



E-Discovery Defensibility

Views from the Bench

A Clearwell White Paper

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Introduction

Defensibility is core to a wide range of processes that may ultimately come under some semblance of judicial scrutiny. In many ways, the search for what is “defensible” is one of the most fundamental risk management tasks that legal practitioners undertake on a daily basis. Those that are not able to defend their e-discovery processes face the threat of sanctions, the loss of attorney client privilege, and/or the loss of work product protection. As an example, defensibility failings can have dramatic and often catastrophic consequences as is seen in numerous e-discovery cases such as *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008). In *Victor Stanley* the judge waived the attorney-client and work product privileges because the defendants failed to demonstrate that their e-discovery search methodology was defensible and could reasonably prevent the inadvertent production of privileged documents.

As we begin our journey to understand defensibility in the context of electronic discovery, we must accept, and perhaps embrace, that there is no singular answer, safe harbor, or best practice. However by understanding the standards defined by the following case law, one can develop “reasonable” practices that will provide the foundations of e-discovery defensibility in one’s organization. As noted e-discovery jurist, Judge Shira Scheindlin, said recently: “courts cannot and do not expect that any party can meet a standard of perfection.”

For many, the flexible and subjective reasonableness standard is vexing precisely because of its vagaries. But, on the flip side of the coin, its elasticity allows legal standards to evolve and manage the incalculable levels of permutation that would never be possible to anticipate ahead of time via delineated statutes.

It is difficult to cover all the case law pertaining to e-discovery defensibility, so here, in distilled fashion, are several of the most important cases you should know about. These cases offer a comprehensive sampling of the emerging standard of defensibility in e-discovery and help define judicial requirements for reasonable and defensible e-discovery practices:

- 1. The Duty to Preserve:** *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 2009 WL 910801 (D. Utah Mar. 30, 2009).
- 2. Keyword Search:** *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008).
- 3. Privilege Waiver/FRE 502:** *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008).
- 4. Cooperation:** *Mancia v. Mayflower Textile Servs. Co.*, 2008 WL 4595175 (D. Md. Oct. 15, 2008).
- 5. FRCP 37(e) Safe Harbor:** *Phillip M. Adams & Assoc., LLC v. Dell, Inc.*, 2009 WL 910801 (D. Utah Mar. 30, 2009).

The Duty to Preserve

Phillip M. Adams & Assoc., LLC v. Dell, Inc.

CASE FACTS

Adams v. Dell is a patent infringement case where the plaintiff, alleged that one of the defendants (ASUS) destroyed critical pieces of evidence and should be sanctioned accordingly. The underlying facts and timelines are fairly complex, but in summary the dispute centered around the alleged infringement of several patents developed to resolve defects in floppy disks during in the late 80's. Both sides fortunately agreed about the definition for the duty to preserve evidence, which in the 10th circuit begins when a party “knows or should know [it] is relevant to imminent or ongoing litigation.”² The triggering of the preservation duty was, not surprisingly, much more complicated, and ASUS (the responding party) claimed that its duty to preserve wasn't triggered until early 2005, when they received a letter warning it of potential litigation because of the alleged patent infringement. But, in a very controversial decision, the Magistrate held that “counsel's letter is not the inviolable benchmark” and the duty to preserve was triggered much earlier (in the 1999-2000 time frame) because similar litigation was rampant in the industry, highlighted by a late 1999 suit where Toshiba paid billions of dollars in a class action settlement related to similar floppy disk issues.³

“A party is under a duty to preserve evidence which it knows, or reasonably should know, is relevant to the future litigation.”

Judge David Nuffer
Adams v. Dell

KEY TAKEAWAYS

The duty to preserve information occurs extremely early in the litigation process and the failure to fulfill this duty gives rise to a host of sanctions since the law places extreme prejudice on any act by a party that serves to remove evidence that can't help to resolve a matter on the merits. Specifically, “[a]s soon as a potential claim is... identified, a party is under a duty to preserve evidence which it knows, or reasonably should know, is relevant to the future litigation.”⁴ Within the litigation timeline this is often the first place a party would encounter the “reasonableness” standard. To make this matter more complex, with the preservation obligation there are really two distinct but interrelated issues—when does the duty to preserve begin, and, once triggered, what is the scope of information that must be preserved?

