law provinces and territories, Ontario Rules of Practice,
  - party must **disclose** all documents relating to a matter in issue that are in the party's **possession, power and control**
  - document includes **data and information in electronic form**
  - electronic has **expansive** definition
- Québec,
  - parties can be required to deliver specific documents when requested by the other side in the context of discovery



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## The Single Most Important Case in e-Discovery

*Zubulake v. UBS*



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## *Zubulake v. UBS* (2003 - 2005)

- *Zubulake I*: Not Reasonably Accessible 05/03
- *Zubulake III*: Cost-Shifting 07/03
- *Zubulake IV*: Preservation Duty 10/03
- *Zubulake V*: Adverse Inference Sanction 07/04
- *Zubulake VI*: Jury Response 04/05



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## *Zubulake v. UBS* (2003 - 2005)

- *Hon. Shira Sheindlin*, U.S.D.C., S.D.N.Y.
- “Routine” employment discrimination case
  - Laura Zubulake, equities trader for UBS
  - Told she was “old and ugly”
  - Hired 8/99, Fired 10/01
  - Earning \$650,000 / year
- Production of E-Mails
  - UBS: 100 e-mails. Zubulake: 450 e-mails.
  - Zubulake sought e-mails stored on 94 backup tapes
  - UBS argued “not reasonably accessible” and requested cost-shifting for cost of retrieval



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## *Zubulake v. UBS (2003 - 2005)*

- Cost-shifting considered only when ESI is “not reasonably accessible” and restoration creates “undue burden or expense”
- UBS ordered to restore five tapes as a sampling for the consideration of cost-shifting
  - Sampling produced ~600 e-mails with 68 “highly relevant”
  - Cost to restore remaining 89 tapes = \$166,000
- Low likelihood of responsive information, so some cost-shifting held appropriate:
  - Zubulake → 25% of cost to retrieve
  - UBS → 75% of cost to retrieve



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## *Zubulake v. UBS (2003 - 2005)*

- Discovery that 6 or more back-up tapes missing!
- UBS breach of duty to preserve:
  - No demonstrated prejudice by Zubulake
  - No award of “negative inference”
  - UBS must only pay for additional depositions
- Additional depo’s reveal e-mail **intentionally** deleted!
  - Violation of legal hold
  - Willful destruction of evidence!
  - Bad faith by UBS **and** prejudice to Zubulake



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## *Zubulake v. UBS (2003 - 2005)*

- Sanctions: Adverse inference instruction & costs
- \$29.3 Million Verdict!
  - \$9.1 Million Compensatory
  - \$20.2 Million Punitive
- Failure of counsel in ethical obligation to client!
- Legal hold alone is not enough → Counsel failed:
  - To communicate with key players
  - To monitor compliance
  - To locate relevant information



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**“A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation; a party cannot reasonably be trusted to receive the "litigation hold" instruction once and to fully comply with it without the active supervision of counsel.”**

**- Hon. Shira Scheindlin**



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**- Hon. Shira Scheindlin**



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- **Don't bank on looks**
- Laura Zubulake is a happy woman. The Wall Street banker **who was told she was too “old and ugly”** to do her job has been awarded £10.7 million in punitive damages and £4.8 million in compensation after the jury decided that the European bank UBS mistreated her because she was a woman and fired her when she complained.



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## Spoliation Sanctions

- Not *spoliation*!
  - Spoliation
  - From the Latin – Spoliatio – to plunder, loot or strip!
- Negligence may be enough for culpable conduct
- Sliding Scale
  - If more prejudice, *less* willfulness required
  - If less prejudice, *more* willfulness required
- Severity of Sanctions
  - Unintentional loss → less severe
  - Most culpable conduct → most severe



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## What's all the fuss about?

Mike-

It might be useful to consider reminding the engagement team of our **documentation and retention policy**. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.



