

Electronic Discovery -- A Professional Responsibility Perspective

David C. Brezina
Ladas & Parry LLP
312.427.1300
dbrezina@ladas.net
May 2013

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1:** Legal Context for Electronic Discovery
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2:** Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3:** Professional Responsibility Implications Arising From Electronic Discovery Situations
- ◆ **Part 4:** Penetrating Technology – Understanding Enough to Solve or Minimize Problems
- ◆ **Part 5:** Best Practices
 - **Specific Plans for ESI**

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1: Legal Context for Electronic Discovery**
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2: Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues**
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3: Professional Responsibility Implications Arising From Electronic Discovery Situations**
- ◆ **Part 4: Penetrating Technology – Understanding Enough to Solve or Minimize Problems**
- ◆ **Part 5: Best Practices**
 - **Specific Plans for ESI**

Qualcomm Inc. v. Broadcom Corp.

Magistrate's Recommendation

- ◆ “... attorneys violated this Court’s discovery and/or scheduling orders ...”
- ◆ “... appropriate sanctions on Qualcomm’s attorneys ...”
 - “... monetary ...”
 - “... continuing legal education ...”
 - “... referral to the California State Bar for appropriate investigation and possible sanctions...” *

* Magistrate Judge’s recommendation modified two years later

Qualcomm v. Broadcom

Sanctions

- ◆ Qualcomm lost the case on the merits
- ◆ \$8,500,000 assessed in fees & costs
 - Exceptional case under Patent Statute
 - Could have been discovery sanctions
 - Could have been spoliation sanctions
- ◆ Attorney Client Privilege Penetrated Where Self Defense
- ◆ Qualcomm did not appeal

Qualcomm v. Broadcom

What Went Wrong

- ◆ Issue: Had Qualcomm participated in the industry group Joint Video Team (“JVT”) before their patent(s) issued?
- ◆ If yes, then the patents were unenforceable because the JVT rules were violated. If no, then Broadcom could be liable for infringement.
- ◆ The Problem:
 - 21 Qualcomm e-mails described JVT
 - These were:
 - ◆ Not located until late in discovery
 - ◆ Not produced until after trial had begun

Qualcomm v. Broadcom

What Went Wrong

- ◆ Witnesses Didn't Remember (Didn't Disclose) Participation
- ◆ Lawyers Didn't Look (Assumed Someone Else Looked) for E-mails (Or Didn't Want To Know)
- ◆ Routine Discovery practices (“after investigation ...”, 30(b)(6) witnesses) fell short
- ◆ Systems and Checklists (If Used) Didn't Encompass 46,000 E-mails

2010 *Qualcomm* Magistrate Judge Conclusion

- ◆ “Incredible lack of candor” by Qualcomm employees
- ◆ No bad faith by the outside lawyers
- ◆ Should have considered
 - Content of documents
 - Relevance to arguments being presented
 - Adequacy of discovery process

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1: Legal Context for Electronic Discovery**
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2: Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues**
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3: Professional Responsibility Implications Arising From Electronic Discovery Situations**
- ◆ **Part 4: Penetrating Technology – Understanding Enough to Solve or Minimize Problems**
- ◆ **Part 5: Best Practices**
 - **Specific Plans for ESI**

Now That We Have Your Attention ...

◆ Spoliation is old law

◆ Federal Rules

- Clarify treatment of electronic information
- Set forth procedures for production
- Provide a safe harbor

◆ Implications of Professional Responsibility

- When Client Harmed
- Rule 11 Signing Frivolous Pleadings
- Rule 37 Discovery Sanctions
- Inadvertent Production
- If You Delete -- a Tort?

