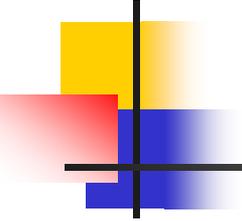


E-discovery

The State of Play, June 2009

Evelyn J. Furse
Senior City Attorney, Salt Lake City Corporation

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- This presentation is educational, not legal advice and cannot substitute for advice of counsel.

2 ½ Years in to E-discovery

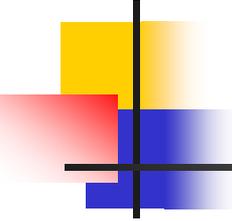
What do we know?



It's all about relationships

- Good ones





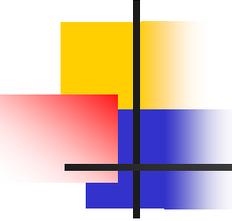
Bad ones



And the ones that really matter:

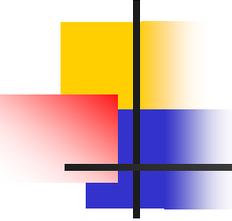
- with the Court.





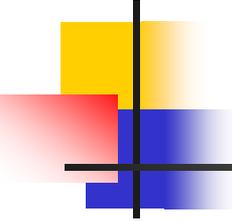
What does that mean for us?

- In deciding what to preserve, when and how to preserve it, we should always do two different “gut checks”:
 - 1. What will the other side think, what will it look like to the other side, how will that make the other side feel?
 - 2. What will the Court think, what will it look like to the Court, how will the Court feel?



E-discovery Sanctions flow from a long line of mistakes.

- Those mistakes lead the other side to distrust you and feel forced to ask the Court for help.
- Those mistakes lead the Court to distrust you and think sanctions are the only way to teach you a lesson.



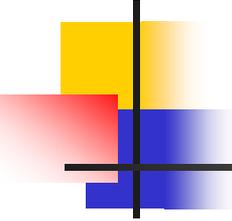
How to avoid the long line of mistakes:

- Have good lines of communication both within and outside of the organization.
 - Good means: honest, intelligible, complete, open minded.

Relationships must be good at home first . . .

- Legal, IT, Records—the foundation
 - E-discovery team
 - Comprehensive Record Retention Policy
 - Litigation Holds
 - Monitoring of Litigation Holds
 - Data Map
 - Training Plan
 - Review Process





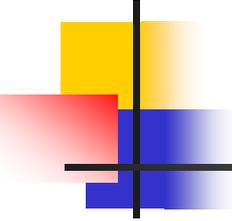
e.g.

- Sanctions imposed where minimal docs produced & no archiving or retention policies. Ad hoc practices, totally dependent on individual employee determinations, except financials, unacceptable.
 - Philip M. Adams Assoc. Inc. v. Dell, Inc., 2009 WL 910801 (D. Utah)
- Failure to issue written hold & to monitor compliance w/ verbal hold = Gross negligence.
 - Acorn v. County of Nassau, 2009 WL 605859 (E.D.N.Y.)

Relationships must be good at home first . . .

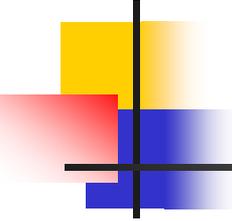
- Division/Department Heads & Staff—the Frame
 - Recognition
 - Honesty
 - Records
 - Litigation Holds
 - Document Collection





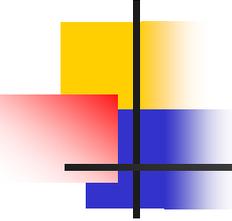
e.g., Document Collection

- Cannot rely on employees to determine what documents relate to a litigation.
- Cannot give employees sole discretion to determine what information to preserve.
 - Counsel must make some effort to check, verify, find other sources of information.
 - Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614 (D. Colo. 2007).



but see,

- Lawyers must communicate with the people who actually created the documents in designing any search of the documents.
 - “This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails.”
 - William A. Gross Constr. Assoc.



