

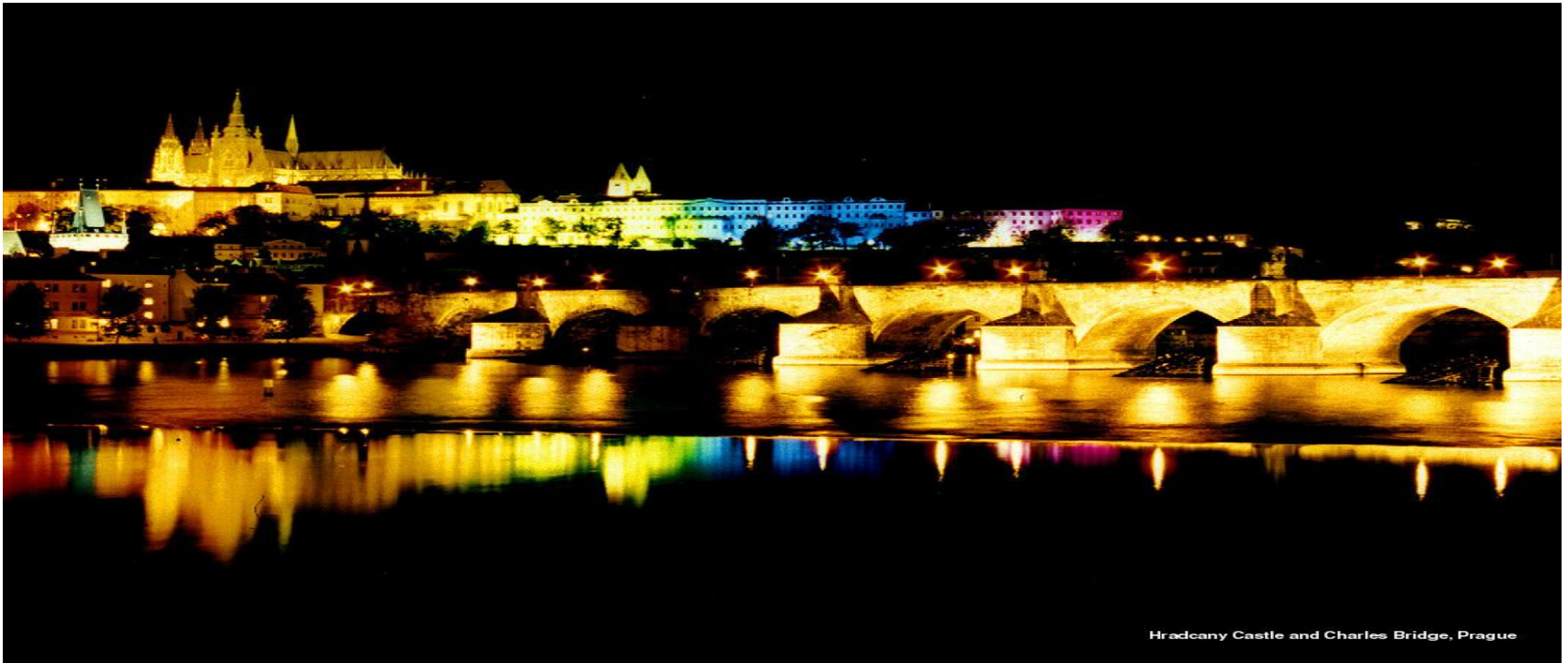
Session 4: Civil Discovery

**LBSC 708X/INFM 718X
Seminar on E-Discovery
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Preservation Order

- **"Documents, data, and tangible things" is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video; phonographic tape; or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.**
--Pueblo of Laguna v. U.S. 60 Fed. Cl. 133 (Fed. Cir. 2004).

***Attack on the Citadel:
Questioning The Opposing Party's
Chosen Method of Responding
To Discovery***



Hradcany Castle and Charles Bridge, Prague

The Sedona Principles (2d ed. 2008), Principle 6

Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

In the face of allegations of missing evidence, the Court upheld a manual collection process used by Ford Motor, acknowledging that “manual collection is sometimes even disfavored” [citing to The Sedona Conference Commentary on Search and Retrieval], but going on to note that “absent an agreement or timely objection, the choice is clearly within the producing party’s sound discretion.”

