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ESI Preservation – Ignore the Numbers at Your Own Risk

ESI Preservation has clearly emerged as the most critical link in the eDiscovery process. “It’s been my position for some time that Preservation represents 90% of the risk in the eDiscovery process,” cautions Patrick Zeller, a thought leader in the eDiscovery community who presently serves as the Chief Strategy Officer at Inventus and previously served as Vice President and Deputy General Counsel at Guidance Software.

Courts across the country are driving Zeller’s point home with alarming clarity. The numbers captured in a survey of eDiscovery sanctions cases published in the December 2010 *Duke Law Journal* show that sanctions were granted in 65% of the 401 federal cases in which they were sought.

Other interesting findings of the Duke study include:

- Within those cases where sanctions were granted, 60% were in relation to failure to properly preserve ESI.
- Cases were outright dismissed in over 25% of those cases where sanctions were granted.
- There is a significant upward trend in sanctions imposed upon counsel with over 400% rise from 2009 to 2010 from 7 to 30 such instances.
- The survey notes the increasing willingness of courts to impose sanctions “for e-discovery failings not rising to the level of intentional or willful conduct.”

What to do? First, act fast! Take stock of all active matters to make sure this has been properly addressed. While ESI is persistent, it is at the same time also fragile. It can very quickly be inadvertently, or intentionally, altered, destroyed, or spoliated! If you need assistance in ESI preservation and collection, Protek can help.

As a general proposition, “When in doubt, preserve!” This may be the one point in the eDiscovery process where there are no “do overs.” If a dispute should later arise in the course of litigation, one can go back to what was only originally preserved. This is no place to be cutting corners.

Much more can, and needs to be said with respect to “forensically sound” ESI preservation and collection practices; as well as reasonable and defensible strategies for narrowing the focus to that ESI which is arguably in play in your litigation.

For today, to paraphrase a favorite law school professor, “take your eDiscovery strategy by the numbers!” Get the preservation piece right, and you reduce your eDiscovery sanction risk by 60%, setting your eDiscovery and litigation strategies on a rock-solid foundation for success.

[Contact Protek](#) today for assistance in ESI Preservation.