



**MER Conference**

The Sixteenth Annual National Conference on  
**Managing Electronic Records**

**Westin Michigan Avenue**  
**May 18-20, 2009 Chicago, Illinois**

# Session 6

## ERM Case Law:

### The Latest News, Trends, and Issues

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# Big “e-discovery” events this year

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- ❖ Enactment of Fed. R. Evid. 502
- ❖ American College of Trial Lawyers Task Force on Discovery Final Report
- ❖ The *Cooperation Proclamation*
- ❖ 100+ new case decisions on e-discovery in the federal courts

# How do these affect you?

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- ❖ Your records management practices
- ❖ Your role as a records manager
- ❖ Your organization's obligations in discovery
- ❖ Your personal role in discovery
- ❖ Your organization's relationship with outside counsel, opposing parties, and the court

# Topics we'll be covering

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- ❖ The efficacy of your records management practices
  - ❖ Managing unusual forms of ESI
  - ❖ Routine records deletion policies
  - ❖ Some records management failures
  - ❖ The continuing saga of *Rambus*
  - ❖ Maintaining privilege and confidentiality

# Topics we'll be covering

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- ❖ Your discovery response
  - ❖ The 30(b)(6) deposition
  - ❖ Knowing your costs
  - ❖ ESI conversion and metadata
  - ❖ “Business record order” and the “data dump”
  - ❖ Key word searching
  - ❖ Cooperation in discovery

# Unusual forms of ESI

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## ❖ Web pages

- ❖ Arteria Property Pty. Ltd. v. Universal Funding V.T.O., Inc., et al., 2008 U.S. Dist. LEXIS 77199 (D.N.J. Oct. 1, 2008)

## ❖ Text messaging

- ❖ Flagg v. City of Detroit, 2008 WL 787061 (E.D. Mich. Mar. 20, 2008); 252 F.R.D. 346 (E.D. Mich. Aug. 22, 2008)
- ❖ Quon v. Arch Wireless Operating Co. 2008 U.S. App. LEXIS 12766 (9<sup>th</sup> Cir. June 18, 2008)

# Unusual forms of ESI

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## ❖ IP logging data

- ❖ Viacom International, Inc. v. Youtube, Inc., 07 Civ. 2103 (S.D.N.Y. July 1, 2008)
- ❖ Arista Records, LLC v. Usenet.com Inc., 2009 U.S. Dist. LEXIS 5185, 2009 WL 185992 (S.D.N.Y. Jan. 26, 2009)

# Routine deletion policies

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## ❖ Policy upheld:

- ❖ ClearOne Comm., Inc. v. Chiang, 2008 WL 704228 (D. Utah Mar. 10, 2008)
- ❖ Gippetti v. UPS, Inc., 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008)
- ❖ In re Riverside Healthcare, Inc., 2008 WL 4183609 (Bankr. M.D. La. Sept. 11, 2008)
- ❖ Petcou v. C.H. Robinson Worldwide, Inc., 2008 WL 542684 (N.D. Ga. Feb. 25, 2008)

# Routine deletion policies

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## ❖ Policy struck down:

- ❖ *Conner v. Sun Trust Bank*, 546 F. Supp. 2d 1360 (N.D. Ga. March 5, 2008)
- ❖ *Phillip M. Adams & Associates LLC v. Dell, et al.*, 2009 U.S. Dist. LEXIS 26964 (D. Utah March 27, 2009)
  - ❖ *But see Realnetworks, Inc. v. DVD Copy Control Assn., Inc.*, 2009 U.S. dist. LEXIS 38221 (N.D. Cal. May 5, 2009)

# Some records management failures

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- ❖ Keithley v. The Home Store.com, Inc., 2008 WL 3833384 (N.D. Cal. August 12, 2008)
- ❖ Gamby, et al. v. First National Bank of Omaha, 2009 U.S. Dist. LEDIS 7687 (E.D. Mich. Jan. 20, 2009)
- ❖ Pandora Jewelry, LLC v. Chamilia, LLC, 2008 U.S. Dist. LEXIS 79232 (D. Md. Sept. 30, 2008)

# Fed. R. Civ. P. 37(e)

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- ❖ “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.”

