

Arkfeld eDiscovery and Digital Evidence Course

The Convergence of Law & Technology

Factual Scenario - David Devoted



UNITED STATES DISTRICT COURT

TECHNO INNOVATIONS, INC.,
Plaintiff and Counterclaim Defendant,

v.

DAVID DEVOTED,
Defendant and Counterclaim Plaintiff,

AGGRESSIVE TECHNOLOGY, INC.,
Defendant.

Factual Setting

- David Devoted is the assistant director of E-Widget Research & Development (R&D) for Techno Innovations (Techno), a technology company serving as a government contractor. David enjoys his work and expects promotion to the open Director of E-Widget R&D position. However, David is mistakenly copied on an email from his boss, Samuel Adams, the VP of R&D, indicating that David will be passed over for the long-anticipated promotion.
- Techno is a corporation based in Washington DC that has over 2,000 employees worldwide. Its annual sales are in excess of \$1 billion.
- His boss intended the e-mail go only to Mary Relations, the Director of Human Resources, who was managing the interview process for internal candidates vying for the open Director position. Techno had been replacing much of its older work force for some time. In-house counsel, Corrine Counsel, advised Mary Relations as to the propriety of this policy.
- The misdirected e-mail reviewed the candidates for promotion and stated that David Devoted “was older and married and may not be able to put in the hours that some of the younger, single guys can.” Hiring and promoting based, in part on age and marital status had been the dirty little secret of the high tech sector for several years. Higher salaries and generous benefits packages paid to older employees and competitive pressures from foreign competitors made securing a lower-cost, energetic workforce a financial advantage, especially in the eyes of Wall Street analysts. But, “weeding out the grays” as the practice was called, had recently drawn some intense criticism in the press in recent years.

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- Seeing the misdirected email, Devoted is distraught and decides to explore other employment options, including a position with Techno's arch competitor, Aggressive Technologies (Aggressive). Devoted sends his resume to a former co-worker now at Aggressive extolling his "broad experience and deep knowledge of R & D" acquired in his years at Techno. As the two biggest players in the industry, it was common for former Techno employees to turn up as Aggressive employees and vice-versa.
 - David Devoted also is upset because of several woman who allegedly gave David admiring glances and he overheard one of them, a paralegal, Sharon Smith in his department, talking to another worker about how "hot" he was and heard her say that she would call her fellow worker and leave a voice mail about him. Also, there may be additional content on Facebook from several female co-employees regarding his "hottie" status.
 - David Devoted is a very "devoted" husband and father. However, several years ago he began communication using his Gmail address with his old high school girlfriend who had located him on Facebook. After this "youth" hiring practice problem started David shared a lot of his feelings with his old girlfriend.
 - David Devoted met with the HR director, Mary Relations, and her assistant, Yolanda Young, to complain about the discriminatory hiring practices and the adolescent behavior of his female co-workers. The office e-mail grapevine went wild when word of David's complaints surfaced. Leaving the meeting, David advised Yolanda Young that he would file an EEOC complaint "and do whatever he had to do" unless the company resolved these issues within 10 days. Young neglected to mention this to Mary Relations.
 - Two months after the meeting with Mary Relations, David Devoted received a call from a VP at Aggressive offering him a job. David asked for a couple of weeks to think about it. The following week, Techno announced it was awarding the Director of E-Widget R&D position to a 27 year old subordinate.
 - David drafts a letter of resignation, but before accepting employment at Aggressive, David contacts an attorney, Bill Elder, about his discrimination allegations via his personal Gmail account using his company-issued laptop computer. In Gmail, David and his counsel discuss whether David should use "Evidence Eliminator" software on his company laptop before returning it to Techno because it holds communications with his wife, other family members and his pastor about sensitive medical and criminal matters involving family members. Techno has a policy banning personal use of company computers.
 - David was a pack rat and kept virtually all of the 30,000 e-mails he'd ever sent or received while employed by Techno in the Outlook Inbox and Sent Items folders on his Techno desktop computer, which was synchronized with his company laptop computer. David's e-mail was a mix of personal and business communications, including messages to and from his wife, family, friends, physician, lawyer and pastor. Of course, it also included strategic and intellectual property information pertaining to the projects David managed at Techno.

