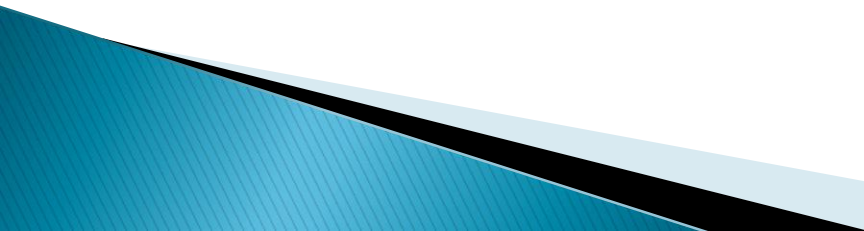


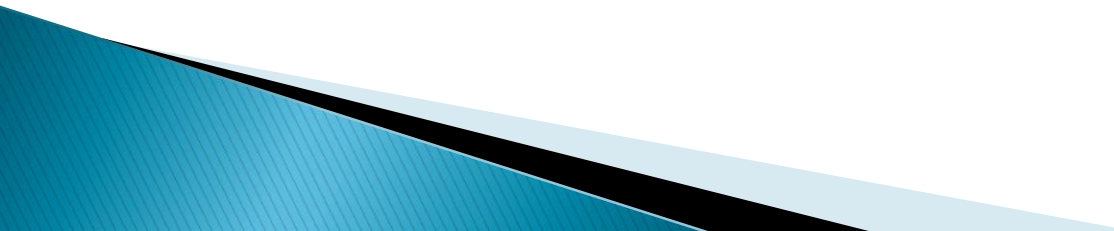
NEW FRONTIERS OF EDISCOVERY

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MARCH 12, 2010

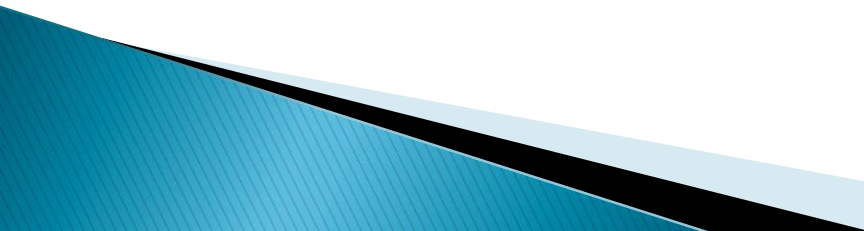
NEW FRONTIERS?

- ▶ EMAIL IS OLD NEWS
 - ▶ WEB 2.0
 - ▶ THE MILLENNIALS / GEN Y
 - ▶ EMERGING TECHNOLOGIES
 - ▶ GROWING ACCEPTANCE OF EXISTING TECHNOLOGIES AMONG ALL AGE GROUPS
 - ▶ CHANGING SOCIAL NORMS
- 

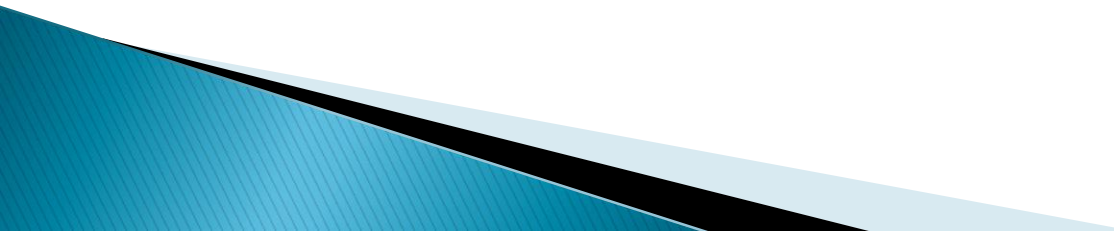
PRESENTATION ROADMAP

- ▶ INSTANT MESSAGING
 - ▶ VOICE MAIL
 - ▶ MOBILE DEVICES
 - ▶ MP3 PLAYERS
 - ▶ WEB BASED EMAIL ACCOUNTS
 - ▶ CLOUD COMPUTING
 - ▶ SOCIAL NETWORKING
 - ▶ NOW WHAT?
- 

