



The MER Conference 2010

National Conference on Managing Electronic Records (MER)

Session 9

Monday May 17, 4:00 p.m.

ERM Case Law: The Latest News, Trends and Issues

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Big “e-discovery” events this year

- ❖ A new court decision *every working day*
- ❖ Landmark decisions on the “legal hold” concept
- ❖ Shifting sands of employee privacy
- ❖ E-discovery reaches the U.S. Supreme Court
- ❖ Final resolution of the *Qualcomm* disaster

Selection criteria

- ❖ Significant (or illustrative) state and federal cases from past 12 months
- ❖ Records management policies and procedures at issue in the court's decision
- ❖ Court holdings that have significant consequences for records management going forward

What is a “record?”

- ❖ *Lake v. City of Phoenix*, 222 Ariz. 547, 218 P.3d 1004 (Ariz. 2009)
 - ❖ Metadata is an integral part of a “record” for FOIA purposes
- ❖ *Ferron v. Echostar Satellite, LLC*, 2009 WL 2370623 (S.D. Ohio July 30, 2009)
 - ❖ But you don’t necessarily have to preserve it...

Who “owns” ESI?

❖ Employee privacy in email

- ❖ *Convertino v. U. S. Dept. of Justice*, 2009 WL 4716034 (D.D.C. Dec. 10, 2009)
- ❖ *Stengart v. Loving Care Agency, Inc.*, 2010 WL 1189458 (N.J. Mar. 30, 2010)
- ❖ *Bruno B. v. Giraud et Migot*, No. 07-44264 Cour de Cassation, Chambre Sociale (Dec. 15, 2009)

Who “owns” ESI?

- ❖ *Quon v. Arch Wireless Operating Co., Inc.*, 554 F.3d 769 (9th Cir. 2009); *cert. granted sub nom. City of Ontario v. Quon*, 130 S. Ct. 1011 (2009) (oral argument heard April 19, 2010)



Who “owns” ESI?



**CHIEF JUSTICE
ROBERTS: Maybe --
maybe everybody
else knows this,
but what is the
difference between
the pager and the
e-mail?**

The duty of preservation

- ❖ *Pension Committee v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
 - ❖ “*Zubulake* Revisited: Six Years Later”
 - ❖ 13 plaintiffs sanctioned for failure to preserve evidence
 - ❖ No willful act or bad faith found
 - ❖ Failure to issue a *written* litigation hold constituted negligence

The duty of preservation

- ❖ *Rimkus Consulting Grp. v. Cammarata*, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010)
 - ❖ Evidence found to support a finding of willfulness or bad faith, but question went to jury
 - ❖ Difference in consideration of “state of mind” between the Second Circuit (New York) and Fifth Circuit (Texas)

Preservation failures continue...

- ❖ *Innis Arden Golf Club v. Pitney Bowes, Inc., et al.*, 2009 U.S. Dist. LEXIS 43588 (D. Conn. May 21, 2009)
- ❖ *Lewis v. Ryan*, 2009 WL 3486702 (S.D. Ca. Oct. 23, 2009)
- ❖ *Peschel v. City of Missoula*, 2009 WL 3364460 (D. Mont. Oct. 15, 2009)

But severe sanctions can be avoided...

... if there were routine records management policies and procedures in place at the time

- ❖ *Kwon v. Costco Wholesale Corp.*, 2010 WL 571941 (D. Hawai'i Feb. 17, 2010)
- ❖ *Mohrmeyer v. Wal-Mart Stores East, L.P.*, 2009 WL 4166996 (E.D. Ky. Nov. 20, 2009)
- ❖ *Patterson v. Goodyear Tire & Rubber Co.*, 2009 WL 1107740 (D. Kan. Apr. 23, 2009)
- ❖ *Sue v. Milyard*, 2009 U.S. Dist. LEXIS 69199 (D. Colo. Aug. 6, 2009)
- ❖ *Southeastern Mechanical Svs., Inc. v. Brody, et al.*, 2009 U.S. Dist. LEXIS 69830 (M.D. Fla. July 24, 2009)

Courts single out records management failures

- ❖ *Ak-Chin Indian Cmty. v. U.S.*, 85 Fed. Cl. 397 (Ct. Fed. Cl. 2009); *motion for reconsideration denied*, 85 Fed. Cl. 636 (Fed. Cl. Feb 5, 2009)
- ❖ *Maggette v. BL Dvlpt. Corp.*, 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009)
- ❖ *Starbucks Corp. v. ADT Security Services, Inc.*, 08-cv-900-JCC (W.D. Wash. Apr. 30, 2009)

Courts single out records management failures

- ❖ *Magana v. Hyundai Motor America*, 167 Wash. 2d 570, 220 P. 3d 191 (Wash. Sup. Ct. Nov. 25, 2009) (en banc)
 - ❖ \$8 million default judgment
 - ❖ Failure to maintain a “document retrieval system”
 - ❖ “Atrocious behavior”

But sometimes courts give a pass...

- ❖ *Capitol Records, et al. v. MP3tunes, LLC*, 2009 WL 2568431 (S.D.N.Y. Aug. 13, 2009)
 - ❖ “The day undoubtedly will come when burden arguments based on a large organization's lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices.”

Update on last year's most notorious case

- ❖ *Phillip M. Adams & Assoc., LLC v. Dell, Inc., et al.*, 2009 WL 910801 (D. Utah Mar. 30, 2009)

A Pyrrhic victory

- ❖ *Qualcomm, Inc. v. Broadcom Corp.* 2010 WL 1336937 (S.D. Cal. April 2, 2010)
 - ❖ Highly relevant damaging emails not disclosed by plaintiff until cross-examination on final day of patent infringement trial
 - ❖ Judgment against the plaintiff followed by post-trial discovery into plaintiff's conduct
 - ❖ 200,000 pages of additional responsive documents produced

A Pyrrhic victory

- ❖ Magistrate Judge sanctioned Qualcomm \$8.5 million
- ❖ Counsel ordered to submit to state attorney discipline authorities
- ❖ District Judge ordered reconsideration and opportunity to present defense
- ❖ Magistrate Judge concluded that attorneys did not act with requisite bad faith to justify sanctions
 - ❖ But the judge found...

A Pyrrhic victory

- ❖ “an incredible breakdown in communication”
- ❖ “neither in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers”
- ❖ “outside counsel did not obtain sufficient information from any source to understand how Qualcomm's computer system is organized”
- ❖ “no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted”
- ❖ “lack of agreement amongst the participants regarding responsibility for document collection and production”
- ❖ “failures were exacerbated by an incredible lack of candor on the part of the principal Qualcomm employees”

Questions and comments