- Thinking he might leave and knowing that others who'd quit were immediately locked out of the company network and "escorted" from the building without time to retrieve their personal information, like e-mail, music, family photos, etc., David sought an efficient way to preserve his personal e-mail. Having no time to segregate those messages, Devoted copied his entire Outlook PST and Archive PST files to a flash drive. Devoted explained to his lawyer that he hadn't considered the Techno information in the PSTs as being an issue: "I knew all that stuff already because most of it was my own work. It was going to be in my head anyway."
- Before David is able to submit a resignation letter, and 2 1/2 months after meeting with the human resources manager to resolve these matters, Techno fires him after learning of his relationship with Aggressive. They escorted him out of the building without David being able to "clean up" his computer.
- When he joined Techno in 2000, David signed a confidentiality agreement regarding new innovations, inventions, customer lists and the research department's procedures and policies.
- Suspecting that David Devoted was taking trade secrets, Techno places Devoted's laptop and desktop machine in a conference room for several days to make it accessible to counsel. Unfortunately the conference room is never locked, so the location also makes the computers accessible to any Techno employee who happens by, including Techno's CEO who, learning of David's defection, turns on the computers and rummages around to see if he could find any communications with Aggressive.
- Several days later, in-house counsel suggests they should "image" the hard drives. The computers are carted to the IT department (the customary method of transport for systems needing upgrades, recovery of company data, reformatting, and maintenance). After the IT department received the computer they made both a "ghost" image and a "forensic" image of the hard drive. Because of lax procedures, the images were stored on hard drives that may have been recycled from prior use without being wiped. The original laptop and desktop were then retrofitted and given to other Techno employees.
- A "forensic examination" of the hard drives turned up some confusing confidential communications with Aggressive employees one year prior to David's firing and also evidence of David's PST files being downloaded.
- Approximately 30 days after David was fired, Techno seeks a temporary restraining order in federal court and makes an *ex parte* request seeking immediate turnover of David Devoted's home computer, alleging breach of his confidentiality agreement and trade secret violations. Techno offers the e-mail between David and his attorney about whether to use "Evidence Eliminator" in support of its claim of irreparable harm. Techno notes that it holds copies of other communications between David and his attorney. Techno also files suit against Aggressive asking that Aggressive be ordered to "return and refrain from using any confidential material it may have received from David Devoted."

Court denies the ex parte request but directs David to not delete anything off his home computer.

- David Devoted counterclaims for discrimination based on age and marital status and asserts "hostile work environment" claims based on Techno's failure to address the "leers and promiscuous postings." Aggressive answers with a denial of the possession or use of Techno's trade secrets.
- Techno's outside counsel in the case is Larry Ludd, who did not issue a written legal hold notice before filing suit but engaged in discussions with Corrine Counsel, Techno's in-house attorney about the need to preserve information, including "e-mail and stuff." He also discussed their present document retention policies and asked whether they were enforcing the policies. This was Larry's second major case with Techno involving ESI and he felt that it was important for him to know about this area since his clients were using digital information in their businesses. In fact, he recently hired two paralegals (who had no background with ESI or ediscovery) to whom he delegated responsibilities for managing ESI.
- Techno declined Ludd's request to visit the company's IT facilities as pointless ("would you even know what you're looking at Larry?"). Larry was not supplied with any inventory of ESI sources or data map since Techno felt this was part of their "trade secret" as a company in how they organized the different departments. Larry did not push to get more involved and about 2 years later signed off on pleadings certifying the "completeness and correctness" of the eDiscovery disclosure and also signed off on responses to discovery requests that he had made a "reasonable inquiry" regarding the identification and production of ESI.
- Corrine Counsel, Techno's in-house counsel, delegated legal hold responsibilities to Sharon Smith, the paralegal in the R & D section who also served as "e-discovery coordinator" for the company. She was appointed the ediscovery coordinator a few months before because of her interest in this area especially after attending a local eDiscovery seminar.
- Sharon Smith e-mailed a memo to certain employees advising them that David Devoted had sued the company for discriminatory hiring practices and told them not to delete paper or ESI in their computer that would be "responsive to David's claims." Smith saved ESI on her own machine she deemed responsive, but did not retain voice mail messages concerning Devoted and "cleaned up" her Facebook postings from the "David D. is a Hottie" account.
- She also called her buddy in IT and asked him to "suspend" the document retention policy and preserve and collect ESI from the different employees after her e-mail notice went out. No follow up audit was done and the IT buddy preserved certain backup tapes, but left it to the employees to select responsive ESI from their local machines and deliver it to him. Techno's IT department was in charge of collecting ESI including the backup tapes

that contained responsive data. Unfortunately, they recycled 4 tapes containing responsive ESI.