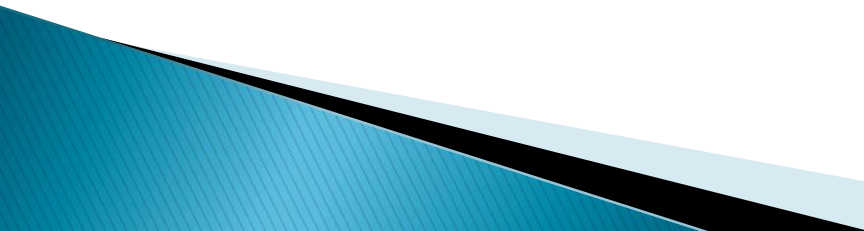
INSTANT MESSAGING

- ▶ Early argument that IM was more like a telephone conversation than an email
 - ▶ Yet archiving on non-enterprise based systems has been possible, easy and not illegal for years
 - ▶ Enterprise based IM gaining some acceptance
 - ▶ Other party may save even if your custodian does not
 - ▶ Surprisingly little litigation on this
- 

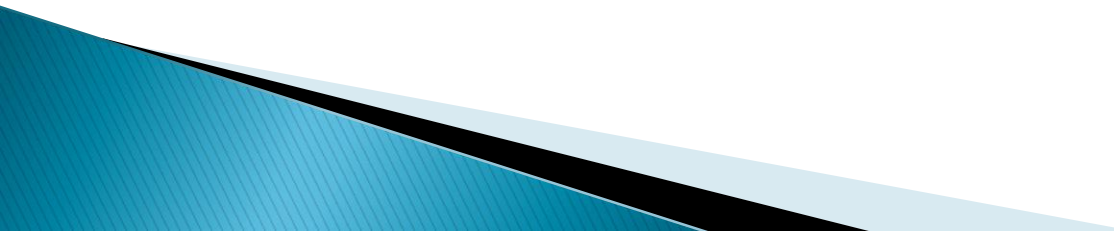
VOICE MAIL

- ▶ Even in early days of VM, many key messages were transcribed
 - ▶ VOIP technology made voicemail like email
 - ▶ Unified messaging continues this trend
 - ▶ Software providers are addressing searchability of audio files
 - ▶ Sampling or testing protocols may work well for large numbers of audio files
- 

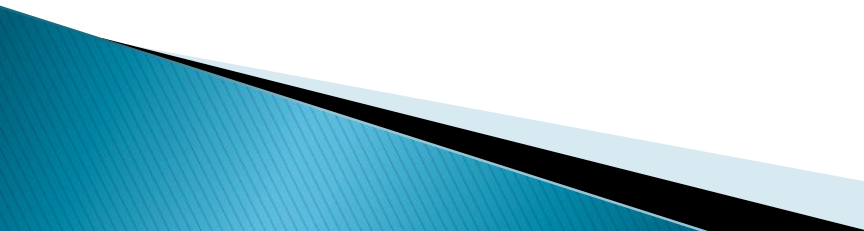
IN RE: VIOXX LITIGATION, NJ 2006

- ▶ Documents suggested Merck employees were using VM instead of email for relevant communications
 - ▶ System could only retain VM for thirty days
 - ▶ Court held VM was covered by original retention order – “all evidence”
 - ▶ Employees ordered not to use VM for any Vioxx related communications until system could be upgraded
- 

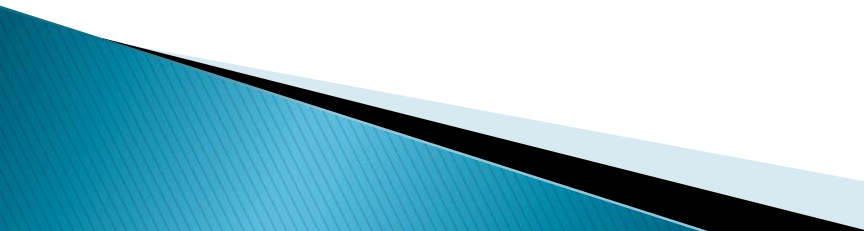
MOBILE DEVICES

- ▶ Mobile device data is the new email
 - ▶ Yet it is often still possible for parties to agree to ignore mobile device data
 - ▶ Prior to reaching agreement, preservation obligation must be considered
 - ▶ Privacy considerations are commonly raised
 - ▶ Stored Communications Act may be asserted as bar
- 