- **Timing**—The timing of when the duty to preserve is triggered may be the most vexing challenge throughout the EDRM spectrum because bright line tests are few and far between. We know, for example, that the duty is often triggered well before the complaint is filed, and in some instances that can span years as *Adams v. Dell* demonstrated. As courts examine when the party should have known that litigation was likely, they often try to find the tipping point when, on balance, the likelihood goes from conceptual to concrete. But, most instances this analysis is viewed in hindsight, against a timeline that most always looks clearer than it probably did at the time key decisions were being made. This being the case, it is always better to err on the side of caution when making a preservation decision. With the courts demonstrating a far reaching definition of “imminent litigation” one should commence preservation if there is any indication whatsoever that litigation may ensue.
- **Scope**—Assuming a party can safely navigate the timing trigger, the next issue isn't much easier—meaning what information should be preserved. This is similarly difficult since at the earliest stages of matter, and particularly before a complaint and attendant discovery is filed, it's often nearly impossible to accurately gauge the

complete scope of the claims to determine who are the “key players” that might be implicated. Without understanding the “key players” it then is correspondingly difficult to determine where all the sources of ESI might reside. Here, it may be best to avoid being overly cautious due to the sheer quantity of data that exists in any corporation. An organization should make a best effort attempt to identify the custodians and data ranges that may be relevant to the imminent litigation and take the appropriate steps to preserve this data. Documenting the selection and preservation process will help demonstrate the reasonableness of the best effort attempt should scope of preservation come into question.

Keyword Search

Victor Stanley, Inc. v. Creative Pipe, Inc.

CASE FACTS

In a series of recent rulings, including *United States v O’Keefe*⁵, *Equity Analytics, LLC v Lundin*⁶, *Gross v Am. Mfrs. Mut. Ins. Co*⁷, and *Victor Stanley v Creative Pipe Inc.*, the bench has shown increasing awareness regarding the challenges of e-discovery searches. The central issue in *Victor Stanley* revolved around whether the defendants, who’d inadvertently produced 165 privileged electronic documents, could get them back in the absence of a valid clawback provision. The plaintiff’s contention was that defendants waived privilege because they failed to take reasonable precautions by performing a faulty review of text-searchable files that were part of defendants’ electronically stored information (ESI) production. In *Victor Stanley*, Judge Grimm sided with the plaintiff and waived attorney-client privilege and work product protection because the defendants failed to demonstrate the search methodology used to prevent the inadvertent production of privileged documents was reasonable. Judge Grimm pointed out that the defendants had the burden to demonstrate their search methodology was reasonable because of the “well-known limitations and risks associated with [keyword searches].”⁸

Keyword search is addressed again in *William A. Gross. Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*⁹ In this recent construction defect case, Judge Peck references keyword sampling and echoes many of the opinions of Judge Grimm in *Victor Stanley*. Judge Peck (a Sedona devotee) issues what he hopes will be a “wake-up” call to the bar 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’).” In *Gross*, the court had to mediate an e-discovery dispute where the requesting party propounded a blatantly over-inclusive search request crafted by the requesting parties. Unfortunately, the responding entity was a non-party and they simply dug their heads in the sand. In order to facilitate a resolution this left the Court in the “uncomfortable position” of having to craft a “keyword search methodology for the parties, without adequate information from the parties (and Hill).”¹⁰

Summing up the problem by citing Judge Grimm and *Victor Stanley* he stated: “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.” He further noted: “[w]hile this message has appeared in several cases from outside this Circuit, it appears that the message has not reached many members of our Bar.”¹¹

“Compliance with the Sedona Conference Best Practices for use of search and information retrieval will go a long way towards convincing the court that the method chosen was reasonable and reliable.”

Judge Paul Grimm
Victor Stanley v Creative Pipe Inc.

After noting both the Sedona Conference® and Judge Facciola (of *O’Keefe and Equity Analytics* fame) Peck’s opinion reached a crescendo:

“Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of ‘false positives.’ It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.”¹²

KEY TAKEAWAYS

Victor Stanley and *Gross* are especially significant because they address keyword search methodology, which is the latest area to come under defensibility scrutiny, and the former comes from Chief United States Magistrate Judge Paul Grimm, a noted e-discovery jurist, who’s authored a number of significant opinions in this area. In order to evaluate the reasonableness of defendants’ privilege review methodology, Judge Grimm honed in on defendant’s use of keyword search techniques. He says, “[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer)...”¹³

Judge Grimm went on to suggest that, given these known limitations, there are two current approaches parties can follow in order to use keyword search in a defensible manner.

