USC-JAMS Arbitration Institute August 8-12, 2016

ADVANCED ARBITRATION ACADEMY
E-Discovery Segment

Judge Judith O. Hollinger
Program in Alternative Dispute Resolution
USC Gould School of Law

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Dealing with E-Discovery Issues in Arbitration – Selected Topics:

1. What is E-Discovery and why should we care?
2. The E-Discovery process in a nut shell
3. Preservation and collection
4. Early data assessment - ***SKIP***
5. The litigation / arbitration "hold"
6. Is the exchange of ESI required in arbitration?
7. Spoliation , sanctions and "safe harbors" - ***SKIP***
8. What are some things the Arbitrator can do to manage E-Discovery?
9. What are some common problems encountered in E-Discovery? - ***SKIP***

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What is ESI and Why Should We Care?

E-Discovery is short for "electronic discovery," and refers to the process of collecting, processing, producing and presenting evidence that exists in electronic / digitized formats – i.e., electronically stored information or ESI.

How ESI is collected, processed and handled at the front end of the dispute may create issues and become the subject of requests to exclude evidence, award sanctions and/or draw negative inferences at the back end of the process.

ESI includes "raw data" or "metadata," which is data about data that forensic investigators can review for hidden information to confirm that it is what it purports to be.

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ESI is usually:

- voluminous
- difficult to locate
- fragile
- something users / custodians routinely access, modify and delete

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ESI is something that has become part of our ordinary personal / professional / business lives. A few examples:

- Emails
- Accounting databases such as QuickBooks
- Interface programs that dump bank and credit card transaction data into accounting databases
- Databases such as Outlook, Excel, TimeMap
- Computer-generated "documents" created using programs such as Word, WordPerfect, PDF, Adobe and Microsoft Publisher
- Snap Chat, text messages and other instant messaging formats
- Cell phone digital photos and videos
- Websites and other internet based profiles
- CAD/CAM files and project management and design software

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The rules, processes, practices and procedures that have developed concerning ESI in the litigation context are focused on commerce.

How do you capture and preserve what is on a computer or server that may be relevant to proving or disproving a disputed fact in a litigation matter, *and* - at the same time - allow the computer or server to stay online and be used for its daily business purpose?

Because ESI tends to be voluminous and is highly manipulatable, this is a challenge!

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Should we care about ESI in arbitration, or should we ignore it…

pretend it doesn't exist or matter…

unless someone else raises the subject first?

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Sticking your head in the sand doesn't work in 2016!

- We now communicate by email – not post – with an estimated **100 billion emails** being generated daily. So when parties' communications are in issue or pertinent to the dispute, that subject will most likely involve ESI.
- Most of our personal and business transactions are conducted electronically: purchases with credit and debit cards, timekeeping, payroll with automatic deposit, banking with automatic bill pay, financial record keeping and tax reporting, insurance and medical records, design services, project management. So when these transactions are in issue or dispute, ESI will be involved in some way.
- It is the rare hard copy document that is not first generated on a computer, and many such "documents" are shared on servers that allow multiple users access. When the origination, existence, drafting, authenticity of a transactional document is in dispute, ESI will be involved in some way.

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REALITY: What is quickly becoming a "paperless" society has rendered our "manual" / "paper" methods of search and review unsustainable.

ESI has also changed how we establish chain of custody, foundation and authenticity because so much information and data is shared through networked and "cloud" servers and carried on portable equipment like cell phones, I-pads, etc.

It has also changed our frame of reference in terms of the size of the world of evidence we're dealing with.

We no longer measure the size of a production by how many pieces of paper must be collected and reviewed – e.g., a redwell, a banker's box, 10 banker's boxes. We now measure in terms of gigabytes and how much server space will be needed.

Indeed, some law firms have whole servers dedicated to housing document productions only - their client's collected data and eventual production and the other side's production!

