ELECTRONIC DISCOVERY: TRENDS AND DEVELOPMENTS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND BEYOND©

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BIOGRAPHY

- United States Magistrate Judge, District of New Jersey, 1986-2007
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- Lead Author, *Managing Discovery of Electronic Information, Third Edition* (Federal Judicial Center: 2017)
- Co-Senior Editor of *The Sedona Conference Cooperation Proclamation: Resources for the Judiciary, Third Edition* and April 2022 *Supplement*
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DISCLAIMER

- The information in these slides is not legal advice and should not be considered legal advice.
- These slides represent only personal views.
- These slides are offered for informational and educational uses only.

NOTE TO THE READER (1)

- These slides are not intended to be an exhaustive review of the rules governing electronically stored information ("ESI"). Rather, the slides are intended as an introduction to, and overview of, the topics addressed. There will be always be more to consider as governing rules change, case law develops, and technology advances.
- Slide decks are available on various topics for anyone interested.

NOTE TO THE READER (2)

- These slides do not address “remote” practice of law or proceedings, etc., that arose from the pandemic.
- Likewise, the slides do not address artificial intelligence or cybersecurity.
- Something new related to ESI appears daily, be it in the context of civil actions, criminal investigations and prosecutions, regulatory investigations and proceedings, or ethics. We need to “fit” whatever is new (including new technologies) into existing legal frameworks.

NOTE TO THE READER (3)

"Fundamentally, the problem here is that we are confronted with a clash between very old law and evolving new technology. *** Trespass is one of the oldest torts known to Anglo-American jurisprudence ***. But back then, even the most advanced thinkers of the day were not aware of such things as atoms ***.

But nowadays light can be so many more things and can be used in so many more ways ***. The inquiry here is whether the bundle of rights traditionally protected by the ancient tort of trespass should be read to include the right to stop the newly-developed light projection used here." *International Union v. Great Wash Park, LLC,* No. 67453 (Nev. Sup. Ct. July 29, 2016) (Tao, J, concurring).

NOTE TO THE READER (4)

- For a "tool to assist in the understanding and discussion of electronic discovery and electronic information management issues," *see The Sedona Conference® Glossary: E-Discovery & Digital Information Management, Fifth Edition* (Feb. 2020), The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Edition | The Sedona Conference®
- For a comprehensive approach to discovery of ESI in litigation, *see* "The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production," 19 *Sedona Conf. J.* 1 (2018), https://thesedonaconference.org/publication/The_Sedona_Principles
- For a catalogue of Sedona Conference publications, *see* https://thesedonaconference.org/sites/default/files/publications/TSC_Publications_Catalogue_August_2023_0.pdf

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WHAT MAKES ESI DIFFERENT (1)

- Bit [a binary digit-either 0 or 1]
- Byte [8 bits]
- 10 bytes = a single word
- Kilobyte [1,000 bytes]
  2 kilobytes = a typewritten page
- Megabyte [1,000,000 bytes]
  5 megabytes = the complete Shakespeare
- Gigabyte [1,000,000,000]
  50 gigabytes = a floor of books
- Terabyte [10^{12} bytes]
  10 terabytes = Library of Congress

WHAT MAKES ESI DIFFERENT (2)

- Voluminous and distributed
- Fragile yet persistent
- Capable of taking many forms
- Contains non-apparent information
  - For an explanation of metadata, *see* N. Lewis, "What is Metadata?" *How-To Geek* (July 20, 2022), https://www.howtogeek.com/815069/what-is-metadata/
  - *See also* R.W. Dilbert, et al., *Metadata Issues in Discovery* (Frost Brown Todd: Sept. 2, 2022), https://frostbrowntodd.com/metadata-issues-in-discovery/
- Created and maintained in complex systems

WHAT MAKES ESI DIFFERENT (3) PLACES TO LOOK

- Personal computers at work and/or home
- Laptop computers, phones and tablets
- Networked devices (*i.e.,* “the Internet of Things”)
- Photocopiers
- Removable media (*i.e.,* flash drives)

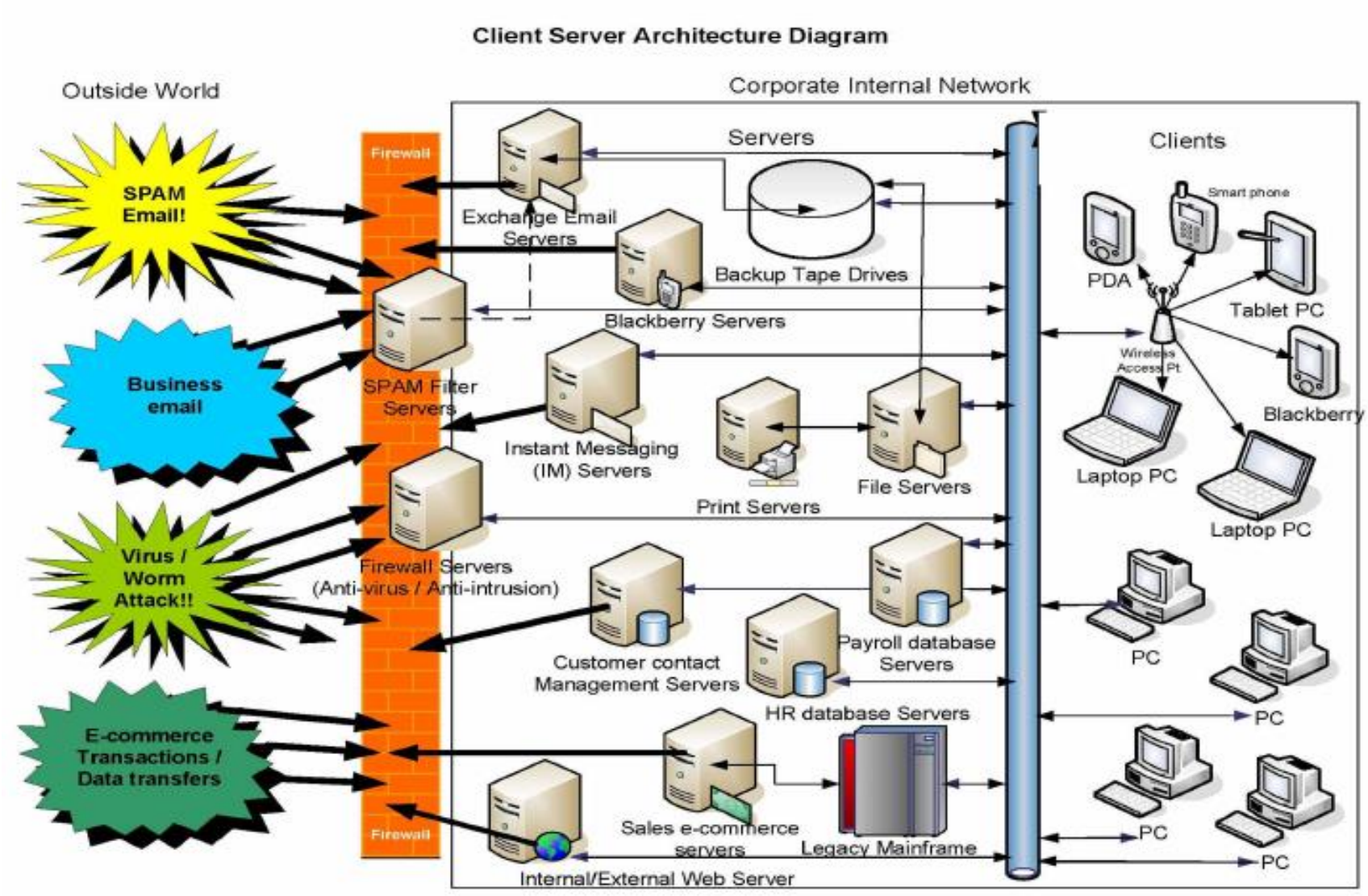
WHAT MAKES ESI DIFFERENT (4) PLACES TO LOOK

- Third-party providers
  - Social media
  - Virtual meeting content
  - Ephemeral messaging apps
- Vehicular ESI
- Drones
- Fitbit
  - *Bartis v. Biomet, Inc.*, No. 4-13-CV-00657 (E.D. Mo. May 24, 2021)
- Body cameras

WHAT MAKES ESI DIFFERENT (5)
PLACES TO LOOK

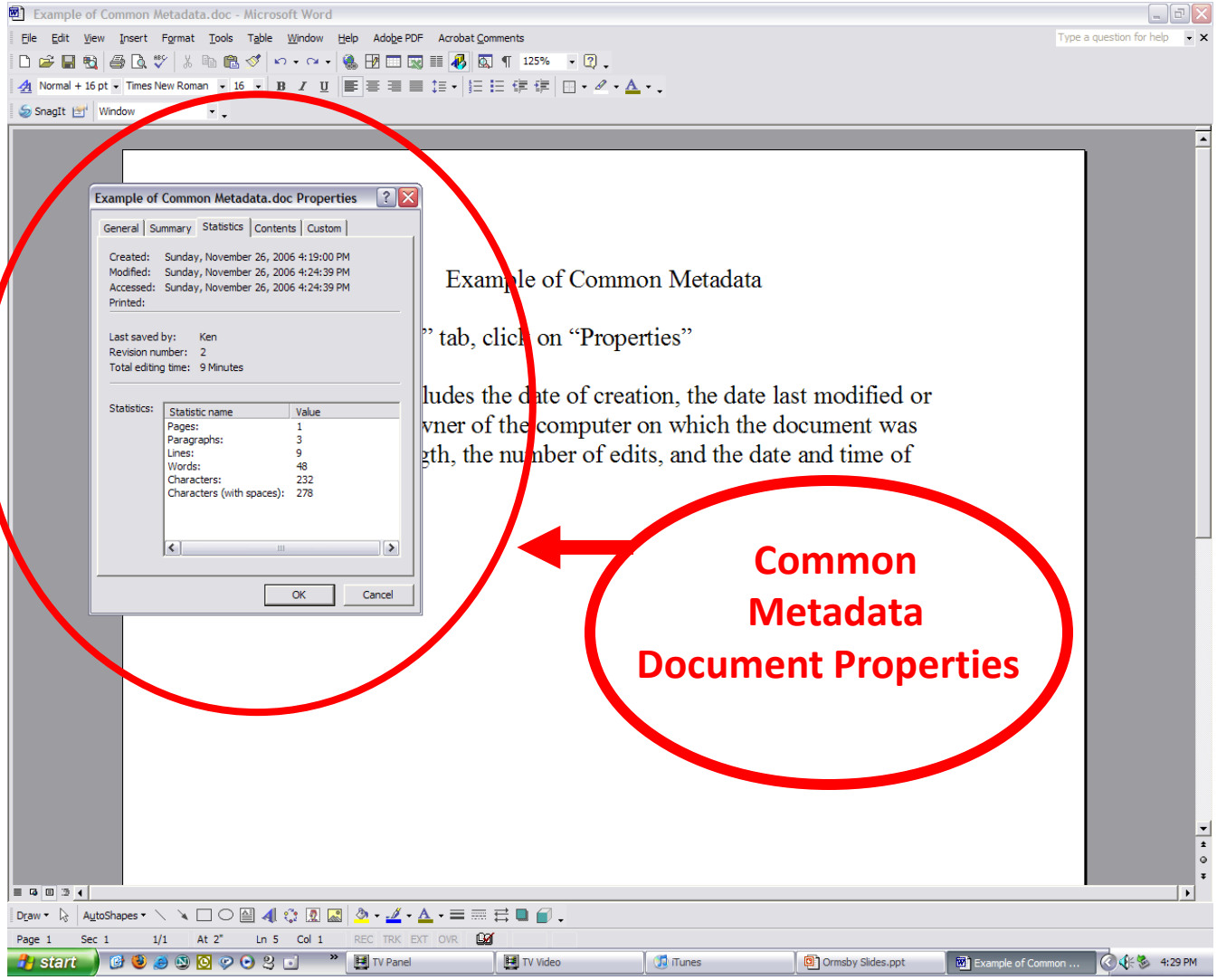
- Random Access Memory (“RAM”)
- Slack space
- System data
- Disaster recovery backup media

WHAT MAKES ESI DIFFERENT (6)



WHAT MAKES ESI DIFFERENT (7)

WHAT MAKES ESI DIFFERENT (8)



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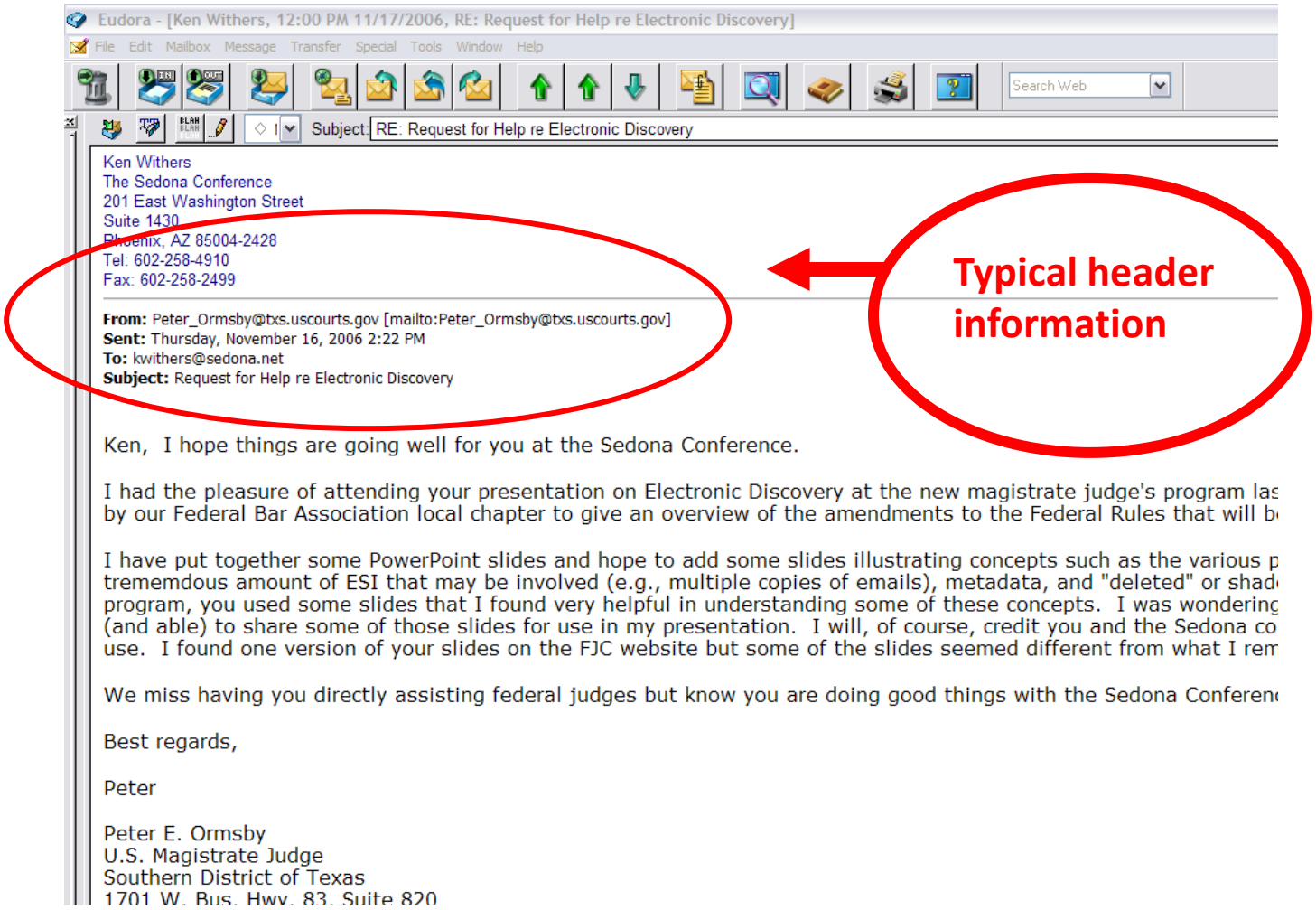
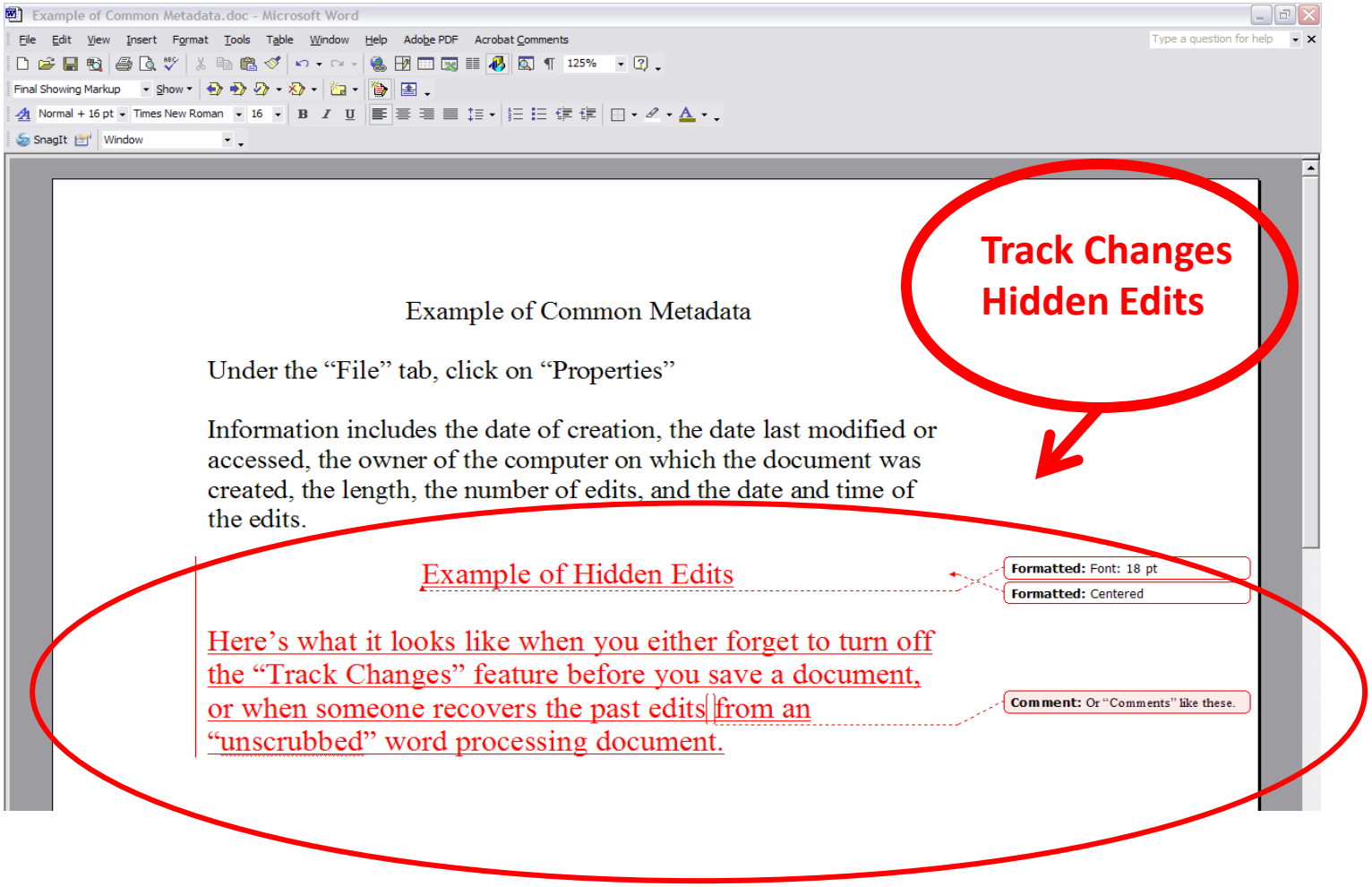


WHAT MAKES ESI DIFFERENT (10)

WHAT MAKES ESI DIFFERENT (11)



WHAT MAKES ESI DIFFERENT (12)
BIG DATA

Big data spans four dimensions:

- Volume
- Velocity
- Variety
- Veracity

And add to the above "Value," both existing or contemplated

See, e.g., P. Overberg & K. Hand, "How to Understand the Data Explosion," *Wall St. J.* (Dec. 8, 2021), https://www.wsj.com/articles/how-to-understand-the-data-explosion-11638979214#:~:text=To%20understand%20the%20data%20explosion%2C%20it%20may%20be%20easier%20to,translated%20digital%20storage%20to%20rice.

INFORMATION GOVERNANCE (1) RESOURCES

- *The Sedona Conference Commentary on Information Governance,* Second Edition (Apr. 2019), https://thesedonaconference.org/publication/Commentary_on_Information_Governance

INFORMATION GOVERNANCE (2) RESOURCES

For discussion of "information governance's emergence as a crucial component of the eDiscovery discipline," *see* T. E. Brostoff, "Corralling Data to Merge eDiscovery, Change Corporate Culture and Prepare for the Technological Future," 13 *DDEE* 638 (2013).

See also R.J. Hedges, "Using Information Governance Principles to Respond to Litigation," *Journal of AHIMA* 36 (Mar. 2015).

See also R.J. Hedges, *et al.*, "Health Information Management and Litigation: How the Two Meet," *Journal of AHIMA* 38 (May 2019).

INFORMATION GOVERNANCE (3) COMPLIANCE & ETHICS PROGRAMS

§8B2.1. United States Sentencing Guidelines (Effective Compliance and Ethics Program):

"(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation — Organizations), an organization shall—
(1) exercise due diligence to prevent and detect criminal conduct; and
(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."

INFORMATION GOVERNANCE (4) COMPLIANCE & ETHICS PROGRAMS

What is an effective compliance and ethics program? Among other things, an organization should:

- Exercise due diligence to prevent, and protect against, criminal acts.
- Be generally effective in doing so.
- Have personnel at various governance levels who are aware of the program and engage in its oversight and administration.
- Evaluate the program periodically for effectiveness.
- Have and publicize a system for employee reporting of criminal acts without fear of retaliation.

INFORMATION GOVERNANCE (5) COMPLIANCE & ETHICS PROGRAMS

- For the Guidelines on slide 24, *see* https://guidelines.ussc.gov/gl/%C2%A78B2.1
- For common questions that the Department of Justice might ask in conducting an investigation of a corporate entity to determine whether to bring charges or negotiate pleas, etc., *see* "Evaluation of Corporate Compliance Programs," from the Criminal Division, U.S. Department of Justice (updated June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download

INFORMATION GOVERNANCE (6) CYBERSECURITY

“In light of the increasing volume and sophistication of cyber threats, the Federal Financial Institutions Examination Council (FFIEC) developed the Cybersecurity Assessment Tool (Assessment) to help institutions identify their risks and determine their cybersecurity preparedness. The Assessment provides a repeatable and measurable process for financial institutions to measure their cybersecurity preparedness over time.”

https://www.ffiec.gov/cyberassessmenttool.htm

INFORMATION GOVERNANCE (7) CYBERSECURITY

“To complete the Assessment, management first assesses the institution’s inherent risk profile based on five categories:”

INFORMATION GOVERNANCE (8) CYBERSECURITY

- Technologies and Connection Types
- Delivery Channels
- Online/Mobile Products and Technology Services
- Organizational Characteristics
- External Threats

INFORMATION GOVERNANCE (9) CYBERSECURITY

“Management then evaluates the institution’s Cybersecurity Maturity level for each of five domains:

INFORMATION GOVERNANCE (10) CYBERSECURITY

- Cyber Risk Management and Oversight
- Threat Intelligence and Collaboration
- Cybersecurity Controls
- External Dependency Management
- Cyber Incident Management and Resilience”

INFORMATION GOVERNANCE (11) CYBERSECURITY

Start with Security: A Guide for Business (FTC), https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business

- Start with Security.
- Control Access to Data Sensibly.
- Require Secure Passwords and Authentication.

INFORMATION GOVERNANCE (12) CYBERSECURITY

- Store Sensitive Personal Information Securely and Protect It During Transmission.
- Segment Your Network and Monitor Who's Trying to Get In and Out.
- Secure Remote Access to Your Network.
- Apply Sound Security Practices When Developing New Products.

INFORMATION GOVERNANCE (13) CYBERSECURITY

- Make Sure Your Service Providers Implement Reasonable Security Measures.
- Put Procedures in Place to Keep Your Security Current and Address Vulnerabilities That May Arise.
- Secure Paper, Physical Media, and Devices.

INFORMATION GOVERNANCE (14) CYBERSECURITY

California Data Breach Report (Ca. Dept. of Justice: Feb. 2016), https://oag.ca.gov/breachreport2016

INFORMATION GOVERNANCE (15) CYBERSECURITY

"Breach Types

- *Malware and hacking breaches* are caused by intentional intrusions into computer systems by unauthorized outsiders.
- *Physical breaches* result from the theft or loss of unencrypted data stored on laptops, desktop computers, hard drives, USB drives, data tapes or paper documents.
- *Error breaches* stem from anything insiders (employees or service providers) unintentionally do or leave undone that exposes personal information to unauthorized individuals.
- *Misuse breaches* are the result of trusted insiders intentionally using privileges in unauthorized ways."