- Techno has a document retention program that backs up data on a specific cycle to magnetic tapes.
- Several employees who also claim to be victims of discrimination left Techno, but still occasionally work for Techno as contract employees. Some of them are the very managers who implemented the "young and single" hiring preference.
- Sharon was afraid to interview the CEO of the company about what he knew, so she sent a memo to Corrine Counsel asking her for advice.
- Bill Friendly, one of David's buddies who still worked for Techno, told him that a legal hold notice was sent out regarding David's allegations, and forwarded the notice to David, about hiring practices, except no mention was made about the hostile work environment claims. Bill had also been on the receiving end of certain flirtations and alluring glances.
- Techno is seeking discovery from Aggressive, demanding "all communications with David Devoted" and the immediate turnover to Techno's computer forensic expert of specific computers from Aggressive on the grounds that Aggressive has a "history of destroying data" per a recently published legal opinion and prior instances of "poaching" competitor's R&D employees. Also, remember David discussed with his attorney about using "evidence eliminator."
- Aggressive refuses discovery since it is a subsidiary of Karma, Inc. which is a multi-national company with offices in France, Germany and several other counties. ESI belonging to David Devoted has been sent to Karma's electronic information storage facilities in both Germany and France. David argues he does not have "custody" or "control" over the content any longer and Karma refuses to provide any ESI because of these two countries blocking statutes.
- Techno's counsel, Larry Ludd, in the spirit of cooperation, and to avoid Rule 30(b)(6) depositions prior to the "meet and confer," met with Aggressive's counsel, Sam Savvy, and Devoted's counsel, Bill Elder, seeking to facilitate an exchange of information regarding ESI systems, data sources and formulate a search protocol suggesting this new fangled "predictive coding" method may reduce costs for the parties.
- Several counsels did not understand "predictive coding" nor the "iterative" approach being suggested and assumed it meant an enhanced keyword searching methodology.
- The parties discussed limiting discovery to specific custodians and an agreed upon list of search terms. To minimize business disruption and cost, the search would be run once and only items with hits would be reviewed by counsel.

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- However, David Devoted's counsel, Bill Elder, realized that a broad search demand would give him more leverage because of Techno's cost of production and so was not inclined to agree to a limited search. Besides, Elder reasoned that Techno was responsible for conducting a "reasonably comprehensive" search – why should he agree to limit the search and take Techno off the hook? They also initially agreed to use TIF or PDF to disclose responsive documents.
 - Brief mention was made to enter into a "clawback" agreement pursuant to FRE 502, but David's counsel, Bill Elder, is reluctant to do so because he knows that Techno has a substantial amount of ESI and wants to use privileged ESI that is inadvertently disclosed.
 - All counsel liked this approach and agreed they should continue discussions by telephone to further understand the IT systems and sources of ESI prior to the "meet and confer."
 - David Devoted seeks access to the human resource employee database application called HIRE (which includes records migrated from a legacy computer database) and seeks e-mail "from all individuals having knowledge of age or martial discrimination." Additionally, Devoted demands access to "all ESI concerning litigation or complaints about hostile work environment and all e-mails and other ESI authored by all female employees where Devoted is mentioned in the e-mail, especially those that refer to Devoted as "RAM Man," (presumably referring to his allegiance to the Wickenburg Rams football team).
 - Some of the data requested by David Devoted resides on a legacy human resources database system no longer used by Techno's HR department. This system was shut down after David left. Some, but not all, of the data from the legacy system was migrated to a successor database system. Though it retains backup tapes containing the legacy data sought, Techno no longer owns a tape drive capable of reading these backup tapes or an annual user license for the database application needed to restore the environment required to access the data.
 - Techno argues that even if they can gain access to the legacy data and must produce same along with data from its current database, all such production should be made in TIFF, PDF or paper format for confidentiality purposes since both databases held medical and other confidential data about employees which must be redacted. They contend there is no means by which they can "redact" database content or native forms.
 - After forensic examination of Devoted's company machines, Techno seeks a forensic copy of Devoted's personal home computer and iPad, both regularly used by Devoted's wife and children. The family is very upset about disclosure of their personal communications and loss of use of the system for homework assignments. Mrs. Devoted uses the computer for her "home-based" nursing and medical aide business.
 - Techno also seeks access to Devoted's personal Internet and home e-mail accounts to locate e-mail and other documents.