◆ Penetrating Geek Speak

- What You See On Your Monitor Is Not Really “There”
- What You Think Is Deleted Is Not “Gone”
- Many Copies and Drafts Can Be in Lots of “Places”

◆ Best practices

- Start Early
- Talk to Opponent
- Avoid Spoliation
- Find Smoking Guns
- Preserve Privilege

Spoliation Is Old Law

- (1) Destruction or altering of evidence
- (2) Sanctions
 - (a) Under Rules and Inherent Powers Of Court
 - (b) Separate Tort in Some Jurisdictions, Negligence in Illinois
- (3) Before spoliation, must be duty to preserve
- (4) Trigger date for commencement of the duty to preserve – expectation of suit
- (5) Once apprehension of suit, scope of duty to preserve is analyzed
- (6) Information Subject to Discovery
 - o Documents or tangible things
 - o Made by or for individuals likely to have discoverable information
 - o Party may use to support its claims or defenses

Preservation Obligations

- ◆ Trigger Date
- ◆ All relevant documents (not multiple identical copies) in existence at the time the duty to preserve attaches
- ◆ Any relevant documents created thereafter
- ◆ Electronic Data Management Examples
 - Retain backup tapes for relevant personnel (if identifiable in good faith and through reasonable effort)
 - Catalog later-created documents in a separate electronic file
 - Mirror-image (“Forensic copy”) of computer system at time the duty to preserve attaches
 - Evaluate Rules
- ◆ If You Wouldn’t Ethically Shred the Paper, Don’t Intentionally or Accidentally Delete The Electronic Information

First Steps To Take After The Trigger Date

- ◆ Notice From Counsel – Preserve discoverable evidence
- ◆ Litigation Hold Communication
- ◆ Check on nature of system, procedures, capabilities, who has knowledge
- ◆ Enhance Efficiency In Preservation, Privilege
- ◆ Consider Sequestration of Computers, Tapes, Forensic Copies
- ◆ Consider Applicable Rules

ESI Discovery Obligations Implicate Professional Responsibility

◆ Directly When Client is Harmed

- *Qualcomm* Sanctions, Exceptional Case
- Lost Cases – Sanctions of Judgment, Issue Preclusion
- Tactical Losses – Lack of Good Evidence, Inference of Bad Evidence

◆ Rule 11 Signing Frivolous Pleadings

◆ Rule 37 Discovery Sanctions

◆ Inadvertent Disclosure – Sent or Received

◆ Spoliation a Tort (or Tortious Act)

“Young man, there are three things you should read before you come to Court ...”

- ◆ The Rules of Civil Procedure
- ◆ The Local Rules
- ◆ All Applicable Standing Orders

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1:** Legal Context for Electronic Discovery
 - The Need for Awareness
 - Basic Principles
- ◆ **Part 2:** Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues
 - Specific Rules
 - Local Court Practices – Experience With ESI
- ◆ **Part 3:** Professional Responsibility Implications Arising From Electronic Discovery Situations
- ◆ **Part 4:** Penetrating Technology – Understanding Enough to Solve or Minimize Problems
- ◆ **Part 5:** Best Practices
 - Specific Plans for ESI

Federal Rules

Civil Procedure

- Clarify treatment of Electronically Stored Information (ESI)
- Set forth procedures for production
- Provide a safe harbor

Evidence

- Rule 502*, Inadvertent Disclosure, Nonwaiver of Privilege

*and Illinois Rule of Evidence 502

Federal Electronic Discovery Production and Rules

- ◆ Rule 16 Pretrial Scheduling, Management
- ◆ Rule 26 Discovery, Disclosure and Timing
- ◆ Rule 33 Interrogatories and Production of Records
- ◆ Rule 34 Production of Documents, Electronically Stored Information
- ◆ Rule 45 Subpoenae

Federal Electronic Discovery Production and Rules -- Consequences

- ◆ Rule 26 Privilege & Claw-back
- ◆ Rule 37 Discovery Sanctions
 - Sanctions of adverse inference, issue preclusion, striking, stay, dismissal, judgment, money
 - Electronically Stored Information (ESI) Safe Harbor – for routine, good faith operation of IT system