Report at 11.

INFORMATION GOVERNANCE (16) CYBERSECURITY

"The 20 controls in the Center for Internet Security's Critical Security Controls identify a minimum level of information security that all organizations that collect or maintain personal information should meet. The failure to implement all the Controls that apply to an organization's environment constitutes a lack of reasonable security."

Report at v.

INFORMATION GOVERNANCE (17) CYBERSECURITY

- Know the hardware and software connected to your network.
- Implement key security settings.
- Limit user and administrator privileges.
- Continuously assess vulnerabilities and patch holes to stay current.
- Secure critical assets and attack vectors.
- Defend against malware and boundary intrusions.

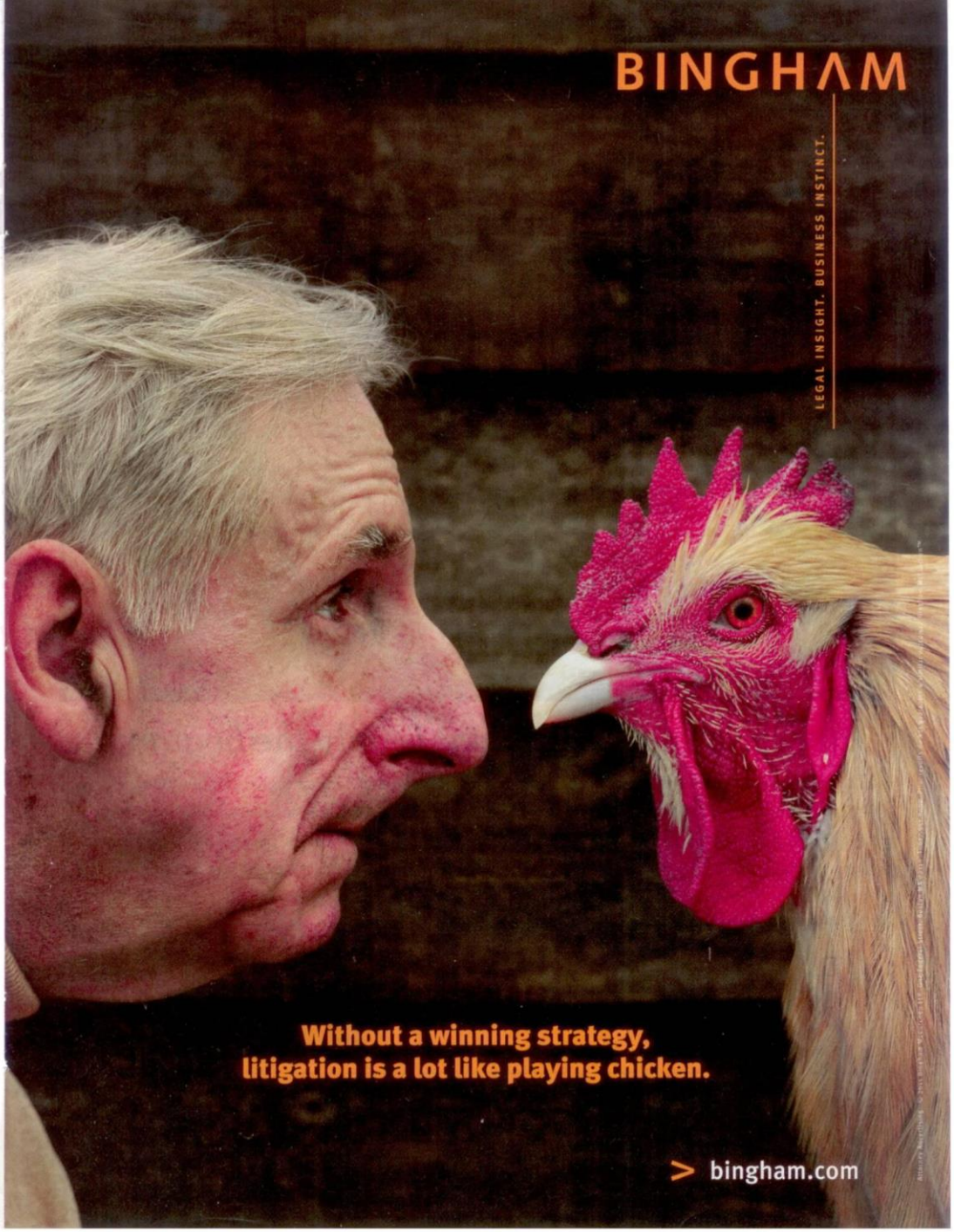
INFORMATION GOVERNANCE (18) CYBERSECURITY

- Block vulnerable access points.
- Provide security training to employees and vendors with access.
- Monitor accounts and network audit logs.
- Conduct tests of your defenses and be prepared to respond promptly and effectively to security incidents.

Report at 32.

INFORMATION GOVERNANCE (19)
A CAUTIONARY TALE

- R.J. Hedges, “Healthcare Providers and Their Contractors: What Could Go Wrong?” *journal.ahima.org* (May 18, 2016), http://journal.ahima.org/2016/05/18/healthcare-providers-and-their-contractors-what-could-go-wrong/


BINGHAM
LEGAL INSIGHT. BUSINESS INSTINCT.
Without a winning strategy,
litigation is a lot like playing chicken.
> bingham.com

THE ESSENTIAL CASE LAW (1)

Zubulake v. UBS Warburg LLC ("Zubulake I"), 217 F.R.D. 309 (S.D.N.Y. 2003):

- Motion to compel further production of email.
- Who will pay for restoring email from archival and backup sources?
- Distinction drawn between "accessible" and "inaccessible" sources.
- Cost-shifting only available if source is found to be inaccessible.

THE ESSENTIAL CASE LAW (2)

Zubulake I cost-shifting factors:

- Extent to which the request is tailored to discover relevant data.
- Availability of the data from other sources.
- Total cost of production, relative to the amount in controversy.
- Total cost of production, relative to the resources available to each party.
- Relative ability and incentive for each party to control its own costs.
- Importance of the issues at stake in the litigation.
- Relative benefits to the parties in obtaining those data.

THE ESSENTIAL CASE LAW (3)

Zubulake v. UBS Warburg LLC ("Zubulake III"), 216 F.R.D. 280 (S.D.N.Y. 2003):

- Responding party to pay 75% of costs to produce email from inaccessible data.
- Attorney review costs not subject to cost-shifting.

THE ESSENTIAL CASE LAW (4)

Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212 (S.D.N.Y. 2003):

- Several backup tapes negligently destroyed.
- No finding of prejudice to requesting party.
- Appropriate sanction was award of costs of further discovery (*e.g.*, depositions to establish likely content of lost material).

THE ESSENTIAL CASE LAW (5)

Zubulake v. UBS Warburg LLC ("Zubulake V"), 229 F.R.D. 422 (S.D.N.Y. 2004):

- Counsel has ongoing duty to monitor preservation and collection efforts.
- Further discovery revealed willful destruction of relevant email.
- Negligently destroyed backup tapes now unavailable as substitute source.
- Adverse inference jury instruction appropriate.

THE ESSENTIAL CASE LAW (6)
THE (OTHER) BIG ONES

- *Morgan Stanley & Co. v. Coleman (Parent) Holdings, Inc.*, 973 So.2d 1120 (Fla. Sup. Ct. 2007) (ending litigation saga that began in 2005 with adverse inference instruction and jury award of $600 million compensatory and $800 million punitive damages).
- *Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Ca. Apr. 2, 2010) (ethics "twist" to discovery problems).

WHAT STATES ARE DOING (1)

Many States have e-discovery rules:

- Some mirror the 2006 and/or 2015 amendments to the Federal Rules of Civil Procedure.
- Some adopt one or more federal rules. *See, e.g., In re: Amendments to the Florida Rules of Civil Procedure—Electronic Discovery* (No. SC11-1542) (Fla. Sup. Ct. July 5, 2012 (*per curiam*), http://www.slk-law.com/portalresource/lookup/wosid/cp-base-4-15502/media.name=/DAC.Docket%20Article%20E-Discovery%20Rules.pdf.
- Some go their own way. *See, e.g.,* (Delaware) *Court of Chancery Guidelines for Preservation of Electronically Stored Information,* http://courts.delaware.gov/forms/download.aspx?id=50988.

WHAT STATES ARE DOING (2)

Beware differences between federal/State rules and among/within the States. *See, e.g., Osmulski v. Oldsmar Fine Wine, Inc.*, 93 So.3d 389 (Fla. 2d Dist. Ct. App. 2012) (duty to preserve videotape arises only when written request made to do so).

WHAT STATES ARE DOING (3) WOULD A PARTY PREFER TO BE IN STATE COURT?

New Jersey "Complex Business Litigation Program, "
Complex Business Litigation Program (njcourts.gov)

- Assigned cases to be individually managed.
- "Cases in the CBLP usually arise from business or commercial transactions or construction projects that have complex factual or legal issues, a large number of parties, substantial discovery issues ***."

WHAT FEDERAL COURTS ARE DOING (1)

- *Guidelines for Cases Involving Electronically Stored Information* (D. Kan.).
- *Electronic Discovery Guidelines and Checklist* (D. Colo.).
- *Principles for the Discovery of Electronically Stored Information in Civil Cases* (D. Md.).
- *Model Order Relating to the Discovery of Electronically Stored Information (ESI) and Checklist for Rule 26(f) Meet and Confer Regarding ESI* (E.D. Mich.).

WHAT FEDERAL COURTS ARE DOING (2)

For a listing of local initiatives, etc., *see* K&L Gates Electronic Discovery Law, "Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues," http://www.ediscoverylaw.com/local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-e-discovery-issues/.

AMENDING THE FEDERAL RULES (1) THE 2006 AMENDMENTS

- Rule 26(f)
- Rule 16(b)
- Rule 26(a)(1)
- Rule 26(b)(2)(B)
- Rule 26(b)(5)(B)
- Rule 34(a)(1)(A)
- Rule 34(b)(2)(D) and (E)
- Rule 37(e)
- Rule 45(a)(1)(iii) and (a)(1)(C), *etc*.

AMENDING THE FEDERAL RULES (2) THE 2015 AMENDMENTS

- Duke Conference in 2010.
- Proposed amendments published August 15, 2013.
- 100+ persons testified at three public hearings.
- 2,000+ written comments submitted.

AMENDING THE FEDERAL RULES (3) THE 2015 AMENDMENTS

- Approval of amendments and transmittal to Congress by the Supreme Court on May 1, 2015.
- Amendments became effective December 1, 2015.

AMENDING THE FEDERAL RULES (4) THE 2015 AMENDMENTS

- Explicit mention of cooperation in Note to amended Rule 1.
- Amended Rule 26(d)(2) allows parties to exchange Rule 34 requests before the Rule 26(f) conference.
- Preservation and Federal Rule of Evidence 502 added to topics to be addressed in amended Rules 26(f)(3) and 16(b)(3)(B).

AMENDING THE FEDERAL RULES (5) THE 2015 AMENDMENTS

- Encouragement of informal discovery dispute resolution under amended Rule 16(b)(3)(B)(v).
- Elimination of “blanket” objections to discovery requests under amended Rule 34(b)(2).
- Tightening of time limits in amended Rules 4(m) and 16(b)(2).

AMENDING THE FEDERAL RULES (6) RULE 1

Scope and Purpose. These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

AMENDING THE FEDERAL RULES (7) RULE 26(d)(2)

(A) Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

AMENDING THE FEDERAL RULES (8) RULE 26(d)(2)

Questions about “early delivery”:

- Is it too early to ask for written discovery before the Rule 26(f) process is completed?
- Can a party deliver written discovery before the Rule 26(f) process is undertaken and make a certification consistent with Rule 26(g)?

AMENDING THE FEDERAL RULES (9) RULE 16(b)(3)(v)

The scheduling order may *** direct that before moving for an order relating to discovery the movant must request a conference with the court.

AMENDING THE FEDERAL RULES (10) RULE 34(b)(2)

(B) *Responding to Each Item.* *** [T]he response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response.

AMENDING THE FEDERAL RULES (11) RULE 34(b)(2)

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

AMENDING THE FEDERAL RULES (12) REPRESENTATIVE DECISIONS ON OBJECTIONS

- For post-amendment decision addressing over-designation of material as bring privileged, *see Brinker v. Normandin's,* No. 14-cv-03007, 2016 WL 270957 (N.D. Ca. Jan. 22, 2016).
- For decision addressing specific objections, *see Rowan v. Sunflower Elec. Power Corp.,* No. 15-cv-9227-JWL-TJJ (D. Kan. July 13, 2016).
- For decision addressing numerosity and specificity of interrogatories and requests to produce, *see Phoenix Process-Equipment Co. v. Capital Equip. & Trading Corp.*, 2019 WL 1261352 (W.D. Ky. Mar. 19, 2019).

AMENDING THE FEDERAL RULES (13) TIGHTENING OF TIME LIMITS

- Rule 4(m): Time to serve summons on defendant reduced from ~~120~~ to 90 days after complaint filed.
- Rule 16(b)(2): Time to issue scheduling order reduced from ~~120~~ to 90 days after defendant served, or from ~~90~~ to 60 days after defendant appears.

AMENDING THE FEDERAL RULES (14) RESOURCES

- R.J. Hedges & M. Nelson, "Status Quo or Game Changer? New Federal Rules Go Into Effect on December 1," 15 *DDEE* 444 (2015).
- T.Y. Allman, "Amended Rule 37(e): The First Two Years of 'Reasonable Steps,'" 17 *DDEE* 484 (2017).
- R.J. Hedges, "The 'Other' December 1 Amendments to the Federal Rules of Civil Procedure," *Pretrial Practice & Discovery* (May 18, 2016), http://apps.americanbar.org/litigation/committees/pretrial/articles/spring2016-0516-other-december-1-amendments-federal-rules-civil-procedure.html.

THE MEET-AND-CONFER (1)

Rule 26(d)(1): A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

THE MEET-AND-CONFER (2)
THE 26(f) CONFERENCE

Should it be attended by people who don't trust each other discussing issues they don't understand?

A.J. Tadler, K.F. Brady, & K.S. Jenson, *The Sedona Conference "Jumpstart Outline": Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (Mar. 2016), https://thesedonaconference.org/publication/The%20Sedona%20Conference%C2%AE%20%22Jumpstart%20Outline%22.

THE MEET-AND-CONFER (3)
THE RULE 26(f) CONFERENCE

- Becoming an iterative process in complex actions.
- Involving specialized consultants in complex actions.
- Developing its own protocols and conventions in individual districts.

THE MEET-AND-CONFER (4)
THE RULE 26(f) CONFERENCE

- Rule 26(f)(3)(C) – any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced.
- Rule 26(f)(3)(D) – any issues about claims of privilege or of protection as trial-preparation materials, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order under *Federal Rule of Evidence* 502.

THE MEET-AND-CONFER (5) REPORTING TO THE COURT

Form 52, Paragraph 3, Discovery Plan – "Disclosure or discovery of electronically stored information should be handled as follows: (*briefly describe the parties' proposals, including the form or forms of production*.)"

"The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (*briefly describe the provisions of proposed order.*)"

THE MEET-AND-CONFER (6)
THE INITIAL SCHEDULING CONFERENCE

Rule 16(b)(3)(B) – The scheduling order may:
***

(iii) provide for disclosure, discovery or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including any agreements reached under *Federal Rule of Evidence* 502.

THE MEET-AND-CONFER (7)
A FAILURE OF PROCESS?

Miller v. York Risk Services Grp., No. 13-cv-01419-JWS (D. Ariz. Apr. 15, 2014):

- Plaintiffs moved for order compelling defendant to participate in a 30(b)(6) deposition "regarding the manner and methods used *** to store and maintain" ESI.
- Plaintiffs argued deposition will allow them to "tailor their discovery requests to avoid potential disputes over what may be discovered."

THE MEET-AND-CONFER (8) A FAILURE OF PROCESS?

- Denied: "The court's view is that starting discovery with such an inquiry puts the cart before the horse and likely will increase, rather than decrease, discovery disputes. Instead of beginning with a deposition that addresses nothing but process, discovery should start with inquiries that seek substantive information. If Defendant then asserts that retrieving relevant information stored electronically would be unduly burdensome, it might then be appropriate to proceed with a 30(b)(6) deposition of the type Plaintiffs seek." (footnote omitted).

Accord Cannata v. Wyndham Worldwide Corp., No. 10-cv-00068-PMP-VCF (D. Nev. Nov. 17, 2011).

INTERLUDE

Questioning *Miller*:

1. Might a "robust" meet-and-confer that included technical representatives of the defendant (or an informal interview) have avoided the perceived need for a 30(b)(6) deposition?
2. Might a reasonable understanding of the defendant's ESI "structure" have allowed targeted discovery requests and thus avoid later disputes?
3. Might a 30(b)(6) deposition be costly and adversarial?

AN ALTERNATIVE TO DISCOVERY?

Rule 36 requests for admissions:

- Requests are not discovery devices.
- Requests are intended to narrow or eliminate fact questions.
- Responses to requests are limited.
- Responding party must make inquiry.

See, e.g., Wichansky v. Zowine, No. CV-13-01208 (D. Ariz. Mar. 22, 2016).

THE NONCOMPLEX (OR SMALL) CIVIL ACTION

- *Connecticut Gen'l Life Ins. Co. v. Karl Scheib, Inc.,* No. 11-CV-0788 (S.D. Ca. Feb. 6, 2013).
- S.B. Harris & R.J. Hedges, "Small Stakes Claims Can Mean Big Headaches," 13 *DDEE* 96 (2013).
- Texas Rule of Civil Pro. 169 (extending expedited actions cap to $250,000).
- G.S. Freeman, P.S. Grewal, R.J. Hedges & C.B. Shaffer, "Active Management of ESI in 'Small' Civil Actions"(available from the author).

RULE 26(a)(1) & INITIAL DISCLOSURES

- Rule 26(a)(1)(A) requires disclosures of certain information "without awaiting a discovery request" and that information includes ESI.
- Disclosures are to be made "at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order." (Rule 26(a)(1)(C)).

SCOPE OF DISCOVERY (1)
AMENDED RULE 26(b)(1)

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ***. Information within this scope of discovery need not be admissible in evidence to be discoverable.

SCOPE OF DISCOVERY (2)
AMENDED RULE 26(b)(1)

Has the amendment changed scope?

- "relevant to any claim or defense"
- "need not be admissible"

Yes: *In re Bard IVC Filters Prod. Liab. Litig.,* No. MDL 15-02641-PHX-DGC (D. Ariz. Sept. 16, 2016) ("marginal relevance" and proportionality).

No: *Gonzalez v. Allied Concrete Ind., Inc.*, No. CV-14-4771 (E.D.N.Y. Aug. 23, 2016) (reemphasis on proportionality but not substantive change in scope).

SCOPE OF DISCOVERY (3)
AMENDED RULE 26(b)(1)

"[R]easonably calculated" language deleted but Advisory Committee Note states, "[d]iscovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery."

SCOPE OF DISCOVERY (4)
RULE 26(b)(1)
REPRESENTATIVE DECISIONS

- *Green v. Cosby,* Misc. No. 16-00002 (E.D. Pa. Mar. 21, 2016).
- *Knaggs v. Yahoo!, Inc.,* No. 15-mc-80281 (N.D. Ca. July 20, 2016).
- *Bartis v. Biomент, Inc.*, Case No. 4:13-CV-00657-JAR (E.D. Mo. May 24, 2021).
- *State Farm Mut. Auto. Ins. Co. v. Fayda,* No. 14 Civ. 9792 (S.D.N.Y. Dec. 3, 2015).

SCOPE OF DISCOVERY (5) SPATIAL LIMITATIONS

Kuttner v. Zaruba, 819 F.3d 970 (7th Cir. 2016) (affirming district court):

- "District judges have broad discretion over discovery matters ***."
- "*Any* temporal limit on discovery is in some sense artificial ***."
- "the proper inquiry *** is two-fold: (1) was *some* time limit warranted here, and (2) was *this* time limit reasonable, i.e., did it allow Kuttner a meaningful opportunity for discovery?"

PROPORTIONALITY (1)

Rule 26(b)(1):

- proportionality factors now in this Rule.
- discovery must be “directly proportional to the needs of the case” and various factors must be taken into account.

PROPORTIONALITY (2)

The factors, in descending order, are:

- importance of the issues at stake;
- amount in controversy;
- relative access to relative information;
- the parties' resources;
- importance of the discovery; and
- burden or expense *** outweighs its likely benefit.

For a decision addressing each factor, *see Oxbow Carbon & Minerals LLC v. Union Pacific RR Co.,* No. 11-cv-1049 (PLF/GMH) (D.D.C. Sept. 11, 2017).

PROPORTIONALITY (3)

Rule 26(g)(1)(B) provides that a signature on a discovery request or response is a certification that, "to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:" ***

"[the request is] neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(g)(1)(B)(iii).

See generally Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008).

PROPORTIONALITY (4)

- Proportionality is an "amorphous" and "highly elastic" concept and may not "create a safe harbor for a party that is obligated to preserve evidence." *Orbit One Communications, Inc. v. Numerex Corp.,* 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010).
- An order might reflect a "reasonable compromise between the parties' positions." *Botey v. Green,* No. 12-cv-01520, 2016 WL 1357708 (M.D. Pa. Apr. 4, 2016).

PROPORTIONALITY (5)

Might changes to scope of discovery and emphasis on proportionality address any concern about "overpreservation?"

- *Davidson v. City of Opelika,* No. 14-cv-323, (M.D. Ala. May 12, 2015).
- *Campbell v. Facebook, Inc.,* No. 13-cv-05596, (N.D. Ca. Oct. 14, 2015).

PROPORTIONALITY (6) REPRESENTATIVE DECISIONS

- *McNulty v. Reddy Ice Holdings, Inc.,* 217 F.R.D. 569 (E.D. Mich. 2011).
- *EEOC v. George Washington U.,* No. 17-cv-1978, 2020 WL 3489478 (D.D.C. June 26, 2020).
- *Gross v. Chapman,* No. 19-cv-2743, 2020 WL 4336062 (N.D. Ill. July 28, 2020).

PROPORTIONALITY (7) REPRESENTATIVE DECISIONS

- *Wagoner v. Lewis Gale Med. Center, LLC,* No. 15cv570 (W.D. Va. July 13, 2016).

- *Wilmington Trust Co. v. AEP Generating Co.*, 13-cv-01213 (S.D. Ohio Mar. 7, 2016).

PROPORTIONALITY (8) REPRESENTATIVE DECISIONS

- *Compare Oxbow Carbon & Minerals LLC v. Union Pacific RR. Co.,* No. 11-cv-1049 (PLF/GMH) (D.D.C. Sept. 11, 2017) (party resisting discovery presented detailed projections of cost and burden sufficient to lead to issuance of protective order) *with Mann v. City of Chicago*, No. 15 CV 9197 (N.D. Ill. Sept. 8, 2017) (motion for protective order denied as resisting party presented little or no support to establish undue cost and burden).

PROPORTIONALITY (9) "DISCOVERY ABOUT DISCOVERY"

- *Banks v. St. Francis Medical Center, Inc.,* No. 15-cv-2602 (D. Kan. Nov. 23, 2015) (denying motion to compel discovery of defendant's preservation and collection methods absent showing of "specific instances and examples" of unreasonable or inadequate efforts).
- *Little Hocking Water Ass'n Inc. v. E.I. DuPont De Nemours & Co.* (S.D. Ohio. Sept. 20, 2013) (denying leave to conduct discovery of litigation hold: "Based on the present record, the Court is not convinced that a preliminary showing of spoliation has been made. Rather, *** contention that information *** has been destroyed is speculative at best.").

PROPORTIONALITY (10) "DISCOVERY ABOUT DISCOVERY"

- *Marchand v. Simonson,* No. 11-CV-348 (D. Conn. Dec. 30, 2013) (allowing party to engage in discovery directed to the preservation of taser gun video data and to participate "in a meeting with knowledgeable officials" about preservation).
- *Pandeosingh v. American Medical Response, Inc.,* No. 14-cv-01792 (D. Colo. Feb. 2, 2016) (denying discovery of "acknowledged email failure" that is of "little real significance to the issues").
- *Ramos v. Hopele of Fort Lauderdale, LLC d/b/a Pandora@Galleria*, Case No. 17-62100-CIV-MORENO/SELTZER (S.D. Fla. Mar. 19. 2018) (denying request for forensic examination of cell phone as content sought not relevant and no limits proposed on scope of examination).

PROPORTIONALITY (11)
"DISCOVERY ABOUT DISCOVERY"

"In short, the phrase 'discovery about discovery' should be abandoned by parties and courts in favor of informed and reasonable case management. That analysis should distinguish between 'merits-directed discovery' and 'process-directed discovery.'"

