

# The Challenge

- 200 emails a day
- 5 people = 1,000 emails a day = 275,000 emails a year
- 2 years for duration of fact pattern = over 500,000 emails, with attachments
- 10 emails a minute, including attachments

# The Challenge (continued)

- 600 emails an hour,  $500,000/600=$
- 833 hours
- X \$200 an hour = over \$165,000 for review
- Different file types, with metadata and imbedded data, constantly evolving
- Dispersed throughout an enterprise

# Introduction to the "New" Rules of Civil Procedure

- Rule 34(a): ESI is recognized
- Rule 26(f): any issues in general; preservation; form or forms; agreements on privilege protection
- Rule 26(a) disclosures: provide ESI that party may use to support claims or defenses
- Rule 16(b) scheduling order: disclosure of ESI; any agreements regarding protection of privilege

# Introduction to the "New" Rules of Civil Procedure (continued)

- Rule 34(b): request forms, object to forms, if no form requested, reasonably usable
- Rule 26(b)(2)(B): not reasonably accessible sources, cost shifting
- Rule 26(b)(5)(B): retrieval procedure
- Rule 37(f): limited safe harbor
- Rule 45, incorporates rules of 34(b), 26(b)(2)(B), 26(b)(5)(B)
- Arizona has highly similar rules, one of first states

# Introduction to Rule 502, Fed. R. Evid.

- Important new rule; reduce agreements to Court order

# Issues Relating to the "Form" of ESI

- Preservation
- Social media
- Not reasonably accessible

Focus Forward

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# Practicalities of Search and Review

# Spoliation

- *Pension Committee v. Banc of America*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010)
  - Failure to issue a written litigation hold constitutes gross negligence.
  - Failure to collect records from "key players" is gross negligence or willfulness
  - Failure to take all appropriate measures to preserve ESI is negligence
  - Relevance and prejudice presumed when there is gross negligence or willfulness
  - Failure to assess the accuracy and validity of search terms is negligence

# Spoliation (continued)

- *Rimkus Consulting Group v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010)
  - Spoliation of evidence – particularly of ESI – has assumed a level of importance in litigation that raises grave concerns
  - Mere negligence not enough to warrant an instruction on spoliation for most circuits
  - Notes that Ninth Circuit appears to follow rule that states that an adverse inference instruction may follow mere negligence, citing *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)

# Spoliation (continued)

- *Melendres v. Arpaio*, 2010 U.S. Dist. LEXIS 20311 (D. Ariz. Feb. 11, 2010)
  - A finding of fault or simple negligence is a sufficient basis on which a Court can impose sanctions against a party that has destroyed documents. *Unigard Sec. Ins. Co. v. Lakewood Eng'g. & Mfr'g. Corp.*, 982 F.2d 363, 369 n.2 (9<sup>th</sup> Cir. 1992); *Residential Funding Corp. v. De George Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) ("A 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence.").

# Spoliation (continued)

- *Melendres v. Arpaio*, 2010 U.S. Dist. LEXIS 20311 (D. Ariz. Feb. 11, 2010) (continued)
  - In a case in which the contents of documents can not be ascertained, Courts should "draw the strongest allowable inferences in favor of the aggrieved party." *Nat'l. Ass'n. of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987).

# Cooperation, Proportionality, and Case Management

Focus Forward

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# Comments from the Bench