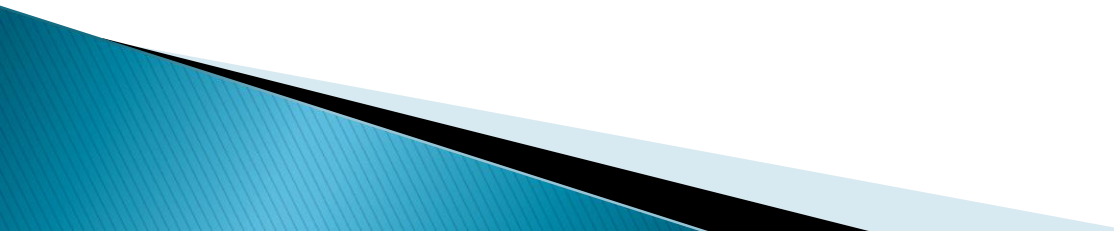
HUANG V. GATEWAY HOTEL HOLDINGS, MISSOURI 2008

- ▶ Fair Labor Standards Act claims
 - ▶ Employer requested production of all devices including cell phones
 - ▶ Court required plaintiffs to provide inventory of all devices
 - ▶ Defendant could seek production of devices at later date if showing of need
 - ▶ Query: what do plaintiffs do in the interim?
- 

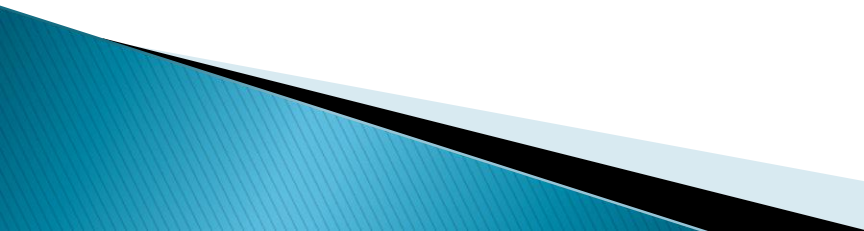
QUON V. ARCH WIRELESS, 9th CIR 2008

- ▶ Sherriff's department contracted with third party for text message service
 - ▶ Department reviewed text messages obtained from provider to determine reason for overages
 - ▶ Found sexually explicit material and attempted to discipline employee
- 

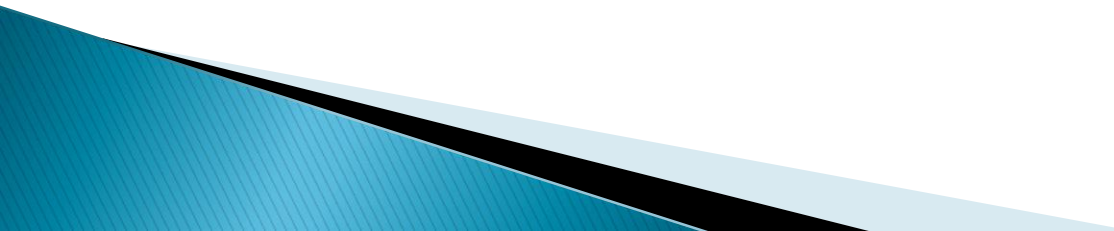
QUON continued

- ▶ Court held that Stored Communications Act applied
 - ▶ Employee had reasonable expectation of privacy
 - ▶ Supreme Court has granted cert
- 

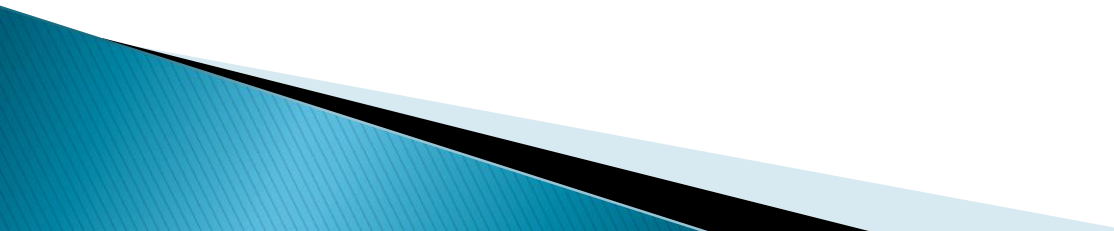
FLAGG V. CITY OF DETROIT, MICH 2008

- ▶ Allegedly botched murder investigation
 - ▶ Relevant text messages to/from city employees including mayor
 - ▶ Court held that Stored Communications Act could not be used to prevent discovery of relevant text messages via subpoena to carrier
 - ▶ Text messages were effectively in “control” of City even though they had to be obtained from carrier
- 