C.B. Shaffer, "Deconstructing 'Discovery About Discovery'," 19 *Sedona Conf. J.* 215, 217 (2018).

PROPORTIONALITY (12)
PROPORTIONALITY AND PRESERVATION

Lord Abbett Mun. Income Fund, Inc. v. Asami, 2014 WL 5477639 (N.D. Ca. Oct. 29, 2014) (after entry of final judgment and while appeal pending):

- A party is preserving computers at a cost of $500/month.
- It appears that the computers do not contain any relevant ESI.
- Defendants argue lack of "clear understanding" of process used to determine computers unlikely to contain relevant ESI.
- Court finds no basis from which to reasonably conclude that computers contain relevant ESI.

PROPORTIONALITY (13)
PROPORTIONALITY AND PRESERVATION

- Defendants had opportunity to inspect computers but did not do so.
- "[P]roportionality principle applies to the duty to preserve potential sources of evidence."
- Defendants refused to continue to pay fair share of storage costs (which they did before summary judgment granted).
- "the Court grants permission to dispose of the *** computers."

PROPORTIONALITY (14)
PROPORTIONALITY AND PRESERVATION

- Note the procedural posture.
- Assume that a magistrate judge has ruled at the initial scheduling conference that, based on proportionality, certain ESI need not be preserved by a party. Should the party dispose of that ESI?

PROPORTIONALITY (15)
PROPORTIONALITY AND PRESERVATION

- *Marten Transport, Ltd. v. Plattform Advertising, Inc.,* No. 14-cv-02464, 2016 WL 492743 (D. Kan. Feb. 8, 2016) (limiting preservation to sources most related to claims and defenses).
- *ML Healthcare Services, LLC v. Publix Super Markets, Inc.,* 881 F.3d 1293 (11th Cir. 2018) (affirming denial of spoliation sanction when party preserved "most relevant portion" of video and party "might reasonably, and in good faith, have concluded it did not have to comply with such a broad and far-reaching request [to preserve]").

PROPORTIONALITY (16) RESOURCES

- J.C. Francis IV, "Good Intentions Gone Awry: Privacy as Proportionality Under Rule 26(b)(1)," 59 *U. of San Diego L. Rev.* 397 (2022), https://www.sandiego.edu/law/academics/journals/sdlr/?_focus=3371
- *The Sedona Conference Commentary on Proportionality in Electronic Discovery,* 18 *Sedona Conf. J*. 141 (2017), 39362 sed_18 (thesedonaconference.org)
- C.B. Shaffer, "The 'Burdens' of Applying Proportionality," 16 *Sedona Conf. J.* 55 (2015), The Burdens of Applying Proportionality.16TSCJ55_0.pdf (thesedonaconference.org)

POSSESSION, CUSTODY, OR CONTROL REPRESENTATIVE DECISIONS

- *Botey v. Green,* No. 12-cv-01520 (M.D. Pa. Apr. 4, 2016).
- *Edwards v. 4JLJ, LLC,* Civil Action No. 2:15-CV-299 (S.D. Tex. June 4, 2018).
- *Matthew Enterprise, Inc. v. Chrysler Group, LLC,* No. 13-cv-04236 (N.D. Ca. Dec. 10, 2015).

ENCRYPTION

- R.J. Hedges & K.B. Weil, "How Will NY Courts Handle Encrypted Communications?" *NYLJ* 11 (Oct. 5, 2016).
- R.J. Hedges & K.B. Weil, "Social Media and Encrypted Data in Discovery," *Pretrial Practice & Discovery* (ABA Sec. of Litig.: posted Nov. 15, 2016).
- Imposing Rule 37(e)(1) sanctions but declining to impose adverse inference instruction pursuant to 37(e)(2) for destruction of encryption keys. *Doubleline Capital LP v. Odebrecht Finance, Ltd.,* 17-CV-4576 (GHW) (BCM) (S.D.N.Y. Mar. 30, 2021).

THE DUTY TO CONFER (1)

- Rule 26(f) requires the parties to cooperate in preparing the discovery plan.

- Rule 26(c)(1) requires a party, when moving for a protective order, to certify that "the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."

- Rule 37(a)(1) requires a party, when moving to compel disclosure or discovery, to make the same certification as above.

THE DUTY TO CONFER (2) REPRESENTATIVE DECISIONS

- "Two-way communication" required to satisfy the duty to confer. *Easley v. Lennar Corp.,* 2012 WL 2244206 (D. Nev. June 15, 2012).

- Courts can require parties to confer outside the context of specific rules. *See, e.g., In re Facebook PPD Ad. Litig.,* 2011 WL 1324516 (N.D. Ca. Apr. 6, 2011).

- The duty to confer does not impose an obligation on a party "to continue negotiations that seemingly have no end." *Fleischer v. Phoenix Life Ins. Co.,* 858 F. Supp. 2d 290 (S.D.N.Y. 2012).

THE DUTY TO CONFER (3) REPRESENTATIVE DECISIONS

- Declining to impose certain sanctions when both parties failed to cooperate in timely fashion. *Johnson v. Ford Motor Co.,* No. 13-cv-06529 (S.D. W. Va. Sept. 11, 2015), *objections sustained in part and overruled in part* (S.D. W. Va. Nov. 5, 2015).

- "Woefully inadequate" effort to confer results in denial of motion to compel discovery. *U-Haul Co. v. Gregory J. Kamer, Ltd.,* No. 12-cv-00231 (D. Nev. Sept. 17, 2013).

COOPERATION (1)

Committee Note to Amended Rule 1:

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.

COOPERATION (2)

"Cooperation" is not a new concept: It was "key" to the 1993 amendments.

- *See* R.J. Hedges, "What You Should Know About the Proposed Civil Procedure Rules Amendments," 39 Practical Lawyer 33 (1993).
- The Sedona Conference® Cooperation Proclamation (July 2008).
- J.W. Craig, "LaRussa's Dilemma: Does an Advocate Have a Duty to the Client to Press Every Advantage?" *PP&D* (Spring 2009).
- J.R. Baron, "E-discovery and the Problem of Asymmetric Knowledge," *presented at Mercer Law School* (Nov. 7, 2008); *see "*Mercer Ethics Symposium," 60 *Mercer L. Rev.* 863 (Spring 2009).

COOPERATION (3)

Johnson v. Everyrealm, Inc., 22 Civ. 6669 (PAE) (S.D.N.Y. Apr. 26, 2023) (granting request of plaintiff's attorney for adjournment due to medical emergency):

"The Court congratulates *** and his family on the birth of their child and wishes *** a speedy and full recovery. The Court reminds defense counsel of the expectation of the Judges in this District that counsel will comport themselves with decency. Counsel's attempt to exploit a moment of obvious personal exigency to extract concessions ***, in other litigation no less, was unprofessional. The Court expects better."

COOPERATION (4)
RULE 29

"Unless the court orders otherwise, the parties may stipulate that: ***

(b) Other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial."

See, e.g., In re: Transpacific Passenger Air Transp. Antitrust Litig., No. C-07-05634 (N.D. Ca. Feb. 24, 2014) (quashing subpoena on nonparty that violated expert stipulation agreed on by parties).

COOPERATION (5)
DISINCENTIVES TO COOPERATE?

- What if a law firm engages in costly discovery using sophisticated technologies to, for example, conduct a privilege review before production and the client limits what the firm will be paid to do?
- Are there economic disincentives to cooperate?

RECURRING TOPICS

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PRESERVATION (1)
THINGS TO THINK ABOUT

- Obligation to retain vs. duty to preserve.
- “Triggering” duty to preserve.
- Scope of duty to preserve:
  - Temporal dimension.
  - “Spatial” dimension.

PRESERVATION (2)
THINGS TO THINK ABOUT

- Communicating the hold.
- Monitoring and modifying the hold.
- Ending the hold.
- The role of the court.

PRESERVATION (3)
SOMETHING ELSE TO THINK ABOUT

Be careful about asserting work product:

"The defendants argued that Siani had raised 'concerns that he was a victim of ongoing age discrimination' at a meeting in January 2008, and that '[l]itigation was therefore reasonably foreseeable' as of that date. If it was reasonably foreseeable for work product purposes, Siani argues, it was reasonably foreseeable for duty to preserve purposes. The court agrees." *Siani v. State University,* No. 09-cv-407 (E.D.N.Y. Aug. 10, 2010), *aff'd,* (E.D.N.Y. June 28, 2011).

PRESERVATION (4)

- According to FRCP Rule 26(b)(1), the duty to preserve extends only to information that is relevant to any party's claim or defense. This means there is no need to save every piece of information or subject all employees to a legal hold.
- Really? Is the latter second sentence correct?

PRESERVATION (5)

R.J. Hedges & M.R. Grossman, “Ethical Issues in E-Discovery, Social Media, and the Cloud,” 39 *Rutgers Comp. & Tech. L. J.* 128-29 (2013):

“I think there are two schools of thought regarding preservation. First is the ‘save everything’ mentality. The downside is that you spend a lot of time, effort, and money searching ‘everything’ for potentially relevant information. Second is the ‘proportionality’ or ‘reasonableness’ approach where the client makes a thoughtful decision about what is most likely to be probative and contribute to the resolution of the dispute ***. The latter approach can be risky at the beginning of the matter, however, when all the issues have not fully emerged, as you may fail to preserve something that should be preserved because you were not aware of its relevance at the time.”

PRESERVATION (6)

- *Aztec Group, Inc. v. Klimov,* No. 15-cv-03449-RMW (N.D. Ca. Aug. 25, 2016) (denying preservation order as no evidence that party would not comply with preservation obligations).
- *State of Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008) (dismissing "preemptive strike" declaratory judgment action).
- *Swetlic Chiropractic & Rehab. Ctr., Inc. v. Foot Levelers, Inc.,* No. 16-cv-236 (S.D. Ohio Apr. 27, 2016) (granting *ex parte* preservation order pursuant to Rule 26(d) against non-party).
- *Tesla, Inc. v. Tripp.,* Case No. 3:18-cv-296 (D. Nev. June 26, 2018) (pursuant to Rule 26, "courts regularly authorize documents preservation subpoenas and other expedited discovery vis-à-vis non-party providers of cloud storage and email").

See generally The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & the Process (June 2019), https://thesedonaconference.org/publication/Commentary_on_Legal_Holds.

PRESERVATION (7)
IS A PRESERVATION ORDER A CASE MANAGEMENT ORDER OR AN INJUNCTION?

- *Compare Pueblo of Laguna v. United States,* 60 Fed. Cl. 133 (Ct. Cl. 2004) ("CMO") *with Haraburda v. Arcelor Mittal USA, Inc.,* 2011 WL 2600756 (N.D. Ill. June 28, 2011) (injunction).

- What are the consequences of one vs. the other?

Cf. Wallace v. Kmart Corp., 687 F.3d 86 (3d Cir. 2012) (distinguishing between sanctions imposed under Rule 37 and finding of contempt under Rule 45 for purposes of appellate jurisdiction).

PRESERVATION (8) "OVERPRESERVATION"

We speak of *preservation* of ESI for purposes of litigation. But ESI is *created* and *retained* for various reasons:

- Business needs.
- Records retention policies (followed or not).
- Compliance with statutes/regulations.

What is interaction between these and duty to preserve?

- *Austrum v. Federal Cleaning Contractors, Inc.,* No. 14-cv-81245 (S.D. Fla. Jan. 8, 2016).

PRESERVATION (9) "OVERPRESERVATION"

- Is there "overpreservation?"
- Is there room for proportionality in prelitigation preservation decisions? *See Pippins v. KPMG, LLC*, 279 F.R.D. 245 (S.D.N.Y. 2012).

PRESERVATION (10)

"Pending amendments *** would refine the scope of permissible discovery in terms of proportionality. *** [S]uch a revision of Rule 26 *** may well have a symmetrical impact upon the scope of the preservation duty."

P. Sloan, "The Compliance Case for Information Governance," XX *Richmond J. of Law & Tech.* 20 n.70 (2014).

PRESERVATION (11)

- *Sedona Principle* 5: *"*The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that is expected to be relevant to claims or defenses in reasonably anticipated or pending litigation. However, it is unreasonable to expect parties to take every conceivable step or disproportionate steps to preserve each instance of relevant electronically stored information."
- Can a party be sanctioned when it acted reasonably but didn't get "it" right? Not under amended Rule 37(e).

PRESERVATION (12)
THE *RAMBUS* CHRONOLOGY

Micron Tech., Inc. v. Rambus, Inc., 2013 WL 227630 (D. Del. Jan. 2, 2013) and *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 897 F. Supp. 2d 939 (N.D. Ca. 2012):

PRESERVATION (13)
THE *RAMBUS* CHRONOLOGY

March 1998 – Presentation to the Board:

- Prioritizes litigation targets and choices of forum
- Litigation to commence 4 – 6 months after infringing products purchased and reverse-engineered
- Targets to be offered 5% royalty agreements
  - "We're not interested in settling"
- Establish "discovery database"
- Establish document retention policy

PRESERVATION (14)
THE *RAMBUS* CHRONOLOGY

July 1998 – Presentation to engineers (with instruction to "look for things to keep")

September 1998 – "Shred Day"

July 1999 – Patent issued

- Goal to file infringement actions by October 1

August 1999 – Second "Shred Day"

January 2000 – Action filed against Hitachi

- Micron and Hynix file declaratory judgment actions

PRESERVATION (15) REPRESENTATIVE DECISIONS

- *Cache La Poudre Feeds, LLC v. Land O' Lakes, Inc.,* 244 F.R.D. 614 (D. Colo. 2007) (failure to follow up to preserve hard drives of former employees and to monitor compliance).
- *Innis Arden Golf Club v. Pitney Bowes, Inc.,* 257 F.R.D. 334 (D. Conn. 2009) (failure of expert consultant to preserve).
- *Mazzei v. The Money Store,* No. 1-cv-5694 (S.D.N.Y. July 18, 2014), *aff'd,* No. 15-2054 (2d Cir. July 15, 2016) (summary order) (failure to preserve ESI held by third party given "practical ability" to obtain it).
- *Rubury v. Ford Motor Co.,* Docket No. A-2839-17T2 (N.J. App. Div. Mar. 6, 2019) (failure to preserve "restraint control module" in vehicle).

PRESERVATION (16)
IS RESTORATION REQUIRED?

- *Great American Ins. Co. v. Lowry Dvlpt., LLC*, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) (duty to preserve hard drive whether in working order or not).
- *Rockwood v. SKF USA Inc.,* 2010 WL 3860414 (D.N.H. Sept. 30, 2010) ("better practice" would have been to preserve damaged hard drives).

PRESERVATION (17)
RECORDS RETENTION POLICIES

- What exactly is a “record?” The classic definition, at least for the Federal Government: http://www.archives.gov/era/pdf/Functional-Requirements-and-Attributes-for-Dec07-2005.pdf.
- Translation = A record is reliable documentary evidence of a business process related to an organization’s business purpose.

PRESERVATION (18)
RECORDS RETENTION POLICIES

This definition is much narrower than that of "document" for purposes of discovery:

- "Record" is not equal to "document" in the "possession, custody, or control" of a party or nonparty subject to a duty to preserve.
- "Document" may be broader than "record" and subject to preservation and production. *See Benefield v. Mstreet Entertainment, LLC,* No. 13-cv-1000 (M.D. Tenn. Feb. 1, 2016).

PRESERVATION (19)
RECORDS RETENTION POLICIES

- Management of “non-records” is complicated given an organization’s fear of spoliation and collection of all types of ESI.
- Definitions can be tricky: http://www.youtube.com/watch?feature=player_embedded&v=PZbqAMEwtOE.

(With thanks to Ken Withers)

PRESERVATION (20)
RECORDS RETENTION POLICIES

What, if anything, might be a consequence of an organization's *failure* to comply with its own retention policies?

- *Brigham Young Univ. v. Pfizer,* 282 F.R.D. 566 (D. Utah 2012) ("A violation of private corporate policy does not always equate to a violation of the law").

When does it, if ever?

- *Spanish Peaks Lodge v. LLC v. Keybank Nat'l Ass'n,* 2012 WL 895465 (W.D. Pa. Mar. 15, 2012) (considering whether parties "instituted a document retention policy for the sole and express purpose of destroying documents").

PRESERVATION (21)
RECORDS RETENTION POLICIES

Isn't that a legitimate purpose of a retention policy?

- *Crawford v. New London,* No. 11-cv-1371 (D. Conn. May 23, 2014) (finding no spoliation because (1) demand letter received after original DVD had been recorded over consistent with sixteen-day retention policy, (2) no evidence of culpable state of mind in recording over DVD, (3) identical copy of original DVD existed, and (4) no evidence that copy of lesser quality than original).

PRESERVATION (22)
RECORDS RETENTION POLICIES

But note that violation of a records retention obligation imposed by law might have adverse consequences. *See United States ex rel. Scutellaro v. Capitol Supply, Inc.,* Civil Action No. 10-1094 (BAH) (D.D.C. Apr. 19, 2017).

PRESERVATION (23)
RECORDS RETENTION POLICIES

What might be asked when making risk management decisions about records retention?

- Has the information in issue been accessed?
- When was the last date of access?
- Who accessed the information and why?
- What do records schedules show about what information exists?
- Is there anything in the information related to actual or reasonably foreseeable litigation or investigation?

PRESERVATION (24)
"BYOD"/"COPE"

What might be the consequences of "BYOD/COPE" policies adopted by organizations?

- Presumably, such policies will lead to greater costs, as there will be more "sources" of ESI.
- If an organization imposes an outright ban (and leaving aside employee morale), how might IT or RIM monitor for unauthorized devices?
- How will an organization monitor use of personal devices such as smart phones, tablets, and peripheral devices used at home to telecommute?

PRESERVATION (25)
"BYOD/COPE"

- How will records retention policies apply and how will legal hold duties be communicated?
- How will employee privacy rights be protected when ESI on devices must be preserved, collected, reviewed, and produced?

PRESERVATION (26)
SOCIAL MEDIA

Content of social media as a subject of preservation:

See Gatto v. United Air Lines, Inc., 2013 WL 1285285 (D.N.J. Mar. 25, 2013) (Facebook account "clearly within his control, as [p]laintiff had authority to add, delete, or modify his account's content").

- Who has "possession, custody, or control" and is that important?
- Is content ESI or ephemeral information?
- Is a "snapshot" sufficient?

PRESERVATION (27)
MIGHT TECHNOLOGY "OVERTAKE" RETENTION AND PRESERVATION?

The Data Lake: "A data lake is a storage repository that holds a vast amount of raw data in its native format until it is needed. *** Increasingly *** the term is being accepted as a way to describe any large data pool in which the schema and data requirements are not defined until the data is queried."

M. Rouse, "data lake," SearchAWS.com

PRESERVATION (28)
MIGHT TECHNOLOGY "OVERTAKE" RETENTION AND PRESERVATION?

D. Oldham, "This Message Will Self-Destruct in 10 Seconds: Snapchat, Confide and the Implications of Disappearing Content for Your Business," Barnes & Thornburg LLP (posted Feb. 9, 2015), https://btlaw.com/en/insights/blogs/this-message-will-self-destruct-in-10-seconds-snapchat-confide-and-the-implications-of

INTERLUDE

A “bright-line” for triggering the duty to preserve: Would it allow persons and organizations to be “bad” without any consequences? Or does “uncertainty” breed (reasonable) caution?

INTERLUDE

Assume these facts:

- Plaintiff alleges that defendant faxed advertisements to it in violation of a federal law. The ads were sent through a non-party service provider. The plaintiff wants the provider to suspend its 60-day retention policy and preserve transmission reports and related electronically stored information (ESI) that will identify fax numbers that received the ads received from the defendant. The provider said it would not.

Should the provider suspend its retention policy? Why?

What should the provider retain?

What can the plaintiff do to compel the provider to retain the transmission reports and related ESI?

INTERLUDE

Assume these facts:

- March 2010: Employee complains to the Human Resources department that she is being subjected to job discrimination.
- April 2010: Emails are exchanged between a union representative assisting Employee and a representative of Employer about Employee's complaint.
- July 2010: Employee is constructively discharged.
- July 2010: Email is purged automatically unless saved in a folder.
- September 2010: Employee files an administrative claim against Employer and Employer institutes litigation hold.
- May 2012: Civil action filed. Employer failed to produce one email during discovery. Employee has a copy of the email. Employee moves for sanctions.

INTERLUDE

Under the facts described in the prior slide:

- When did the duty to preserve arise?
- Was there prejudice?
- Was Rule 37(e) applicable?

Hixson v. City of Las Vegas, 2013 WL 3677203 (D. Nev. July 10, 2013).

INTERLUDE

- *Hixson* notes that, “we live in a litigious age” and that, “[i]t is not reasonably foreseeable that every internal employment complaint may result in litigation if not resolved to the employee’s satisfaction.” *Hixson* declined to address “the outer markers” of what notice is sufficient to trigger the duty to preserve.
- What might be sufficient?

INTERLUDE

Assume these facts:

- A rider on a rollercoaster sustained personal injuries when the car in which he was riding came to a sudden stop and was struck by the following car.
- The rider, among others, filed a personal injury action against the rollercoaster's owner/operator.
- The owner/operator counterclaimed against the rider, alleging that he had worn a baseball cap despite being asked to remove it and that the hat flew off the rider's head, became lodged in his car's braking system, and caused the collision.
- The owner/operator preserved a photograph of the rider wearing a cap but did not preserve photographs of any other rider.

INTERLUDE

Under the facts described in the prior slide, did the owner/operator breach its duty to preserve?

Simms v. Deggeller Attractions, Inc., 2013 WL 49756 (W.D. Va. Jan. 2, 2013).

INTERLUDE

Assume these facts:

- Two parties are involved in a breach of contract litigation.
- An employee of the defendant contributed sales data used to calculate a royalty payment relevant to the litigation.
- After the duty to preserve had been triggered, the employee retired and, consistent with the defendant's policy, his email archives were deleted thirty days later.
- The sales data he contributed were lost when the archives were deleted.

INTERLUDE

Under the facts described in the prior slide:

- Was there a duty to preserve the employee's archives?
- Was there spoliation?
- Would sanctions be warranted?

AMC Tech., LLC v. Cisco Sys., Inc., 2013 WL 3733390 (N.D. Ca. July 15, 2013).

INTERLUDE

Assume these facts:

- An individual confers with an attorney about filing a civil action against "X."
- The individual is convinced that "X" has wronged him and that he could succeed in litigation.
- The attorney rejects the representation and advises the individual that he has neither a factual nor a legal basis to file a civil action.

Has the individual's duty to preserve been triggered? When? Why?

Cf. Kan-Di-Ki, LLC v. Suer, C.A. No. 7937-VCP (Del. Ch. July 22, 2015) (duty arose, at latest, when plaintiff "was communicating with his attorneys about possible allegations ***").

INTERLUDE

Assume these facts:

- The plaintiff in an employment discrimination action moved for a document preservation order. He did so after learning that the defendant planned to migrate its email system to a new platform.
- The defendant contended that it had addressed the plaintiff's concerns: The parties had agreed on 91 "custodians" and the defendant had taken steps to ensure that relevant ESI would be preserved.

Should the order issue?

McDaniel v. Loyola Univ. Med. Ctr., No. 13-cv-06500 (N.D. Ill. May 5, 2014).

INTERLUDE

Assume these facts:

- A nonparty has been advised by the attorney for a party to expect a subpoena for production of records but has not yet been served with the subpoena.

Has the duty to preserve attached?

What is the scope of the duty?

What if the subpoena hasn't been served within "X" days?

Ervine v. B., No. 11 C 1187 (N.D. Ill. Mar. 10, 2011).

INTERLUDE

Assume these facts:

- A corporation reasonably anticipates that it will be named as a defendant and institutes a legal hold.
- The corporation is not named as a defendant when the civil action is commenced.

Has the duty ended? If not, when does it end?

What if the corporation is instead served with a subpoena?

Should the corporation release the hold once it has complied with the subpoena?

EPHEMERAL INFORMATION

- *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (random access memory).
- *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (oscilloscope readings).
- *Drips Holdings, LLC v. Teledrip, LLC,* Case No. 5:19-cv-2789 (N.D. Ohio Sept. 29, 2022) (Slack retention setting changed after becoming aware of duty to preserve)
- K.J. Withers, "Ephemeral Data and the Duty to Preserve," 37 *U. Balt. L. Rev.* 349 (2008).
- The Sedona Conference Commentary on Ephemeral Messaging, 22 *Sedona Conf. J.* 435 (2021), https://thesedonaconference.org/civicrm/mailing/view?reset=1&id=2153.

DISCOVERY HEARINGS (1) TOPICS

To determine whether there was a failure to preserve or search adequately, a hearing might address:

"1. ***what did Defendant's system of creating and storing ESI consist of;

2. When and how a litigation hold was instituted;
3. What employees were notified of the litigation hold;
4. What efforts were made to preserve ESI;
5. What or whose computers *** were searched for responsive ESI;
6. How the computers *** were searched (e.g., keyword searches, manual review, computer-assisted coding); and
7. Who performed the searches."