- **Collaboration approach**—The first approach parties could defensibly undertake would be to “confer with their opposing party in an effort to identify a mutually agreeable search and retrieval method.”¹⁴ Grimm points out this approach would “[minimize] cost because if the method is approved, there will be no dispute resolving its sufficiency.”¹⁵ If this type of collaboration is not possible, then parties can follow a second approach.
- **Best practices approach**—With this approach, Grimm argues that best practices and appropriate search technologies can be used in order to create a reasonable and defensible methodology in the absence of collaboration. Grimm goes on to specifically cite the Sedona Conference Best Practices document as a source of best practices. “In this regard, compliance with the Sedona Conference Best Practices for use of search and information retrieval will go a long way towards convincing the court that the method chosen was reasonable and reliable.”¹⁶

In order to adhere to the Sedona Conference Best practices, it is useful to leverage the Commentary on Search which includes a section on “practical advice” which contains eight “Practice Points.”¹⁷ Practice point two is the most relevant to the actual implementation of a search methodology. It states “[s]uccess in using any automated search method or technology will be enhanced by a well thought out process with substantial human input on the front end.”¹⁸ The Commentary doesn’t prescribe a specific “process” parties should follow, but it does suggest the following key components could be used in a reasonable and effective search methodology:

- **Testing**—Searches need to be tested for efficacy, i.e. whether the search is producing over or under-inclusive results.
- **Sampling**—The primary way to test the efficacy of a search is through sampling. In *Victor Stanley*, Judge Grimm states that “[t]he only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.”¹⁹
- **Iterative feedback**—Finally, the process of testing and refining one’s search based on the results of testing needs to be iterative so every refinement can be reported and validated.

For additional information regarding defensible keyword search, see Clearwell’s whitepaper: [*Victor Stanley and the Changing Face of E-Discovery: What You Need to Know*](#).

Privilege Waiver/FRE 502

Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.

CASE FACTS

In this breach of contract and negligent misrepresentation action, plaintiff Rhoads admittedly, yet inadvertently, produced over eight hundred privileged, electronic documents during e-discovery. After returning the documents, the defendants filed a motion claiming that Rhoads waived privilege. The court began its analysis by focusing on FRE 502 which created a national standard and states a “middle ground” for the determining of inadvertent disclosure during e-discovery. The court acknowledged provision (b)(2) specifically, which provides protection if “the holder of the privilege or protection took reasonable steps to prevent disclosure.”²⁰ Ultimately, the court determined there was no waiver of privilege of the remaining documents despite finding numerous flaws with the responding producing party’s methodology.

KEY TAKEAWAYS

The party that inadvertently produced privileged information can often times only retrieve that information if their review and production processes were “reasonable.” *Rhoads* provides a good example of the typical line of analysis which often combines state law and new Federal Rule of Evidence 502. After returning the documents, Defendants filed a motion claiming that Rhoads waived privilege because (i) its production was careless, (ii) its response in seeking the return of the documents was delayed, and (iii) it failed to produce complete and accurate privilege logs. The court began its analysis by focusing on FRE 502 which recently created a national standard (versus the previous split in jurisdictions) and now states a “middle ground” for the determining of inadvertent disclosure during electronic discovery.²¹ The key provision being FRE 502 (b)(2) which provides protection if “the holder of the privilege or protection took reasonable steps to prevent disclosure.”

As the court began its legal analysis it quickly noted the similarity to *Victor Stanley, Inc. v. Creative Pipe, Inc.*, which had “analogous facts” despite being decided pre-FRE 502.²² Both *Rhoads* and *Victor Stanley* leveraged the five-factor test stated in *Fidelity & Deposit Co. of Maryland v. McCulloch*, which was:

"Here there was no testing [read: no sampling] of the reliability or comprehensiveness of the keyword search. Plaintiff's only testing of its search was to run the same search again."