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Especially in complex matters, it has become more common place for litigation-style discovery and motions to be utilized in arbitration. Routinely, arbitrators are asked to:

- allow or deny various types of discovery
- rule on requests to exclude evidence
- sanction parties and / or counsel for failure to comply with a discovery order
- decide what weight should be given (or not given) to competing or conflicting evidence
- draw negative inferences based upon the circumstances showing the loss or destruction of evidence
- award / shift / reallocate the attorney's fees and costs associated with the process

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E-Discovery and the handling of ESI in litigation has become such a big deal that in 2015, the State Bar of California adopted a formal opinion in 2015 [Opinion No. 2015-193] concluding that attorneys who handle litigation have an ethical duty of competence and must, at a minimum, have a basic understanding of, and facility with, E-Discovery – *presumably that same ethical duty would apply to attorneys who work in the arbitral field of civil dispute resolution as advocates and arbitrators!*

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The State Bar Opinion lists nine E-Discovery skills for lawyer competence :

- Assess E-Discovery needs and issues at the outset
- Analyze and understand the client's ESI systems and storage
- Identify custodians of potentially relevant ESI
- Implement ESI preservation procedures
- Advise the client on available options for collection and preservation of ESI
- Engage in "competent and meaningful" meet-and-confer with opposing counsel concerning an E-Discovery plan
- Direct the performance of data searches – for both relevant and privileged information
- Produce non-privileged ESI in a responsive and appropriate manner

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Defending Liberty
Pursuing Justice

ABA Model Rules of Professional Conduct, Comment to Rule 1.1 re an Attorney's Duty of Competence

"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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E-Discovery Process in a Nut Shell:

- Identification of sources of ESI and their location(s)
- Preservation
- The arbitration / litigation "hold"
- Collection using defensible methods
- Process / Review / Analyze
- Production to the other side
- Presentation as evidence – need to be able to explain the ESI protocol (identification, preservation, collection, production), search terms and procedures used, list of ESI custodians collected from; chain of custody and activity log

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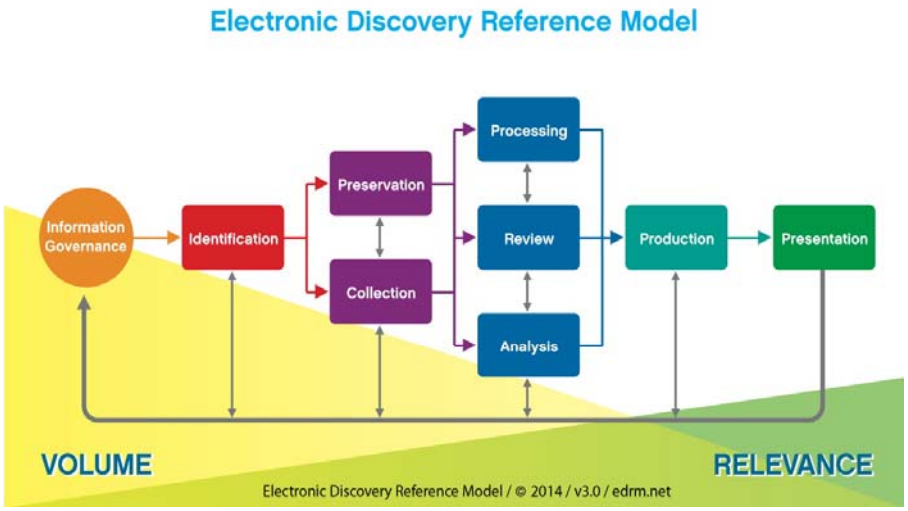

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Preservation:

As soon as a party reasonably anticipates litigation (or similar event, such as a governmental investigation) over a subject, that party has an immediate duty to preserve both hard copy materials and ESI relevant to that subject.

Courts pay attention to the form, substance and timing of this obligation, and the failure to satisfy it may invite and warrant the assessment of both monetary and non-monetary sanctions that could affect the outcome of the case.

Golden Rule: It is cheaper to preserve than to explain why you don't have and cannot produce material information.

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Not all PRESERVED information is PRODUCED – The duty to preserve is larger than the duty to produce.

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Preservation Drivers:

- Reasonableness – judged by the circumstances presented
- Efficiency – look to reduce cumulative and duplicative effort
- Auditable – use special tools and practices so as to be able to show that that which was preserved is authentic and has not been manipulated or altered in any way
- Affordable – cost of collection and preservation must bear a proportional relationship to what is at stake
- Realistic – does the effort bear a reasonable relationship to the dispute resolution process, objectives and needs

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Types of Information Subject to Preservation:

- Emails – #1 form of ESI
- Texts and instant messages
- Structured data, meaning data organized in a dynamic database – e.g., Outlook, Excel, QuickBooks
- Unstructured data, meaning data organized in a software application – e.g., Word, PDF, TIF and JPEG files
- Meta Data, meaning data about data – e.g., information about a document that describes how, when and by whom a document was created, accessed, modified, and collected; also information about its size and formatting

Again, just because you preserve it does not mean you collect, review, analyze and produce it!

