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Legal Developments since the New E-Discovery Rules in a Web 2.0 World

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Lunch KeyNote

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Course Agenda

- Review Federal Rules re: E-Discovery and resulting need for “legal holds” to avoid spoliation sanctions
- Discuss related new Federal Rules of Evidence
- Analyze recent cases re: “trigger events” for legal holds
- Analyze recent cases re: “scope” for legal holds
- Propose 7 Steps to implement legal holds




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Part I

**THE REVISED FEDERAL RULES
& LEGAL HOLDS**




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What is “spoliation” and why should you care?

- Where courts have great discretion, at minimum, to impose sanctions for destroying records relevant to pending or potential litigation.
- Some states recognize it as a separate cause of action, while others simply give courts discretion on how to punish the parties involved.

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Examples of Spoliation Sanctions

- Evidentiary or legal sanctions
 - ✓ Not allowing documents introduced at trial
 - ✓ Special jury instructions or assumptions
- Financial sanctions
 - Fines per Statute (e.g., \$5 mill per S-Ox)
 - Imprisonment per Statute (e.g., 20 yrs per S-Ox)
 - New lawsuit in states where available
 - Report to State Bar for sanctions

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Enter the Revised Federal Rules - Overview

Enacted December 1, 2006 and cover the following:

- Part I: Early Meet and Confer - Rules 26(f) & 16(b)
- Part II: Redefining “Document”- Rules 33(d), 34(a) & 45
 - * Includes ESI irrespective of medium.
- Part III: Form of Production - Rules 34(b) & 45(a), (c), (d)
- Part IV: Dual Discovery - Rules 26 & 45(d)
- Part V: Safe Harbor – Rule 37(f)

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Meet & Confer: Rule 26(f)

Conference of Parties; Planning for Discovery.

[...] the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b),[...] confer to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

- ▶ (1) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- ▶ (2) any issues relating to claims of privilege or protection as trial-preparation material, including –if the parties agree on a procedure to assert such claims after production –whether to ask the court to include their agreement in an order











Rule 26(a) - Self-Disclosure

Rule 26(a) Required Disclosures; Methods to Discover Additional Matter.

Initial disclosures... a party must, without awaiting a discovery request, provide to other parties:

- The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses.
- A copy of, or a description by category and location of, all documents, electronically stored information, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.








So where does concept of “legal holds” come from?


The Duty to Preserve Continuum:

1. Statutory or regulatory obligations to preserve;
2. Statutes of limitations;
3. Duty arising from potential or threatened litigation or investigation;
4. Duty created by preservation letter from opposing counsel or agency;
5. Duty created by service of a complaint and resulting civil discovery statutes, discovery requests or court orders.

Items 3 to 5 should trigger litigation holds.



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Legal Holds Needed Even Before Litigation Filed

"The duty to preserve material evidence arises not only during the litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation."

➤ Toth v. Parish, 2009 U.S. Dist. LEXIS 16116 (W.D. La. Mar. 2, 2009)




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Part II

**THE REVISED FEDERAL RULES
OF EVIDENCE**




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Federal Rules of Evidence Revised as of September 19, 2008

- Under revised Federal Rules there was potential for waiver of privilege re: protected communications
- Extremely high volumes of data exchanged
- So, the judicial review committee recognized that:
 - ✓ There is enormous expense associated with document production (to protect against inadvertent disclosure of privileged information)
 - ✓ Because the producing party risks a ruling that even an inadvertent disclosure can result in a subject matter waiver.




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In other words...

If you show it, you blow it!



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Enter FRE 502(a) – Limitations on Scope of Waiver

If a waiver is found:

1. it applies only to the information disclosed,
2. unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.



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Revised FRE 502(b) – Protections Against Inadvertent Disclosure

The inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if

1. the holder took reasonable steps to prevent such a disclosure and
2. employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.




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FRE 502(d)

The order is enforceable against all persons and entities in any federal or state proceeding.