# Understanding the *Rambus* cases

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## ❖ Compare:

- ❖ Micron Tech., Inc. v. Rambus, Inc., 2009 WL 54887 (D. Del. Jan 9, 2009) (Rambus guilty of spoliation)
- ❖ Hynix Semiconductor, Inc. v. Rambus, Inc., 2009 WL 292205 (N.D. Cal. Feb 3, 2009) (under same set of facts, Rambus not guilty of spoliation)

# Privilege and confidentiality

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- ❖ Protecting privilege and confidentiality through records management
  - ❖ Continental Casualty Co. v. Under Armor, Inc., 537 F. Supp. 2d 761 (D. Md. Feb. 13, 2008)

# Federal Rule of Evidence 502

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- ❖ Addresses waiver of privilege through inadvertent disclosure
- ❖ Limits scope of waiver
- ❖ Establishes uniform federal test for waiver
- ❖ Allows parties to enter non-waiver agreements
- ❖ Allows federal courts to enforce non-waiver orders even against state courts

# Federal Rule of Evidence 502

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- ❖ Allows “claw back” procedures
- ❖ Allows “quick peek” procedures
- ❖ Absent agreements or court orders, preserves “reasonableness” standards to evaluate whether waiver has occurred

## Rule 502 “reasonableness” cases

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- ❖ Rhoads Industries, Inc. v. Building Materials Corp. of Am., 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008)
- ❖ Laethem Equipment Co. v. Deere and Co., 2008 WL 4997932 (E.D. Mich. Nov. 21, 2008)
- ❖ Harriot v. Byrne, 2009 WL 742769 (N.D. Ill. Mar. 20, 2009)

# Your 30(b)(6) deposition

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- ❖ Ideal Aerosmith, Inc. v. Acutronic USA, Inc., 2008 WL 4693374 (W.D. Pa. Oct. 23, 2008)
- ❖ Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc., 2008 WL 4298331 (N.D. Cal. Sept. 19, 2008)
- ❖ Newman v. Borders, Inc., Civ. Act. No. 07-492 (D.D.C. April 6, 2009)
- ❖ Cunningham v. Standard Fire Insurance Co., 2008 WL 2668301 (D. Colo. July 1, 2008)

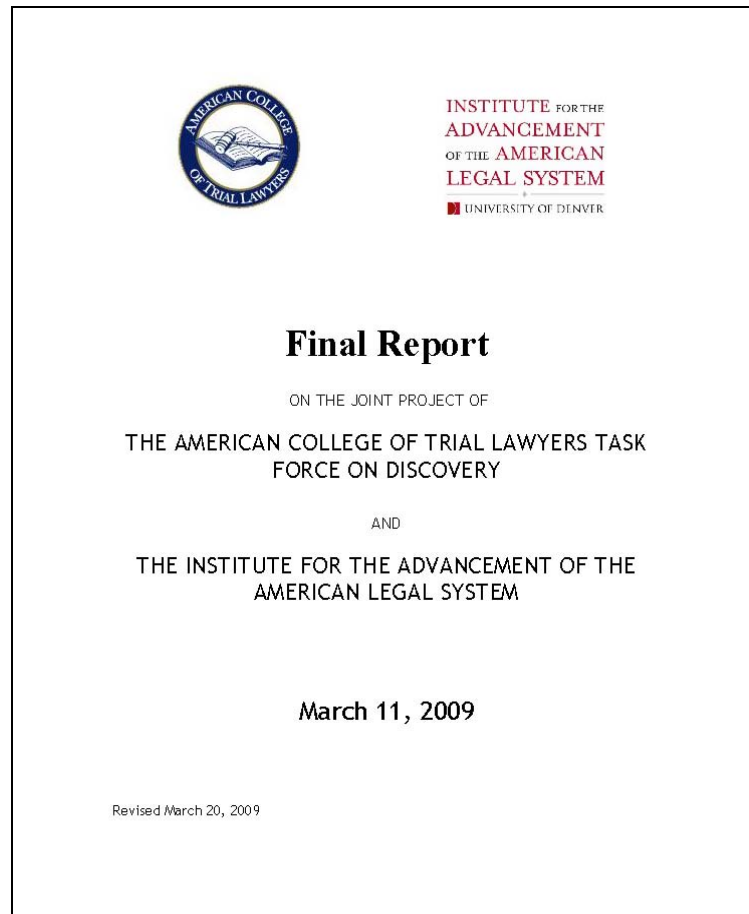
# Know what your costs are

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- ❖ Mikron Ind., Inc. v. Hurd Windows & Doors, Inc., 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008)
- ❖ Oracle Corp. v. SAP AG, No. C-07-01658 (N.D. Cal. July 3, 2008)
- ❖ *In re Fannie Mae Securities Litigation*, 552 F.3d 814 (D.C. App. 2009)

# ACTL report

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# E-DISCOVERY ON TRIAL

I SUBMIT THAT E-DISCOVERY IS RUINING LITIGATION. IT'S A BURDENSOME MORASS CREATED BY TECHNOLOGY PEOPLE.