Rules 16 and 26 Discovery, Disclosure and Timing

◆ Rule 16 Scheduling Plan Should Include ESI

◆ Early Attention Can Avoid Trouble

- Promote Efficiency
- Minimize Impact of Errors
- Head Off Disputes
- Civility

◆ Rule 26

- Standard using Reasonable Accessibility
 - ◆ Undue Burden
 - ◆ Undue Cost
- Commentary about Asymmetric cases

◆ Conference to include electronic discovery issues

Interrogatories – Responsive Documents

◆ Rule 33 (d)

- Option to Produce Documents Can Be Met By Producing Electronic Documents
- Adapt Strategy and Tactics to Medium
 - ◆ Produce Documents Where Kept In Ordinary Course of Business?
 - Will You Need to Provide “Tech Support”?
 - Be Clear on your Handling of Privilege
 - ◆ Produce Documents Responsive to Specific Interrogatories?

Document Requests

◆ Rule 34

- Includes Electronically Stored Information (“ESI”)
- Obligation to Translate to Humanly Readable
- Ability to Request and Object to Format
- Adapt Responsiveness to Specific Form of ESI and Issues of case
 - ◆ Authenticity
 - ◆ Dates of Origin
 - ◆ Nature and Authorship of Modifications – metadata
 - ◆ Form of Documents

Rule 26 Privilege & Claw Back

◆ Information Withheld Based on Privilege

- Claim Expressly
- Describe, Without Revealing, to Enable Assessment
- Privileged Document Log?

◆ Information Inadvertently Produced Subject to Privilege

- Promptly Inform
- Receiving Party
 - ◆ Return, Sequester, Destroy, Retrieve
 - ◆ Present to Court

Rule 37 Discovery Sanctions

◆ Sanctions – Apply to All Discovery

- Adverse Inference
- Issue Preclusion
- Striking
- Stay
- Dismissal
- Judgment
- Money

◆ ESI Safe Harbor

- Routine
- Good Faith
- Operation of IT system

Rule 37 Discovery Sanctions – Proposed Amendments (9/2012)

◆ Additional Discovery

◆ Sanctions

- Currently a Variation in Sanctionable Culpability
 - ◆ Negligence to Bad Faith/Willfulness
- Proposed:
 - ◆ Bad Faith
 - ◆ Irreparable Harm

◆ Factors

- Extent of Notice
- Reasonableness of Preservation
- Completeness of Preservation Request
- Resources and Sophistication
- Proportionality of Efforts
- Was the Court Asked?

Federal Rules of Evidence – Rule 502

◆ Waiver of Privilege Considers:

- Intentional Disclosure
- Identity of Subject Matter Disclosed, and
- Fairness

◆ Inadvertent Disclosure

- Inadvertent
- Reasonable Steps to Protect
- Prompt Correction

Illinois Rules

- ◆ 1990s (?) Rule 201 “Documents” Include Information Stored on Computers
- ◆ All Rules “Document” Replaces Paper”
- ◆ Rule 214 Print Copies of Computer Information, or Object
- ◆ New Illinois Evidence Rule 502
- ◆ Rule 219 (c) Sanctions for Failure to Comply with Discovery Order
- ◆ Old Inadvertent Production
 - ISBA Advisory Op. No. 98-04
 - ◆ May Use Inadvertently Disclosed Information
 - ◆ If Without Notice of Inadvertence
 - Professional Responsibility Rule 4.4 (b): Notice of Receipt of Inadvertently Sent
- ◆ New 201 (p) Inadvertent Production

201 (p) Asserting Privilege or Work Product Following Discovery Disclosure.

- ◆ If information inadvertently produced in discovery is subject to a claim of privilege or of work-product protection,
- ◆ the party making the claim may notify any party that received the information of the claim and the basis for it.
- ◆ After being notified, each receiving party must
 - promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved;
 - must take reasonable steps to retrieve the information if the receiving party disclosed the information to third parties before being notified; and
 - may promptly present the information to the court under seal for a determination of the claim.
- ◆ The producing party must also preserve the information until the claim is resolved.