- The Court directs the parties to "meet and confer" and urges "cooperation" in resolving the issues in the case. The meet and confer is held with all the parties and counsel participating. Objection was made by David Devoted's counsel, Bill Elder, to having any IT personnel present since they would not understand the legal issues in the case. Also, Bill Elder did not want to discuss "native" files, "deleted" ESI, "not reasonably accessible" data, and other IT issues since he did not go to law school to become a computer science expert. He suggested the litigation support personnel could discuss those issues later.

After the meet and confer.

- After the "meet and confer," Techno subsequently delivers over 10,000 documents, (of an estimated 300,000 responsive documents, which include e-mail, word processing documents, spreadsheets and database output) in a PDF nonsearchable format. David's lawyer, Bill Elder, was comfortable with PDF documents since he files pleadings that way using PACER (federal docketing and court filing service). Elder undertakes review of the production using his Adobe Acrobat Pro software and makes annotations on the documents using the Adobe program.
- Over four years later, and about four months before trial, Yolanda's buddy in IT told her over coffee that he always makes a "secret" set of backups so that they have two sets of duplicate backups. Sharon remembered that of the 48 backup tapes that 4 of them had been inadvertently overwritten. After locating the tapes, she called Larry Ludd, Techno's counsel, to let him know. Larry waited until one month before trial and then disclosed to the Court and opposing party about the recently discovered tapes.

Suggested Search Terms

Search Term Analysis

	Search	Syntax
1	Age Discrimination	(hostile OR haras* OR harras* OR discrim*) AND age
2	Age Termination	(fire* OR firing* OR terminat* OR termiate OR terminat OR terminati OR terminats OR terminate) AND age
3	Employee Complaints	(eeoc OR E.E.O.C OR employ* OR labor or work or job) AND (complaint OR comnlaint OR compaint OR complain* OR complot OR complaizt OR greivance* OR *suit OR "law suit")
4	Employment Policies	(employ* OR hire OR hiring OR hirings) W/5 (procedur* OR practic* OR polic*)
5	Hottie	hottie OR hotties OR hotttte

6	HR Complaints	((human W/5 resource*) OR (HR) OR ("H.R.)) AND (complaint OR comnlaint OR complain* OR complot OR complaizt OR greivance* OR *suit OR "law suit")
7	HR Policies	((human W/5 resource*) OR (HR) OR ("H.R.)) AND (procedur* OR practic* OR polic*)
8	Marriage Discrimination	(hostile OR haras* OR harras* OR discrim*) AND (marri OR marrie OR married OR marrieds OR marries OR marry)
9	Old Man	((old) W/3 (man OR maid OR fart OR timer)) OR oldtimer OR codger OR geezer OR gaffer OR oldster OR ((gray OR grey) W/3 (beard)) OR greybeard OR graybeard
10	Weeding Greys	(weed*) AND (grey* OR gray*)
11	Work Place	(hostile OR hostility OR bad OR unpleasant OR rotten OR miserable OR terrible OR unhappy OR haras* OR harras*) W/5 (work* OR site OR job OR office)
12	Young and Single	(young* OR age OR youth*) AND (single OR singel)

David Devoted's ESI includes the following:

- Personal e-mail account (DavidD123@gmail.com)
- FaceBook page
- Outlook E-mail
- ESI stored on a home computer and iPad belonging to David Devoted's wife, Daisy, who also runs her home business off the computer and shares it with their children.
- Personal cell phone (iPhone)
- ESI stored on personal computer
- ESI stored on work computer at Aggressive storage facilities
- ESI stored on "Dropbox" which David Devoted uses for backup and for access to ESI while on the road

Aggressive's ESI includes the following

- Aggressive has 1,100 employees and has moved to the cloud. It has Virtual Exchange Servers for three regional United States locations (west/central/southeast), virtual file and applications servers with Windows Azure (cloud computing) with no backups.
- The cloud storage service is located in France.