Chura v. Delmar Gardens, Civil Action No. 11-2090 (D. Kan. Mar. 20, 2012).

DISCOVERY HEARINGS (2)
EXPERTS

- *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008).
- *Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc.,* 2012 WL 5927379 (S.D.N.Y. Nov. 21, 2012).
- R.J. Hedges, "Rule 702 and Discovery of Electronically Stored Information," 8 *DDEE* 122 (2008).

DISCOVERY HEARINGS (3) EXPERTS

D.J. Waxse, "Experts on Computer-Assisted Review: Why Federal Rule of Evidence 702 Should Apply to Their Use," 52 *Washburn L.J.* 207 (2013):

Summary: The Federal Rules of Evidence apply to proceedings before USMJs and there is no exception for discovery-related hearings:

- Rule 1101(a) provides that the rules apply.
- Rule 1101(d) does not exempt discovery-related hearings.

TRANSNATIONAL DISCOVERY (1)

- *Corel Software, LLC v. Microsoft Corp.,* Case No. 2:15-cv-00528-JNP-PMW (D. Utah Oct. 5, 2018).
- *d'Amico Dry d.a.c. v. Nikka Finance, Inc.,* CA 18-0284-KD-MU (S.D. Ala. Oct. 19, 2018).
- *Finjan, Inc. v. Zscaler, Inc*., Case No. 17-cv-06946-JST (KAW) (N.D. Ca. Feb. 14, 2019).

TRANSNATIONAL DISCOVERY (2)

- *Giorgi Global, Inc. v. Smulski,* Civil Action No. 17-4416 (E.D. Pa. May 21, 2020).
- *In re App. of Daniel Snyder,* Misc. Action No. 20-mc-00199-NRN (D. Colo. Mar. 5, 2021).

See E.F. Maluf, *et al., The Intersection of 28 U.S.C. 1782 and the GDPR* (Seyfarth: June 22, 2021), The Intersection of 28 U.S.C. § 1782 and the GDPR | Seyfarth Shaw LLP.

INSPECT, COPY, TEST, OR SAMPLE (1)

Rule 34(a):

- *In re Ford Motor Co.*, 345 F.3d 1315 (11th Cir. 2003) (pre-2006 amendments).
- *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008) (post-2006 amendments).

INSPECT, COPY, TEST, OR SAMPLE (2)

- *Kickapoo Tribe v. Nemaha Brown Watershed Joint Dist. No. 7,* No. 06-cv-2248 (D. Kan. Sept. 23, 2013) (denying broad, non-specific request for forensic imaging of personal computers of current and former personnel of defendant; defendant had no right of access under Rule 34(a) and request intrusive and raises privacy concerns).
- *NOLA Spice Designs, LLC v. Haydel Enterprises, Inc.,* No. 12-2515 (E.D. La. Aug. 2, 2013) (denying motion to compel forensic examination of computers through proportionality analysis under Rule 26(b)(2)(C)).

INSPECT, COPY, TEST, OR SAMPLE (3)

- *Sophie & Chloe, Inc. v. Brighton Collectibles, Inc.,* No. 12-cv-2472 (S.D. Ca. Sept. 13, 2013) ("Given the legitimate privacy and other interests at issue, absent 'specific, concrete evidence of concealment or destruction of evidence,' courts are generally cautious about granting a request for a forensic examination of an adversary's computer").
- *Teledyne Instruments, Inc. v. Cairns,* No 12-cv-854 (M.D. Fla. Oct. 25, 2013) (denying request for forensic imaging despite discrepancies in metadata absent explanation "why the discrepancies *** are cause for concern or suspicion").

ACCESSIBILITY (1)

Rule 26(b)(2)(B): “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.”

ACCESSIBILITY (2)

- Emphasis on “sources,” not information itself.
- What defines “not reasonably accessible?”
- How does one disclose “not reasonably accessible” sources?
- What is the duty to preserve sources deemed “not reasonably accessible?”

ACCESSIBILITY (3)

- Is exhaustion of “first-tier” discovery necessary? Should it be?
- Efficacy of sampling?
- Availability of cost-sharing or -shifting?

ACCESSIBILITY (4)
WHAT IS "NOT REASONABLY ACCESSIBLE?"

Sedona Principle 2: "When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

ACCESSIBILITY (5)
WHAT IS "NOT REASONABLY ACCESSIBLE?"

Sedona Principle 8: *"*The primary sources of electronically stored information to be preserved and produced should be those readily accessible in the ordinary course. Only when electronically stored information is not available through such primary sources should parties move down a continuum of less accessible sources until the information requested to be preserved or produced is no longer proportional."

ACCESSIBILITY (6)
EXAMPLES OF INACCESSIBLE SOURCES

Committee Note to 2006 Amendments to Rule 26(b)(2):

- Magnetic backup tapes
- Legacy data that is unintelligible
- Fragmented data after deletion
- Unplanned output from databases different from designed uses

What sources will be – or remain – not reasonably accessible as technology advances?

ACCESSIBILITY (7)
REPRESENTATIVE DECISIONS

- *Sung Gon Kang v. Credit Bureau Connection, Inc.,* Case No. 1:18-cv-01359 –AWI-SKO (E.D. Ca. Apr. 7, 2020) (conclusory, unsupported statements insufficient to meet burden of proof)
- *Palgut v. City of Colorado Springs*, 2007 WL 4277564 (D. Colo. Dec. 3, 2007) (lack of hardware).
- *United States ex rel. Guardiola,* No. 12-cv-00295 (D. Nev. Aug. 25, 2015) (backup tapes).
- *Robinson v. De Niro,* 19-CV-9156, 2022 WL 229593 (S.D.N.Y. Jan. 26, 2022) (former email account).

THE 30(b)(6) DEPOSITION (1) ADVISORY COMM. NOTE TO 1970 AMENDMENT OF RULE 30

"The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. *** It will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. *** The provisions should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge."

THE 30(b)(6) DEPOSITION (2)

- Rule 30(b)(6): "Notice or subpoena directed to an Organization."
- Is 30(b)(6) a default for a meaningful discussion at the Rule 26(f) "meet-and-confer?"
- Is "it" worth it? Or is a 30(b)(6) deposition before a request to produce ESI worthwhile?

See Miller v. York Risk Services Group, No. 13-cv-1419 (D. Ariz. Apr. 15, 2014).

THE 30(b)(6) DEPOSITION (3)

Rule amended effective Dec. 1, 2020:

- Serving party and the organization must "confer in good faith about the matters for examination."
- Subpoena "must advise nonparty organization of its duty to confer with the serving party and to designate person who will testify."

THE 30(b)(6) DEPOSITION (4) REPRESENTATIVE DECISIONS

- *In re: Actos® (Pioglitazone) Prod. Liability Litig.,* No. 6:11-md-02299-RFD-PJH (W.D. La. June 23, 2014) (Amended Final Memorandum Decision and Ruling (Takeda Only)).
- *Leach Farms, Inc. v. Ryder Integrated Logistics, Inc.,* No. 14-C-0001 (E.D. Wisc. Jan. 26, 2015).
- *LeBron v. Royal Caribbean Cruises, Ltd.,* Case No. 16-24687-CV-WILLIAMS/SIMONTON (S.D. Fla. Sept. 6, 2018).

SEARCH (1)

Regardless of how a search is conducted, how much is enough? One answer:

"Absent an order of the Court upon a showing of good cause or stipulation ***, a party from whom ESI has been requested shall not be required to search for responsive ESI:

a. from more than ten (10) key custodians;
b. that was created more than five (5) years before the filing of the lawsuit;
c. from sources that are not reasonably accessible without undue burden or cost; or

SEARCH (2)

d. for more than 160 hours, *inclusive* of time spent identifying ***, collecting ***, searching ***, and reviewing *** for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records *** for review by the adversary and the Court, if requested."

Discovery Order, Hon. Paul W. Grimm, quoted in *Design Basics, LLC v. Carhart Lumber Co.,* No. 13-cv-125 (D. Md. Nov. 24, 2014).

SEARCH (3)

How do we search for discoverable ESI?

- Manually?
- With automated assistance?
- Which is “better” and why?

SEARCH (4)

Automated search tools include:

- Keyword search
- Concept search
- Discussion threading
- Clustering
- Find similar
- Near-duplicate identification

M.D. Nelson, *Predictive Coding for Dummies®* 9-10 (2012).

SEARCH (5)
REPRESENTATIVE DECISIONS

- Are search terms accurate? *See In re National Ass'n of Music Merchants, Musical Instruments and Equipment Antitrust Litig.,* 2011 WL 6372826 (S.D. Ca. Dec. 19, 2011).
- Orders approving search terms, *see W Holding Co. v. Chartis Ins. Co.,* No. 11-2271 (D.P.R. Apr. 3, 2013) and *EEOC v. Original Honeybaked Ham Co.,* 2013 WL 753480 (D. Colo. Feb. 27, 2013).
- Limitation on scope of search and recognition that, under the circumstances, "ESI is neither the only nor the best and most economical discovery method for obtaining the information the government seeks." *United States v. University of Nebraska,* No. 11-cv-3209 (D. Nebr. Aug. 25, 2014).
- "Without any showing that additional searches are likely to result in a higher rate of success, the Court will not order NMC to engage in further problem-solving." AND NOTE that, "[a]n attorney is not required to offer opposing counsel his or her own ideas about how to narrow a particular search." *Lareau v. Northwestern Med. Ctr.,* 2019 WL 1379872 (D. Vt. Mar. 27, 2019).

SEARCH (6)
REPRESENTATIVE DECISIONS

- Federal rules do not require perfection and denying request to test sufficiency of adversary's search effort, *Freedman v. Weatherford Internat'l Ltd.,* No. 12-cv-2121 (S.D.N.Y. Sept. 12, 2014).
- Interpreting agreement between the parties, finding that documents not responsive to agreed-on search terms do not have to be produced, *BancPass, Inc. v. Highway Toll Admin., LLC,* 14 CV 1062-SS (W.D. Tex. July 26, 2016).
- Compelling meet-and-confer regarding search terms, *Pyle v. Selective Ins. Co. of America,* No. 16-cv-335 (W.D. Pa. Sept. 30, 2016).

SEARCH (7)
REPRESENTATIVE DECISIONS

- Compelling party to write program to allow database to be queried for existing discoverable information. *Meredith v. United Collection Bureau, Inc.,* No. 16 CV 1102 (N.D. Ohio Apr. 13, 2017).
- Finding search to have been adequate based on steps taken by in-house counsel to coordinate and supervise search and rejecting requesting party's concerns about adequacy as speculation. *Mirmina v. Genpact LLC,* No. 16-cv-00614 (AWT) (D. Conn. July 27, 2017).
- Finding search terms overinclusive. *American Municipal Power, Inc. v. Voith Hydro, Inc.,* No. 2:17-cv-708 (S.D. Ohio June 4, 2018).

SEARCH (8)
REPRESENTATIVE DECISIONS

- Establishing production protocol. *City of Rockford v. Mallinckrodt ARD Inc.,* No. 17 CV 50107 (N.D. Ill. Aug. 7, 2018).
- *FTC v. American Screening, LLC*, No. 4:20-CV-1021 RLW (E.D. Mo. July 7, 2021) ("Defendants fail, however, to elaborate on their [proportionality and other] objections. Instead, defendants assert that their initial search yielded over 7,000,000 hits. But, as FTC points out, the number of 'hits' is not the same as the number of documents.")

SEARCH (9)
Technology Assisted Review ("TAR")

- M.R. Grossman & G.V. Cormack, "Technology Assisted Review in E-Discovery Can be More Effective and More Efficient than Exhaustive Manual Review," XVII *Rich. J.L. & Tech.* 11 (2011).
- M.R. Grossman & G.V. Cormack, "The Grossman-Cormack Glossary of Technology-Assisted Review," 7 *Fed. Cts. Law R.* 1 (2013).
- M.R. Grossman & G.V. Cormack, "Continuous Active Learning for TAR," *Practical Law* 32 (Apr./May 2016).
- "The Sedona Conference TAR Case Law Primer, Second Edition," *Sedona Conf. J.* 1 (2023), https://thesedonaconference.org/sites/default/files/Handout-2023-February-TAR-Case-Law-Primer-2d-Edition.pdf

SEARCH (10)
REPRESENTATIVE TAR-RELATED DECISIONS

- *In re Viagra *** Products Liability Litig.,* No. 16-md-02691-RS (SK) (N.D. Ca. Oct. 14, 2016).
- *In re Mercedes-Benz Emissions Litigation, Case No.*: 2:16-cv-881 (D.N.J. Jan. 9, 2020) (Order & Opinion of Special Master).
- *Lawson v. Spirit Aerosystems, Inc.,* Case No. 18-1100-EFM-ADM (D. Kan. Apr. 9, 2020).

SEARCH (11)

Lessons From Case Law

- Judge approved TAR at “threshold” level.
- Results may be subject to challenge and later rulings.
- Threshold superiority of automated vs. manual review recognized given volume of ESI and attorney review costs.
- Large volumes of ESI in issue.
- Party seeking to use TAR should offer “transparency of process” or something close to it.
- “Reasonableness” of methodology is key.
- Speculation by the opposing party insufficient to defeat threshold approval.

SEARCH (12)

Where we are on TAR:

- We have yet to see a reported judicial analysis of *process* and *results* in a *contested* matter before a court.
- It is safe to assume that the proponent of a specific *process* will bear the burden of proof (whatever that burden might be).
- How much transparency is enough?
- If "reasonableness" is standard, how reasonable must the *results* be? Is "precision" of 80% enough? 90%?
- There are no generally accepted standards.

INTERLUDE

Assume these facts:

- A special master was appointed to create a privilege log.
- To create the log, and with the assistance of a vendor, the special master screened a large volume of ESI.
- The special master and the vendor used a screening process and testing to populate the log.
- The special master recommended that any document that met a 59% threshold be released as nonprivileged.

Does this make sense? Do you need more information? Is the percentage rate appropriate?

Dornoch Holdings Internat'l LLC v. Conagra Foods Lamb Weston, Inc., 2013 WL 2384235 (D. Idaho May 1, 2013), adopted, 2013 WL 2384103 (D. Idaho May 24, 2013).

INTERLUDE

A collision between search and ethics?

- Assume a party's attorney knows that search terms proposed by adversary counsel, if applied to the party's ESI, will not lead to the production of relevant (perhaps highly relevant) ESI.
- Absent a lack of candor to adversary counsel or the court under RPC 3.4 (which implies if not requires some affirmative statement), does not RPC 1.6 require the party's attorney to remain silent?
- What if the "nonproduction" becomes known later? If nothing else, will the party's attorney suffer bad "PR"?
- If the party's attorney wants to advise the adversary, should the attorney secure her client's informed consent? What if the client says, "no?"

(With thanks to Judge Facciola)

INTERLUDE

What are the ethical duties related to use of a nonparty vendor?

See P. Geraghty, "Duty to Supervise Nonlawyers: Ignorance is Not Bliss," *Your ABA* (ABA Ctr. for Prof. Respon. June 2013).

For discussion of two types of work performed by an ESI consultant and possible disqualification of a consulting expert, *see Gordon v. Kaleida Health,* No.08-cv-378 (W.D.N.Y. May 21, 2013).

FORM OF PRODUCTION (1)

Rule 34(b): The request *** may specify the form or forms in which electronically stored information is to be produced *** [the responding party may lodge] an objection to the requested form for producing electronically stored information *** the [responding] party must state the form or forms it intends to use.

FORM OF PRODUCTION (2)

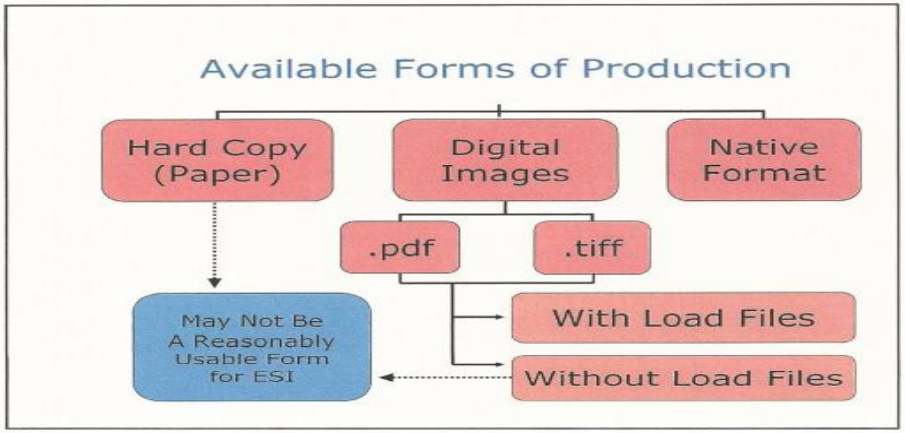
Rule 34(b)(2)(E):

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

FORM OF PRODUCTION (3)



COURTESY OF MAURA R. GROSSMAN

FORM OF PRODUCTION (4)

Sedona Principle 12: “The production of electronically stored information should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the electronically stored information and the proportional needs of the case.”

FORM OF PRODUCTION (5) INTERPRETING RULE 34(b)(2)(E)

Anderson Living Trust v. WPX Energy Production, LLC, No. 12-cv-0040 (D.N.M. Mar. 6, 2014):

"There is confusion among courts and commentators as to the meaning of and relationship between (E)(i) and (E)(ii), hinging in large part on whether the term 'documents' as used in (E)(i), includes ESI. The Court concludes that provisions (E)(i) and (E)(ii) apply to distinct, mutually exclusive categories of discoverable information: Documents – a term that does not include ESI – are governed for production solely by (E)(i), while (E)(ii) *** governs ESI." (footnote omitted).

FORM OF PRODUCTION (6) INTERPRETING RULE 34(b)(2)(E)

McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Inc. Co., No. 14-cv-2498 (N.D. Tex. Jan. 8, 2016):

"Courts are split on whether both Rule 34(b)(2)(E)(i) and Rule 34(b)(2)(E)(ii) apply to ESI productions or whether an ESI production must comply with only Rule 34(b)(2)(E)(ii)."

McKinney adopted the former.

FORM OF PRODUCTION (7) DEFINING "USUAL COURSE OF BUSINESS"

Defining "usual course of business:"

- *SEC v. Collins & Aikman Corp.,* 256 F.R.D. 403 (S.D.N.Y. 2009).
- *Ak-Chin Indian Country v. United States,* 85 Fed. Cl. 397 (Ct. Cl. 2009).
- *SEC v. Kovzan,* 2012 WL 3111729 (D. Kan. July 31, 2012).

FORM OF PRODUCTION (8) REPRESENTATIVE DECISIONS

- *A&R Body Specialty Works, Inc. v. Progressive Cas. Ins. Co.,* No. 07-cv-929 (D. Conn. Sept. 9, 2014) (Rule 34 does not require "creation of an entirely new data set").
- *Apex Colors, Inc. v. Chemworld Int'l Ltd.,* No. 14-CV-273-PRC (N.D. Ill. June 16, 2016) (compelling production of spreadsheet in native format because .pdf format not "reasonably useable").
- *In re Benicar (Olmesartan) Prod. Liability Litig.,* No. MDL 15-2606 (D.N.J. June 30, 2015) (transcript of oral ruling) ("TIFF Plus and not native format will be used as the default format of ESI production").

FORM OF PRODUCTION (9) REPRESENTATIVE DECISIONS

- *EEOC v. SVT, LLC,* Case No. 13-cv-245 (N.D. Ind. Apr. 10, 2014) ("SVT should produce responsive ESI information in the format initially designated *** so that the information is reasonably useable" and ordering parties to meet-and-confer to resolve their dispute).
- *Johnson v. RLI Ins. Co.,* No. 14-cv-00095 (D. Alaska Aug. 31, 2015) (denying motion to compel production in native format).

FORM OF PRODUCTION (10) REPRESENTATIVE DECISIONS

- *Lawrence v. VB Project, LLC,* No. 14-cv-60289 (S.D. Fla. Sept. 12, 2014) ("While Plaintiff was entitled to produce *** in the form in which it is ordinarily maintained ***, Plaintiff's production of electronic documents that Defendant could not open is tantamount to a failure to produce").
- *National Day Laborer Org. Network v. ICE,* 2011 WL 381625 (S.D.N.Y. Feb. 7, 2011) ("all future productions must include load files that contain the following fields"), opinion withdrawn June 17, 2011.

FORM OF PRODUCTION (11) REPRESENTATIVE DECISIONS

- *Nichols v. Noom,* 20-CV-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), objections overruled, No. 20 Civ. 3677 (LGS) (S.D.N.Y. Apr. 30, 2021) (hyperlink in electronic document an "attachment?").
- *Famulare v. Gannett Co., Inc.*, Civ. No. 2:20-cv-13991(WJM) (D.N.J. Mar. 17, 2022 (affirming order requiring 30(b)(6) deposition on functionality, generation, and printing of Salesforce reports).
- *In re Actos Antitrust Litig.*, No. 1:13-cv-09244, 2022 WL 949798 (S.D.N.Y. Mar. 30, 2022) (should "earlier in time" emails from email threads be produced?).

FORM OF PRODUCTION (12) REPRESENTATIVE DECISIONS

- *Venture Corp. v. Barrett,* No. 13-cv-03384 (N.D. Ca. Oct. 16, 2014) ("because there was not even an agreement on form, Venture had an obligation *** to show that the production was in which 'it is ordinarily maintained or in a reasonably usable [*sic*] form or forms.' *** [T]here is no serious question that a grab-bag of PDF and native files is neither how the Venture[] ordinarily maintained the documents and ESI nor is 'in a reasonably usable [*sic*] form.'").

INTERLUDE

Assume these facts:

- A party in an arbitration served on a nonparty a subpoena that demanded production of ESI in native format.
- The respondent did not produce ESI in native format.
- The ESI sought was "located in the 'cloud' and stored with a third-party e-mail provider."

What form of production might be sufficient?

Sexton v. Lecavalier, No. 13-cv-8557 (S.D.N.Y. Apr. 11, 2014).

INTERLUDE

Assume these facts:

- A plaintiff seeks to compel defendants to produce his medical records in "native readable format."
- He argues that the production in .pdf form lacks metadata of any "audit trail."
- Defendants argue that they would suffer undue burden if required to comply with plaintiff's request.

What should the court do?

Peterson v. Matlock, No. 11-cv-2594 (D.N.J. Oct. 29, 2014).

INTERLUDE

Assume these facts:

- A plaintiff sued for breach of contract and alleged that the defendant failed to provide it with a software system.
- The defendant produced "snippets" of the source code without any metadata.

Was the production sufficient?

CQuest America, Inc. v. Yahasoft, Inc., No. 13-cv-03349 (C.D. Ill. July 30, 2015).

INTERLUDE

Assume these facts:

- Defendant has ESI in its archive and backup data storage.
- Plaintiff wants to compel defendant to create certain reports by extracting ESI from the above sources.
- To do so, defendant would have to modify its record-keeping systems.

Can defendant be required to create the reports?

Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc., No. 09-cv-0487 (M.D. Tenn. Sept. 20, 2013).

INTERLUDE

Assume these facts:

- In a False Claims Act action, plaintiff sought production of various emergency room-related records for individual patients.
- Defendant hospital estimated its costs of review of records of over 15,000 patients as well as redaction to be over $240,000 and requested that production be limited to a random sample.

What should the court do?

Duffy v. Lawrence Memorial Hospital, No. 14-cv-2256-SAC-TJJ (D. Kan. Mar. 31, 2017).

COST-SHIFTING (1)

- In 1998, the Civil Rules Advisory Committee proposed an amendment to Rule 34(b) to make "explicit the court's authority to condition document production on payment by the party seeking discovery ***. This authority was implicit in the 1983 adoption of Rule 26(b)(2) ***. The court continues to have such authority with regard to all discovery devices." 181 F.R.D. 18, 89-91.
- The amendment was never adopted, in part because the authority already existed and highlighting the authority might result in its "overuse." 8 Wright, Miller & Marcus, *Federal Practice and Procedure,* Sec. 2008.1 at 40-41 (2006 pocket part) (footnotes omitted).