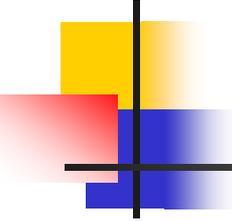
see also, public records

- A policy "that vests individual government employees with unreviewable authority to delete work-related e-mails is unreasonable [under public records laws] because it would authorize the unfettered destruction of public records."
 - State v. Seneca Co. Bd. of Comm., 899 N.E.2d 961 (Ohio 2008).
 - Sanction for deletion of e-mail in violation of public record retention requirements was having to pay for restoration.

Relationships must be good at home first . . .

- Former Employees, Agents, Clients, Outside Counsel—the Roof
 - Ownership/control of documents
 - List
 - Process & Plan



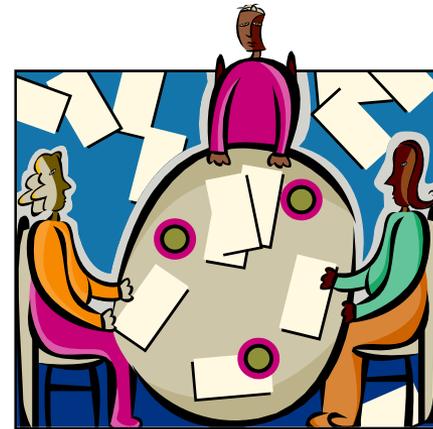


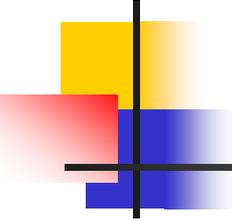
e.g. employees' agents

- E-mails re gov't business on personal e-mail accounts w/in "control" of gov't.
 - Flagg v. City of Detroit, 2008 WL 3895470 (E.D. Mich.)

Then we can make “friends”.

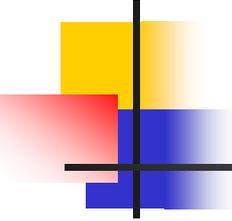
- Meet & Confer
 - Limitations
 - Parameters
 - Format
 - Expectations





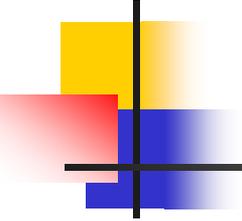
Phrases you don't want to see in a Court's opinion:

- "This case has had a rather acrimonious history."
 - Cache La Poudre Feeds, LLC
 - RESULT: more discovery granted & certifications required



Phrases you don't want to see in a Court's opinion:

- “This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or “keywords” to be used to produce emails or other electronically stored information (“ESI”).”
 - William A. Gross Constr. Assoc. v. Am. Manuf. Mut. Insur., 256 F.R.D. 134 (S.D.N.Y. 2009).

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- “Of course, the best solution in the entire area of electronic discovery is cooperation among counsel.”
 - William A. Gross Constr. Assoc.

Sometimes friends disagree

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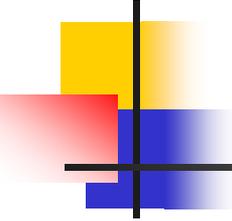
- When in litigation, attorneys are expected to and in fact are paid to test boundaries and distrust the other side.



That's when the Judge gets involved.

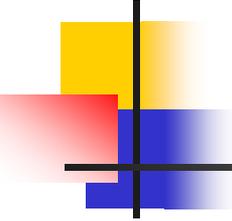
- Legitimate disagreement about scope of discovery, who's going to pay for discovery, whether something exists.
- Illegitimate disagreement resulting from ego, subterfuge, dishonesty, poor communication with other side, poor communication internally





If . . .

- If you put a litigation hold in place when litigation is pending or reasonably anticipated,
- If you make the hold appropriately broad,
- But narrow enough to allow quick review of documents,
- If you engage in an earnest meet and confer prior to discovery and do not wait for problems to arise,
- And you produce documents in an agreed upon format, not solely based on your convenience,
- And make only reasonable objections to discovery, not just ones meant to obfuscate,
- And produce responsive documents in good faith, maintaining your honesty above all else,



Yours is the Earth and everything that's in it,

- And--the judge may not mind being asked to intervene on a discrete matter upon which you cannot reach agreement.
- And--the judge may not sanction you for your actions.