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1:** Legal Context for Electronic Discovery
 - The Need for Awareness
 - Basic Principles
- ◆ **Part 2:** Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues
 - Specific Rules
 - Local Court Practices – Experience With ESI
- ◆ **Part 3:** Professional Responsibility Implications Arising From Electronic Discovery Situations
- ◆ **Part 4:** Penetrating Technology – Understanding Enough to Solve or Minimize Problems
- ◆ **Part 5:** Best Practices
 - Specific Plans for ESI

Seventh Circuit Pilot Program Principles

- ◆ Purpose: Just, Speedy Inexpensive Litigation
- ◆ Cooperation: Is Not Bad Advocacy
- ◆ Discovery Should Be Proportional
 - Consider Type of Case
 - Asymmetric Discovery
- ◆ Meet and Confer, Identify Disputes Early
- ◆ Parties' E-Discovery Liaison
- ◆ Preservation Requests and Orders -- Identify Appropriate People and Information
- ◆ Scope of Preservation Should Be Proportionate
- ◆ Identification of Electronically Stored Information
- ◆ Agree on Production Formats
- ◆ Judges Expect
 - Read the Rules
 - Read the Advisory Committee Report on ESI
 - Duty of Continuing Education

Circuit Court of Cook County Calendar W ESI Procedures

1. Introduction

Just, speedy, and inexpensive conduct of discovery, attorneys should become knowledgeable about client's information systems

2. Exchange E-discovery Materials before Rule 218 conference

- a. Identify ESI That You May Use
- b. List Likely Custodians
- c. Steps To Identify, Segregate And Preserve ESI And Inform Custodians
- d. List Information Management System(s)
- e. Identify ESI Of Limited Accessibility
- f. Name Retention Coordinator
- g. Current Document Retention Policy
- h. Name "E-discovery Liaison"
- i. Identify Any Expected Issues

3. Discovery Conference

4. E-Discovery Liaison

5. Search methodology

6. Timing of e-discovery

7. Format of ESI Production – Good Faith Effort to agree

8. Privilege. discuss procedures for handling inadvertent production

9. Costs

- Generally, Borne By The Producing Party
- Consider Apportioning Costs On Good Cause

10. Discovery regarding compliance with discovery follows discovery rules

Federal Circuit Advisory Counsel – Model Order (Patent Cases)

- ◆ Supplements Existing Orders
- ◆ Modify for Good Cause
- ◆ Proportionate Cost Shifting
- ◆ Foot Dragging Penalty
- ◆ Metadata Only On Good Cause
- ◆ E-Mail is Separate
 - E-Mail Requests on Specific Issues
 - Voluntary Disclosure, But Phase E-Mail Discovery
 - Custodian, Search Terms, Time
 - Five Custodians
 - Five Search Terms
- ◆ FRE 502 (d) Expressly Part of Discovery

Court Procedures -- Common Themes

- ◆ Just, Speedy & Inexpensive Litigation
- ◆ Cooperation Expected
- ◆ Preservation Expected
- ◆ Meet & Confer Early
- ◆ Seek Agreement
- ◆ Treatment of Privilege in Calendar W Order & Federal Rules
- ◆ Electronic Discovery Liaison
 - Know the Technology
 - Know About Documents
- ◆ Identification/ Formats
 - Avoid Duplicates
 - Filtration
 - Search Methods
- ◆ De-emphasis of Metadata

Court Procedures Different Approaches

◆ Seventh Circuit

- Principles
- Proportionate, Open to Cost Shifting
- Strong Preservation Standards
- Includes Exclusions of Limited Access Information

◆ Calendar W

- Own Costs
- Searchability Left *Status Quo*
- More Detailed Checklist
- Limited Privilege Protection

◆ Patent Rules

- Supplemental
- Special Treatment of Email
- Numerical Limitation
- Clear No-Waiver Position

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1:** Legal Context for Electronic Discovery
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2:** Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3:** Professional Responsibility Implications Arising From Electronic Discovery Situations
- ◆ **Part 4:** Penetrating Technology – Understanding Enough to Solve or Minimize Problems
- ◆ **Part 5:** Best Practices
 - **Specific Plans for ESI**