COST-SHIFTING (2) REPRESENTATIVE DECISIONS

- Is cost-shifting available only under Rule 26(b)(2)(B)? *See, e.g., Couch v. Wan,* 2011 WL 2551546 (E.D. Ca. June 24, 2011); *Clean Harbors Env. Serv. v. ESIS, Inc.,* 2011 WL 1897213 (N.D. Ill. May 17, 2011).
- *SPM Resorts, Inc. v. Diamond Resorts Mgmt., Inc.,* 65 So.3d 146 (Fla. Dist. Ct. App. 2011 (*per curiam*) (imposing costs of computer inspection on requesting party: "[t]o place a substantial financial burden on a party relating to the production of its adversary's discovery request does nothing more than require a party to fund its adversary's litigation.").
- *Compare Boeynaems v. LA Fitness Internat'l,* 285 F.R.D. 331 (E.D. Pa. 2012) (shifting costs pre-class certification) *with Fleischer v. Phoenix Life Ins. Co.,* No. 11-cv-8405 (S.D.N.Y. Dec. 27, 2012) (rejecting same).
- *FDIC v. Brudnicki,* 2013 WL 2948098 (N.D. Fla. June 14, 2013) (addressing cost-shifting under Rule 26(b)(2)(C) in context of production of ESI under a protocol).

COST-SHIFTING (3)
AMENDED RULE 26(c)(1)(B)

"In General. * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

* * * specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery[.]" (emphasis added.)

RULE 45 SUBPOENAS (1)

Rule 45 was amended in 2006 to include key concepts from Rules 26(b)(2)(B), 34(a) and 34(b):

- “electronically stored information.”
- two-tier approach to discovery based on accessibility.
- form of production.

RULE 45 SUBPOENAS (2) REPRESENTATIVE DECISIONS

- No "official" requirement that issuing party and receiving nonparty engage in "meet-and-confer," but "[t]his court will not automatically assume an undue burden or expense may arise simply because electronic evidence is involved." *Auto Club Family Ins. v. Ahner,* 2007 U.S. Dist. LEXIS 63809 (E.D. La. Aug. 29, 2007).

- For "undue burden or expense" sufficient to impose sanctions under Rule 45(d)(1), *see Mount Hope Church v. Bash Back!,* 705 F.3d 418 (9th Cir. 2012).

- For sanctions under Rule 45(d)(1) and cost-shifting under Rule 45(d)(2)(B)(ii), s*ee Legal Voice v. Storman's Inc.,* No. 12-35224 (9th Cir. Dec. 31, 2013).

RULE 45 SUBPOENAS (3) REPRESENTATIVE DECISIONS

- Cost-shifting: *See ASUS Computer Internat'l v. Micron Tech. Inc.,* No. 14-cv-00275 (N.D. Ca. Apr. 21, 2014); *Sonoma County Assoc. of Ret. Employees v. Sonoma County,* 15-mc-191 (S.D.N.Y. Oct. 6, 2015).
- Quashing a subpoena which sought to compel forensic imaging of laptops, *see Boston Scientific Corp. v. Lee*, No. 14-mc-80188 (N.D. Ca. Aug. 4, 2014).
- Post-December 1, 2015, decision applying proportionality and limiting the scope of a subpoena, *see Continental West Ins. Co. v. Opechee Constr. Corp.,* No. 15-cv-865232 (D.N.H. Mar. 2, 2016).
- Concluding that attorneys' fees incurred in discovery are an "expense related to compliance," *see In re: Subpoena of American Nurses Ass'n,* No. 15-1481 (4th Cir. Apr. 7, 2016).

RULE 45 SUBPOENAS (4)

“Practical Guidelines to follow to shift costs under Rule 45:

- As a non-party faced with overly broad and burdensome discovery requests ***, make sure to properly object and refuse to comply in order to trigger Rule 25(d)(2)(B)(ii).
- Estimate the costs of compliance *** as specifically as possible, including the details of the time and all associated expenses.

RULE 45 SUBPOENAS (5)

- If the cost estimate is 'significant,' put the requesting party on notice from the outset.
- Attempt to obtain an agreement *** for reimbursement ***.
- Absent an agreement, seek protection from the court.
- Keep a detailed record of the expenses involved in compliance ***."

S.K. Maheshwari & S.S. Eskandari, "Shifting the Cost of Complying with a Rule 45 Subpoena," *Dentons Legal Notices* (posted Sept. 15, 2014), https://www.dentons.com/en/insights/alerts/2014/september/15/shifting-the-costs-of-complying-with-a-rule-45-subpoena.

RULE 45 SUBPOENAS (6)

- The Sedona Conference Commentary on Rule 34 and Rule 45 “Possession, Custody, or Control,” 17 *Sedona Conf. J.* 469 (2016), The Sedona Conference Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control" | The Sedona Conference®.
- The Sedona Conference Commentary on Rule 45 Subpoenas to Non-Parties, Second Ed., 22 *Sedona Conf. J.* 1 (2021), https://thesedonaconference.org/civicrm/mailing/view?reset=1&id=2153.

REASONABLE EXPECTATIONS OF PRIVACY (1)

Privacy:

- "We got over it"?
- "We never had it"?
- "What is it for good anyway"?

See, for a discussion of "privacy," *NASA v. Nelson*, 562 U.S. 134 (2011).

REASONABLE EXPECTATIONS OF PRIVACY (2)

What's the status of privacy under the Constitution post-*Dobbs*? *See, e.g.,* A. Gajda, "How *Dobbs* Threatens to Torpedo Privacy Rights in the US," *Wired* (June 29, 2022), https://www.wired.com/story/scotus-dobbs-roe-privacy-abortion/.

REASONABLE EXPECTATIONS OF PRIVACY (3)

Examples of technology that impact privacy:

- S. Clifford & Q. Hardy, "Attention, Shoppers: Store is Tracking Your Cell," *New York Times* (July 14, 2013).
- K. Hill, "Beware, Houseguests: Cheap Home Surveillance Cameras are Everywhere Now," *Fusion* (posted Feb. 18, 2015).

REASONABLE EXPECTIONS OF PRIVACY (4)

Under California law, "[t]here are two general types of privacy interest. Autonomy privacy is the interest in making intimate personal decisions or conducting personal activities without observation, intrusion or interference. *** Informational privacy *** is the interest in precluding the dissemination or misuse of sensitive or confidential information." *Kamalu v. Walmart Stores, Inc.,* No. 13-cv-00627 (E.D. Ca. Aug. 15, 2013) (quashing defense subpoena for plaintiff's mobile phone records).

REASONABLE EXPECTATIONS OF PRIVACY (5)

- *City of Ontario v. Quon,* 540 U.S. 746 (2010) (public employer as "monitor").
- *Compare Stengart v. Loving Care Agency,* 201 N.J. 300 (2010) *with Holmes v. Petrovich Dvlpt. Co.,* 191 Cal. App. 4th (2011) (private employer as "monitor").
- *Huff v. Spaw,* 794 F.3d 543 (6th Cir. 2015) ("pocket dialing").

REASONABLE EXPECTATIONS OF PRIVACY (6)

In re Asia Global Crossing, 322 B.R. 247 (S.D.N.Y. 2005), suggested factors to consider in deciding whether an employee's communications are protected:

- Does the corporation have a policy that bans personal or other objectionable use?
- Does the corporation monitor employee use?
- Do third parties have a right of access?
- Was the employee aware of the policy?

INTERLUDE

Assume these facts:

- A civil action is pending in the United States District Court. The plaintiff, a former deputy sheriff, has sued his former employer for wrongful termination, alleging that the decision to terminate him resulted from the illegal search of the content of his cell phone. The plaintiff had left his cell phone, which was not password-protected, in his marital residence after he and his wife separated.

INTERLUDE

- The wife, who divorced the plaintiff, searched the content of the phone, found statements to fellow deputies that demonstrated the plaintiff's racial prejudice, and then gave the phone to the NAACP. The NAACP created a report detailing the plaintiff's statements and turned the report and the phone over to the employer. After an investigation that included a forensic examination of the content of the phone, the employer terminated the plaintiff. (By the way, the plaintiff also named his ex-wife as a defendant.)

INTERLUDE

- What rights did the plaintiff have to the content of his cell phone?
- Did the ex-wife do anything wrong when she searched the content?
- Did the employer do anything wrong when it acted on the report?

Sollenberger v. Sollenberger, No. 15-cv-00213 (S.D. Ohio Mar. 25, 2016).

PRIVILEGE (1)
THE PRIVILEGE LOG
RULE 26(b)(5)(A)

- *Chevron Corp. v. Weinberg Grp.,* 286 F.R.D. 95 (D.D.C. 2012):
  - Notes that intent of rule is to allow opposing party, "from the entry in the log itself, to assess whether the claim of privilege is valid."
  - Acknowledges that, "intervening technological changes have rendered [the rule] even more difficult to apply."
- *Compare Rhoads Industries v. Building Materials Corp. of America,* 254 F.R.D. 238 (E.D. Pa. 2008) *with Muro v. Target Corp*., 250 F.R.D. 350 (N.D. Ill. 2007) ("strings").
- *In re: 3m Combat Arms Earplug Prod. Liability Litig.,* Case No. 3:19-md-2885 (N.D. Fla. Mar. 20, 2020) (finding privilege log adequate).
- What might be done to avoid the "harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings"? *See* M.A. Crane & R.L. Becker, "Privilege Logs for the New Millennium," *NY Litigator* 22 (NYSBA: Spr. 2014).

PRIVILEGE (2)

Rule 11-b of Section 202.70(g) of the Uniform Rule for the Supreme and County Courts (Rules of the Commercial Division):

- "meet and confer" must address privilege logs
- "categorical designations" preferred
- if requesting party insists on "document-by-document listing," producing party may seek allocation of costs and attorneys' fees
- Supervising attorney must be "actively involved in establishing and monitoring the procedures used to collect and review documents"

PRIVILEGE (3)
LITIGATION HOLD NOTICES

United States ex. rel. Barko v. Halliburton Co., No. 05-cv-01276 (D.D.C. Nov. 20, 2014).

PRIVILEGE (4)
APPEALABILITY

Compare Jane Doe 1 v. United States, No. 13-12933 (11th Cir. Apr. 18, 2014) (allowing interlocutory appeal by nonparty defense attorneys under *Pullman* doctrine of order rejecting work product protection for inadvertently-produced document) *with In re: Naranjo,* No. 13-1382 (4th Cir. Sept. 24, 2014) (rejecting applicability of doctrine to interlocutory appeal by "subpoena-targets in an ancillary proceeding").

For a discussion of interlocutory appeals from adverse privilege rulings, *see* R.J. Hedges & J.A. Thomas, "*Mohawk Industries* and E-Discovery," 10 *DDEE* 13 (2010); R.J. Hedges & J.A. Thomas, "*Mohawk Industries* and E-Discovery: An Update," 10 *DDEE* 272 (2010).

PRIVILEGE (5)
FRE 502

- *Hopson v. Mayor and City Council*, 232 F.R.D. 228 (D. Md. 2005).

- "Absent further Congressional action, the Rules Enabling Act does not authorize modification of state privilege law. Thus, the clawback provision in Fed. R. Civ. P. 26(b)(5)(B) and 16(b)(6), while respected in federal courts, might be deemed a common law waiver of privilege in state courts, not only for the document in question, but a broader waiver of attorney client privilege as to the subject matter involved." *Henry v. Quicken Loans, Inc.,* 2008 WL 474127 (E.D. Mich. Feb. 15, 2008).

PRIVILEGE (6)
FRE 502

Reduce cost of privilege review.

Provide clear guidance on waiver of privilege.

Avoid broad waiver through inadvertent disclosure of privileged communications.

Give effect to agreements between parties and court orders regarding privilege.

See Explanatory Note on FRE 502 (prepared by Judicial Conf. Adv. Comm. on Evidence Rules) (rev. Nov. 28, 2007) and Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, 154 *Cong. Rec.* H7818-H7819 (daily ed. Sept. 8, 2007).

PRIVILEGE (7)
FRE 502(a)

Intentional waiver:

Waiver by disclosure in a federal proceeding or to a federal agency acts as a waiver of additional undisclosed communications only if:

- Waiver was intentional;
- Undisclosed communication concerns the same subject matter; and
- Disclosed and undisclosed communications "ought in fairness to be considered together."

PRIVILEGE (8)
FRE 502(a)

- For a decision addressing when undisclosed communications must be turned over under FRE 502(a), *see Massachusetts Mut. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* No. 2011-cv-30285 (D. Mass. Sept. 23, 2013).
- For a State court decision which found intentional waiver by putting "reasonable foreseeability" of litigation in issue, *see Premium Pet Health, LLC v. All American Pet Proteins, LLC,* No. 2014-cv-31356 (Colo. Dist. Ct. June 11, 2015).

PRIVILEGE (9)
THE FRE 502 “HIERARCHY”

No Agreement
Agreement
Order

PRIVILEGE (10)
FRE 502(b)

Inadvertent disclosure:

Disclosure does not act as waiver if:

- Disclosure is inadvertent;
- Reasonable steps were taken to prevent disclosure; and
- Prompt and reasonable steps were taken to rectify the error.

PRIVILEGE (11)
INTERPLAY BETWEEN RULE 26(b)(5) and FRE 502(b)

- *EEOC v. George Washington U.,* Case No. 17-cv-1978 (D.D.C. Nov. 5, 2020).
- *Smith v. Allstate Ins. Co.,* No. 11-cv-165 (W.D. Pa. Nov. 8, 2012).
- *Strategic Environmental Partners, LLC v. Bucco,* No. 13-cv-5032 (D.N.J. Nov. 12, 2014).
- *Woodard v. Victory Records, Inc.,* No. 11-cv-7594 (N.D. Ill. Aug. 22, 2013).

PRIVILEGE (12)
REPRESENTATIVE WAIVER DECISIONS

Compare Mt. Hawley Ins. Co. v. Felman Prod., Inc., 271 F.R.D. 125 (S.D. W. Va. 2010), *aff'd sub nom. Felman Prod., Inc. v. Industrial Risk Insurers,* 2010 WL 2944777 (S.D. W. Va. July 23, 2010) *with Datel Holdings, Ltd. v. Microsoft Corp.,* 2011 WL 866993 (N.D. Ca. Mar. 11, 2011) *and Burnett v. Ford Motor Co.,* Case No.: 13-cv-14207 (S.D. W. Va. Apr 14, 2015) ("reasonableness" under 502(b)).

PRIVILEGE (13)
REPRESENTATIVE WAIVER DECISIONS

Blythe v. Bell, 2012 NCBC 42 (Sup. Ct. Div. July 26, 2012) (finding waiver after utter failure of defense counsel to take precautions to avoid inadvertent production; "litigant may make a considered choice to relax efforts to avoid that [preproduction review] expense. While such choices may be informed and reasonable ones, those choices must at the same time absorb the risk of a privilege waiver").

Cormack v. United States, No. 13-232C (Ct. Fed. Cl. July 18, 2014) (rejecting waiver of work product protection for one document inadvertently produced among more than one million).

Monco v. Zoltek Corp., 317 F. Supp. 3d 995 (N.D. Ill. 2018) (finding waiver given failure to timely claim privilege or log document).

PRIVILEGE (14)
FRE 502(e)

Controlling effect of a party agreement:

"An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order."

PRIVILEGE (15)
FRE 502(d)

Controlling effect of a court order:

"A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."

- *Rajala v. McGuire Woods, LLP,* 2010 WL 2949582 (D. Kan. July 22, 2010) and subsequent "Order Determining Privilege Waiver and Clawback" (D. Kan. Jan. 3, 2013).
- *Brookfield Asset Mgmt. v. AIG Fin. Prod. Corp.,* 2013 WL 142503 (S.D.N.Y. Jan. 7, 2013) (FRE 502(d) order means what it says if document inadvertently produced).
- *See* D.D. Cross, "Protecting Privilege Without Breaking the Bank," 14 *DDEE* 497 (2014).

PRIVILEGE (16)
FRE 502(d)

- 502(d) does not require parties to take "reasonable" precautions to avoid disclosure as part of a quick peek, clawback, or other non-waiver agreement.
- Asking a court to incorporate a 502(e) agreement into a 502(d) order (1) makes the agreement binding on nonparties and (2) gives the parties an opportunity to advise the court of anything unusual in the agreement.
- Can 502(d) orders apply to any disclosure, intentional or inadvertent? Counsel should be explicit in describing the scope of any underlying 502(e) agreement: Exactly what disclosures is it intended to apply to?

PRIVILEGE (17)
FRE 502(d)

- One court has held that a 502(d) order cannot "protect" intentional disclosures. *Potomac Elec. Power Co. v. United States,* 107 Fed. Cl. 725 (2012).
- Interpreting party agreement and finding that, despite reference to 502(d), 502(b) governs inadvertent production. *In re: Testosterone Replacement Therapy Products Liab. Litig.,* 301 F. Supp. 3d 917 (N.D. Ill. Mar. 14, 2018).
- Scope of 502(d) order limited to exclude confidential or proprietary information. *Proxicom Wireless, LLC v. Target Corp.,* 2020 WL 1671326 (M.D. Fla. Mar. 25, 2020).

PRIVILEGE (18)
FRE 502(d) FORM OF ORDER

"1. The production of privileged or work-product protected documents, electronically stored information ('ESI') or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

PRIVILEGE (19)
FRE 502(d) FORM OF ORDER

2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production."

(from, the author believes, Judge Peck but the link is no longer active).

PRIVILEGE (20)
QUESTIONS ABOUT FRE 502

- What if attorney-client privilege or work product is implicated?
- Would it be reasonable for a producing party to "share *** the nagging suspicion that [the opposition's] trial preparation and presentation *** benefitted from confidential information ***?" *Maldonado v. State,* 225 F.R.D. 120 (D.N.J. 2004).

  Note: *Maldonado* was pre-FRE 502.

PRIVILEGE (21)
QUESTIONS ABOUT FRE 502

- Can "the bell be unrung"? What might be the practical consequences of "returning" an inadvertently produced document?
- *Stinson v. City of New York,* 10 Civ. 4228 (S.D.N.Y. Oct. 10, 2014):

  "Plaintiffs are directed to return all copies ***. Plaintiffs may, however, rely on any material learned prior to *** [notification of the inadvertent disclosure] in challenging Defendants' assertion of privilege."

PRIVILEGE (22)
QUESTIONS ABOUT FRE 502

How far can a receiving party go in using information learned?

- Can the receiving party develop a line of questioning based on the information?
- Can the receiving party impeach a witness with his statements "in" the information?
  - The information (*i.e.,* the documents) would not be introduced into evidence.
  - The cross-examination would not reveal the substance of the privilege.

Cf. United States ex rel. Barko v. Halliburton Co., No. 05-cv-01276 (D.D.C. Nov. 20, 2014) (attorneys may cross-examine witnesses about whether they spoke with their attorneys as long as no inquiry made into content).

PRIVILEGE (23)
QUESTIONS ABOUT FRE 502

FRE 502 was intended to "allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive preproduction review." 154 *Cong. Rec.* 117829.

If that was the intent, hasn't Rule 502 failed? *See* K. Brady, A.J. Longo & J. Ritter, "The (Broken) Promise of Federal Rule of Evidence 502," 11 *DDEE* 317 (2011); P.W. Grimm, L.Y. Bergstrom & M.P. Kraeuter, "Federal Rule of Evidence 502: Has It Lived Up to Its Potential?" XVII *Rich. J. L. & Tech.* 8 (2011).

Can anything else be done? Should anything else be done?

PRIVILEGE (24)
FRE 502(c)

Disclosure in a State proceeding:

- Disclosure does not operate as a waiver in a federal proceeding if:
  - It would not be a waiver if made under this rule in a federal proceeding, or
  - It is not a waiver under applicable State law.

PRIVILEGE (25)
FRE 502(f)

Controlling effect of the rule:

"*** this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision."

PRIVILEGE (26)
STATE EQUIVALENTS OF FRE 502

Arizona
Colorado
Delaware
Illinois
Indiana
Iowa
Kansas
New Jersey (NJ Rule 530)
Vermont
Virginia
Washington

PRIVILEGE (27)
INTERNAL INVESTIGATIONS

- *In re Capital One Consumer Data Sec. Breach Litig.,* No. 1:19MD2915 (AJT/JFA), 2020 WL 2731238 (E.D. Va. May 26), *aff'd*, No. 1:19MD2915, 2020 WL 3470261 (E.D. Va. June 25, 2020)
- D.M. Greenwald, *et al.,* "Fitting Consultants Within the Attorney-Client Privilege and Work Product Protection – Cyber Breach Consultants," *Privilege Newsletter* (Jenner & Block: Apr. 18, 2022), **https://jenner.com/library/publications/21717**

PRIVILEGE (28)
RESOURCE

The Sedona Conference Commentary on Application of Attorney-Client Privilege and Work-Product Protection to Documents and Communications Generated in the Cybersecurity Context (2020), Privilege and Protection in Cybersecurity Context.pdf (thesedonaconference.org)

INTERLUDE

Under the following facts should Plaintiffs' counsel be disqualified?

- Plaintiffs secured a writ of execution and a sheriff seized a computer from a defendant's home.
- An attorney for plaintiffs successfully bid on the computer at a public auction.
- Plaintiffs had the hard drive searched by a third-party vendor and privileged documents were found.

INTERLUDE

The answer is no. Why?

- Plaintiffs had no ethical duty to return the inadvertently disclosed ESI.
- "Plaintiffs' acquisition of the computer was not inherently wrongful."
- Plaintiffs' use of a third-party vendor is not equivalent to "metadata mining of documents produced through the normal discovery process ***."

Kyko Global Inc. v. Prithvi Info. Solutions Ltd., No. 13-cv-1034 (W.D. Wash. June 13, 2014) (also finding no waiver: "The facts here bear a closer resemblance to the memo torn into 16 pieces than a document simply placed in the trash without alteration").

INTERLUDE

FRE 502(b) was "of uncertain applicability *** because the disclosure (if the relinquishment of the computer to the sheriff's auction can be termed a disclosure) occurred outside the usual discovery process ***."

"[T]he clawback procedures outlined in FRCP 26(b)(5)(B) do not apply to documents obtained outside the usual discovery process."

SANCTIONS (1)
"RON'S RULES"

- Whatever you do today to preserve may not be challenged for a long time. Have a records retention policy and a litigation hold, document what you do and why you do it, and monitor what you do.
- If you make a mistake, come clean right away and try to make "it" right. Covering up only leads to more problems.
- Don't ____ off the judge!

SANCTIONS (2)
WHOM TO SANCTION?

Texas Alliance v. Hughs, No. 20-40643 (5th Cir. June 20, 2021).

- Partners?
- Senior Attorneys?
- Junior Attorneys?

SANCTIONS (3)
MOTION PRACTICE

Bozic v. City of Washington, 912 F. Supp. 2d 257 (W.D. Pa. 2012):

"Sanctions motions addressing claimed spoliation of evidence are serious business. They will always implicate professional and personal reputations, and are time-consuming and costly to litigate. When proven, the spoliation of evidence can materially affect the disposition of the case on the merits and must be remedied. When it is not, the sting of the allegation remains, along with the lost time and the unnecessary expenses attendant to litigating what turns out to have been a costly diversion."

SANCTIONS (4)
APPELLATE REVIEW

Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013):

- No "finality" in order imposing adverse inference instruction.
- No appellate review under "collateral order" doctrine.
- No *mandamus* review available.

National Abortion Federation v. Center for Medical Progress, No. 17-16622 (9th Cir. June 5, 2019) (no immediate appellate review from civil contempt).

In re: Avantis, Inc., 2020-147 (Fed. Cir. Nov. 3, 2020) (no immediate appellate review related to adverse inference instruction).

SANCTIONS (5)
APPELLATE REVIEW

In re Petition of Boehringer Ingelheim Pharm., Inc., 745 F.3d 216 (7th Cir. 2014):

- District court imposed $1 million in fines for discovery abuse: “this part of his order is not so questionable (if it is questionable at all)”
- District court also ordered German nationals to be deposed in USA: “that is deeply troubling”
- “This is one of those rare ‘safety valve’ cases for mandamus because of the risk of international complications ***.”

SANCTIONS (6)
SOURCES OF AUTHORITY

Rule-based:

- *King v. Fleming,* No. 17-3095 (10th Cir. Aug. 15, 2018) (Rule 11(b)).
- *In re: Panthera Enterprises, LLC,* Case No. 2:19-bk-00787 (Bkrcy. N.D. W. Va. Apr. 1, 2021) (strict compliance with Rule 11(c)(1)(A) safe-harbor provision precludes imposition of sanctions under rule).
- *EEOC v. Original Honeybaked Ham Co.,* 2013 WL 752912 (D. Colo. Feb. 27, 2013) (Rule 16(f)).
- *Estakhrian v. Obenstine,* No. CV 11-3480, 2016 U.S. Dist. LEXIS 66143 (C.D. Ca. May 17, 2016) (Rules 26(a) and 26(e)).
- *Sun River Energy, Inc. v. Nelson,* No. 14-1321, 2015 WL 5131947 (10th Cir. Sept. 2, 2015) (Rule 37(b)).
- *First Fin. Security, Inc. v. Freedom Equity Group, LLC*, No. 15-cv-1893 (N.D. Ca. Oct. 7, 2016) (Rule 37(b)(2) and using "gross negligence" standard).

