E-Discovery

"Ignore at your peril"
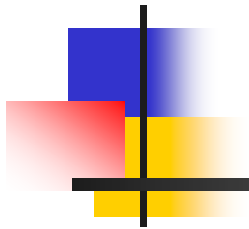
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Why E-Discovery?

- **Explosion in use of e-documents**
  - Over 90% business documents in e-format
- **No. of gadgets for storage**
  - Still on the increase
- **Misunderstanding of the need:**
  - For collaboration

What is an E-Document?

- Anything which contains e-information
- Includes:
  - Email & other e-communications
  - Word processed documents
  - Databases
  - Documents stored on servers
  - Deleted e-files

E-Document Preservation

- Organisations to manage & preserve
  - E-documents over time
- Preservation techniques
  - Data migration
  - Conservation
  - Technical preservation
  - Technical emulation

Duty to Preserve ESI

- As soon as litigation is contemplated

- Duty to preserve include documents in:
  - Computer systems
  - Servers
  - Back-up systems
  - Electronic devices & media

Reasonable E-Search (1)

- **Parties required to make:**
  - Reasonable e-search for documents
- **Reasonable e-search depends on:**
  - Number of documents involved
  - Nature & complexity of proceedings
  - Ease / expense of retrieval

Reasonable E-Search (2)

- The reasonableness of e-search is:
  - A matter for the court
- Digicel Ltd & ors v Cable Wireless plc
  - Def. searched for e-document
  - Back-up tapes not restored
  - Claimant applied for back-up tapes
- Noble Resources SA v Gross
  - Held – reasonable to require:
    - Back-up messages on blackberries

Privilege & Confidence

- E-discovery brings about:
  - Heightened risk of breach
  - Disclosure of privilege or confidential info.
- Responding to inadvertent disclosure
- Difficulties in maintaining:
  - Privilege and confidence

Production of E-Documents

- Preserve ESI
  - Notice to personnel
  - Litigation hold
- Identify, locate & retrieve
- May require computer forensic activities
- Analyse – for relevance
- Produce in accessible form

Need for Cooperation

- **With e-discovery parties are:**
  - Expected to cooperate

- **Unilateral decisions by parties**
  - May result in:
    - Order to conduct additional search
    - Increased costs
      - Earles v Barclays Bank

Computer Forensics for E-Discovery

- Use of forensics for e-discovery

- Forensic discovery tools for:
  - Data imaging
  - Retrieval of deleted data
  - Hashing
 - Forensic field acquisition

E-Disclosure in the Cloud

- **Data in cloud can be stored in:**
    - Multiple physical locations
- **Presents difficulties with:**
    - Requirement of "reasonable search"
- **E- documents in cloud**
    - Reside in shared environments
        - Issues of privacy & security

Failure to Effect E-Disclosure

- Parties failure to disclose

    - Adverse inference against party
        - Earle v Barclays bank
    - Cost warded against party
    - Disfavour with the court
        - R v. Secretary of State for Defence
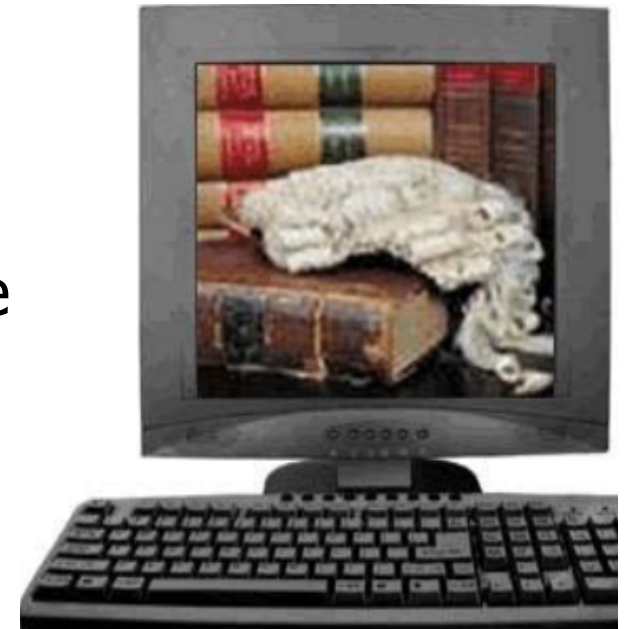
Destroying E-Documents

- **Destroying before or after proceedings:**
  - Perverting course of justice

- **Use of secure deletion software**
  - Rybak v Langbar International Ltd

- **Intentional or unintentional deletion**
  - Intentional   – computer misuse
  - Unintentional - lack of security controls

Emails as E-Documents

- To manage e-mail documents:

  - Develop email policy and procedures

  - Provide training to staff on:
    - Email management
    - Implication of non-compliance
    - Email policy and procedures

E-mail: Special Requirements

- **Understand legal obligations**

- **Identify types of email**

- **Categorise all identified email**
  - Email records of permanent value
  - Email records of temporary value

Coleman Holdings v Morgan Stanley

- Court ordered Morgan Stanley to:
  - Produce full back-up tapes
  - Review specific emails
  - Certify full compliance with order
- Failure to produce email records:
  - Violation of order
- Huge damage - $800 million

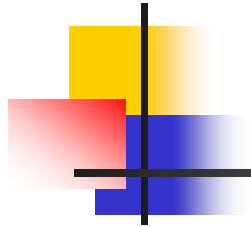# E-Document Retention Strategy

- Organisations to be encouraged to:

  - Implement a e-retention strategy

  - Establish e-document review procedures

  - Implement e-document production procedures

  - Manage metadata
    - Recordkeeping metadata
    - Discovery metadata

Conclusion

- **Lawyers & clients to disclose:**
  - E-documents during civil proceedings
- **Expectation** - to conduct a reasonable search
- **Difficulties due to:**
  - Volume of e-data
  - Disparity of locations
  - Variety of storage media
- **Organisations to implement strategy**
  - For preserving & searching for e-documents

Questions