Overview of Electronic Document Discover (EDD) Practices

- ◆ Preservation of Documents to Avoid of Sanctions
- ◆ Obtaining Usable “Good” Evidence
 - Timely Production
 - Authentication and Foundation
 - Plan Evidence Early
 - Plan Searches and De-duplication
- ◆ Zealously Obtain Information, Defend
- ◆ Preservation of Privilege

Litigation “Hold”– Seventh Circuit Principles

- ◆ Identify Parties
- ◆ Describe Facts
- ◆ Identify Witnesses
- ◆ Relevant Time Period
- ◆ Other Helpful Information for Identification of Responsive Information

After Preservation – Begin Discovery

◆ Work With IT/IS Staff/ Liaison

- Assist In Identifying Relevant Information Sources
- Contribute Ideas, May Not Be Set Up to Operate Discovery

◆ Forensically Image Computer For Preservation And Review

◆ Harvest Electronic Data

- Ensure The Comprehensiveness And Reasonableness
- Potential Testimony

◆ Filter collected data to minimize review of irrelevant documents

- Keywords
- Dates
- Custodians

◆ Plan Introduction Of Helpful Documents Into Evidence

◆ Scheduling Order

- Read Applicable Rules
- Investigate Time To Comply Before Scheduling Order
- Write Order To Effectuate Necessary Discovery

Reasonable Accessibility a Typical Standard for Burden in Production

- ◆ Active, online data – lowest burden
- ◆ Near-line data
- ◆ Offline storage /archives
- ◆ Backup tapes and
- ◆ Erased, fragmented or damaged data – highest burden
- ◆ Proportionality increasingly recognized.

Winning At Trial Requires Evidence – Consider ESI After Discovery

- ◆ Preserve It – You Cannot Introduce What Does Not Exist
- ◆ Produce It – Your Opponent Will Object to Use If You Do Not
- ◆ Maintain It – Authenticity Will Need To Be Established
- ◆ Introduce It – Electronic Evidence Using Analogy To Photographic Evidence

Inadvertent Production

- ◆ Sheer Volume of Documents to Review an Issue
- ◆ Technology Sometimes Results in Mistakes
- ◆ Waiver of Privilege Issue Can Be Complex
 - Federal Rules
 - Local Rule
 - Ethical Rules
 - Court Orders
 - Use of Received Inadvertent Disclosure Not a Waiver
 - Evidence Rules 502 (Federal and Illinois)

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1:** Legal Context for Electronic Discovery
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2:** Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3:** Professional Responsibility Implications Arising From Electronic Discovery Situations
- ◆ **Part 4:** Penetrating Technology – Understanding Enough to Solve or Minimize Problems
- ◆ **Part 5:** Best Practices
 - **Specific Plans for ESI**

Penetrating Geek Speak

- ◆ What You See On Your Monitor Is Not Really “There”
 - On the equipment
 - In the Document
- ◆ What You Think Is Deleted Is Not “Gone”
- ◆ Copies and Drafts Can Be in Lots of “Places”
- ◆ Anything You Do Might Change The “Document”

Why Do You Need to Understand?

- ◆ Explosive Growth in Volume of ESI
- ◆ Information Potentially Hard to Find
 - Volume
 - Machine Readable
- ◆ Witnesses may not know where things are kept
- ◆ Searchability can yield smoking guns
- ◆ The Process of Observation of the Information Can Change the Information
- ◆ Judges & Rules Expect It

What You See On Your Monitor Is Not Really “There”

- ◆ Folders Are Not Really Folders
- ◆ Pictures and Words
- ◆ Machine Information – “Metadata” Created by the Computer
- ◆ Hidden Information – A Program Doing What It Was Told to Do
 - Redactions
 - Character Recognition
- ◆ Modification – Some Formats Harder to Alter

Anything You Do Might Change The “Document”

- ◆ Any change in the machine has the potential to change the information
- ◆ “On”, “Off”, “Copy”, “Save”, “Save As”
- ◆ Sometimes the changes are included (“metadata”) and sometimes the changes are irrevocable and untraceable
- ◆ Depends on operating system, application software, particular commands, source, destination, memory arrangement, network, etc.