Techno's ESI includes the following:

Generally

- Techno's primary headquarters is located in Washington DC and it also has four regional offices located in New York, N.Y., Chicago, IL, Atlanta GA, and Arlington, Va. Each regional office has its own email application and storage servers.
- Techno IT assigns the following equipment to each Techno employee: one Citrus desktop computer with a 500 GB hard drive, one laptop computer with a 200 GB hard drive (optional), one iPhone (PDA) and 4 GB of shared server space on a 20 TB Network Area Storage device (NAS) located in DC. In addition, David Devoted has a flash drive and a personal cell phone which he used to conduct Techno business.
- Employees are prohibited by the Techno retention policies from storing ESI in any other locations, especially including any home computers or portable storage devices. Despite this policy, several employees frequently work from home. They are also prohibited from making any backups of any ESI and instructed to instead rely solely upon Techno. However, Mr. Head Honcho, the engineer in charge of the R&D department, and others routinely email documents to their own personal email account from their Techno account so that they can open them at their home and do work from their personal computer.

Document Retention Policies and Procedures

- Techno has its own document retention policy and schedule attached to this hypothetical. The document retention schedules were prepared under the supervision of Techno's General Counsel, Corrine Counsel, whose overall philosophy is to destroy anything that is not absolutely required to run the business profitably. Ms. Counsel was especially concerned that documents referring or relating to hiring practices be held for the absolute minimum amount of time because of her concerns that they may be called for in litigation. The schedules for these documents were agreed to by the human resources department and are automatically deleted by the Techno computer systems.
- Once a year, Techno distributes its document retention policy and schedule to employees. Beyond this annual notice, Techno does not check for compliance by individual employees. As a result, it is not uncommon for Techno employees to disobey the retention and usage policies.
- Techno has no written policy or procedures for determining when or how to institute a litigation hold.

Storage of Emails and Other Employee Documents

- Techno uses Outlook for all employee email and has Microsoft Exchange Servers. Techno has a strong policy of prohibiting any of its employees from using any other email account for company business. Although many employees have personal email accounts, they are told never to use these accounts for work related communications. Company policy also prohibits the storage of email outside of the centralized servers, except on the "C" drive. In fact, company policy specifically forbids user creation of individuals' own PST files for storage, transfer or any other purposes in any location other than the "C" drive.
- Techno maintains its own email server. An email is stored on Techno's email server when the email is "delivered" and appears in an employee's "In-box." When an employee sends email, the email is automatically stored in the employee's "Sent" folder, and automatically stored on Techno's email server. An employee also has the ability to create individual folders in his or her email database. When an employee views an email in a personal email database, the employee is actually viewing information residing on the server. Techno has automatically programmed the server to retain emails, whether in the In-box, Sent folder or an individual's personal folders, for specified periods of time. Techno automatically deletes emails from the employee's In-box and Sent folder every ninety days. If an employee moves an email from the In-box to a personal folder before the ninety-day period expires, the email will remain in the employee's personal folder indefinitely (unless the employee deletes the email).
- An employee can store e-mails and other documents on the computer's hard "C" drive. An email saved on the "C" drive also resides separately on the Techno server. Emails residing on the "C" drive are automatically deleted after six months. Each employee also has a personal "D" hard drive. When an employee stores information on his or her individual "D" hard drive, that information will not be duplicated on Techno's server. Any emails or other documents stored on the "D" hard drive will remain in that location indefinitely (unless the employee deletes the documents). Therefore, if an employee wants to keep emails or documents longer than the six-month "C" drive retention period, the employee has the ability to transfer any such files to the "D" hard drive. Techno has been looking at various email archiving solutions but, for cost reasons, has not yet purchased any such systems.
- In general, Techno has a fairly decentralized computing environment for ESI. In addition to the policies described above, employees are also permitted to store electronic records locally on their hard drives, but only in the My Documents folder ("My Docs") where all files are synchronized with a corresponding My Docs folder in individual directories ("H drives") on Techno's server. Alternatively, employees may save

electronic files in self-created folders in any one of various Techno group directories on those same servers. There is no required naming convention for creating such folders and they can be set up with little or no supervision by the IT organization.