Judge Michael M. Baylson
Rhoads v. Bldg. Materials

1. The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production
2. The number of inadvertent disclosures
3. The extent of the disclosure
4. Any delay in measures taken to rectify the disclosure
5. Whether the overriding interests of justice would be served by relieving the party of its errors

Acknowledging that the reasonableness of Rhoads' review was the crux of the dispute, the court then concluded, "that once the producing party has shown at least minimal compliance with the three factors in Rule 502, but 'reasonableness' is in dispute, the court should proceed to the traditional five factor test."²³ There were a number of things the court found lacking in Rhoads' methodology including a failure in crafting a viable search strategy:

*"Plaintiff produced documents that its limited search should have caught. Therefore Plaintiff not only failed to craft the right searches, but the searches it ran failed. Plaintiff has no explanation for this...Here there was no testing [read: no sampling] of the reliability or comprehensiveness of the keyword search. Plaintiff's only testing of its search was to run the same search again."*²⁴

"Although Rhoads took steps to prevent disclosure and to rectify the error, its efforts were, to some extent, not reasonable...The most significant factor,...is that Rhoads failed to prepare for the segregation and review of privileged documents sufficiently far in advance of the inevitable production of a large volume of documents."²⁵

Rhoads serves as a practical caution for those producing potentially privileged digital evidence. The producing party should develop "reasonable" procedures for identifying privileged document and preventing inadvertent disclosures. Documentation of these steps will help demonstrate the reasonableness of the precautionary processes, in the event of a challenge.

Cooperation

Mancia v. Mayflower Textile Servs. Co.

CASE FACTS

Mancia is a wage action brought by six laundromat workers. During the case the plaintiffs served widespread discovery requests on the defendants, which prompted objections and several disputes over the adequacy of the defendants' responses. There was specific objection to the defendants' certification under Rule 26(g) that their boilerplate responses were based on a "reasonable inquiry." The court referred the case to the Chief Magistrate Judge for resolution of the discovery concerns. The judge, Judge Paul Grimm again, cited The Sedona Conference Cooperation Proclamation.²⁶ He said that cooperation with opposing counsel in discovery is a professional obligation, and that neither side should attempt to make discovery a legal battleground. He ordered the parties to meet and confer in order to find a reasonable resolution. He instructed them to discuss the damages alleged, estimate attorneys fees in prosecuting and defending this action, and "quantify a workable 'discovery budget' that is proportional to what is at

“Courts repeatedly have noted the need for attorneys to work cooperatively to conduct electronic discovery, and sanctioned lawyers and parties for failing to do so.”

Judge Paul Grimm
Mancia v. Mayflower

issue in the case”.²⁷ Judge Paul Grimm also proposed a format to report on the plaintiff and defendants progress and address unresolved e-discovery issues.

If there ever was an opinion written by a judge to make a larger societal point, *Mancia* was certainly it. In *Mancia*, Judge Grimm used a garden variety discovery dispute, which was typically rife with boilerplate objections and other obstreperous tactics, to highlight the Sedona Conference’s Cooperation Proclamation. The proclamation cites the following methods for accomplishing effective cooperation during electronic discovery:

1. Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses
2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information
3. Jointly developing automated search and retrieval methodologies to cull relevant information
4. Promoting early identification of form or forms of production
5. Developing case-long discovery budgets based on proportionality principles
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes²⁸

KEY TAKEAWAYS

The lasting takeaway from the opinion is the notion that “[c]ourts repeatedly have noted the need for attorneys to work cooperatively to conduct electronic discovery, and sanctioned lawyers and parties for failing to do so.”²⁹ To support this notion he cites the Sedona Conference Proclamation and the little used FRCP 26(g). This opinion is noteworthy because it gives precedent to bolster the Sedona initiative and should provide a ready citation for all those counsel who aren’t getting the level of cooperation they need from the opposition. This case serves to show that courts are becoming increasingly intolerant of adversarial discovery. Judges unanimously agree that cases should be contested on case facts not discovery requirements. With this in mind, it’s best to avoid extraneous and disproportionate discovery requests in order to avoid the ire of the judiciary. At the onset of a case, it’s typically best to collaborate on a viable discovery plan to avoid unnecessary wrangling.

FRCP 37(e) Safe Harbor

Phillip M. Adams & Assoc.

CASE FACTS

The case of *Adams v. Dell*, discussed earlier, also serves to illustrate another important defensibility factor within e-discovery; the FRCP 37 safe harbor. To review, *Adams* is a patent infringement case where the plaintiff, alleged that one of the defendants (ASUS) destroyed critical pieces of evidence and should be sanctioned accordingly. During the case, ASUS claimed it could “find a safe harbor against sanctions because of the recently adopted rule that sanctions may not be generally imposed for ‘failing to provide electronically stored information lost’ if a party can show the loss was ‘a result of the routine, good-faith operation of an electronic information system.’”³⁰

The court seems to think it's an "unreasonable" practice to have custodians responsible for compliance with data retention.