SANCTIONS (7)
SOURCES OF AUTHORITY

- Inherent authority (subject to Rule 37(e) preemption?):
  - *Goodyear Rubber & Tire Co. v. Haeger,* No. 15-1406 (U.S. Apr. 18, 2017).
  - *Guarisco v. BOH Bros. Constr. Co.,* Civil Action No: 18-7514 Section: "J"(3) (E.D. La. Oct. 3, 2019).
- 28 U.S.C. Sec. 1927:
  - *Haynes v. City & County of San Francisco,* 688 F.3d 984 (9th Cir. 2012).
  - *Parsi v. Daioleslam,* 778 F.3d 116 (D.C. Cir. 2015).
  - *Six v. Generations Fed. Credit Union,* No. 17-1548 (4th Cir. May 31, 2018) (also addressing inherent authority).

SANCTIONS (8)
SOURCES OF AUTHORITY

- Contempt:
  - *Southern New England Tele. v. Global NAPs,* 624 F.3d 123 (2d Cir. 2010).
  - *Waste Management of Washington, Inc. v. Kattler,* 776 F.3d 336 (5th Cir. 2015).

SANCTIONS (9)
NECESSARY PROOFS

Sedona Principle 14: *"*The breach of a duty to preserve electronically stored information may be addressed by remedial measures, sanctions, or both: remedial measures are appropriate to cure prejudice; sanctions are appropriate only if a party acted with intent to deprive another party of the use of relevant electronically stored information*."*

SANCTIONS (10)
NECESSARY PROOFS

- Possession, custody, or control
- Relevance
- Absence of "reasonable steps"
- *Scienter*
- Prejudice

To understand how to balance these under the facts of a particular civil action, *see, e.g., Hester v. Vision Airlines, Inc.,* 687 F.3d 1162 (9th Cir. 2012).

SANCTIONS (11)
RULE 37(e)

Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

SANCTIONS (12)
RULE 37(e)

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

SANCTIONS (13)
RULE 37(e)

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may,

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

SANCTIONS (14)
RULE 37(e)

- Does not restrict judicial case management powers under Rules 16 or 26
- Applies only to loss of ESI
  - What does this mean for loss of other than ESI?
- Defers to common law for trigger and scope of preservation
  - Might uniformity be expected in the future?

SANCTIONS (15)
RULE 37(e)

- Applies only if lost ESI should have been preserved
- Applies only if party failed to take "reasonable steps"

AND

- Applies only when lost ESI cannot be restored or replaced with additional discovery

SANCTIONS (16)
RULE 37(e)

What does “lost” mean?

- *Carty v. Steem Monsters Corp.,* Civil Action No. 20-5585 (E.D. Pa. Nov. 18, 2022).
- *Envy Hawaii LLC v. Volvo Car Co.,* Civ. No. 17-00040 HG-RT (D. Hawaii. Mar. 20, 2019).
- *Grant v. Gusman*, Civil Action Case No. 17-2797 (E.D. La. Apr. 13, 2020).

SANCTIONS (17)
RULE 37(e)

What might be "reasonable steps?"

- A "bad" example: *Moody v. CSX Transportation, Inc.*, 07-CV-9398 (W.D.N.Y. Sept. 21, 2017).
- *See*, for a review of the case law, T.Y. Allman, "Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures," 26 *Rich. J.L. & Tech.* 1 (2020).

SANCTIONS (18)
RULE 37(e)

Since “reasonableness” is central:

- Will process become central to any analysis of reasonableness? (*modus supra materiem*)
- Yes or no, shouldn’t process be documented and monitored for effectiveness and modified as necessary?

SANCTIONS (19)
RULE 37(e)

- Can an organization guard against intentional loss of relevant ESI that is subject to a duty to preserve? (Maybe, depending on "reasonable steps" taken, etc.)
- Can an organization be sanctioned for the wrongful conduct of an employee? *See Selectica, Inc. v. Novatus,* No. 13-cv-1708 (M.D. Fla. Mar. 12, 2015) (yes).

SANCTIONS (20)
RULE 37(e)

What might "restored or replaced" mean?

- *Cat3, LLC v. Black Lineage, Inc.,* No. 14-cv-05511, 2016 WL 154116 (S.D.N.Y. Jan. 12), motion for sanctions withdrawn and action dismissed with prejudice (S.D.N.Y. Apr. 6, 2016).
- *Fiteq v. Venture Corp.,* No. 13-cv-01946, 2016 WL 1701794 (N.D. Ca. Apr. 28, 2016).
- *Marquette Transportation v. Chembulk,* No. 13-6216, 2016 WL 930946 (E.D. La. Mar. 11, 2016).

SANCTIONS (21)
RULE 37(e)

What might be prejudice and who bears the burden of proof?

- *Bruno v. Bozzuto's, Inc.,* No. 09-cv-00874, 2015 WL 5098952 (M.D. Pa. Aug. 31, 2015).
- *Cat3, LLC v. Black Lineage, Inc.,* No. 14-cv-05511, 2016 WL 154116 (S.D.N.Y. Jan. 12), motion for sanctions withdrawn and action dismissed with prejudice (S.D.N.Y. Apr. 6, 2016).
- *Core Laboratories v. Spectrum Tracer Services*, No. 11-cv-1157, 2016 WL 879324 (W.D. Okla. Mar. 7, 2016).
- *Faulkner v. Aero Fulfillment Services,* Case No. 1:19-cv-268 (S.D. Ohio June 8, 2020).
- *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.,* No. 14-cv-62216, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).

SANCTIONS (22)
RULE 37(e)(1)

What might be "measures no greater than necessary"?

- Forbidding party from presenting certain evidence.
- Permitting parties to present evidence and argument regarding loss.
- Permissive jury instruction, without presumption.
- Striking related claims or defenses, if not equivalent of judgment or dismissal.

SANCTIONS (23)
RULE 37(e)(1) (cont'd)

What might be "measures no greater than necessary"?

- *Nuvasive, Inc. v. Madsen Medical, Inc.,* No. 13-cv-2077, 2016 WL 305096 (S.D. Ca. Jan. 26, 2016).
- *Ericksen v. Kaplan Higher Education, LLC,* Civil No. RBD-14-3106, 2016 WL 695789 (D. Md. Feb. 22, 2016).
- *Matthew Enterprise, Inc. v. Chrysler Group, LLC,* No. 13-cv-04236, 2016 WL 2957133 (N.D. Ca. May 23, 2016).

SANCTIONS (24)
RULE 37(e)

What might be "intent to deprive"?

- *Carty v. Steem Monsters Corp.,* Civil Action No. 20-5585 (E.D. Pa. Nov. 18, 2022).
- *Crossfit, Inc. v. National Strength and Cond. Ass'n,* Case No.: 14-CV-1191 (KSC) (S.D. Ca. Dec. 4, 2019).
- *Goldrich v. City of Jersey City,* Civil Action No. 15-885 (SDW) (LDW) (D.N.J. Sept. 19, 2018).

SANCTIONS (25)
RULE 37(e)

What about inherent authority?

- *Cat3, LLC v. Black Lineage, Inc.,* No. 14-cv-05511, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016), motion for sanctions withdrawn and action dismissed with prejudice, 2016 WL 1584011 (S.D.N.Y. Apr. 6, 2016).
- *Burris v. JPMorgan Chase & Co.,* No. CV-18-0312-PHX-DMI, 2022 WL 1591642 (D. Az. May 19, 2022) (awarding attorneys' fees to defendants on finding of plaintiff's bad faith spoliation of ESI).
- J.C. Francis & E.P. Mandel, "Limits on Limiting Inherent Authority: Rule 37(e) and the Power to Sanction," 17 *Sedona Conf. J.* 613 (2016).
- T. Brostoff, "Reports of Death of Inherent Judicial Authority Exaggerated?" 16 *DDEE* 501 (2016).

SANCTIONS (26)
RULE 37(e)

What might be "splits"?

- Recall 37(e) will apply only to ESI. Existing splits on *scienter,* etc., will continue unless the Courts of Appeals reconsider precedent in light of the amended rule.
- What does reasonableness mean in context of Rule 37(e)? (And note variations among the courts as to what it means under *Fed. R. Evid.* 502(b) --Will we see similar variations?
- What is the appropriate standard of proof: preponderance of the evidence or clear and convincing evidence?

SANCTIONS (27)
RULE 37(e) RESOURCES

- A.J. Tadler & H.J. Kelston, "What You Need to Know About the New Rule 37(e)," *Trial* 20 (Jan. 2016).
- R.J. Hedges, "Practice Pointer: A Primer on Rule 37(e) Remedial Measures – A.K.A. Sanctions," 16 *DDEE* 349 (2016).
- T.Y. Allman, "Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures," 26 *Rich. J.L. & Tech.* 1 (Issue 2, 2020).
- T.Y. Allman, "Informing Juries About Spoliation of Electronic Evidence After Amended Rule 37(E): An Assessment," 13 *Fed. Cts. L. Rev.* 81 (2021).

SANCTIONS (28)
NON-ESI SANCTIONS DECISIONS

- *Williams v. BASF Catalysts,* 765 F.3d 306 (3d Cir. 2014) (test results and reports documenting presence of asbestos in products).
- *Kettler Internat'l, Inc. v. Starbucks Corp.,* 96 F. Supp. 3d 563 (E.D. Va. 2015) (allegedly defective chairs).

SANCTIONS (29)
VARIATIONS ON INFERENCES

- *Bracey v. Grondin,* 712 F.3d 1012 (7th Cir. 2013).
- *Herrmann v. Rain Link, Inc.*, 2013 WL 4028759 (D. Kan. Aug. 7, 2013).
- *Sekisui American Corp. v. Hart,* 945 F. Supp. 2d 494 (S.D.N.Y. 2013).
- *Jensen v. BMW of North America, LLC,* 2019 WL 2411362 (S.D. Ca. June 7, 2019).

SANCTIONS (30)
WHAT IS AN ADVERSE INFERENCE?

Banks v. Enova Financial, 2012 WL 5995729 (N.D. Ill. Nov. 30, 2012):

"The magistrate judge sanctioned Enova by a presumption at the summary judgment stage of a factual dispute as to whether plaintiff hung up on the customer, and if the case proceeds to trial, the court should instruct the jury with a 'spoliation charge.' The magistrate judge left the precise contours of the 'spoliation charge' for this Court to determine in the event of trial, but distinguished a 'spoliation charge' from an 'adverse instruction' in that a 'charge' does not require the jury to presume that the lost evidence is both relevant and favorable to the innocent party."

SANCTIONS (31)
WHAT IS AN ADVERSE INFERENCE?

For the difference between permissive and mandatory adverse inferences, *see Mali v. Federal Ins. Co.,* 720 F.3d 387 (2d Cir. 2013) (and distinguishing between fact-finding needed for each, including finding of *scienter*)*; Flagg v. City of Detroit,* 715 F.3d 257 (6th Cir. 2013) ("Whether an adverse inference is permissive or mandatory is determined on a case-by-case basis, corresponding in part to the sanctioned party's degree of fault").

SANCTIONS (32)
"LESS" THAN AN ADVERSE INFERENCE

EEOC v. SunTrust Bank, No. 12-cv-1325 (M.D. Fla. Apr. 7, 2014):

"The Court *** will permit the EEOC to introduce evidence at trial concerning SunTrust's video surveillance system, SunTrust's policies relating to the use and preservation of video surveillance footage, and SunTrust's failure to preserve the video footage in issue."

SANCTIONS (33)
"LESS" THAN AN ADVERSE INFERENCE

Dalcour v. City of Lakewood, 492 Fed. App'x 924 (10th Cir. 2012):

- adverse inference instruction unwarranted when record of TASER use lost due to negligence or computer error.
- allowing plaintiffs to question witness on missing evidence is appropriate "lesser sanction, although the Plaintiffs do not appear to recognize it as such."

SANCTIONS (34)
"LESS" THAN AN ADVERSE INFERENCE

BMG Rights Mgm't (US) LLC v. Cox Communications, Inc., No. 14-cv-1611 (E.D. Va. Aug. 8, 2016):

"Here, the Court employed two measures contemplated by the Advisory Committee: 'permitting [Cox] to present evidence and argument to the jury regarding the loss of information' and 'giving the jury [an] instruction[] to assist in its evaluation of such evidence or argument.' *** While Cox clearly feels stronger action was warranted, the Court believes the lesser measures were sufficient after having considered all of the evidence adduced on this issue at trial."

SANCTIONS (35)
NONJURY CONTEXT

What might be the effect of a finding of spoliation and the imposition of an adverse inference? *See Owner-Operator Indep. Drivers Ass'n v. Comerica Bank,* 860 F. Supp. 2d 519 (S.D. Ohio 2012).

SANCTIONS (36)
VARIATIONS AMONG THE STATES

Pension Committee continues to be followed in some jurisdictions. *Pegasus Aviation I, Inc. v. Varig Logistics, S.A.,* 26 N.Y.3d 543 (Ct. App. 2015).

See Strong v. City of New York, 2013 NY Slip. Op. 06655 (Sup. Ct. App. Div. Oct. 15, 2013) ("reliance on the federal standard is unnecessary … the erasure of, and the obligation to preserve, relevant audiotapes and videotapes, can be, and has been, fully addressed without reference to the federal rules and standards").

SANCTIONS (37)
VARIATIONS AMONG THE STATES

Petroleum Solutions, Inc. v. Head, 454 S.W.3d 482 (Tex. Sup. Ct. 2014):

"In *Brookshire Brothers,* we *** held that a trial court may submit a spoliation instruction *** only if it finds (1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense."

Is this comparable to the amendment to Rule 37(e)?

INTERLUDE

Assume these facts:

- Plaintiff ran a business. Plaintiff brought a tort action against Defendant, alleging that Defendant destroyed Plaintiff's business. Plaintiff seeks damages based on the value of its business.
- Defendant learned at deposition that Plaintiff's accountant had a document related to valuation. Defendant subpoenaed the document.
- Accountant was prepared to produce the document. However, Plaintiff's attorney took the document before production date.
- After Plaintiff's attorney took the document — and after he failed to produce it in discovery for various reasons — he mailed it to a nonparty.
- The attorney did not make a copy. The nonparty lost the document.

Defendant has moved for sanctions. Who is responsible for what?

Fairview Ritz Corp. v. Borough of Fairview, No. 09-cv-0875 (D.N.J. Jan. 14, 2013).

INTERLUDE

Assume these facts:

- A highly relevant document was produced in a manner that obscured or "hid" what might have been a "smoking gun."
- The producing party was involved in multiple litigations regarding the same subject matter and that party was represented by separate counsel in each litigation.

Who's responsible for spoliation:

- Retained counsel?
- E-discovery vendor?
- In-house counsel?

Coquina Investments v. Rothstein, 2012 WL 3202273 (S.D. Fla. Aug. 3, 2012), *aff'd*, 760 F.3d 1300 (11th Cir. 2014).

INTERLUDE

Assume these facts:

- A quarterback is implicated in a civil action arising out of alleged pre-game misconduct.
- Preservation order entered.
- Thereafter, QB told an aide to destroy QB's cell phone and replace it with new one.
- The QB states that this was a regular practice and evidence confirms this.
- QB alleges there has been no prejudice as data is backed up in the Cloud.

INTERLUDE

- Requesting party seeks “maximum” sanctions, including contempt.

Can requesting party seek Rule 37(b) sanctions rather than resort to 37(e) because:

- Order is in place?
- Order violated?
- Intent not required under 37(b)?
- ESI not in issue?

(With thanks to Ken Withers)

INTERLUDE

Assume these facts:

- You are representing, in the United States district court, the executor of the estate of a person who died in a car accident.
- The State mandates retention of data recorders of vehicles involved in accidents resulting in death or serious bodily injury.
- The “other” vehicle was owned by a leasing company and leased to the driver of the vehicle, both named defendants.

INTERLUDE

- The vehicle was totaled and the leasing company took possession.
- The manager of the leasing company was unaware of the law, sold the vehicle for scrap, and a scrap collector destroyed the vehicle.
- You have moved for sanctions pursuant to Rule 37(e) for the loss of the ESI in the recorder.

INTERLUDE

When did a duty to preserve arise?

What was the scope of the duty?

Who had possession, custody, or control of the data recorder?

Were reasonable steps taken to avoid loss of the ESI?

Might remedial measures be imposed under Rule 37(e)?

INTERLUDE

Assume these facts:

- An individual has a new model cell phone with “unbreakable” encryption.
- The content of the cell phone is highly relevant to an action in which the individual is a defendant.
- In response to a demand for production, the defendant says that he cannot remember how to decrypt the phone.
- The requesting party moves to compel production of the encrypted data.

INTERLUDE

What arguments can be made about:

- The data is not reasonably accessible under Rule 26(b)(2)(B)?
- The data has been “lost” under Rule 37(e)?
- The defendant did not take reasonable steps to avoid the loss?
- The requesting party is entitled to relief under 37(e)(1) or (e)(2)?
- The defendant should be held in contempt until he decrypts the phone?

37(e) RECAP (1)

Charlestown Cap. Advisors v. Acero Junction, Inc., 18-CV-4437 (JGK) (BCM), 2020 WL 5849096 (S.D.N.Y. Sept. 30, 2020), offers lessons in spoliation. It addresses:

- Failure to take reasonable steps to preserve.
- "Restore or replace" unavailable as "gaps" remained after production.
- Prejudice.
- Preclusion of ability of spoliator to contest authenticity.
- Etc.

37(e) RECAP (2)

DR Distributors, LLC v. 21 Century Smoking, Inc., No. 12 CV 50324 (N.D. Ill. Jan. 19, 2021), offers lessons in spoliation. It addresses:

- Competence of counsel.
- Failure to take reasonable steps to avoid loss of relevant ESI.
- Etc.

A MUST-READ! (FYI: IT's LONG).

THE CLOUD & THE WEB (1)

"Cloud Computing" as defined by NIST:

"[A] model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider information." *The NIST Definition of Cloud Computing* 2 (Special Publication 800-145) (Sept. 2011), available at http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf

THE CLOUD & THE WEB (2)

"Service models" according to NIST:

- Software as a Service (SaaS)
- Platform as a Service (PaaS)
- Infrastructure as a Service (IaaS)

THE CLOUD & THE WEB (3)

"Deployment models" according to NIST:

- Private Cloud
- Community Cloud
- Public Cloud
- Hybrid Cloud

THE CLOUD & THE WEB (4)
THE STORED COMMUNICATIONS ACT

- *Jennings v. Jennings,* 401 S.C. 1 (Sup. Ct. 2012).
- *Low v. LinkedIn Corp.,* 900 F. Supp. 2d 1010 (N.D. Ca. 2012).
- For discussion of the SCA in the context of a Rule 45 subpoena, *see Obodai v. Indeed Inc.,* 2013 WL 1191267 (N.D. Ca. Mar. 21, 2013); *Optiver Australia PTY v. Tibra Trading PTY,* 2013 WL 256771 (N.D. Ca. Jan. 23, 2013).
- For effect of court-ordered consent, *see Negro v. Superior Court,* No. H040146 (Ca. Ct. App. Oct. 21, 2014).

THE CLOUD & THE WEB (5)
DISCOVERY OF SOCIAL MEDIA CONTENT

"I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms. I therefore fashion a single order covering all these communications." *Robinson v. Jones Lang LaSalle Americas, Inc.,* 2012 WL 3763545 (D. Ore. Aug. 29, 2012) (allowing discovery of, among other things, plaintiff's email and text messages as well as her "social media content").

THE CLOUD AND THE WEB (6) REPRESENTATIVE DECISIONS

- *Forman v. Henkin,* No. 1 (N.Y. Ct. App. Feb. 3, 2018) (holding that party seeking discovery had met threshold burden of showing that social media content was "reasonably calculated to contain evidence 'material and necessary' to the litigation").
- *Hampton v. Kink,* Case No. 18-cv-550-NJR (S.D. Ill. Jan. 13, 2021) (ordering plaintiff to provide defendants with her Facebook "handle" as content available to public and ordering defendants to search and produce their relevant private posts).
- *Howell v. Buckeye Ranch Inc.,* 2012 WL 5265170 (S.D. Ohio Oct. 1, 2012) (directing defendants to serve discovery requests that seek relevant information; plaintiff's counsel may access *private* portions of social media accounts and provide responses).

THE CLOUD & THE WEB (7) REPRESENTATIVE DECISIONS

- *Keller v. National Farmers Union Prop. & Cas. Co.,* 2013 WL 27731 (D. Mont. Jan. 2, 2013) (denying access to private portions of social media site absent threshold showing of need based on content of public portions).
- *Masterson v. Xerox Corp.,* No. 13-CV-692-DJH (W.D. Ky. Sept. 13, 2016) (compelling discovery of website content as it existed over a date range).

THE CLOUD & THE WEB (8) REPRESENTATIVE DECISIONS

- *In re Milo's Kitchen Dog Treats Consol. Cases,* No. 12-cv-1011 (W.D. Pa. Apr. 14, 2015) (no unlimited access to social media account).
- *Nucci v. Target Corp.,* No. 4D14-138 (Fla. 4th Dist. Ct. App. Jan. 7, 2015) (on interlocutory appeal, denying relief from order compelling discovery of photos from plaintiff's Facebook account).

THE CLOUD & THE WEB (9) REPRESENTATIVE DECISIONS

- *Rhone v. Schneider Nat'l Carriers, Inc.,* No. 15-cv-01096 (E.D. Mo. Apr. 21, 2016) (compelling disclosure of list of social media accounts and "Download Your Info" report).
- *Root v. Balfour Beatty Constr. LLC,* 132 So.3d 867 (Fla. 2d Dist. Ct. App. 2014) (on interlocutory appeal, quashing discovery order in part absent showing that postings were relevant and admissible).

THE CLOUD & THE WEB (10) DISCOVERY-RELATED QUESTIONS

- There have been instances in which a court has directed a party to provide access to, for example, the party's Facebook page or online dating service account.
- Why should an adversary be permitted to "rummage" through social media that may be irrelevant or subject to legitimate privacy concerns?
- What can be done to limit "rummaging?"

THE CLOUD & THE WEB (11)
A "DECISION TREE" FOR SOCIAL MEDIA

1. Under the liberal discovery standard of *Fed. R. Civ. P.* 26(b)(1) or State equivalent, is the content of social media discoverable?
2. What can be done as alternative to discovery of content?
   - Deposition of "author/publisher."
   - Conduct discovery of other sources for equivalent of content.
   - Question: Are either or both of these adequate "substitutes" for content?
3. How can relevance of content be shown:
   - For content of "public" site?
   - For content of "private" site?

THE CLOUD & THE WEB (12)
A "DECISION TREE" FOR SOCIAL MEDIA

4. If content of public site sought?
   - Content described by a witness.
   - Content described by investigator (ethics question).

5. If content of private site sought?
   - Content described by witness.
   - Content described by investigator (ethics question).
   - Public site yielded information.

INTERLUDE

Assume a social media page or website contains relevant information:

- How does a party fulfill its duty to preserve? Is a "snapshot" sufficient? Must there somehow be "complete" preservation, whatever that is?
- How might the third-party service provider react to such a preservation request by the party? What does the service contract provide? Is the ESI in the "possession, custody, or control" of the party? What will it cost?
- Is this equivalent to preservation of ephemeral information such as, for example, random access memory, where the duty to preserve is "forward looking?"

THE CLOUD & THE WEB (14) RESOURCE

The Sedona Conference Primer on Social Media, Second Edition (Feb. 2019), https://thesedonaconference.org/publication/Primer_on_Social_Media

THE CLOUD & THE WEB (15) APPLYING THE COMMON LAW

- Agency Principles
- Authority Principles
  - Actual
  - Apparent
  - Implied
- For agency, *see Lawlor v. North American Corp.,* No. 112530 (Ill. Sup. Ct. Oct. 18, 2012).
- For authority, *see Cornelius v. Bodybuilding.com, LLC,* 2011 WL 2160358 (D. Idaho June 1, 2011).
- For apparent authority, *see Astra Oil Co. v. Hydro Syntec Chem., Inc.,* No. 13-cv-08395 (S.D.N.Y. Feb. 18, 2014).
- For apparent authority and ratification, *see Thomas v. Taco Bell Corp.,* No. 12-56458 (9th Cir. July 2, 2014) (mem.).

THE CLOUD & THE WEB (16) APPLYING THE COMMON LAW

Enforcement of browsewrap vs. clickwrap agreements?

- The former does not require user to manifest intent. The latter requires affirmative action to do so.
- Browsewraps require that user had actual or constructive knowledge of terms and conditions.

THE CLOUD & THE WEB (17) APPLYING THE COMMON LAW

"In this appeal we consider whether a hyperlink to a document containing a forum selection clause may be used to reasonably communicate that clause to a consumer." *Starkey v. G Adventures, Inc.,* No. 14-1361-cv (2d Cir. Aug. 7, 2015).

Opinion suggests that using a "clickwrap" to provide notice and obtain consent would have made the case "simpler to resolve."

See Cullinane v. Uber Technologies, Inc., No. 16-2023 (1st Cir. June 25, 2018) (enforceability of arbitration clause contained in online contract).