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Nancy

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## THE GLOBE AND MAIL

### **“INQUIRY SHUTS DOWN UNTIL FALL AFTER E-MAIL SUGGESTS RCMP MEANT TO USE TASER”**

- In the Braidwood inquiry a newly discovered e-mail suggested that officers went into a fatal confrontation with Robert Dziekanski ready to taser him.
- Mr. Vertlieb told the inquiry that the RCMP gave a CD-ROM with scores of documents to the justice department in April, but justice lawyers did not look at it until this week, when the RCMP told them about what the e-mail said.



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Vancouver, Saturday June 20, 2009, National News, p.A4

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## THE GLOBE AND MAIL

### **“LAWYER WITHDRAWS FROM TASER DEATH INQUIRY; FEDERAL LAWYER LEAVES OVER EXPLOSIVE RCMP E-MAIL WHICH SUGGESTED TASER USE PLANNED”**

The Justice Department lawyer who tearfully apologized for an error that has delayed the Braidwood inquiry into Robert Dziekanski's death has withdrawn from the file.



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Vancouver, Friday, July 17, 2009, National News, p. A6

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## What Triggers a Duty to Preserve?

- When litigation or administrative proceeding is **reasonably anticipated**:
  - Claim Letter or Lawsuit
  - Filing of an Administrative charge
  - Cease & Desist letter in a copyright action
  - Catastrophic Incident
  - Fact-sensitive assessment
- Claim letter or filing of a lawsuit may be too late!



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## Preservation

*Cache La Poudre Feeds v. Land O'Lakes (2007)*

- Trademark dispute in Colorado
- Defendant routinely reformatted hard drives of former employees before use by new employees
- Policy continued even after the litigation began
- Plaintiffs requested spoliation sanctions for Defendant's failure to preserve relevant ESI



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## Preservation

*Cache La Poudre Feeds v. Land O'Lakes (2007)*

- No **Active Supervision** by Defendant's counsel
  - Failure to become aware of retention policies and practices and suspend routine destruction of ESI
  - Both in-house and outside counsel blindly accepted that employees were following the litigation hold
  - No communication of counsel with key employees
  - No attempt by counsel to confirm compliance
- But no prejudice! → Monetary sanctions only



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## THE *SEDONA CANADA PRINCIPLES*

### - PRESERVATION -

- Prepare computer systems & users for the demands of litigation or investigation.
- Define orderly procedures & policies for preserving and producing potentially relevant ESI, and establishing processes to:
  - ▶ identify      ▶ assess      ▶ produce
  - ▶ locate      ▶ preserve
  - ▶ retrieve      ▶ review



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## **THE *SEDONA CANADA PRINCIPLES***

### **- PRESERVATION -**

- A records retention policy should provide guidelines for the routine retention and destruction of electronically stored information as well as paper, and account for necessary modifications to those guidelines in the event of litigation.



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## **Preservation Letters – Two Types:**

### **#1: Attorney-to-client upon initial retention**

- Explain preservation obligation & litigation hold
- Confirm sense of urgency, scope & depth
- Confirm need to renew hold & periodically audit
- Note consequences of failure to preserve
- Refer to Sedona & other resources
- Request urgent meeting



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## Preservation Letters – Two Types:

### #2: Litigant-to-Litigant

- Set up for a later spoliation claim – bad faith!!
- The **most reasonable** are the **most dangerous**
- Seeks immediate halt of routine deletion
- Sets forth who, what, when, where & how
- Asks for wide dissemination of litigation hold
- Seeks to prevent “Your honor, I didn’t know...”
- Drafted correctly, they cannot be ignored!



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## E-Discovery: Canadian Developments

- Ontario E-discovery Implementation Committee develops model precedents including,
  - Memorandum to corporate client regarding document discovery
  - Preservation letter to be sent to opposing party or counsel
  - Annotated checklist (with suggestions on minimizing costs)
- Source: [www.oba.org](http://www.oba.org)  
(General Information at bottom of Home Page)



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## **THE *SEDONA CANADA PRINCIPLES*** **PROCESSING ISSUES**

- Metadata presents unique issues for the preservation and production of documents.
- To authenticate a document or establish facts material to a dispute, such as when a file was accessed.
- In most cases, the metadata will have no material evidentiary value.