"ASUS provided an extensive declaration from an experienced consultant in e-discovery. While he stated the reasons for and history of ASUS' 'distributed information architecture,' he did not state any opinion as to the reasonableness or good-faith in the system's operation. And while he says 'ASUSTeK's data architecture relies predominantly on storage on individual user's workstations,' his 31-page declaration does not show he is familiar with the precise practices pointed out in the declarations of employees. Those employees' declarations describe the practice of ASUS' email system to overwrite old data regardless of its significance; ASUS' reliance on employees for all email and data archiving; and the process of replacement of computers, which also relies on employees to transfer data from their old to their new computers. Neither the expert nor ASUS speak of archiving 'policies;' they speak of archiving 'practices.'"³¹

KEY TAKEAWAYS

The court's distinction between "policies" and "practices" seems like a convenient way to discount ASUS' data retention activities and prevent the use of the FRCP 37(e) safe harbor. In most instances, "bona fide, consistent and reasonable" document retention "policies" have been found to be presumptively valid by everyone ranging from Sedona (Guideline 3) to *Carlucci v. Piper Aircraft Corp.*³² and *Arthur Andersen LLP v. United States*.³³

It's not clear how he draws the important "practices" distinction and why said practices are exponentially different from presumptively valid "policies." It's precisely this line of thinking that confuses the alleged failure of the duty to preserve (discussed at the outset of the opinion and earlier in this paper) with the duty to retain information. The court seems to think it's an "unreasonable" practice to have custodians responsible for compliance with data retention and this deficiency made the safe harbor unavailable.

"ASUS has explained that it has no centralized storage of electronic documents, email or otherwise, and relies on individual employees to archive email (which will be deleted if left on the server) and electronic documents (which reside only on individual workstations)."³⁴

Not only is this custodian-based retention practice, in and of itself, probably reasonable; it's the most common form of data retention practices seen at corporations today. Additionally, there are significant technical challenges to have an application manage *all* ESI (Electronically Stored Information) that may exist for a given custodian (including desktop files, instant messaging, text messaging, social media, etc.). As such, most companies must inherently rely upon their custodians to both retain and preserve data pursuant to company policies. The court not only seems to miss this point, but also attempts to impose an obligation that corporations must prevent the "loss of data" above and beyond specific preservation obligations.

"ASUS' practices invite the abuse of rights of others, because the practices tend toward loss of data. The practices place operations-level employees in the position of deciding what information is relevant to the enterprise and its data retention needs. ASUS alone bears responsibility for the absence of evidence it would be expected to possess. While Adams has not shown ASUS mounted a destructive effort aimed at evidence affecting Adams or at evidence of ASUS' wrongful use of intellectual property, it is clear that ASUS' lack of a retention policy and irresponsible data retention practices are responsible for the loss of significant data."³⁵

Although the exact rationale was unclear, the court held that ASUS violated their duty to preserve and that the loss of evidence could not be excused as a “routine, good faith operation of electronic information systems.” While the court ruled that sanctions were appropriate, it reserved final sanctions pending the close of discovery. Depending on what those ultimate sanctions look like, it seems pretty likely that this decision will be subject to appellate review. Until then, it’s probably too soon to treat this questionable holding as gospel. Nevertheless, wary corporations should continue to bolster the “reasonableness” of their information management/retention/destruction policies and practices so that in hindsight a court won’t be able to take away the FRCP 37(e) safe harbor by casting those “practices” as being unreasonable.

Conclusion

Admittedly, the foregoing list isn’t exhaustive. Yet, it does highlight the persistent nature of the reasonableness standard as practitioners seek defensibility sanctuary throughout their travails through the treacherous e-discovery process. The good news is that the law doesn’t require perfection and there are also a number of “get out of jail free cards” that may help to bolster the defensibility of any process.