Policy on Departing or Transferred Employees

- Techno's policy is that when an employee is terminated, retired or transferred from Techno to another department in Techno, their computer and iPhone are taken, stored "as is" for thirty days, and then completely wiped clean by IT and reissued to a new employee. Supervisors are supposed to use the thirty-day period to review the data retained locally by the employee and to copy any documents needed by the company; in practice, this is seldom done.
- Supervisors are also supposed to review the shared space of departed employees on the Techno server, transfer any useful ESI to another employee, and delete any remaining documents. Again, supervisors rarely have the time to do that, so the files typically remain on the shared server space forever. Occasionally a diligent supervisor will follow policy and review and delete a departed employee's data, but this is the exception rather than the rule.
- When an employee leaves the company, his or her email account is deactivated as soon as the employee leaves, and then the contents of the email account are deleted entirely thirty days after the employee's last day of work. If the employee is transferred to another department (rather than terminated), their emails are supposed to be copied and transferred onto the server of that department.

Magnetic Tape (Backup)

- Techno IT has historically obliged departmental requests for separate backup tapes of specified servers, for which indefinite, or specific, off-site retention periods may be requested. The Techno tape drives have data capacities of forty gigabytes. Accordingly, there are several hundred Techno tapes off-site that date back to 1999 or earlier. This is not very accessible because of the lack of data organization on the tape and the special restoration software needed to restore the tape.

Instant Messages

Techno employs Microsoft Office Communicator for internal IM communications. IM active data is logged and retained for 30 days.

Network Storage



Network storage is provided for all employees (group and personal shares). Techno employs the Microsoft SharePoint for collaboration and Microsoft Office Suite, as well as Adobe Acrobat, for document creation. Group shares exist for the human relations department, the IT department and legal department.

Voicemail

- Voice mail is stored until deleted. Voicemail is also backed up to tape and kept for 60 days

Backup Tapes

- Monthly full back up tapes of all e-mail messages are retained for four years. Instant messages older than 30 days are backed up to tape and kept for one year. Office documents stored on the network are backed up daily, weekly, and monthly - the monthly tapes are rotated after six months. The human relations' server is backed up daily - the tapes are rotated after four weeks.

Storage Information

- Legacy database, an assortment of 40 DLT Tapes
- Backup tapes - 48 tapes during the relevant time period (1 tape/month) containing e-mail and other ESI; 4 backup tapes (1 tape/month) were erroneously overwritten.

Memorandum from: Head of IT

To: E-Discovery Team

Re: Estimated EDiscovery Costs

Date: January 15, 2011

I have received a proposed Statement of Work from Atomic Solutions describing its charges for the ESI production. I sincerely hope we can negotiate a narrower discovery window, agree to search terms, or somehow limit this production. Atomic notes that we have identified four currently employed custodians with possible documents and Outlook email stored on the Techno server (4GB per custodian). These files are so large because each of these custodians have been at the company for twenty-five years and, to our knowledge and regardless of the company's document retention policies, they have retained all of their files. Each of these individuals has 500GB hard drives on their personal computers but we estimate there is 1GB of data on the "C" drive that is not duplicated on the Techno servers. We have a rough estimate that there are



approximately 16,000 documents per GB and four pages per document based upon industry standards.

The cost for transferring this ESI (including metadata) to the eDiscovery platform is \$250/GB. This will include de-duplication, and any folder, file and date filters. In general the de-duplication process will reduce the amount of ESI by 25% (3.75GB). So for each custodian, the cost of processing 5GB of data is \$1,250. This will be then loaded onto the Atomic One platform for an Early Case Assessment (“ECA”) analysis. ECA will allow us to generate more accurate data on exactly how much information is contained in these files and the consequences of negotiating certain dates and search terms limitations.

Most eDiscovery companies charge the next phase based upon the expanded size of the data (i.e., after the zip files and embedded documents have been decompressed). The standard calculation for expanded size is 1.5 times the original size. So for 3.75GB of data this would increase to 5.6 GB for billing purposes going forward.