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Places Where ESI is Stored:

- Work computers / PC's
- Company servers
- Home computers / PC's
- Laptops
- External media hosted by third parties
- Cell phones
- PDA's
- Backup tapes and drives
- Cloud-based storage

Note: Need to distinguish between ACTIVE data – that which is in use and readily accessible – and INACTIVE, ARCHIVED, RESIDUAL and LEGACY data. Does any of the latter need to be preserved?

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Collection Methods:

- Preserve in place – turn off auto delete
- Preserve by removal – e.g., a laptop, a particular employee's PC, a backup tape, a hard drive. *But active servers can't be taken out of service.*
- Preserve by copy – use a "write blocker," a physical device that goes between the computer and the jump drive to transfer the data. *Doesn't protect the data, just insures that what was collect is as it was on the source. If you copy and save a document directly, you just messed with the metadata.*
- Bulk collection by IT specialist (inhouse or outside vendor) – e.g., all of a custodian's email
- Self-collection –represents the minimum standard for preservation; definitely not a "best practice," not appropriate for a high-stakes case.

Note: Preservation and collection may be the same thing in a small case.

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Early Data Assessment / "EDA""

- Seeks to understand the data landscape before making any representations to a tribunal or opposing counsel – e.g., what data is potentially relevant; who has access to or control over that data; on what devices is the data stored, where are those devices located and who has access to them
- Prioritizes potential document custodians
- Estimates review and production costs to support argument for reduced scope

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Early Data Assessment / "EDA""

- Answers questions about the overall IT system – e.g., how old is the ESI, is there "legacy" data and, if so, where and how stored, has there been any purging, deletion or overwriting, what is the native file format of the ESI, where is email stored, where are user's documents stored (Word, Excel, PPT, Visio, etc.), what are the party's backup policies and procedures, what is the company's policy re departing employees, etc.
- Has the client invested in the creation of a data map or data survey of its IT systems?

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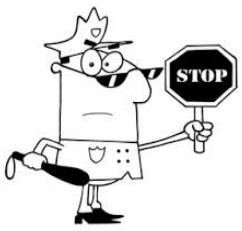
The Litigation / Arbitration "Hold":

Problem: ESI is routinely changed or deleted in the normal course, and individual custodians may alter or delete data unless notified of their obligation not to do so.

So, there needs to be a "hold" notice to all pertinent custodians … and, in some instances, steps may need to be taken to identify and collect a custodian's data before the custodian is notified!

A party has a common law duty to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control.



This duty has been codified as part of the FRCP and CCP on ESI. *And* it is an ethical duty for attorneys practicing in California.

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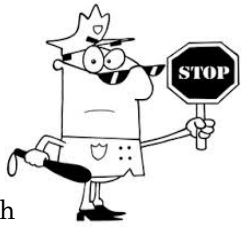
Components of a "Hold" Notice:

- Should be in writing – *Handout samples*
- Sent to "custodians" – meaning people who are likely to have relevant evidence / ESI *and* who are under the control and direction of a party (employee) or under contract with a party (outside vendor)
- "Best practices" require there to be a receipt and acknowledgment from the custodian that the hold notice was
  - Received
  - Read
  - Understood
  - Will be complied with
- For a case of long duration, "best practices" suggests reminder notices with an acknowledgment of receipt



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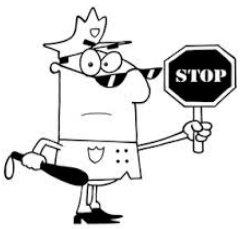
The AMENDED "Hold" Notice

It is not unusual for the scope of relevant information to change as a case progresses.

In such cases, an *amended* hold notice needs to be issued following the same send and receipt protocols.



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Is the exchange of ESI required in arbitration?

No easy / one size fits all answer. It depends …

1. on what the parties' arbitration agreement provides (e.g., does it provide for discovery rights under the CCP or FRCP)

2. on what the parties, through their counsel, might agree to and request be ordered per stipulation

3. on what the arbitral tribunal's rules provide

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JAMS Comprehensive Arbitration Rules, Rule 17 provides that the parties "shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI") relevant to the dispute or claim …"

AAA Commercial Rules, Rule 22(b)(i) provides for a voluntary exchange of documents on which the parties intend to rely if the arbitrator so orders. Rule 22(b)(iv) provides that when documents to be exchanged or produced are maintained in electronic form, the arbitrator may require that such documents be made available in the form most convenient and economical for the producing party, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form.

