

E-discovery for litigators

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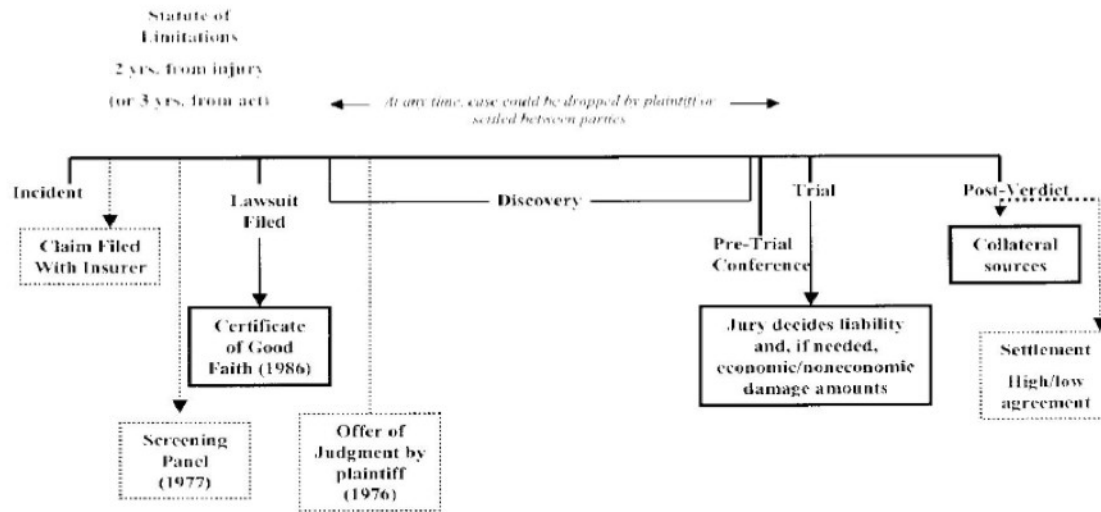
April 29, 2010
KCMBA CLE
Business Litigation Committee

E-discovery *is* for litigators.

E-discovery is for litigators, because

**“E-DISCOVERY” HAS A
GROWING DEFINITION.**

Claims/Lawsuit Process



E-disc

“E-DISCOVERY HAS A GROWING DEFINITION.”

E-discovery is for litigators, because

**ESI ISSUES MUST BE
ADDRESSED EARLIER THAN
EVER.**

E-discovery is for litigators, because

**ESI ISSUES ARE LEGAL ISSUES,
NOT JUST ADMINISTRATIVE
ISSUES.**



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The 2010 Revolution:

**“A FAILURE ... IS NEGLIGENT
EVEN IF IT RESULTS FROM A
PURE HEART AND AN EMPTY
HEAD.”**

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*Pension Comm. of the Univ. of Montreal
Pension Plan v. Banc of Am. Sec., LLC*, No. 05
Civ. 9016, 2010 U.S. Dist. LEXIS 4546, 2010
WL 184312 (S.D.N.Y. Jan. 15, 2010) (as
amended)

*Pension Comm. of the Univ. of Montreal
Pension Plan v. Banc of Am. Sec., LLC*, No.
05 Civ. 9016, 2010 U.S. Dist. LEXIS 4546,
2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)
(as amended)

Pension Committee's Continuum

Negligence

- “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm”

Gross Negligence

- “the failure to exercise even the care which a careless person would use.”

Willful/ Reckless

- Intentional acts ... in disregard of a known or obvious risk...mak[ing] it highly probable that harm [will] follow.

Pension Committee's Continuum

Negligence

- Failure to obtain records from *all* employees
- Failure to take all measures to preserve ESI
- Failure to assess accuracy and validity of search terms

Gross Negligence

- Failure to collect records from key players
- Destruction of email or backups
- Failure to collect files of former employees
- Failure to issues written litigation hold that:
 - Directs
 - Collects
- Failure to identify key players and preserve their records
- Cease deletion of email
- Preserve electronic and paper records
- Preserve backup tapes

*Rimkus Consulting Group, Inc. v.
Cammara*, 2010 WL 645253, 2010
U.S. Dist. LEXIS 14573, 2-6 (S.D. Tex.
Feb. 19, 2010)

Qualcomm v. Broadcom, 05cv1958-B
(BLM), 2010 U.S. Dist. LEXIS 33889,
2010 WL 1336937 (S.D. Cal. April 2,
2010)

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PRODUCTION, PRIVILEGE & CLAWBACK

**COOPERATION,
COORDINATION & STRATEGY**

PREPARATION

48% of lawyers do not use a document management system.

More than 14,000 laws & standards governing retention.

PROPORTIONALITY

PRICE

PRICE

CRAIG BALL'S EDNA CHALLENGE

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BAD NEWS: FEWER PEOPLE USE E-MAIL FOR ANYTHING
YOU PROBABLY WANT.