FOR EXHIBIT A, I HAD AN ASSOCIATE TRANSCRIBE THIS EMAIL FROM THAT GOOGLE THINGY ON "THE INTERNET"

I HAVE MET THE ENEMY AND HE IS US



# Conversion and metadata

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## ❖ Conversion acceptable:

- ❖ Autotech Techs. Ltd. P'ship v. Automationdirect.com, Inc., 288 F.R.D. 556 (N.D. Ill. 2008)
- ❖ Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec., 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008)
- ❖ *In re Classicstar Mare Lease Litigation*, 2009 WL 250954 (E.D. Ken. Feb. 2, 2009)

# Conversion and metadata

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- ❖ Conversion not acceptable:
  - ❖ Goodbys Creek v. Arch Inc. Co., 2008 WL 4279693 (M.D. Fla. Sept. 15, 2008).
  - ❖ Bray & Gillespie Management LLC, et al. v. Lexington Ins. Co., et al., 2009 WL 546429 (M.D. Fla March 4, 2009).

# The big “data dump”

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- ❖ Ak-Chin Indian Cmty. v. U.S., 85 Fed. Cl. 397 (Ct. Fed. Cl. 2009)
- ❖ GP Industries, LLC v. Bachman, 2008 WL 1733606 (D. Neb. April 10, 2008)
- ❖ SEC v. Collins & Aikman Corp, et al., 2009 U.S. Dist. LEXIS 3367 (S.D.N.Y. Jan. 13, 2009)
- ❖ ReedHycalog UK, LTD v. United Diamond Drilling Services, Inc., 2008 U.S. Dist. LEXIS 93177 (E.D. Texas Oct. 3, 2008)
- ❖ Pass & Seymour, Inc. v. Hubbell Inc. 2008 WL 4240490 (N.D.N.Y. Sept. 12, 2008)

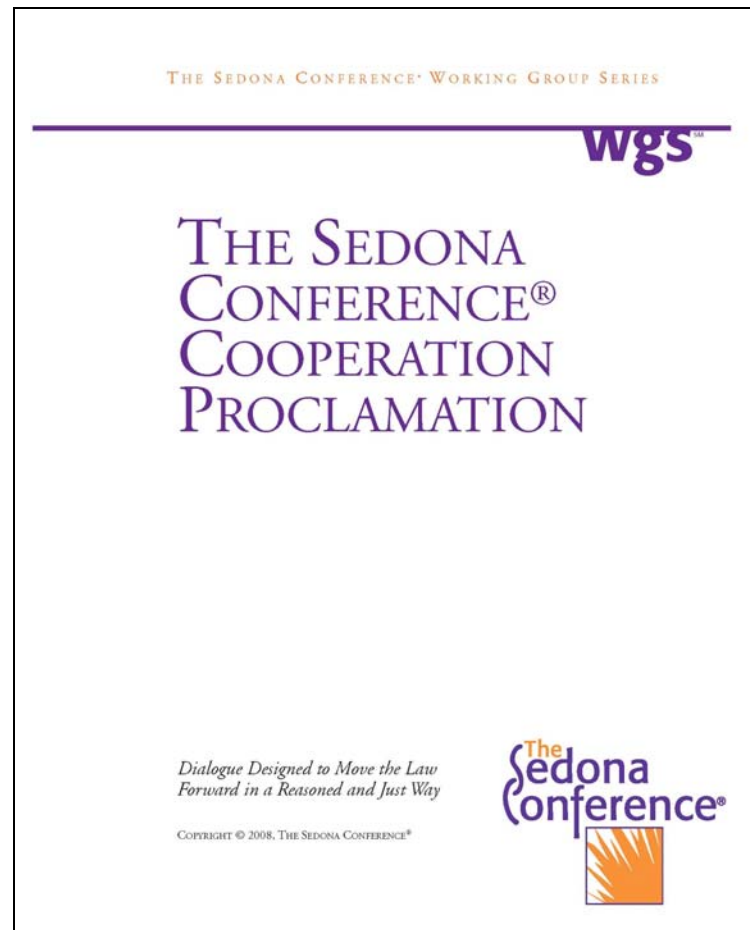
# Keyword searching

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- ❖ Kipperman ex rel. Magnatrax Litigation Trust v. Onex Corporation, et al., 2008 WL 4372005 (N.D. Ga. Sept. 19, 2008)
- ❖ Ross, et al. v. Abercrombie & Fitch Co., 2008 WL 4758678 (S.D. Ohio Oct. 27, 2008)
- ❖ William A. Gross Construction Assoc., Inc. v. American Manufacturers Mutual Ins. Co., 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009)
- ❖ Victor Stanley, Inc. v. CreativePipe, Inc., 2008 WL 2221841 (D. Md. May 29, 2008)

# The Cooperation Proclamation

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# *The Cooperation Proclamation*

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- ❖ Mancina, et al. v. Mayflower Textile Servs. Co., et al., 253 F.R.D. 354 (2008)
- ❖ And other cases already cited, including:
  - ❖ William A. Gross Construction
  - ❖ Newman v. Borders, Inc.
  - ❖ SEC v. Collins & Aikman
  - ❖ Aguilar v. ICE

# Questions and comments

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