***Ford Motor Co. v. Edgewood Properties Inc.*, 257 F.R.D. 418, 427 (D. N.J. 2009).**



Please your Honor, may I have some more (ESI, that is)?

In the face of a protest of “inexplicable deficiencies” in a party’s production, “vague notions that there should have been more than what was produced are speculative and are an insufficient premise to compel judicial action.”

**Judge Facciola,
U.S. v. O’Keefe, 537 F.
Supp. 2d 14, 22 (D.D.C. 2008).**



**But there are gale force winds
in the case law...**



Judge Scheindlin, *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, et al.* 685 F.Supp.2d 456, 473 (S.D.N.Y. 2010) (as amended May 28, 2010).

Plaintiffs' litigation hold policy is defective...

Judge Scheindlin's Opinion in Pension Committee goes on to say @ 685 F.Supp.2d at 473 n.68:

attorney oversight of the process ... is important.

Citing to:

Adams v. Dell, 621 F.Supp.2d 1173, 1194 (D. Utah 2009).

(holding that defendant had violated its duty to preserve information, in part because the defendant's preservation practices "place operations-level employees in the position of deciding what information is relevant")

Issues & Challenges With Manual Collection



Issues and Challenges with Manual, Custodian Based Collection

1. Under-collection
2. Inconsistent, idiosyncratic searching for purpose of collection
3. Late identification of key evidence
4. Metadata spoliation
5. Self-interest, bias
6. End user's absence of legal knowledge (e.g., relevancy)
7. Failure of attorney supervision (being out of loop)
8. Burdens, costs, and the risk of a do-over

Hot topic: Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes*, 261 F.R.D. 44 (S.D.N.Y. 2009)

- “In [a prior case] the Court notes its dismay that the party opposing discovery of its ESI had organized its files in a manner which seemed to serve no purpose other than ‘to discourage audits. . .’ Similarly, in this case, [the party] host[ed] no ediscovery software on their servers and apparently are unable to conduct centralized email searches of groups of users without downloading them to a separate file and relying on the services of an outside vendor.”

Judicial second guessing of failure to use e-search capabilities: *Capitol Records v. MP3 Tunes* (con't)

Court went on to add:

“The day will undoubtedly will come when burden arguments based on a large organization’s lack of internal ediscovery software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices.”

Judge Facciola writing for the U.S. District Court for the District of Columbia

“Whether search terms or ‘keywords’ will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. See George L. Paul & Jason R. Baron, [*Information Inflation: Can the Legal System Adapt?*](#), 13 RICH. J.L. & TECH.. 10 (2007) * * * Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”

-- ***U.S. v. O'Keefe***, 537 F.Supp.2d 14, 24 D.D.C. 2008).

Search Protocols: Two paths

One approach: the judiciary
choosing to decide between
competing methods and protocols

A second approach: requiring the
parties to negotiate and come to
agreement.

Judge Grimm writing for the U.S. District Court for the District of Maryland

“[W]hile it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying on such searches for privilege review.” ***Victor Stanley, Inc. v. Creative Pipe, Inc.***, 250 F.R.D. 251 (D. Md. 2008); *see id.*, *text accompanying nn. 9 & 10* (citing to Sedona Search Commentary & TREC Legal Track research project)

Victor Stanley v Creative Pipe, 250 FRD 251 (D Md 2008) (*Victor Stanley I*)

- o What was new and different about the opinion?
- o Is there a distinction to be made between searching for responsiveness and searching for privilege?
- o How does *Mt Hawley Ins. Co. v. Felmen Production* (S.D. W. Va 2010) deal with issue of quality control in e-discovery?
- o How does the reasoning of *Mt Hawley* line up with *Victor Stanley*?

Hot topic: Metadata

- What is it?
 - Email header information (possibly hidden)
 - Proprietary features of word processing (e.g. summary fields)
 - Embedded & shadow data
 - Deleted keystrokes
 - Tracking info
 - Spreadsheet formulas
- Format issues and metadata
- Metadata ethics: inadvertent production

Recent Cautionary Tales

- 1) *In re Fannie Mae Litigation*, 552 F.3d 814 (D.C. Cir. 2009) (backup tapes)
- 2) *Aguilar v. ICE Division of US Dept of Homeland Security*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008) (metadata)