Deletions

- ◆ Computer operation – the file system is really a catalog of where to find the information
- ◆ “Delete” command merely removes the catalog entry, not the information
- ◆ “Forensic copies” of machines preserve everything
- ◆ Deletions can often be reconstructed
- ◆ Backups can be routinely maintained

Copies and Drafts Can Be in Lots of “Places”

- ◆ In Modern Business, Huge Volume of ESI
- ◆ E-mail is ubiquitous
 - Ease of use
 - Sloppy content
 - Sloppy addressing (Berenson the NY Times Reporter, or Berenson the Attorney?)
- ◆ Ease of copying ESI – Many Copies, Places
- ◆ Mobile users
 - Different devices
 - Networks and Analogous Systems
- ◆ Servers, co-workers, colleagues, outsiders, routine backups, disaster recovery copies

Metadata

- ◆ Record of Machine Made Changes – Typically “Automatic”
- ◆ Often hidden or partly hidden
- ◆ “Track Changes” plus other information
- ◆ Imagine a compulsive, old time patent lawyer who tracks each revision of each draft, including author, date, time, etc. in different colored pencils – metadata may provide this
- ◆ Including it could convey key information (it was counsel who deleted the phrase?)
- ◆ Not including it could hide key information (the witness not only saw the document but edited it?)
- ◆ Rules and procedures being refined to address metadata

Electronic Discovery -- A Professional Responsibility Perspective

- ◆ **Part 1: Legal Context for Electronic Discovery**
 - **The Need for Awareness**
 - **Basic Principles**
- ◆ **Part 2: Rules of Civil Procedure and Evidence Focusing on Electronic Discovery Issues**
 - **Specific Rules**
 - **Local Court Practices – Experience With ESI**
- ◆ **Part 3: Professional Responsibility Implications Arising From Electronic Discovery Situations**
- ◆ **Part 4: Penetrating Technology – Understanding Enough to Solve or Minimize Problems**
- ◆ **Part 5: Best Practices**
 - **Specific Plans for ESI**

Preliminary EDD Management Considerations

- ◆ Many Options May Be Available
- ◆ Retain then-existing backups
- ◆ Catalog later-created documents
- ◆ Mirror-image – Forensic Copy
- ◆ Sliding scale?
 - Low Likelihood of Relevant documents -- save copies, Ghost drive?
 - High importance and volatility -- Complete forensic copies or even sequester computer
 - Memorialize your rationale for good faith and reasonableness
 - Check Local Rules and Practices on Accessibility, Burden, Specific Information

Best Practices

- ◆ Other than following the rules!
 - Avoid Spoliation
 - Find Smoking Guns
 - Preserve Privilege
- ◆ Ideas to evaluate for your client and case
 - Start Early
 - Talk to Opponent
 - Understand Enough About the Technology

Start Early - Ask Your Client

◆ Document Policies and Practices

- Document Destruction In-Place
- Followed

◆ Dates of interest

- Litigation subject
- Fit into organization history
- Go Earlier if it Helps You

◆ Personnel

- Court Assigned or *De Facto* Discovery Liaison
- Custodians
- Witnesses
- Document Managers
- IT Department

◆ What records – especially old records – need preservation, production

◆ Electronic Information Organization

- Communications – E-mail, Other
 - ◆ Programs
 - ◆ Policies
- Network
 - ◆ Architecture
 - ◆ Programs
 - ◆ Policies
 - ◆ Off-network, local, mobile
 - ◆ BYOD
- Non-e-Mail
 - ◆ Word processing
 - ◆ Accounting & Financial
 - ◆ Graphics
 - ◆ Inventory & Distribution

Electronic Discovery Management “Tools”

- ◆ Your own procedures & equipment
- ◆ Your client’s procedures & equipment
- ◆ Outside vendors
 - Shop Around
 - Management software
 - Services
 - Analysis tools
 - Interface with Trial Preparation & Presentation Programs
 - Will They Be “Around” for Trial?
- ◆ Determine appropriate toolbox for your case

Preservation Ideas

◆ Sequester Computers?