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Overriding Concept – Arbitration is NOT Litigation

- Is the production of ESI necessary in the particular case? If so, with respect to what disputed issues?
- If the exchange of ESI is allowed, how can it be controlled / limited? For example, does it make sense to start with a first level exchange of emails of a select group of key players and to use a limited date range?
- If the exchange of ESI is allowed, what search methods and criteria are going to be used and what are the estimated costs associated with those methods? What ESI discovery plan is cost-effective and proportional to the case?

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- No "fishing" expeditions – ESI requests need to be substantiated:

  Why do you think the ESI sought exists?

  Is the ESI reasonably accessible?*

  How critical is that information?

  To what *disputed* issue(s)?

  What is the cost – time, money and human resources – to obtain as compared to the amount in controversy? as compared to the resources of each party?

  Is the information available from other sources?

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Spoliation and Sanctions:

Spoliation consists of:

- ❑ Destruction
- ❑ Material alteration
- ❑ Failure to preserve for another's use as evidence in pending or reasonably foreseeable litigation

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The loss of data is not necessarily a sanctioning offense – both federal and state law provide for a "safe harbor."

Under recently amended FRCP 37(e), there must be a finding of 1. "prejudice resulting from the loss of information," or 2. "intent to deprive the other of information" before sanctions may be awarded. [Effective Dec. 2015]

In the first instance, the sanction "remedy" is such relief as may be necessary to cure the prejudice. In the second, it is a negative inference, dismissal, default or an instruction to the jury that it must presume that the lost information was unfavorable to the party who lost it.

The CCP provides that "absent exceptional circumstances," the court may not impose sanctions for failure to provide ESI that has been lost, damaged, altered or overwritten as the result of routine, good faith operation of an electronic information system.

Early data assessment, prompt "hold" notices, turning off auto delete and broad preservation / collection are all key to avoiding lost data and/or demonstrating no intent deprive the other of information.

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Do arbitrators have sanction authority for non-production, loss, alteration or destruction of ESI?

Generally speaking – yes!

Most courts recognize the inherent power of arbitrators to impose monetary sanctions and to draw negative inferences when their orders are violated or a party does not participate in the arbitration process in good faith.

Rule R-58 of the 2013 AAA Commercial Rules and Rule 29 of the JAMS Comprehensive Arbitration Rules expressly provide the arbitrator with the authority to impose sanctions – in a broad sense, not just limited to E-Discovery violations.

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AAA Rule 58

(a) The arbitrator may, upon a party's request, order appropriate sanctions were a party fails to comply with its obligations under these rules or with an order of the arbitrator.

(b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Note: There is no "obligation" under the AAA Rules for a party to provide E-Discovery, so this sanctioning "power" is only available if (a) it is clear that the voluntary exchange obligation under Rule 22 includes E-Discovery, and/or (b) parties request and are granted the right to discovery that includes ESI, and (c) in either event, the obligation to produce ESI is set forth in an arbitrator order AND a party makes the sanctions request.

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JAMS Rule 29

"The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules or with an order of the Arbitrator. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, assessment of any other costs occasioned by the actionable conduct, including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or, in extreme cases, determining an issue submitted to Arbitration adversely to the Party that has failed to comply."

Note: Unlike the AAA Rule, an award of sanctions is not dependent on a party request, the scope of available sanctions is broader, and an order re E-Discovery is not necessary since the exchange of ESI is an obligation under the JAMS Rule 17.

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What are some things that Arbitrators can do to help manage E-Discovery?

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5 Topics to Put on the Preliminary Hearing Agenda:

1. Have the parties' counsel discussed and defined the scope of preservation? Have they discussed "hold" and "preservation" notices? If not, put the discussion on the table – do these matters need to be discussed in this case?
2. If ESI is to be the subject of discovery and/or exchange, have the parties' counsel discussed and agreed on the format of production? Are "documents" going to be bates numbered? Are "documents" going to be provided in electronic and hard copy format? Have the parties discussed and agreed upon the electronic format for production (e.g., native v. PDF or TIFF)?
3. What search tools and methodologies are going to be used to collect and process the ESI? And what is the time and cost associated with that effort? Is that time and expense reasonable / warranted in relation to the amount at issue in the case? If not, what are the alternatives?

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4. How large or small is the proposed ESI request? If large, should collection / processing / review / analysis / production be done in stages?
5. Have the parties' counsel discussed and agreed upon how to handle privileged information? Will there be clawback and non-waiver protocols for inadvertent production of attorney-client communications, work product and other privileged / protected information?