See Tayyib Bosque, Corp. v. Emily Reality, 17 Civ. 512 (ER) (S.D.N.Y. June 17, 2019) (no contract through exchange of text messages given failure to comply with Statute of Frauds).

See E. Goldman, "If You Want an Enforceable Online Contract, You Better Keep a Good Chain of Evidence—Snow v. Eventbrite," *Technology & Marketing Law Blog* (Nov. 7, 2020), If You Want an Enforceable Online Contract, You Better Keep a Good Chain of Evidence-Snow v. Eventbrite - Technology & Marketing Law Blog (ericgoldman.org)

THE CLOUD & THE WEB (18) APPLYING THE COMMON LAW

Representative decisions:

- *McGhee v. North American Bancard, LLC,* No. 17-CV-0586-AJB-KSC (S.D. Ca. July 21, 2017).
- *Meyer v. Kalanick,* Docket Nos. 16-2750-cv, 16-2752-cv (2d Cir. Aug. 17, 2017).
- *Sgouros v. TransUnion Corp.,* No. 15-1371 (7th Cir. Mar. 25, 2016).

THE CLOUD & THE WEB (19) APPLYING THE COMMON LAW

"Parents may be held directly liable *** for their own negligence in failing to supervise or control their child with regard to conduct which poses an unreasonable risk of harming others." *Boston v. Athearn,* A14A0971 (Ga. Ct. App. Oct. 10, 2014) (reversing summary judgment and remanding for trial on whether parents liable for failing to ensure their child deleted offensive Facebook profile).

THE CLOUD & THE WEB (20) APPLYING THE COMMON LAW

Can a blog entry be libelous?

Why not? *See Lewis v. Rapp,* 725 S.E.2d 597 (N.C. Ct. App. 2012).

THE CLOUD & THE WEB (21)
THE PRIVATE SECTOR

National Labor Relations Act:

- "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Section 7).
- "It shall be an unfair labor practice for an employer *** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." (Section 8(a)).

THE CLOUD AND THE WEB (22)
THE PRIVATE SECTOR

The NLRB applied Sections 7 and 8(a) to disciplinary actions and employer policies in, for example:

- *Karl Kranz Motors, Inc.,* 358 NLRB No. 164 (2012).
- *Design Tech. Grp. d/b/a Betty Page Clothing,* 359 NLRB No. 96 (2013).

The NLRB "adopted an approach to assessing facial challenges to employer work rules under Section 8(a) in *Stericycle, Inc and Teamsters Local 628,* 372 NLRB No. 113 (2023).

THE CLOUD & THE WEB (23)
THE PRIVATE SECTOR

Various States have enacted laws that bar employers from demanding employees to allow access to the employees' social media accounts. *See, e.g.,* P.L. Gordon & J. Hwang, "Making Sense of the Complex Patchwork Created by Nearly One Dozen New Social Media Password Protection Laws," *Lexology* (July 2, 2013); R. Manna, "Employee Social Media Accounts: What Employers Can and Can't Do," 214 *N.J.L.J.* 850 (Dec. 9, 2013).

THE CLOUD & THE WEB (24)
THE PRIVATE SECTOR

Examples of corporate social media policies:

- Associated Press, "Social Media Guidelines for AP Employees" (revised May 2013).
- The Coca-Cola Co., "Coca-Cola Online Social Media Principles" (Dec. 2009).

Who owns "it?" *See Eagle v. Morgan,* 2013 WL 943350 (E.D. Pa. Mar. 12, 2013) (LinkedIn account); *In re CITI, LLC,* 2015 Bankr. Lexis 1117 (Bankr. S.D. Tex. Apr. 3, 2015) (social media accounts).

THE CLOUD & THE WEB (25)
THE PRIVATE SECTOR

J. Cline, "7 Reasons the FTC Could Audit Your Privacy Policy," *Computerworld* (Aug. 21, 2012):

1. Secretly tracking people;
2. Not regularly assessing and improving data security;
3. Not honoring opt-outs;
4. Not collecting parental consent;
5. Not providing complete and accurate privacy policies;
6. Disclosing consumer data without consent;
7. Not assessing vendor and client security.

THE CLOUD & THE WEB (26) "PUBLIC ACCOMMODATION"

Can a website be a "place of public accommodation" within the meaning of the Americans with Disabilities Act?

National Fed. of the Blind v. Scribd Inc., No. 14-cv-162 (D. Vt. Mar. 19, 2015) ("yes" even absent a "physical location").

THE CLOUD & THE WEB (27)
"BYOD"

"The two most common approaches [to employee use of personal devices] *** are BYOD (bring your own device) and COPE (company-owned, personally-enabled)."

"With BYOD, a separate, secure area for work data and activity is created on an employee's personal device. In COPE, a separate area for personal data and activity is created on an employee's otherwise securely protected work device. The concepts are simple, but the devil is in the details."

From "The Battle of BYOD," *ABA Journal* 26 (Jan. 2013).

THE CLOUD & THE WEB (28) "BYOD"

- "Get Ready for Wearable Technology in the Office," *Information Management* 12 (ARMA: Nov./Dec. 2014).
- Can/should an employer reject BYOD and/or COPE? *See* L. Rappaport & K. Burne, "Goldman Looks to Ban Some Chat Services Used by Traders," *Wall St. J.* (Jan. 23, 2014).
- If not, what's the worst that could happen? *See* D. Garrett & R.J. Hedges, "No Good Deed Goes Unpunished: The Unintended Consequences of Using Your Personal Devices for Work," 12 *DDEE* 394 (2012).
- *See* "Bloomberg BNA Webinar: Risks, Liabilities, and Differences Between BYOD and COPE," 13 *DDEE* 272 (2013).

THE CLOUD & THE WEB (29)
"BYOD"

"We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills." *Cochran v. Schwan's Home Service, Inc.,* B247160 (Ca. Ct. App. Aug. 12, 2014) (footnote omitted).

THE CLOUD & THE WEB (30)
THE PUBLIC SECTOR

- *Layshock v. Hermitage School Dist.,* 650 F.3d 205 (3d Cir. 2011) (*en banc*).
- *S.J.W. v. Lee's Summit R-7 School Dist.,* 696 F.3d 771 (8th Cir. 2012).
- *Gresham v. Atlanta,* No. 12-12968 (11th Cir. Oct. 17, 2013) (*per curiam*).
- *Mahanoy Area School Dist. V. B.L.,* No. 20-255 (U.S. June 23, 2021).

ADMISSIBILITY (1)

- FRE 104(a) (role of judge).
- FRE 104(b) (role of jury).
- FRE 401 (relevance).
- FRE 402 (admissibility, but ***).
- FRE 403 (undue prejudice, etc.).
- FRE 901-02 (authenticity).
- FRE 801-07 (hearsay).
- FRE 1001-08 (“best evidence”).

ADMISSIBILITY (2)
FRE 104(a) and (b)
BENCH TRIALS AND EXPERT TESTIMONY

- *Reetz v. Lowe's Companies, Inc.*, Civil Action No. 5:18-00075-KDB-DCK (W.D.N.C. Feb. 22, 2021).
- *BCD Assoc., LLC v. Crown Bank, C.A.*, No. N15C-11-062-EMD (Del. Super. Ct. July 20, 2021).

ADMISSIBILITY (3)

- The Federal Rules of Evidence do not address explicitly electronic evidence but are easily adaptable to it.
- However, some rules may make admissibility problematical:
  - 801(b): What is a declarant?
  - 803(g): What is a business record?
  - 901-02: Is “it” authenticated?
  - 1001-08: What is an original writing?

(With thanks to Judge Grimm)

ADMISSIBILITY (4)

The “hurdles” to admissibility:

1. Is it relevant?
2. Is it authenticated?
3. Is it hearsay?
4. Is it an original?
5. Is there undue prejudice?

(With thanks to Judge Grimm)

ADMISSIBILITY (5)

FRE 902:

"The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted: ***

(13) *Certified Records Generated by an Electronic Process or System*. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12)."

ADMISSIBILITY (6)

Committee Note to 902(13):

"The amendment sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. *** It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly."

ADMISSIBILITY (7)

"A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds—including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the web page was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. ***"

ADMISSIBILITY (8)

"A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided."

ADMISSIBILITY (9)

"(14) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11)."

ADMISSIBILITY (10)

FRE 803:

"The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

***

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998 and whose authenticity is established."

ADMISSIBILITY (11)

Committee Note to 803(16) (as amended):

*"*The ancient documents exception to the rule against hearsay has been limited to statements in documents prepared before January 1, 1998. The Committee has determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). *Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception*. (emphasis added).

ADMISSIBILITY (12)

*** Going forward, it is anticipated that any need to admit old hardcopy documents produced after January 1, 1998 will decrease, *because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception*. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. ***" (emphasis added).

ADMISSIBILITY (13) REPRESENTATIVE DECISIONS

- *Applebaum v. Target Corp.,* No. 15-2198 (6th Cir. Aug. 2, 2016).
- *Espejo v. Southern California Permanente Med. Grp.,* B262717 (Ca. Ct. App. 2d App. Dist. Apr. 22, 2016).
- *Marten Transport, LTD. v. Plattform Advertising, Inc.,* Case No. 14-2464-JWL (D. Kan. Apr. 29, 2016).
- *United States v. Browne,* 834 F.3d 403 (3d Cir. 2016).

ADMISSIBILITY (14)

United States v. Browne:

"In view of Browne's challenge to the authentication and admissibility of the chat logs, our analysis proceeds in three steps. First, as with nondigital records, we assess whether the communications at issue are, in their entirety, business records that may be 'selfauthenticated' by way of a certificate from a records custodian under Rule 902(11) of the Federal Rules of Evidence.

ADMISSIBILITY (15)

Second, because we conclude that they are not, we consider whether the Government nonetheless provided sufficient extrinsic evidence to authenticate the records under a traditional Rule 901 analysis. And, finally, we address whether the chat logs, although properly authenticated, should have been excluded as inadmissible hearsay, as well as whether their admission was harmless."

ADMISSIBILITY (16) COMPETENCE

FRE 701. Opinion Testimony by Lay Witnesses:

"If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

ADMISSIBILITY (17) COMPETENCE

Rule 702. Testimony by Expert Witnesses:

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case."

ADMISSIBILITY (18) COMPETENCE

- *Collins v. State,* 172 So.3d 724 (Miss. 2015) (distinguishing lay vs. expert opinion).
- *Huzinec v. Six Flags Great Adventure,* No. 21-1950 (3d Cir. Feb. 1, 2023) (statement offered to prove notice not hearsay).
- *Reetz v. Lowe's Companies, Inc.,* Civil Action No. 5:18-CV-00075-KDB-DCK (W.D.N.C. Feb. 22, 2021) (judge has increased discretion to perform gatekeeping role in bench trial).
- *United States v. Lizzarraga-Tirado,* 789 F.3d 1107 (9th Cir. 2015) (Google map as hearsay).

ADMISSIBILITY (19) REPRESENTATIVE DECISIONS

- *State v. Stube,* No. 1 CA-CR 19-0032 (Az. Ct. App. June 30, 2020) (admissibility of machine-produced statement).
- *Weinhoffer v. Davie Shoring, Inc.,* No. 20-30568 (5th Cir. Jan. 20, 2022) (Wayback Machine not self-authenticating).
- *Wi-Lan Inc. v. Sharp Elec. Corp.,* 2020-1041 (Fed. Cir. Apr. 6, 2021) (admissibility of source code printout under 803(6) or 703).
- *Yassin v. Blackman,* 2020 NY Slip Op 05090 (2d Dept. App. Div. Sept. 23, 2020) (two levels of hearsay when admissibility of statement within document is dispute).

ADMISSIBILITY (20)
A REMINDER

"An electronic document has no single original—an 'original' is any printed copy. *See* [Ohio] Evid. R. 1001(3) (providing that the 'original' of an electronic document is any readable output that accurately reflects the data in the electronic environment." *Sacksteder v. Senney,* 2014 Ohio 2678 (Ct. App. 2014).

ADMISSIBILITY (21) ADMISSIBILITY AND THE CONFRONTATION CLAUSE

United States v. Brooks, 715 F.3d 1069 (8th Cir. 2013):

- Affirms conviction for bank robbery-related offenses.
- Affirms admission of GPS evidence over objection that adequate foundation had not been laid.
- Rejects argument that GPS tracking reports were inadmissible hearsay.
- Rejects argument that admission of reports violated the Confrontation Clause.

ADMISSIBILITY (22) RESOURCES

- H. Adams, "What is the Evidentiary Significance of [an emoji]? *FMJA Bulletin* 4 (Mar. 2018).
- K.R. Berman, "The Changing World of Expert Testimony," *Litigation* (ABA: Jan. 30, 2023), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2022-23/winter/the-changing-world-expert-testimony/
- K.F. Brady & D. Regard, "Agnes and the Best Evidence Rule or Why You'll Never Get an Original Copy and Why It Doesn't Matter," 12 *DDEE* 185 (2012).

ADMISSIBILITY (23) RESOURCES

- J.M. Haried, "How Two New Rules for Self-Authentication Will Save You Time and Money," 100 *Judicature* 33 (2016), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/judicature/judicature_100-4_haried.pdf
- C.C. Histed, et al., *Bot or Not? Authenticating Social Media Evidence at Trial in the Age of Internet Fakery* (K&L Gates: Nov. 10, 2020), Bot or Not? Authenticating Social Media Evidence at Trial in the Age of Internet Fakery | HUB | K&L Gates (klgates.com)
- The Sedona Conference Commentary on ESI Evidence and Admissibility, Second Ed. (2020) https://thesedonaconference.org/civicrm/mailing/view?reset=1&id=2153

INTERLUDE

Is an expert required under these circumstances?

"The gist of Mills' counterclaim was that, even if Vestige performed a competent forensic evaluation of Starner's computers, it did not accurately and/or effectively communicate the results of its analysis to Mills ***. The sole focus of the counterclaim was on Vestige's breach of its duty to adequately communicate its forensics findings to Mills to enable him to plan his trial strategy ***."

Vestige Ltd. v. Mills, 2013 Ohio 2379 (Ct. App. 2013).

INTERLUDE

Assume these facts:

- A train was involved in a fatal collision with a motor vehicle at a crossing.
- The defendant railroad alleged that warning lights were working and that the crossing gates were down.
- At trial, the railroad introduced a video depicting the scene of the accident.
- The original electronic data had been on the train's hard drive, which had been overwritten and therefore could not be produced in discovery.
- Should the video be admitted? What foundation is necessary? What objections could be made?

Jones v. Union Pacific Rr. Co., No. 12-cv-771 (N.D. Ill. Jan. 6, 2014).

INTERLUDE

Under what circumstances might an emoji be admitted into evidence?

- What evidence rules might apply?
- Who is competent to testify about the meaning of an emoji?
- *See* L. Foster, "Meaning of a Message," *Texas Bar J.* 14 (Jan. 2016); B. Sullivan, "'Just Kidding' ;) : What's the evidentiary standard for social media symbols?" *ABA Journal* 71 (Feb. 2016).

INTERLUDE

Under what circumstances might “blockchain” evidence be admissible?

- What evidence rules might apply?
- Who is competent to testify about the evidence?
- *See* C.C. Sullivan, “Could Blockchain Evidence Be Inadmissible,” *Technologist* (FindLaw Legal Technology Blog May 5, 2016), *http://blogs.findlaw.com/technologist/2016/05/could-blockchain-evidence-be-inadmissible.html*

INTERLUDE

Under what circumstances might evidence derived from the Wayback Machine be admissible?

- Rule 201?
- Rule 803(6)?
- Rule 902(11) or (12) certification?

For the Wayback Machine: https://web.archive.org/

JUROR MISCONDUCT (1)

"'Juror misconduct' does not necessarily mean a juror's bad faith or malicious motive, but means a violation of, or departure from, an established rule or procedure for production of a valid verdict." *Oahu Publications Inc. v. Ahn,* SCPW-13-0003250 (Hawai'i Sup. Ct. July 16, 2014).

JUROR MISCONDUCT (2)

- "Jurors' Use of Social Media During Trials and Deliberations ***" (FJC: 2011).
- "Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations ***" (FJC: 2014) (follow-up to above).
- "New Jury Instructions Strengthen Social Media Cautions" (U.S. Courts: Oct. 1, 2020), New Jury Instructions Strengthen Social Media Cautions | United States Courts (uscourts.gov)

JUROR MISCONDUCT (3)
NYSBA POSTER

JUROR MISCONDUCT (4)
NYSBA POSTER

As a juror, you play a critical role in ensuring that all parties receive a fair trial. It is essential that your decisions be based solely on the information you receive in the courtroom.

Do Not Receive or Send Electronic Communications About the Case

This includes texting, emailing, blogging, posting information on social network websites, or using any other electronic communications to discuss or even mention, this case.

Do Not Talk to Anyone, or Let Anyone Talk to You About the Case

This includes your family and friends. You must not discuss any aspect of the case with anyone until the trial is concluded. Also do not discuss the case with the other jurors until your deliberations begin.

Avoid Outside Information From the Internet or Other Sources

Do not seek information about any aspect of the case, including searching the internet. Avoid news reports – broadcast, print, or internet – relating to this case or issues in this case.

Thank You for Serving as a Juror

JUROR MISCONDUCT (5)

In re Amendments to the Florida Rules of Judicial Administration—Rule 2.451 (Use of Electronic Devices), No. SC12-764 (Fla. Sup. Ct. July 3, 2013):

- "Electronic devices *** may be removed *** from all members of a jury panel at any time before deliberations, but such electronic devices must be removed from all members of a jury panel before jury deliberations begin." (Rule 2-451(b)(1).

JUROR MISCONDUCT (6)

J.T. v. Anbari, No. SD32562 (Mo. Ct. App. Jan. 23, 2014) (affirming defense verdict in medical malpractice action and rejecting argument that juror engaged in misconduct):

"We now live in an age of ubiquitous electronic communications. To say the comments in this case, which simply informed people Doennig [a juror] was serving jury duty, were improper simply because they were posted on Facebook would be to ignore the reality of society's current relationship with communication technology."

JUROR MISCONDUCT (7)

And if something happens:

- *Juror No. One v. Superior Court*, 142 Cal. Rptr. 151 (Ct. App. 2012).
- *State v. Webster,* No. 13-1095 (Iowa Sup. Ct. June 19, 2015).
- *Slaybaugh v. State,* No. 79A02-CR-798 (Ind. Ct. App. Sept. 24, 2015).

ATTORNEY MISCONDUCT

State v. Polk, No. ED98946 (Mo. Ct. App. Dec. 17, 2013):

- Prosecutor tweeted "during the critical time frame of trial."
- "We doubt that using social media to highlight the evidence *** and publically dramatize the plight of the victim serves any legitimate law enforcement purpose or is necessary to inform the public ***."
- Conviction affirmed as no evidence that jury knew of or was influenced by the tweets.

POSTJUDGMENT COSTS (1)

- *Fed. R. Civ. P.* 54(d).
- 28 U.S.C. Sec. 1920:
  - Sec. 1920(2) allows costs for "printed or electronically recorded transcripts necessarily obtained for use in the case."
  - Sec. 1920(d) allows costs for "[f]ees for exemplification and *** copies of any materials where the copies are necessarily obtained for use in the case."

POSTJUDGMENT COSTS (2)

Appellate courts have addressed what costs related to e-discovery are taxable, with varying outcomes: *Compare In re Ricoh Co., Ltd., Patent Litig.,* 661 F.3d 1361 (Fed. Cir. 2011) ("expansive" interpretation with background of parties' agreement) *and Colosi v. Jones Lang LaSalle Americas, Inc.,* No. 14-3710 (6th Cir. Mar. 17, 2015) (*Race Tires "*overly restrictive") *with Race Tires of America, Inc. v. Hoosier Racing Tire Co.*, 674 F.3d 158 (3d Cir. 2012), *Country Vintner v. E.&J. Gallo Winery, Inc.,* 718 F.3d 249 (4th Cir. 2013) *and CBT Flint Partners, LLC v. Return Path, Inc.,* 737 F.3d 1320 (Fed. Cir. 2013) ("narrow" interpretation).

POSTJUDGMENT COSTS (3)

What might the Supreme Court do?

Cf. Taniguchi v. Kan Pacific Saipan, Ltd., 132 S.Ct. 1997 (2012) (term "compensation of interpreter" as used in Sec. 1920(6) does not include costs of document translation from one language to another).

ETHICS (1)
INTRODUCTION

"At the hearing, Sklar's counsel stated: 'I don't even know what 'native format' means.' The court responded: 'You'll have to find out. I know. Apparently [Toshiba's counsel] knows. You're going to have to get educated in the world of *** electronic discovery. E.S.I. *** is here to stay, and these are terms you're just going to have to learn.'" *Ellis v. Toshiba America Info. Sys., Inc.,* 218 Cal. App. 4th 853 (2013).

ETHICS (2)
COMPETENCE

State v. Scoles, 214 N.J. 236 (2013):

- New Jersey Supreme Court demands level of "ESI competence" in context of child pornography prosecution.
- Court established framework by which images may be copied and inspected at defense counsel's office.
- Framework includes requirement that defense counsel "demonstrate the ability to comply with *** a[n] *** order to secure the computer images" and anticipate "advances in technology."

ETHICS (3)
COMPETENCE

Johnson v. McCullough, 306 S.W.3d 551 (Mo. Sup. Ct. 2010) (*en banc*):

"in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters [nondisclosure by a juror] to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history ***."

ETHICS (4)
COMPETENCE

D. Lewis, "Technology: What's Next for Predictive Coding?" *Inside Counsel* (Dec. 27, 2013):

"Even though there is strong support for predictive technology in some legal circles, many of these lawyer-advocates already have a good understanding of the technology and are outliers, constituting a discreet minority in the profession. Attendees of e-discovery conferences will note that the audience is often very homogenous. This is not a mere coincidence; it reflects the reality that e-discovery remains a niche practice, tangential to the merits of the case, and interest in the topic to the Bar, in general, is limited."

ETHICS (5)
COMPETENCE

What should a competent attorney know or do?

- *I/M/O Collie,* 406 S.C. 181 (Sup. Ct. 2013).
- *In re Taylor,* 655 F.3d 274 (3d Cir. 2011).
- *In re Fannie Mae Sec. Litig.,* 552 F.3d 814 (D.C. Cir. 2009).

ETHICS (6)
COMPETENCE

What should a competent attorney know about search?

"[W]here counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and the abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of 'false positives.'"

William A. Gross Constr. Assocs. v. American Mfrs. Ins. Co., 256 F.R.D. 134 (S.D.N.Y. 2009).

ETHICS (7)
COMPETENCE

What should a competent attorney know in the wills and estates context?

A. Eisenberg, "Bequeathing the Keys to Your Digital Afterlife," *New York Times* (May 25, 2013); G.A. Fowler, "Life and Death Online: Who Controls a Digital Legacy?" *Wall St. J.* (Jan. 5, 2013); G.A. Fowler, "What to do Online When a Loved One Dies," *Wall St. J.* (Jan. 4. 2013); S. Kellogg, "Managing Your Digital Afterlife," *Washington Lawyer* 28 (Jan. 2013).

ETHICS (8)
COMPETENCE

What should a competent attorney know about dockets?

- *Franklin v. McHugh,* 2015 WL 6602023 (2d Cir. Oct. 30, 2015).
- *Two-Way Media LLC v. AT&T, Inc.,* 782 F.3d 1311 (Fed. Cir. 2015):

  "In this era of electronic filing—post-dating by some 60 years the era in which the cases cited by the dissent were issued—we find no abuse of discretion in a district court's decision to impose an obligation to monitor an electronic docket for entry of an order which a party and its counsel already have in their possession ***."

ETHICS (9)
COMPETENCE

What should a competent attorney know in the litigation context?

- The Sedona Conference "Jumpstart Outline"
- *See* K.F. Brady, *"Sedona Conference® Revises Popular Jumpstart Outline,"* 16 *DDEE* 227 (2016).
- *"The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel"* (Mar. 2011).

ETHICS (10)
COMPETENCE

The California State Bar Standing Committee on Professional Responsibility and Conduct states in Formal Opinion No. 2015-193 (June 30, 2015) that attorneys should have technical competence and skill – either by themselves or through co-counsel or expert consultants.

ETHICS (11)
COMPETENCE

The “facts:”

- Client is in litigation against chief competitor.
- Opposing counsel suggests joint search of client’s network using opposing counsel’s chosen vendor.
- Opposing counsel offers clawback which court approves.

ETHICS (12)
COMPETENCE

- Attorney prepares keywords for searches and accepts keywords proposed by opposing counsel.
- Client's CEO tells attorney there is no ESI that has not been produced in hard copy.
- Attorney relies on client's IT to understand searches so allows vendor to have unsupervised access.