For each custodian there will be 5.6GB of ESI transferred to the reviewing platform for native file processing. This totals 89,600 documents per custodian (5.6 x 16,000). These documents are then processed to another database for attorney review. The cost for native processing is \$700/GB or \$3,920 per custodian. This processing will convert all of the various documents into a tiff format.

Our counsel proposes that they will review the ESI in two stages. During the first stage, junior lawyers will review the documents on the database for relevance, responsiveness, privilege, redactions, and conduct basic issue coding. We estimate that the lawyers will average about 60 documents per hour per lawyer. The average billing rate for each such lawyer is \$200/hr. However, many companies are requiring that first-pass review be completed by contract attorneys at a rate of \$65/hr. We should do this. Thus, for each of the custodians, we estimate the first review cost at \$97,066 (89,600/60=hrs x \$65=\$97,066).

There would then be a second stage of review by more senior attorneys who are actually working on the case and need to review the documents more carefully. We estimate that 30% of the documents from the first review will be have to be produced, or 26,880 documents (89,600 x 30%). The more senior attorneys will bill out at an average of \$300/hr. So the second stage review per custodian would be 26,880/60 x \$300= \$134,400.

Many of these documents for example, redacted versions, would then be re-tiffed for production at an additional cost of \$.04 per page.

On a per custodian basis, my rough cost estimate for searching, collecting and producing documents would be:

Initial Collection for ECA:	\$1,250
Transfer to Attorney Review DB	\$3,920
First Stage Review	\$97,066



Second Stage Review	\$134,400
Total	\$236,636 per custodian

Thus, at present, the eDiscovery alone would cost us at least \$236,636 per custodian!

Based on these costs we should consider asking our in-house counsel to file an affidavit with the Court arguing proportionality, burdensomeness, overbroad, relevancy, proportionality and cost allocation.

Finally, at a recent eDiscovery conference we heard from several experts that using TAR (technology assisted review) sophisticated search software that the cost can be reduced over 50 times, so the cost may be reduced per custodian to \$5,000 per custodian. Does this seem far-fetched and unrealistic? Not sure this is a very idea to use if it has not been tested, and it will have a major impact on our billable hour charges to our client, which could have a severe detrimental effect on our firm revenue. Our in-house counsel has recently let me know that the requesting party is “demanding” that we use this software to reduce our costs, which if accepted may negate our burdensomeness, etc. arguments. Where do they get off “demanding” that we use this software? It is our responsibility, as officers of the Court, to conduct a “reasonably comprehensive” search to identify and disclose ESI responsive to the discovery request. David Devoted also wants us to disclose the search terms we use, type of search software and other issues surrounding the search base on some “Proclamation of Cooperation” tacit approval by the Courts.

Please let me know your thoughts as to the pros and cons of using this type of search software on our data.

TECHNO DOCUMENT RETENTION POLICY

I. PURPOSE

Background and Necessity

Federal and state laws require companies to maintain certain records for particular time periods. Failure to maintain such records could subject Techno Inc. (“Techno”), Techno and its employees to detrimental positions in litigation, as well as penalties and fines related to the obstruction of justice, spoliation of evidence, and other non-compliance issues.

If you have been notified by the legal department or you reasonably believe that (1) records are or could be relevant to future litigation, or (2) there is a dispute that could lead to litigation, or (3) Techno is a party to a lawsuit, you must preserve such records until Techno’s Legal Counsel determines that they are no longer needed.

All business records shall be retained for a period no longer than necessary for the proper conduct and functionality of Techno. No business records shall be retained longer than five years, except those that (1) have periods provided for herein, (2) are in the Retention Schedule titled Appendix "A", or (3) are specifically exempted by Techno's Legal Counsel.

If, as an Techno employee, you are uncertain about any of the provisions set forth in this Policy (e.g., what documents to retain or destroy, when or how to do so), it is imperative that you contact Techno Legal Counsel.

II. RETENTION GOALS

The retention goals of Techno are as follows:

- 1) Retain important documents for future use or reference;
- 2) Delete documents which are no longer necessary for the proper functioning of Techno;
- 3) Organize important documents for efficient retrieval;
- 4) Delete and destroy duplicate documents; and
- 5) Ensure that Techno and its employees know what documents should be retained, the retention time periods, the means of storage, and how and when to destroy documents.