- **Demonstrable acceptance by the opposition**—Here, the notion is that collaboration with the opposition allows the parties to comfortably move ahead with their discovery process. The significant benefit with this approach is that even if the e-discovery process is not objectively reasonable, the parties’ consent to the protocol will in most instances carry an imprimatur of reasonableness. In order to achieve this level of communication and assent the parties will increasingly need to collaborate, along the lines suggested by the Sedona Working Group in their Collaboration Proclamation.³⁶
- **Auditing / process transparency**—Similar to the first bullet, auditing the process and giving the opposition visibility into the procedural steps will often make it hard for them to lodge successful downstream challenges. This is really a combination of two notions, the first being the need for the maintenance of good records via an internally transparent process. Once this process transparency is achieved then it becomes necessary to share the right level of pertinent details with the opposition without inciting needless micromanagement.
- **Adherence to local rules**—There are now a number of jurisdictions that provide detailed local rules creating a template of expected e-discovery behavior.³⁷ This framework certainly sets the stage for transparency and collaboration. The main potential downside is that compliance with the stated provisions may ultimately be challenged, but given a more detailed listing of protocols, this should occur less frequently than with ad hoc processes.
- **Data analytics / sampling**—The use of sampling and statistics as a way to bolster process defensibility is starting to come to maturity. These disciplines are used in a variety of industries, and in the future we will continue to see the increasing use of objective metrics, versus subjective decision making. Increasingly, e-discovery best practices are calling for detailed statistics on precision, recall, and other indices that will play a large role in e-discovery defensibility.

- **Expert Testimony**—To some extent, the use of expert testimony may help save the day, but it's typically deployed once the dispute has reached a boiling point, meaning judicial intervention. Nevertheless, having a qualified expert testify that a given e-discovery process was reasonable may go a long way to either validating the process or reducing sanctions.

None of these steps can be guaranteed to get you off the hook from a rabid opposing party calling foul, but using them in a “belt and suspenders” fashion will certainly help buttress any discovery process. They also should be deployed in as repeatable and methodical fashion as possible to create a process that has fundamentally good defensive hygiene. This way many challenges can be preempted from even rising to the level where judicial scrutiny is necessary.

FOR MORE INFORMATION

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References

1. *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).
2. *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 26964 (D. Utah Mar. 27, 2009) at 10.
3. *Id.*
4. *Micron Technology, Inc. v. Rambus Inc.*, Civ. No. 00-792-SLR (U.S.D.C., D. Del., opinion and order filed Jan. 9, 2009). *Id.* at pg. 12
5. *United States v. O'Keefe*, No. 06-CR-0249, 2007 WL 1239204 (D.D.C. April 27, 2007)
6. *Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331 (D.D.C. 2008)
7. *William A. Gross. Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 2009 WL 724954 (S.D.N.Y. Mar. 19, 2009)
8. *Victor Stanley, Inc.* at 19.
9. *William A. Gross. Constr. Assocs., Inc.* at 1.
10. *Id.*
11. *Id.*
12. *Id.* at 3.
13. *Victor Stanley, Inc. v. Creative Pipe, Inc.* at 20.
14. *Id.* at 23.
15. *Id.*
16. *Id.* at 26.
17. *The Sedona Conference Best Practices Commentary on Search & Retrieval Methods* (August, 2007).The Sedona Conference.
18. *The Sedona Conference Best Practices Commentary on Search & Retrieval Methods* (August, 2007) at 194.The Sedona Conference.
19. *Victor Stanley, Inc.* at 12.
20. *Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.*, 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008) at 6.
21. *Id.* at 4.
22. *Id.*
23. *Id.* at 10.
24. *Id.* at 8.
25. *Id.* See also *SEC v. Badian*, 2009 WL 222783 (S.D.N.Y. Jan. 26, 2009), “there is no basis ... to conclude that there were precautions [to prevent the disclosure], let alone whether they were reasonable.”
26. *The Sedona Conference Cooperation Proclamation* (July 2008) The Sedona Conference.
27. *Mancia v. Mayflower Textile Servs. Co.*, 2008 WL 4595175 (D. Md. Oct. 15, 2008) at 28.
28. *The Sedona Conference Cooperation Proclamation* (July 2008) The Sedona Conference.
29. *Mancia v. Mayflower Textile* at 18.
30. *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, at 8.
31. *Id.* at 12.
32. *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984).
33. *Arthur Andersen LLP v. United States*, 125 S.Ct. 2129 (2005).
34. *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, at 10.
35. *Id.* at 13.
36. *The Sedona Conference Cooperation Proclamation* (July 2008) The Sedona Conference.
37. See the Seventh Circuit Pilot Program (October 2009). www.7thcircuitbar.org/associations/1507/files/Statement1.pdf.