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FRE 502(e) – Agreements to Protect Privileged Communications

- Parties in a federal court can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding.
- Although those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.




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Why should you care about FRE?

- Given sizable productions, the inadvertent disclosure of confidential or privileged information could be deemed a waiver.
- Do you want to be the employee responsible for the disclosure and waiver of privilege that affects the outcome of the case?




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A sobering e-mail case

- Stengart v. Loving Care Agency Inc., Case No. A-3506-08T1 (NJ Sup. Ct. Appellate Div., June 26, 2009)
- In discrimination case, employee had emailed her attorney from office computer through her personal account
- Defense argued waiver of attorney-client privilege because of use of company computers to send emails
- Court disagreed based on the employer policy in this case that called for employer to own all equipment and resulting information, but also allowing employee's occasional use for personal matters
- Door still open for waiver if employers has drafted a better policy
- Be careful what you say or do on company issued desktops, laptops and PDA's




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A sobering metadata opinion

- West Virginia State Bar Lawyer Disciplinary Bd., Op. 2009-01 (June 10, 2009)
- Lawyers who receive electronic documents may not unilaterally search for or view hidden metadata that the sender provides by mistake
- Metadata is literally the data behind the data
- Metadata sometimes reveals significant information about a client's representation such as when a document was created, who worked on it, and changes made.
- Lawyers who send electronic documents must use reasonable care to avoid transmitting embedded information that is confidential or privileged.
- These principles should apply to anyone sharing electronic documents, whether lawyers or not.



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Part III

**SIGNIFICANT LEGAL DEVELOPMENTS
RE: "TRIGGER EVENTS" FOR LEGAL
HOLDS**





Triggering Events Going Back 8 Years!

- In Phillip M. Adams & Associates, L.L.C., v. Dell, Inc., 2009 WL 910801(D. Utah., March 30, 2009) the Federal District Court of Utah found that a party should have anticipated litigation eight years before the plaintiff's lawsuit was filed.
- Co-defendant, ASUSTEK, destroyed various electronic records due to poor recordkeeping practices
- The court held that in the 1999-2000 environment, when several class actions were brewing, ASUSTEK should have been preserving evidence related to floppy disk controller errors.
- Because they failed to do so, they now face case terminating spoliation sanctions.





Compilation of List of Potential Opponents as a Trigger Event

- Rambus v. Infineon, 220 F.R.D. 264 (ED VA 2004);
Samsung v. Rambus, 2006 U.S. Dist. LEXIS 50007 (ED VA 2006); cf Hynix v. Rambus, 2006 U.S. Dist. LEXIS 30690 (N.D. Cal. 2006).
- Retention policy 2 years before lawsuits
 - Held office "Shred Days"
 - Goal to make company "battle ready"
 - Same facts in all three cases






Rambus Holdings

- The court in two of the decisions found spoliation, because duty attached when list of potential opponents and potential causes of action were created
- Court viewed "Shred days" as pretext for destroying relevant documents
- Court in California was more forgiving! Court determined that retention policy and "Shred Days" were not adopted in bad faith.




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Rambus Still Active in 2009!

- Micron Technology Inc. v. Rambus Inc., Case No. 00-792-SLR (D. Del., Civ., January 9, 2009).
- New spoliation sanctions issued.
- Rambus' record retention program and its "Shred Days" from 10 years ago continue to haunt the company.
- Courts keep harping on whether Rambus instituted a document retention program at the same time it knew that it would be filing litigation regarding certain patents.