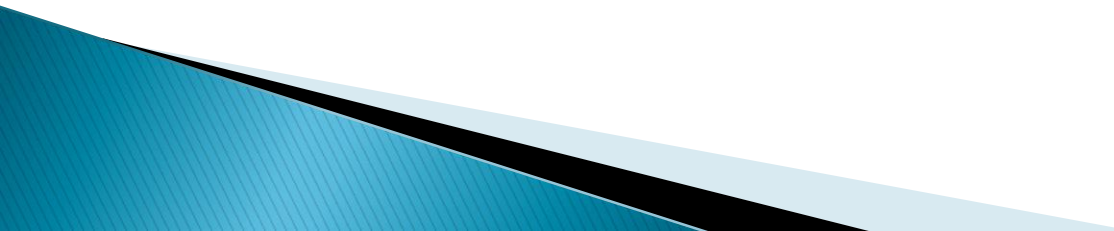
SOUTHWESTERN MECHANICAL SERVICES INC V. BRADY, FLA 2009

- ▶ Sanctions were imposed for failure to preserve data on Blackberries
 - ▶ For key time period, devices were not synched with server
 - ▶ Court focused on email, but also text messages, contacts, calendar items, telephone usage records
- 

SOUTHWESTERN continued

- ▶ Theft of trade secrets by employees who left to join competitor
 - ▶ Court issued TRO requiring return of all information and property to former employer
 - ▶ Forensic exam showed that data had been wiped from Blackberries used by two former employees
- 

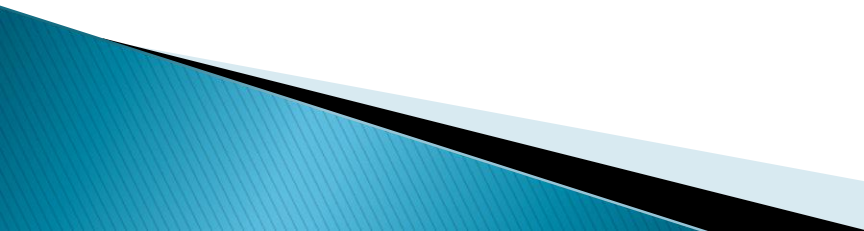
MOBILE DEVICES – audio visual

- ▶ Nothing new about discoverability of audio visual media
 - ▶ Digitalization has resulted in explosion of data
 - ▶ Anyone and everyone can take photos or short videos easily
 - ▶ Preservation is the issue
- 

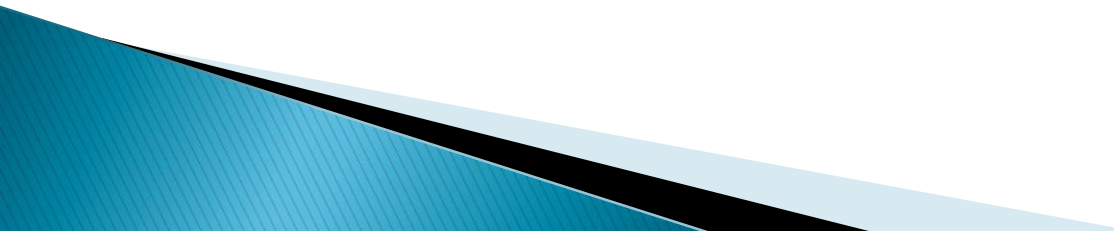
MOBILE DEVICES – mp3 players



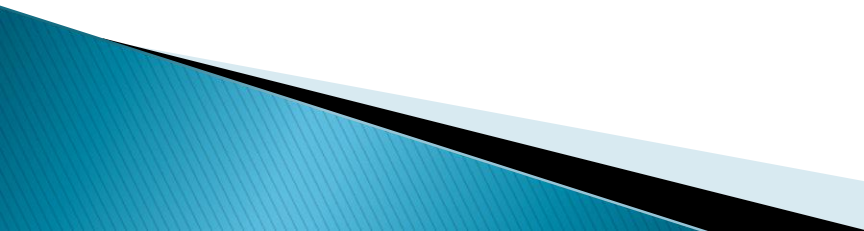
MOBILE DEVICES – SUMMARY

- ▶ Device technology undergoing rapid improvement
 - ▶ Device usage is increasing and supplanting use of traditional computers
 - ▶ Counsel and courts are becoming more aware of the availability of this data
 - ▶ Forensics tools are improving and costs are coming down
- 

WEB BASED EMAIL

- ▶ Hotmail, gmail, yahoo, comcast
 - ▶ Often used to “hide” communications
 - ▶ Where does the data reside?
 - ▶ Who can get it?
 - ▶ How can it be gotten?
- 