Note: The point of including ESI on the PH agenda is to avoid unnecessary expense and delay and work towards party consensus and cooperation so as to keep the case on track and moving forward.

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Additional Topics for the Preliminary Hearing Agenda:

1. Limitation on the number of requests, and the need for specific, targeted descriptions with the added requirement that requests relate to specific claims, defenses and/or disputed facts.
2. No meta data without a showing
3. Arbitrator can have E-Discovery guidelines and require counsel to meet-and-confer and develop a joint discovery plan for presentation and discussion at the preliminary hearing. *Handout sample arbitrator guidelines*.
4. When substantial ESI, inaccessible data (i.e., restoration) and/or multiple storage sources are involved, require the parties to provide written cost and time estimates, especially when IT technicians and outside ESI consultants are expected to be needed for the job.

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Additional Topics for the Preliminary Hearing Agenda:

5. Objection protocols
6. Who pays for what, with mention of Arbitrator's power to allocate "costs" to the losing party at the end of the case?

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What are common problems encountered with E-Discovery?

- Defining proportionality and scope
- Understanding the technology and/or technical terms
- Use and qualification of ESI experts
- Amorphous "document" demands
- Lack of clarity re form of ESI sought and/or lack of understanding about what ESI is / is not accessible
- Lack of cooperation between/among counsel
- Not defining a clear purpose what ESI is needed and how it relates to a claim, defense or disputed fact
- Selecting the appropriate search tools and methodologies
- Cost burden and allocation of costs

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- Dealing with party preservation obligations
- Producing ESI in admissible / defensible / usable form
- Dealing with allegations of spoliation (loss, destruction and/or alteration)
- Dealing with duplicate information / data and lack of understanding re what technology is available to properly cull out identical duplicates from collection and processing
- Using overly broad search terms that result in producing an electronic haystack
- Dealing with inadvertent disclosures of attorney-client privilege and/or work product ESI
- Dealing with counsel and/or party inexperience with ESI

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Reference Articles / Additional Reading:

Gibson Dunn Website Articles, including:

- E-Discovery Basics – 2011 – Why Care About E-Discovery
- E-Discovery Basics – 2011 – Discovery Life Cycle
- E-Discovery Basics – 2011 – Litigation Preparedness
- E-Discovery Basics – 2011 –Legal Holds
- E-Discovery Basics – 2011 – Preservation (Part 1)
- E-Discovery Basics – 2011 – Preservation (Part 2)
- E-Discovery Basics – 2011 – Collection
- E-Discovery Basics – 2011 – Processing
- E-Discovery Basics – 2011 – Production
- E-Discovery Basics – 2011 – Admissibility
- E-Discovery Basics – 2011 – Cross-Border
- E-Discovery Basics – 2015 – Spoliation Standards Under the New Rules

http://www.gibsondunn.com//practices/pages/PracticePublications.aspx?pg=%22Electronic%20Discovery%20and%20Information%20Law%22

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Reference Articles / Additional Reading:

Andres Hernandez, "*Common Problems with E-Discovery – and Their Solutions,*" The Federal Lawyer (September 2016)

Jennifer H. Rearden and Goutam U. Jois, "*Spoliation Standards Under the New Rule 37(e),*" Law 360 (October 28, 2015)

Giyoung Song, "*The Advantages of Early Data Assessment,*" E-Discovery Bulletin" (February/March 2015)

Monica McCarroll, "*E-Discovery: What Litigation Lawyers Need to Know,*" Risk Management Handouts of Lawyers Mutual (November 2011)

Gareth T. Evans, "*Access Granted,*" The Recorder (July 15, 2009)

Mark S. Sidoti and Renee L. Monteyne, "*The Effective Internal Litigation Hold Letter,*" In-House Defense Quarterly (Winter 2007)

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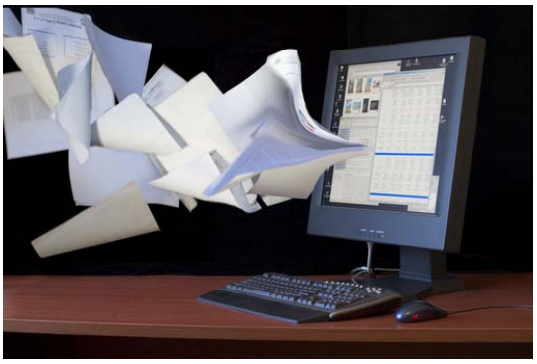

Q & A

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