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## **THE *SEDONA CANADA PRINCIPLES*** **PROPORTIONALITY**

Parties should ensure that steps taken in the discovery process are proportionate, considering:

- the nature & scope of the litigation, including the importance & complexity of the issues, interest & amounts at stake;
- the relevance of the available ESI;
- its importance to the court's adjudication; and
- the costs, burden and delay that may be imposed on the parties.



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## THE *SEDONA CANADA PRINCIPLES* BASIC PRINCIPLE

### Underlying Values:

- Good faith
- Collaboration
- Proportionality
- Focus
- Demonstrable Relevance



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## Processing Issues: Two-Tiered Discovery

- Reasonably Accessible – Proportionality
  - Cumulative or Duplicative
  - Requesting party already had opportunity to obtain
  - Burden or expense outweighs likely benefit
- Not Reasonably Accessible
  - Can object based on “Undue Burden or Cost”
  - Requesting party must show “Good Cause”
  - Court may specify conditions → Cost-Shifting



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## Processing Issues

*Spieker v. Quest Cherokee (2008)*

- Matter involving class action certification issues
- Amount in controversy:
  - \$100,000 for named plaintiffs
  - \$5 million estimate if class certified
- Plaintiffs' search terms identified 32 GB of data:  
~ 31,000 documents & 1.4 million pages
- Defendant objected to plaintiffs' request



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## Processing Issues

*Spieker v. Quest Cherokee (2008)*

- Estimated cost of review → \$370,000
  - Processing by outside vendor: \$82,000
  - Conversion to TIFF format: \$38,000
  - Privilege & relevance review: \$250,000
- Court denied plaintiffs' motion to compel based upon proportionality principles



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## **THE *SEDONA CANADA PRINCIPLES*** **DELETED or FRAGMENTED ESI**

A party should not be required,  
absent agreement or a court order  
based on demonstrated need and relevance,  
to search for or collect deleted or residual  
electronically stored information.



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## **THE *SEDONA CANADA PRINCIPLES*** **COSTS**

- The reasonable costs of preserving, collecting and reviewing electronically stored information will generally be borne by the party producing it.
- In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.



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## Delayed Production

*Gamby v. First National Bank of Omaha (2009)*

- Plaintiffs demanded a copy of a policy manual.
- Defendants, after an allegedly reasonable search, could not produce the manual.
- Plaintiffs subpoenaed the manual from a non-party auditor with access to the Defendant's servers
- The auditor easily located a copy of the manual on the Defendant's servers and agreed to produce it
- Plaintiffs moved for sanctions based on ease with which auditors located the manual & the **two-year delay**



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## Delayed Production

*Gamby v. First National Bank of Omaha (2009)*

The Court's response:

- [Defense counsel] was not familiar with his client's employees or business practices.
- [Defense counsel's] misrepresentations were merely recitations of what his client had told him.
- **Defendant's performance can be explained only by monumental incompetence, inexcusable neglect, or purposeful evasion.**



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## Lessons Learned



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## Lessons Learned

### Preservation

- Good faith required
- Your lawyers need to understand your computer systems and their architecture
- Need to communicate with key players
- Need to monitor the key players → **active supervision!**
- Refine procedures & policies for document retention
- Consider e-discovery in IT system changes & purchases



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## Lessons Learned

### Processing & Production

- Reasonable inquiry required
- Neither you nor your counsel can turn a blind eye
- Your lawyers need to understand your computer systems and their architecture
- Need to understand the costs involved
- Need to agree upon form of production & metadata
- Make proportionality & “not reasonably accessible” objections early in the process



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## Lessons Learned

Foster a culture  
of thoughtful communication  
and document creation



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## Recommended Reading

- *Principles for Electronic Document Production*  
(The Sedona Conference, June 2007)
- *Sedona Canada Principles for Electronic Document Production*  
(The Sedona Conference, January 2008)
- [www.oba.org](http://www.oba.org)  
(General Information at bottom of Home Page)



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## Thank you!

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