WEB BASED EMAIL ACCOUNTS

- ▶ Can be collected with user's permission
 - ▶ Can be subpoenaed from service provider
 - ▶ Sometimes requesting party will do both
 - ▶ Privacy policies vary
 - ▶ Beware of shared or easily determined passwords
- 

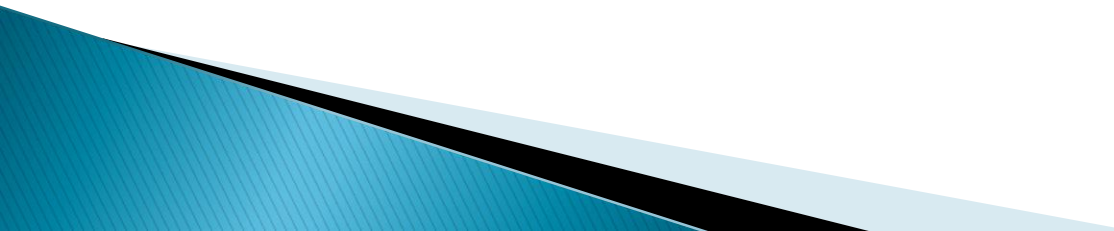
CLOUD COMPUTING



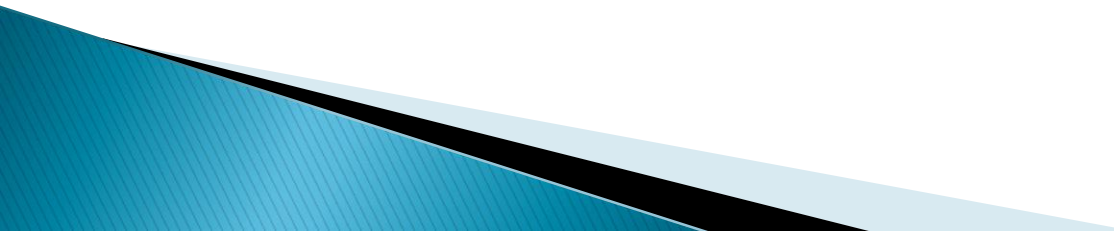
CLOUD COMPUTING

- ▶ What is it?
- ▶ Cloud computing v. software as a service (SaaS)
- ▶ Part of Web 2.0 trend

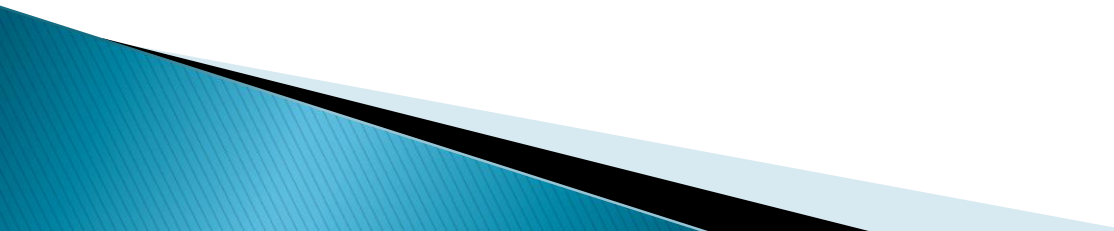
CLOUD COMPUTING

- ▶ Current concern about ediscovery preparedness
 - ▶ Obtain copy of service agreement
 - ▶ Litigation hold may not be possible without modification of service agreement
- 

HOW DO WE PREDICT TRENDS?

- ▶ Courts will borrow from experience in law enforcement related matter
 - ▶ Courts will be influenced by frequent use of mobile device data in family law disputes
 - ▶ A few prominently reported decisions will result in rapidly changing expectations
 - ▶ State courts will continue to lag federal courts, but gap will narrow
- 

TAKE HOME MESSAGES

- ▶ **Think the unthinkable**
 - ▶ **Know that actions will be viewed in context of technology at time the judge hears the dispute, not at time decision is made**
 - ▶ **Defensibility**
 - ▶ **Documentation**
- 

FOR FURTHER INFORMATION

- ▶ Yahoo Lit Support Group
 - ▶ Google, Lit Support News
 - ▶ Ediscovery.com
 - ▶ Applieddiscovery.com
 - ▶ ILTA
 - ▶ Women in Ediscovery
 - ▶ Association of Litigation Support Professionals
 - ▶ Electronic Discovery Reference Model
 - ▶ Sedona Conference
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