III. POLICY MANAGEMENT

To ensure strict compliance with this policy, Techno Legal Counsel is responsible for the following functions:

- 1) Providing counsel regarding proper retention and destruction of documents;
- 2) Routinely conferring that proper retention periods are in place;
- 3) Suspending the destruction of documents subject to existing or foreseeable litigation; and
- 4) Keeping Techno's officers, directors, and employees apprised of changes to the Policy.
- 5) Techno Legal Counsel shall periodically review and, if necessary, modify the Policy. In the event of any such modification, Techno Legal Counsel shall apprise Techno employees on the respective change(s).

IV. TYPE OF RECORDS

The term "Records" is defined as all business records of Techno produced by its employees during the scope of their employment (and is used interchangeably with "documents"), including written, printed, and recorded materials whether in paper or electronic format (i.e., emails and documents saved electronically). "Appendix A" containing a specific Retention Schedule is attached at the end of this Policy. This Retention Schedule lists several record categories and their respective retention periods.



All records not referenced in Appendix A or otherwise described herein, shall fall into one of three general classifications: (1) Temporary Records; (2) Final Records; and (3) Permanent Records.

Temporary Records

Temporary records include all business documents that have not been completed. These documents would include, but are not limited to, written memoranda, dictation to be typed in the future, to-do lists, reminders, reports and case studies, calculation drafts, interoffice correspondence. Temporary records can be destroyed, or permanently deleted if in electronic form, when the underlying matter is completed or closed. Proper destruction of electronic data is discussed below. Before you destroy or permanently delete temporary records, confirm that you have duplicates of all the final records pertaining to the matter. Upon destruction or deletion, organize the final records and properly store them.

Final Records

Final records include all business documents that are not superseded by any addition or modification, including but not limited to documents, whether in paper or electronic form, furnished to a third party or government agency, final memoranda and reports, correspondence, handwritten telephone memoranda not further transcribed, minutes, etc. Except as otherwise provided for in Appendix A, all final documents are to be discarded five years after the completion or close of the underlying matter.

Permanent Records

Permanent records include all business documents that define the scope of Techno work, research, professional opinions, and reference materials. Except as provided for in Appendix A, all permanent documents are to be retained indefinitely.

V. STORAGE

Tangible Records

Tangible records are those which you must physically move to store, such as paper records, including printed versions of electronically saved documents. Active records and records that need to be easily accessible may be stored in Techno office space. Inactive records can be sent to Techno' off-site, archive storage facility

Electronic Records

Electronic records should be either printed and stored as tangible evidence, or downloaded to a computer file and kept electronically or on a disk. Techno has software that duplicates files, which are then backed-up on central servers.

VI. DESTRUCTION/DELETION

Tangible Records

Tangible records should be destroyed by shredding or some other means that will render them unreadable. Techno shred bins are located throughout the Techno facilities. If you have a record that you do not know how to destroy, such as a compact disc or tape recording, ask the advice of Techno Legal Counsel.

Electronic Records

Electronic records that you “delete” remain in the Techno system. Accordingly, Techno’s Information Technology (“IT”) department will be responsible for permanently removing deleted electronic records from the computer system. Deleting files and emptying the recycling bin is usually sufficient in most circumstances to get rid of a record. However, because electronic records can be stored in many locations, Techno’s IT department will be responsible for permanently removing deleted files from the computer system.

VII. CESSATION OF RECORD DESTRUCTION OR DELETION

If a lawsuit is imminent or has been filed, or Techno is subjected to a legal document request, all record destruction must cease immediately. Techno Legal Counsel may suspend this Policy to require that documents relating to the existing or threatened litigation, or other potential legal issue(s), be retained for potential production. Should a Techno employee fail to comply with this section, such employee and Techno may be subject to fines and penalties, among other sanctions.



APPENDIX A

RETENTION SCHEDULE

Record Retained	Location of Records	Record Retention Period	Documentation Format
		Permanent	Hard Copy
		30 days from receipt	Electronic
		1 year.	Electronic
		2 year	Electronic
		2 years	Electronic
		1 year	Electronic
		1 year	Electronic
		1 year	Electronic and Hard Copy