

E-Discovery

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Tech Tsunami

- Finance guy @ major tech company: The social impact of technology is suffocating us!
- Soon two lines of business:
 - 1. Traditional stuff
 - 2. Managing the legal records created in running our traditional business



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Big Picture

- US legal and political culture thrives on assigning blame
 - Investigations
 - Lawsuits
- Blame culture thirsts for *records*
- Technology is creating records like mad

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Legal System is Overwhelmed

- A lawsuit is a slow, laborious investigation
- The explosion in record quantity is radically changing litigation dynamics
- Supreme Court Justice shocked to learn the costs of e-discovery!

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Amendments to Federal Rules Civil Procedure

- Unclear whether these amendments are right
- State rules following suit
- 99 days after lawsuit filed, must start negotiating e-discovery
- Policy issues for enterprises

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New Phenomenon

- Major enterprises forming e-discovery teams
- Emerging like a wildfire
- Shocked to find a dozen people devoted to this at a major company
- Background of e-discovery team members: IT security

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2-Way Street In Gov't Investigations

- Attorney General Eliott Spitzer pioneered discovery of e-mail in investigations of corporations (e.g. Henry Bloget)
- Dick Grasso, NYSE, & Maurice Greenberg, AIG, turn the tables, demand e-mail from AG's office (to investigate witness pressuring)

▪ A. Lucchetti & I. McDonald, "Spitzer's targets use his tactics," Wall St Journal, C.1, 1/24/06.

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What is E-Discovery?

- Lawsuit
- Legal attitude that "records" are precious
- Discover the records
- How many relevant records in an enterprise?
- "Legal Hold" – hard to do - e.g. Washington Metro

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Historical Practices Not Faring Well

- Record destruction policy to reduce the quantity of records available for discovery in a lawsuit
- Hard to know if you've destroyed every copy

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Traditional Advice Stumbled!

- Netscape policy: destroy e-mail 60 days
- Forgot to destroy backups
- Forced in litigation “discovery” to disclose
- Leibowitz, "E-Mail Policy on Trial," Natl Law Journal, Nov. 9, 1998
<http://www.wendytech.com/articlesemailpolicyontrial.htm>

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Legal System Looks Back with 20/20 Hindsight

- All record retention policies say you must cease destruction when you know of litigation
- But, what potential litigation does a large enterprise know about at any point in time?
- Courts are unfair in second guessing honest decisions

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Nancy Temple Video

Example of Blame Culture

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Broadcom v. Qualcomm

- Sloppy e-discovery by Qualcomm
- Engineer witness refers to 21 undisclosed e-mails
- Court fines Qualcomm
- Court sanctions Qualcomm attorneys

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Best Practice Today

- Organize e-mail so you can find it
- Morgan Stanley - \$1.45 billion jury verdict
- Comedy of errors in producing e-mail in discovery

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Dealing with Cost

- Storage cost dropping
- Law puts more emphasis on storage than it does accessibility
- Still, to keep everything is ridiculous

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Coleman (Parent) Holdings, Inc. v.
Morgan Stanley & Co., Inc., No.
502003 (Fla. Cir. Ct., May 16, 2005).

Conjecture on how Mr. Belnick made records.

Tyco Scandal

E-mail Supports Execs

- Authority for bonuses, loans, payments
- Swartz, Kozlowski - thin documentation

- Belnick - thorough e-mail records

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Departure from the Past

- My hypothesis
- Achieve advantage by understanding massive records
- Not by having small quantity of records

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