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New Trigger Event Case – Backup Tapes

- Forest Laboratories Inc. v. Caraco Pharmaceutical Laboratories, Case No. 06-CV-13143 (E.D. Michigan, April 14, 2009)
- Patent infringement case
- At issue was the destruction of backup tapes
- Triggering event for legal holds was NOT when drug was developed in the late 1990's, but when generic brand appeared in August 2003
- Forest admitted recycling tapes until May of 2005
- Court deemed tapes "not accessible" but still entertaining duty to preserve if tapes could have been easily segregated for "key players" of the litigation

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Part IV

**SIGNIFICANT LEGAL DEVELOPMENTS RE: "SCOPE"
FOR LEGAL HOLDS IN A WEB 2.0 WORLD**

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The Scope Problems in a Web 2.0 World

A survey conducted by New Dilligence in September of 2008 reported that:

1. Nearly all employees with Web access report using Internet applications at work, primarily to engage in instant messaging, peer-to-peer file sharing, and social networking.
2. Such conduct increases the risk of a data breach or infecting company computer networks with malware.
3. It also presents huge e-discovery issues.



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Scope in Web 2.0 - MySpace

- Prosecution's Case Against a Driver in a fatal accident:
 - ✓ "I'm not an alcoholic, I'm a drunkaholic"
 - ✓ from the driver's MySpace profile
- Sheriff in Florida fired for comments about heavy drinking and women on MySpace.
- Colleges & Schools monitoring MySpace and Facebook for "inappropriate" conduct.

Source: Don Tapscott, *Growing Up Digital: The Rise of the Net Generation*, McGraw Hill, 2009, at page 66.



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Scope in Web 2.0 – More MySpace


Police Officer Accused of Misconduct over MySpace Profile

- A police officer was accused of misconduct after he posted information on his MySpace profile regarding the arrest of John Michael Montgomery.

Cromer v. Lexington-Fayette Urban County Gov't, 2008 U.S. Dist. LEXIS 65374 (E.D. Ky. Aug. 25, 2008).



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Scope in Web 2.0 – Even More MySpace


Students Suspended from Private Religious School for Online Statements

- Two female students were suspended from a private Lutheran school for statements on their MySpace pages about their sexual orientations and a relationship between the two youth.

Doe v. California Lutheran High School Assn., 170 Cal. App. 4th 828, 833 (Cal. App. 4th Dist.2009)



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Scope in Web 2.0 – What else? MySpace


School Administrator Sued for Discrimination

- A middle school administrator was sued for multiple discrimination claims. Some of the evidence included Facebook groups entitled “Everyone Hates [WWJ]” and “I Love Watching Fights at School.” Threats were made on the groups and the youth was assaulted shortly after the online threats.

Wolfe v. Fayetteville, 2009 U.S. Dist. LEXIS 15182 (W.D. Ark. Feb. 26, 2009).



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Scope in Web 2.0 - Facebook


Court Allows Discovery of Plaintiff's Facebook Postings, Despite Privacy Settings

- The Ontario Superior Court of Justice ordered the plaintiff in a negligence lawsuit to respond to the defendant's discovery questions related to his Facebook page, regardless of the fact that he had used privacy settings to limit public access to the page.
- If a party to a lawsuit posts content on Facebook that relates to any matter at issue in the lawsuit, the party must identify that content in its affidavit listing relevant documents, the court ruled.

Leduc v. Roman, Case No. 06-CV-3054666PD3 (Ontario Super. Ct., discovery ruling February 20, 2009).



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Scope in Web 2.0: YouTube

- YouTube Ordered to Disclose Video Logging Databases
- U.S. District Court for the Southern District of New York found that YouTube Inc.'s logging database, which includes information about how many times each video has been viewed as well as the user name and IP address of every viewer, is essential information in a copyright infringement lawsuit. The information must be surrendered to the plaintiffs during discovery.

Viacom Int'l Inc. v. YouTube Inc., Case No. 07 Civ. 2103 (S.D.N.Y., July 2, 2008)



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Scope in Web 2.0 – MySpace & YouTube


Sentence Enhancement of Criminal Defendant for MySpace Photos & YouTube Video

- Criminal defendant's sentence increased for photos found on his MySpace page and a YouTube video. The Defendant was photographed holding an AK-47 with a loaded clip *after* he had been convicted of a felony crime of violence.

