



E-Discovery

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Significant E Discovery Cases

***Quantum Comm. Corp. v. Star Board., Inc.*, 2007 WL 445307 (S.D. Fla. 2007)**

- Smoking gun document deleted
- Obtained from third party
- Default Judgment entered





Significant E Discovery Cases

In re NTL, Inc. Securities Litigation, 2007 WL 241344 (S.D.N.Y. 2007)

- Litigation hold memo issued but ignored
- E Mails destroyed
- Court awards adverse inference instruction and and monetary fees and expenses





Significant E Discovery Cases

Qualcomm, Inc. v. Broadcom Corp., 2008 WL 66932 **(S.D.Cal. 2008)**

- 46,000 documents not produced
- \$8.5 million in sanctions awarded
- Attorneys referred to California Bar for investigation and possible punishment





At The Beginning

The Legal Team Must Understand:

- The computer systems used by the company, including hardware systems, primary operating systems, and major software systems.
- How those computers are networked both internally and externally.
- The backup processes and schedules, document retention and destruction schedules.
- Third parties who hold or have access to the company's data.



Preservation

Litigation hold

- The duty to preserve arises whenever litigation or a claim is reasonably anticipated.
- Send hold to everyone in the company who might possibly have relevant information
- Make sure all auto deletes are suspended
- Follow up with all persons with knowledge of relevant facts
- Reissue on set schedule and follow up again
- Document your work
 - Tip: Send a Preservation of Evidence letter to opposing counsel or any relevant third party giving formal notice of their requirement to preserve electronic data.



Gathering and Collecting

- Collect data from all persons with knowledge of relevant facts
- Collect data from all relevant servers
- Use IT expert to collect the data in native format
- Create mirror image to capture active and inactive data
- Supervised Tape Archive Process (STAP) is an alternative to mirror image
- Don't forget about home offices, laptops, legacy systems, and instant messaging
- What about those pesky back up tapes?



Current eDiscovery Technologies

- Enterprise Content Management (ECM)
- E-mail Archiving
- Indexing
- Service Providers / Document Review Tools
- Search and Collection Technologies

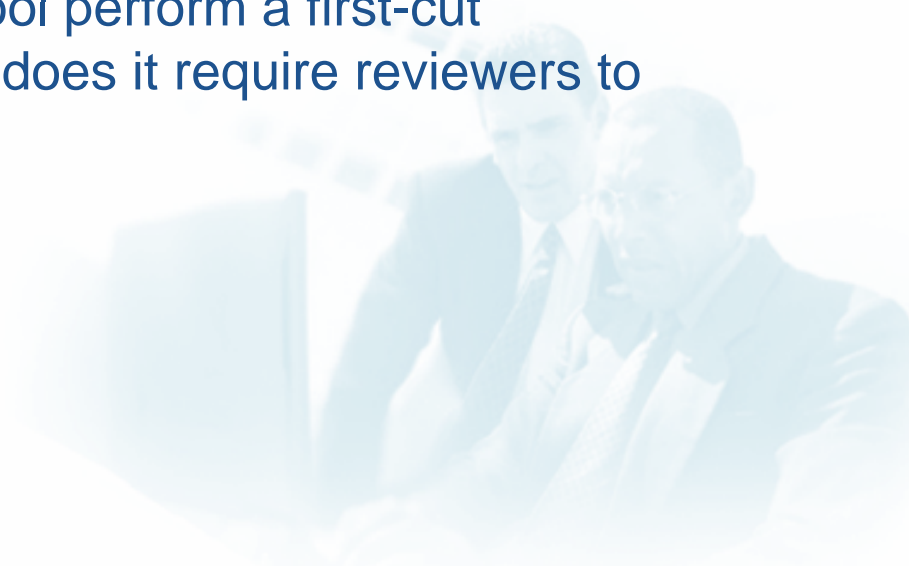




Understanding the Technology

Some relevant questions to vendors offering these technologies include::

- How do conceptual search systems determine the “concepts”? Does the user participate in the creation of a thesaurus or are the concepts automatically identified by the technology?
- Does the system rank the search results by relevance and what criteria does it use in that ranking?
- Does the auto-categorization tool perform a first-cut categorization automatically or does it require reviewers to submit criterion?





Understanding the Technology

- Does the system allow the review team to further tailor the categories to its review requirements through the use of rules and/or examples?
- The key to any solution is the flexibility to not impede the “rolling” nature of most large-scale review projects.
- Does the categorization tool place the same document in more than one folder or restrict it to only one?
- What tools or algorithms are used to identify email threads, duplicates or near-duplicates?





From Collection to Production

- Use search terms and relevant dates to identify potentially responsive documents
- Maintain list of search terms and dates – agreed terms and dates is ideal
- Pull privileged
- Produce responsive documents – agree on the format of the production
- Consider hash marks for authenticity



Supplemental Production

Do not forget about the continuing need to supplement production.





A Word to The Wise

- Read your company's document retention policy
- Make sure your company's document retention policy applies to and is applied to electronically stored information
- Make preparations in advance
 - Policies and procedures
 - Infrastructure
 - Educate yourself (technically and legally)