- Inexpensive for Personal Computers
- Impractical, Disruptive, Temporary, Liability
- Software license and copyright issues.

◆ In-House IT to “Copy”?

- Inexpensive, Ease of Access, Familiarity
- Possible Missed Data, Altered Data, Liability, Testimony, Penetrating privilege
- Be Sure The Chosen Method IS Effective
 - ◆ Ghost drive restoration to identical computer?

◆ Outside Forensic Experts?

- Experience, Completeness, Admissibility, Outsource Risks
- Up Front Cost (Over Long Haul, May be Least Expensive)
- Shopping in a Burgeoning Industry
 - ◆ The Usual Suspects
 - ◆ Independent Specialists
- Counsel and Client Remain Responsible
 - ◆ Will Vendor Be In Business Later?
 - ◆ Is Vendor’s Methodology Absolutely Sound?

Privilege and Privileged Document Logs

- ◆ “Send” Makes It Easy to Lose Privilege (Berenstein and Berenstein)
- ◆ Identification Of Communications Both Necessary and Efficient
- ◆ Use Easy Tools:
 - “Confidential”, “Privileged” Subject Lines
 - Separate “Folders”
 - List Making Tools
- ◆ Plan Ahead
 - Avoid Need for “Claw Back”
 - Fit In With Production Strategy
- ◆ Cut and Paste Not Enough

Privilege and Privileged Document Logs

- ◆ The Judge Expects a Log
- ◆ Party claiming privilege
 - expressly make claim
 - "describe the nature of the documents . . . not produced or disclosed"
 - "do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

FRCP 26(b)(5)(A)

- ◆ "Letter from Client X to Lawyer Y seeking advice about whether certain transaction was taxable."
 - Communication From Client
 - Intended To Be Confidential
 - Sought Legal Advice
- ◆ "Letter from client to lawyer—attorney client privilege." insufficient

Chevron Corp. v. Weinberg Grp.
(D.D.C., 2012)

Maturing Discovery

- ◆ Filtration, Word Searches for Relevant Documents, Fuzzy Logic for Synonyms, Predictive Coding
- ◆ De-duplication
- ◆ Burden, Duplicates, Privilege Review
- ◆ Duty to Supplement
- ◆ As Issues Mature, Reassess
- ◆ Consider Tactics – Remember *Qualcomm's* Lessons
- ◆ The Month Before the Pre-trial Order is Too Late

Sensitive Cases With Extra Care or Shorter Time Lines

- ◆ Criminal – Work With Someone Who Knows
- ◆ Criminal overtones – Government “Bills” for Emergency Services, Civil Antitrust/Price Fixing, Copyright/Counterfeiting, Trade Secret/Computer Fraud
- ◆ Disappearing Evidence
 - Trade Secrets
 - RAM copying
 - *Ex Parte* Seizures

Summary

- ◆ Volume and Difficulties In Management Give A Different Perspective for Electronically Stored Information (ESI)
- ◆ Federal Rules of Civil Procedure
 - Planning and Handling Burdens
 - Safe Harbor
- ◆ Federal Rules of Evidence – Clarify Privilege
- ◆ Compare and Contrast State Rules
- ◆ Violation Implicates Professional Responsibility
- ◆ Understanding The What, Where and What Can Happen to ESI Helps Formulate a Plan
- ◆ Best practices
 - Read the Rules
 - Start Early
 - Avoid Spoliation
 - Affirmatively Obtain and Maintain Evidence for Your Case
 - Preserve Privilege

Any Questions?

David C. Brezina
Ladas & Parry LLP
312.427.1300
dbrezina@ladas.net
May, 2013