ETHICS (13)
COMPETENCE

- Attorney does not review search results (assuming results same as hard copies).
- Attorney receives letter from opposing counsel accusing client of destroying evidence.
- Attorney cannot open data and retains forensic expert who determines ESI routinely destroyed following client's retention policy.
- Chief competitor receives privileged and proprietary information.

ETHICS (14)
COMPETENCE

Attorney's ethical duties in managing discovery of ESI:

- "initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;

ETHICS (15)
COMPETENCE

- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet-and-confer with opposing counsel concerning an e-discovery plan;

ETHICS (16)
COMPETENCE

- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner."

(footnotes omitted).

ETHICS (17)
COMPETENCE

For a broad discussion of ESI-related competence, *see* R.J. Hedges & A.W. Wagner, "Competence with Electronically Stored Information: What Does It Currently Mean in the Context of Litigation and How Can Attorneys Achieve It?" 16 *DDEE* 322 (2016).

ETHICS (18)
COMPETENCE

- For an "overview of how to leverage computer technology to best position the claims/defenses that clients look to counsel to purs[u]e/defend for them effectively," *see* D.K. Gelb, "Using Technology to Prepare for Trial," 31 *GPSolo* (Sept./Oct. 2014).
- For a discussion of the use of evidence presentation systems, *see* L. Bachman, "How to Take Advantage of Courtroom Technology," 40 *Litigation*, No. 2 (ABA: Winter 2014).

ETHICS (19)
DATA SECURITY

- P.B. Haskel, "Confidential Communications, Data Security, and Privacy in the 'Cloud'," *The* [Texas Bar] *College Bulletin* 8 (2013).
- C. J. Hoffman, "How Law Firms Can Protect Client Confidences and Private Data from Hackers," 14 *DDEE* 485 (2014).
- V.I. Polley, "Cybersecurity for Lawyers and Law Firms," 53 *Judges' Journal* 11 (ABA Jud. Div.: Fall 2014).
- *The Sedona Conf. Commentary on Privacy and Information Security: Principles and Guidelines for Lawyers, Law Firms, and Other Legal Service Providers*, 17 *Sedona Conf. J.* 1 (2016), https://thesedonaconference.org/download-pub/4786

ETHICS (20)
BASICS

August 2012 Amendments to the ABA Rules of Professional Conduct:

- Model Rule 1.1 requires competent representation of clients. Comment to 1.1 requires lawyer to "keep abreast of changes in the law and its practice." Comment amended to include "the benefits and risks associated with technology."
- Model Rule 1.6 requires confidentiality. Rule amended to require lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

ETHICS (21)
BASICS

Amendments continued:

- Comment to Model Rule 1.6 amended to include factors to be considered in determining whether lawyer made reasonable efforts and to state that, "[a] client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures ***," and to note that state or federal laws may require lawyer to take additional steps, but that this is "beyond the scope of these Rules."

ETHICS (22)
BASICS

Amendments continued:

- Model Rule 4.4(b) amended to reference document or "electronically stored information" that lawyer receives and knows or reasonably should have known was sent inadvertently.
- Comment expanded to include "electronically stored information" and reference "embedded data (commonly referred to as 'metadata')."
- Comment expanded to state: "Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

ETHICS (23)
BASICS

Amendments continued:

- Comment to Model Rule 5.3 amended to address use of "Nonlawyers Outside the Firm." Requires attorney to "make reasonable efforts to ensure that the services are provided in a manner that is compatible with the attorney's professional obligations" and to "communicate directions appropriate under the circumstances ***."
- Comment also amended to address client selection of "a particular nonlawyer service provider outside the firm."
- Comment to Model Rule 7.2 amended to reference electronic media in context of attorney advertising.

ETHICS (24)
OTHER TOPICS

- ABA Formal Opinion 498 (Mar. 10, 2021) ("Virtual Practice").
- ABA Formal Opinion 496 (Jan. 13, 2021) ("Responding to Online Criticism").
- ABA Formal Opinion 495 (Dec. 16, 2020) ("Lawyers Working Remotely").
- ABA Formal Opinion 483 (Oct. 17, 2018) ("Lawyers' Obligations After an Electronic Data Breach or Cyberattack").
- ABA Formal Opinion 482 (Sept. 18, 2018) ("Ethical Obligations Related to Disasters").

ETHICS (25)
OTHER TOPICS

- ABA Formal Opinion 477R (May 11, 2017; Revised May 22, 2018) ("Securing Communication of Protected Client Information")
- ABA Formal Opinion 479 (Dec. 15, 2017) ("The 'Generally Known' Exception to Former-Client Confidentiality")
- ABA Formal Opinion 480 (Mar. 6, 2018) ("Confidentiality Obligations for Lawyer Blogging and Other Public Commentary")
- ABA Formal Opinion 466 (Apr. 24, 2014) ("Lawyer Reviewing Jurors' Internet Presence").
- ABA Formal Op. 11-460 (Aug. 4, 2011) ("Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel").

ETHICS (26)
OTHER TOPICS

- State Bar of California Standing Comm. on Prof. Respon. and Conduct, Formal Op. No. 2010-179 ("Does an attorney violate the duties of confidentiality and competence *** by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?").
- State Bar of California Standing Comm. on Prof. Respon. and Conduct, Formal Op. No. 2016-196 ("Under what circumstances is 'blogging' by an attorney a 'communication' subject to the requirements and restrictions of the *** [RPC] regulating attorney advertising?").

ETHICS (27)
OTHER TOPICS

- North Carolina State Bar 2012 Formal Ethics Op. 5 (Oct. 26, 2012) ("a lawyer representing an employer must evaluate whether email messages an employee sent to and received from the employee's lawyer using the employer's business email system are protected by the attorney-client privilege and, if so, decline to review or use the messages ***.").

- North Carolina State Bar 2015 Formal Ethics Op. 6 (Oct. 23, 2015) (Does attorney have ethical obligation to replace trust funds stolen from online trust fund account by hacker?).

- Ohio Supreme Court Bd. of Commn'rs on Grievances & Discipline Op. 2013-2 (Apr. 5, 2013) ("Direct Contact with Prospective Clients: Text Messages").

ETHICS (28)
OTHER TOPICS

- Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof. Responsibility Formal Op. 2010-200 (undated) ("Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in Pennsylvania").

- Philadelphia Bar Ass'n Prof. Guidance Comm. Op. 2013-4 (Sept. 2013) (firm's handling of former partner's e-mail account).

- San Diego Cty. Bar Ass'n Legal Ethics Op. 2011-2 (May 24, 2011) ("friending").

ETHICS (29)
REPRESENTATIVE DECISIONS

- *Castellano v. Winthrop,* 27 So.3d 134 (5th Fla. Dist. Ct. App. 2010).
- *Jeanes-Kemp, LLC v. Johnson Controls, Inc.,* 2010 WL 3522028 (S.D. Miss. Sept. 1, 2010).
- *Lawson v. Sun Microsystems,* 2010 WL 503054 (S.D. Ind. Feb. 8, 2010).
- *Stengart v. Loving Care Agency, Inc.,* 201 N.J. 300 (2010).
- *Estate of Kennedy v. Rosenblatt,* No. A-5397-15T4 (N.J. App. Div. Nov. 4, 2016).

ETHICS (30)
CITATIONS & REFERENCES

Beware "link rot":

- "Missing Links," *ABA J.* 17 (Dec. 2013).
- "Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions," *Judicial Conference of the United States* (Mar. 2009).

ETHICS (31)
ETHICS & SOCIAL MEDIA

NYCLA Ethics Opinion 745 (July 2, 2013):

"DIGEST: It is the Committee's opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4." (footnote omitted).

ETHICS (32)
ETHICS & SOCIAL MEDIA

Philadelphia Bar Ass'n Prof. Guidance Comm. Op. 2014-5 (July 2014):

"It is the Committee's opinion that, subject to the limitations described below:

(1) A lawyer may advise a client to change the privacy settings on the client's Facebook Page.

ETHICS (33)
ETHICS & SOCIAL MEDIA

(2) A lawyer may instruct a client to make information on the social media website 'private,' but may not instruct or permit the client to delete/destroy a relevant photo, link, text or other content, so that it no longer exists.

(3) A lawyer must obtain a copy of a photograph, link or other content posted by the client on the client's Facebook page in order to comply with a Request for Production or other discovery request.

(4) A lawyer must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client." (footnote omitted).

ETHICS (34)
ETHICS & SOCIAL MEDIA

Professional Ethics Committee of the Florida Bar Advisory Opinion 14-1 (approved by the Board of Governors Oct. 16, 2015):

- Attorney may advise client to make social media content inaccessible to the public.
- "Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the inquirer also may advise that a client remove information relevant to the foreseeable proceeding from social media pages as long as the social media information or data is preserved."

ETHICS (35)
ETHICS & SOCIAL MEDIA

Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the NYSBA (Release Date June 20, 2019):

- No. 1 Attorney Competence
- No. 2 Attorney Advertising and Communications Concerning a Lawyer's Services
- No. 3 Furnishing of Legal Advice Through Social Media
- No. 4 Review and Use of Evidence from Social Media
- No. 5 Communicating with Clients

ETHICS (36)
ETHICS & SOCIAL MEDIA

- No. 6 Researching Jurors and Reporting Juror Misconduct
- No. 7 Using Social Media to Communicate with a Judicial Officer

For discussion of conflict between ABA Formal Opinion 466 and the Guidelines regarding juror contact, *see* M.A. Berman, I.A. Grande & R.J. Hedges, "Why ABA Opinion on Jurors and Social Media Falls Short," *NYSBA J.* 52 (Sept. 2014).

ETHICS (37)
ETHICS & SOCIAL MEDIA

Pennsylvania Bar Ass'n Formal Op. 2014-300 ("Ethical Obligations for Attorneys Using Social Media") (Sept. 2014):

"1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.

ETHICS (38)
ETHICS & SOCIAL MEDIA

6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties."

ETHICS (39)
ETHICS AND SOCIAL MEDIA

D.C. Bar Legal Ethics Comm. (Nov. 2016):

Ops. 370 ("Social Media I: Marketing and Personal Use") and 371 ("Social Media II: Use of Social Media in Providing Legal Services"):

Among other things, these raise:

- "Positional conflicts" that may be created by blogging.
- Warning about allowing social media sites to access e-mail contact lists.

ETHICS (40)
ETHICS & SOCIAL MEDIA

Some social media-specific questions:

- Must "tweets" directed to potential clients be labeled as "attorney advertising?" NYSBA Comm. on Prof. Ethics Op. 1009 (May 21, 2014).
- Must an attorney disclose her identity when sending a "friend" request to an unrepresented person who is a possible defendant? *Compare* Massachusetts Bar Ass'n Comm. on Prof. Ethics Op. 2014-5 (yes) *with* Oregon State Bar Legal Ethics Comm. Formal Op. 2013-189 (Feb. 2013) (no).

ETHICS (41)
ETHICS & SOCIAL MEDIA

NYCLA Ethics Opinion 748 (Mar. 10, 2015):

- An attorney may have a LinkedIn profile.
- Depending on content, a profile may constitute Attorney Advertising.
- An attorney must ensure that content truthful.
- Inaccurate endorsement should be excluded.
- Profile should be monitored.

ETHICS (42)
ETHICS & SOCIAL MEDIA
WHAT'S THE WORST THAT COULD HAPPEN?

Allied Concrete Co. v. Lester, 736 S.E.2d 699 (Va. Sup. Ct. 2013).

Kenneth Paul Reisman, Public Reprimand No. 2013-21 (Mass. Bd. of Bar Overseers Oct. 9, 2013).

ETHICS (43)
ETHICS & SOCIAL MEDIA
IN SUMMARY

- "Cloud Ethics Opinions Around the U.S.," ABA Legal Technology Resource Center, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.
- R.J. Hedges & M.R. Grossman, "Ethical Issues in E-discovery, Social Media, and the Cloud," 39 *Rutgers Computer and Tech. L.J.* 125 (2013).

ETHICS (44)
ELECTRONIC COMMUNICATIONS IN GENERAL

For a comprehensive overview of how attorneys might "embrace technology" and avoid "ethical, legal and professional issues," *see The Florida Bar Best Practices for Professional Electronic Communication* (Updated May 2020), https://www-media.floridabar.org/uploads/2020/06/ADA-E-communication-FINAL_May-2020.pdf.

INTERLUDE

Assume these facts:

- You represent a party in a civil action.
- You are about to make a production of one terabyte of ESI to your adversary.
- Your client has retained a vendor to make the production after it undertakes a privilege review. The client tells you not to be concerned about whatever review the vendor does.
- The production is made and, after the fact, you learn that several thousand privileged documents were included in the production.

Did you take reasonable steps to avoid the inadvertent disclosure?

INTERLUDE

Assume these facts:

- You represent a party in a civil action.
- Your client has retained a vendor to review four terabytes of ESI in response to a request for production served by your adversary. The client tells you not to be concerned about whatever review the vendor does.

Do you have an obligation to oversee what the vendor does?

If you do, how might you supervise the vendor?

INTERLUDE

Assume these facts:

- You represent a party in a civil action.
- You have been served with requests for production of certain ESI.
- Your client tells you that, despite your warning that relevant ESI must be preserved, one division of your client failed to implement a hold and, as a result relevant ESI has been "lost."

What do you do?

INTERLUDE

Assume these facts:

- Your associate is on vacation but is communicating with you remotely.
- She is drafting a will for your review and will be sending it to you shortly. The draft will include notes about her conversation with the client for whom the will is being written.
- Your associate sends you the draft from a coffee shop using the shop's WiFi to connect to the firm's email.

Any problem with this?

TRENDS TO WATCH (OUT) FOR (1)

- Emphasis on cooperation and proportionality.
- Disputes about “overpreservation” and limiting scope of discovery about preservation efforts.

TRENDS TO WATCH (OUT) FOR (2)

- Discovery and preservation of new sources of electronic information:
  - Social media.
  - BYOD and the like.
  - Ephemeral messages and virtual meetings.
  - New or “exotic” sources – whatever those may be.
- Dealing with increasing volume, variety, and velocity of ESI.

TRENDS TO WATCH (OUT) FOR (3)

- Discovery becoming an iterative process, especially in complex actions.

- Discovery becoming more than “worth the game” in “small” actions and perhaps even in larger ones.

TRENDS TO WATCH (OUT) FOR (4)

- Use of third-party providers to provide services, etc., and preservation of ESI.
- Proactive attempts to deal with privilege:
  - Non-waiver agreements and third parties.
  - Deferred privilege logs.
  - Categorical privilege logs.

TOP TEN COST-SAVERS (1)

Develop and implement a comprehensive e-records management program before any litigation is contemplated (a/k/a “Information Governance”). It just makes good business sense.

TOP TEN COST-SAVERS (2)

Establish a standard “litigation response” procedure, just as you would have any other business risk mitigation procedure (fire, flood, etc.). No well-run organization should be without one.

TOP TEN COST-SAVERS (3)

Include knowledgeable IT, RM, and business personnel in litigation response planning, conferences, and execution. Effective response is a team effort.

TOP TEN COST-SAVERS (4)

Focus on data preservation issues early – well before the Rule 26(f) conference. This is a two-way street, for both requesting and responding parties.

TOP TEN COST-SAVERS (5)

Cooperate with opposing counsel to develop a "multi-tiered" discovery plan that concentrates first on review and production of relevant data from the most accessible sources, and avoids review and production of data from less accessible sources unless and until it is shown to be necessary.

TOP TEN COST-SAVERS (6)

Go beyond agreeing with opposing counsel on the form or forms of production, and consider agreeing on a common litigation support platform and the exchange of “standard” objective metadata.

TOP TEN COST-SAVERS (7)

Preserve and review potentially responsive data in native format, if possible. If money must be spent on data conversion, spend it later on the small amount of data most likely to be produced to opposing counsel.

TOP TEN COST-SAVERS (8)

Use appropriate and proven technology to assist in identification, review, and response. Mutually agreed-upon sampling, de-duplication, and keyword searches are good starting points.

Consider the benefits – and limits – of transparency.

TOP TEN COST-SAVERS (9)

Make specific requests and responses. Nothing wastes more time and energy in discovery than a set of vague, overbroad requests promoting a set of vague, overbroad objections, which are not allowed anyway in a federal court.

TOP TEN COST-SAVERS (10)

Enter into “quick peek” or “clawback” agreement with opposing counsel to mitigate both parties’ privilege review risks and secure nonwaiver order under Rule 502(d) or State equivalent.

If there is no State equivalent, at least get a nonwaiver agreement.

PROTECTIVE ORDERS & PUBLIC ACCESS (1)

- *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases,* 8 *Sedona Conf. J.* 141 (2007) (post-public comment version), https://thesedonaconference.org/download-pub/478.
- R.J. Hedges, "Maintaining Privacy and Confidentiality in Litigation – Can It Be Done?" *Pretrial Practice & Discovery* (Dec. 3, 2015), http://apps.americanbar.org/litigation/committees/pretrial/articles/fall2015-1215-maintaining-privacy-confidentiality-litigation-can-it-be-done.html.

PROTECTIVE ORDERS & PUBLIC ACCESS (2)

- Presumption of public access to court records and proceedings:
  - Common law.
  - First Amendment.
- 21st century privacy concerns given the Internet:
  - CM/ECF and PACER.
  - *Fed. R. Civ. P.* 5.2.
- Rule 26(c) protective orders available upon showing of "good cause."
- Sealing orders available upon showing of "compelling need."

PROTECTIVE ORDERS & PUBLIC ACCESS (3)

Five questions to ask regarding pleadings, orders, motions, and dockets:

1. Are anonymous pleadings allowed and, if so, why?
2. Why do some courts distinguish between dispositive and non-dispositive motions for purposes of public access?
3. What circumstances might justify the redaction or sealing of a docket?
4. What showing is necessary for a sealing order?
5. Should “strangers” be permitted to intervene to challenge an order?

PROTECTIVE ORDERS & PUBLIC ACCESS (4)

Five questions to ask regarding discovery:

1. What is “good cause” for issuance of a protective order?
2. Is there a basis for an order under Rule 26(c) or a State equivalent?
3. What remedies are available for a breach?
4. Can a party recover something that was made public despite an order?
5. Should “strangers” be permitted to intervene to challenge an order?

PROTECTIVE ORDERS & PUBLIC ACCESS (5)

Five questions to ask regarding court proceedings:

1. What is the meaning of “experience and logic”?
2. Does the experience and logic test apply to other than criminal proceedings?
3. What are examples of “nonpublic” proceedings?
4. How is the right to “open” proceedings enforced?
5. Should “strangers” be permitted to intervene to challenge an order?

PROTECTIVE ORDERS & PUBLIC ACCESS (6)

Five questions to ask regarding settlements:

1. What is the difference between a settlement involving a public entity and one involving only private parties for purposes of confidentiality or access?
2. When does a private settlement become “public”?
3. What remedies are available for breach of an order?
4. What ethical considerations are related to sealed settlements?
5. Should “strangers” be permitted to intervene to challenge an order?

PROTECTIVE ORDERS & PUBLIC ACCESS (7)

Four questions to ask regarding criminal matters and on appeals:

1. Do the standards established for confidentiality and public access apply equally to criminal proceedings and appeals?
2. If not, what is different and why?
3. Are there any circumstances that would justify sealing anything on an appeal?
4. Should “strangers” be permitted to intervene to challenge an order?

PROTECTIVE ORDERS & PUBLIC ACCESS (8) REPRESENTATIVE DECISIONS

- *Company Doe v. Public Citizen,* 749 F.3d 246 (4th Cir. 2014).
- *Delaware Coalition for Open Gov't, Inc. v. Strine*, 733 F.3d 510 (3d Cir. 2013), *cert.* denied, 124 S.Ct. 1551 (2014).
- *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan,* Nos. 15-1544/1551/1552 (6th Cir. June 7, 2016).

PROTECTIVE ORDERS & PUBLIC ACCESS (9) REPRESENTATIVE DECISIONS

- *Oahu Publications Inc. v. Ahn,* 331 P.3d 460 (Hawai'i Sup. Ct. 2014).
- *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486 (5th Cir. 2012).
- *Times Publishing Co. v. Bollea,* No. 2D15-5044 (Fla. 2d Dist. Ct. App. Mar. 17, 2016).

ESI IN CRIMINAL ACTIONS (1) POTENTIAL OBSTRUCTION OF JUSTICE CHARGES

Spoliation may be a crime *and* be used to prove consciousness of guilt for underlying crimes. Defining statutes include:

- 18 U.S.C. Sec. 1512(c).
- 18 U.S.C. Sec. 1517.
- 18 U.S.C. Sec. 1519.

Note that Section 1519 requires that "information" be lost. *Yates v. United States,* 574 U.S. 528 (2015).

ESI IN CRIMINAL ACTIONS (2) POTENTIAL OBSTRUCTION OF JUSTICE CHARGES

- *United States v. Kernell*, 667 F.3d 746 (6th Cir. 2012) (conviction affirmed; defendant deleted email related to efforts to gain access to Sarah Palin's email).
- *In re: Grand Jury Investigation*, 445 F.3d 266 (3d Cir. 2006) (conviction affirmed; defendant deleted email after receipt of grand jury subpoena).
- *United States v. Ganier*, 468 F.3d 920 (6th Cir. 2006) (defendant CEO deleted files from laptop and desktop PC after learning of grand jury subpoena).

ESI IN CRIMINAL ACTIONS (3)
THE EVOLVING FOURTH AMENDMENT

"Although text messaging has enjoyed a precipitous rise ***, it is still a relatively new phenomenon and, as is often the case with new technology, courts may struggle to adapt existing legal principles to new realities. It is often not easy to pour new wine into old wineskins, yet wise stewardship might suggest the use of the old skins until they burst. So too, legal principles developed in the context of more antediluvian forms of communication may provide useful guidance ***." *State v. Patino,* No. 2012-263-C.A. (R.I. Sup. Ct. June 20, 2014).

ESI IN CRIMINAL ACTIONS (4)
THE EVOLVING FOURTH AMENDMENT

"We realize that judicial decisions regarding the application of the Fourth Amendment to computer-related seizures may be of limited longevity. Technology is rapidly evolving and the concept of what is reasonable for Fourth Amendment purposes will likewise have to evolve. *** New technology may become readily accessible, for example, to enable more efficient or pinpointed searches of computer data, or to facilitate onsite searches. If so, we may be called upon to reexamine the technological rationales that underpin our Fourth Amendment jurisprudence in this technology-sensitive area of the law." *United States v. Hill,* 459 F.3d 966 (9th Cir. 2006).

ESI IN CRIMINAL ACTIONS (5)
THE SUPREME COURT

United States v. Jones, 132 S.Ct. 945 (2012):

- Scalia (with Roberts, Kennedy and Thomas) = "trespass."
- Alito (with Ginsburg, Breyer and Kagan) = "The best we can do *** is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated."
- Sotomayor = Joins Scalia's opinion, but notes that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."

ESI IN CRIMINAL ACTIONS (6)
THE SUPREME COURT

Riley v. California, 134 S.Ct. 2473 (2014):

- Unanimous decision by Roberts, C.J.
- "Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different."
- "Our answer to the question of what police must do before searching a cell phone incident to an arrest is accordingly simple – get a warrant."
- "Exigent circumstances" remain available.

ESI IN CRIMINAL ACTIONS (7) INTERPRETING *RILEY*

- For analysis of *Riley* and how it might impact other "criminal ESI" issues, *see* J.P. Murphy & L.K. Marlon, "*Riley v. California*: The Dawn of a New Digital Age of Privacy," 14 *DDEE* 318 (2014).
- Post-*Riley* decision that rejects an "exigent circumstances" argument, *see United States v. Jenkins,* 2014 WL 2933192 (S.D. Ill. June 30, 2014).
- Post-*Riley* decision that rejects the argument that a hard drive is a "closed container," *see People v. Evans,* No. A138712 (Ca. Ct. App. Oct. 3, 2014).

ESI IN CRIMINAL ACTIONS (8) POST-*RILEY* QUESTIONS

- Has *Riley* ushered in a new age of digital privacy?
- Do the "qualitative" and "quantitative" differences between cell phones and physical containers identified by the Chief Justice carry over to other "sources of electronic information?"
- What is left of the search-incident-to-arrest doctrine as applied to electronic devices?

ESI IN CRIMINAL ACTIONS (9)
POST-*RILEY* QUESTIONS

- What might be exigent circumstances in the context of cell phones?
- Might the "mosaic" theory give rise to a new definition of privacy?
- Assuming that *Riley* is always quoted for the *objective* expectation of privacy, might the focus now be on *subjective* expectation? (And lead to examination of terms of service and conditions of employment?)

(With thanks to Judge Grimm.)

ESI IN CRIMINAL ACTIONS (10)
THE SUPREME COURT

Grady v. North Carolina, 135 S.Ct. 803 (2015) (*per curiam*):

- Unanimous decision.
- Petitioner a recidivist sex offender, ordered to wear satellite-based monitoring device for life.
- "The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search."
- