

THE AMERICAN EMPLOYMENT LAW COUNCIL
TWENTY-SEVENTH ANNUAL CONFERENCE

Advanced E-Discovery Issues

Thursday, 1:45 – 2:45 PM

OCTOBER 23-26, 2019
Ojai, California

Offensive use of e-discovery and avoiding the e-discovery sideshow: employers are no longer relegated to defense and increasingly have opportunities to use e-discovery offensively. *E.g.*,

- Preservation notices to plaintiffs
- Early forensic captures of plaintiffs' devices
- Getting out in front – proactive use of Scheduling Orders & ESI Plans

Effective use and management of e-discovery costs and vendors: Vendors can be a critical component of an employer's defense:

- Services
 - General consulting support and guidance from start to end
 - Building affidavits to support proportionality and reasonableness arguments
 - Serving as the employer's 30(b)(6) witness
- Cost containment
 - Making a huge/case-ending problem a \$30,000 problem
 - Sampling
 - Right platform and team for the matter
 - Technology vs. human review
 - Review teams

Leveraging TAR, AI, and technology generally in employment cases:

- Can we even get there in employment cases, or not?
- If so, what platforms and technologies have worked best?
- Legal hold tracking – manual or automated via technology?

Challenging preservation issues:

- Personal devices
- Ephemeral messaging
- Social media
- Blind holds
- Retaliation considerations
- Email for putative class/collective actions
- Releasing holds

Case law updates from SCOTUS on down in the last year, e.g.:

- *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019)
- *Fuhs v. McLachlan Drilling Co.*, No. CV 16-376, 2018 WL 5312760, at *15 (W.D. Pa. Oct. 26, 2018)
- *Kennicott v. Sandia Corp.*, No. CIV 17-0188 JB\GJF, 2019 WL 366883, at *31 (D.N.M. Jan. 30, 2019)