United States v. Villanueva, 2009 U.S. App. LEXIS 3852 (11th Cir. Fla. Feb. 25, 2009).




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Scope in Web 2.0 – Music Uploads

- **Web Service Must Preserve Relevant Data Upon Request, Even if Not Routinely Retained**
- In Arista v. Usenet.com Inc., CaseNo. 07-8822 (S.D.N.Y., January 26, 2009), the court sanctioned an online newsgroup service failure to preserve data about subscribers' music file uploads and downloads.
- Company had asserted it did not routinely retain such information.
- Once the service was on notice that the recording label plaintiffs found the data relevant to their infringement claims and requested it, the company had an obligation to preserve it.
- Because it failed to do so, spoliation sanctions were warranted.




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Scope in General – Metadata

- **E-Mail Metadata Must Be Disclosed Pursuant to State Public Records Act**
- In *O'Neill v. City of Shoreline*, Case No. 59534-2-1 (Wash. Ct. App., July 21, 2008), the Washington Court of Appeals held that metadata associated with an e-mail discussed at a city council meeting is a "public record" and should have been disclosed in response to a request under Washington's Public Records Act.

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Scope in General – Metadata (cont'd.)

- **Metadata of Police Department Official Notes Not 'Public Records' in Arizona**
- In *Lake v. Phoenix*, Case No. 07-415(Ariz. Ct. App., January 13, 2009), the court found that metadata associated with official records are not "public records" under Arizona's freedom of information law.
- Courts in the state have distinguished between "public records" and all other records created as a result of government employees' activities.
- Including metadata within the scope of the definition of "public records" would all but eliminate that distinction, the court said.

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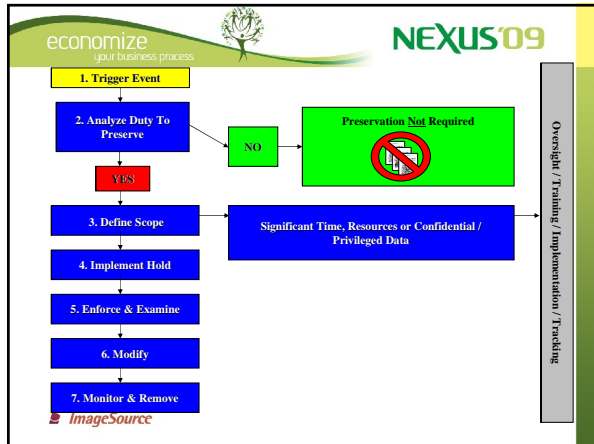


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Part V

7 STEPS TO IMPLEMENT LEGAL HOLDS

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Steps 1, 2 & 3

- Discussed above
- Is there a trigger event?
- Does it require a legal hold?
- If so, what is the scope of what to put on hold?


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Step 4: Implement the Legal Hold

- Who issues Hold Order?
- Who receives Hold Order?
- Form of Hold Orders (notices & content)
- Coordinating with IT
- Technical Considerations (the Data Map)

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Step 5: Enforce and Examine Effectiveness of the Hold

- Verify Receipt of Hold Notice
- Interview Key Witnesses
- Get Together with IT
- Consult with Legal Hold Oversight Committee

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Step 6: Modify the Legal Hold

- Re-check scope of Distribution
- Broadening or Narrowing
- Adding Custodians
- Discussions with Potential Litigants
- Modify Scope

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Step Seven: Monitor and Remove the Legal Hold

- Audits
- Record Hold Reminders
- Issuance to New Employees
- Narrow Over Time
- Monitor Holds and Re-Check
- Management of Terminated Employees
- Releasing Legal Holds
- The Cascading Hold Dilemma

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Final Big Picture Considerations

- The Governing Body
- Legal Hold Oversight Committee
- Education & Training
- Auditing
- Ongoing Support

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Thank You

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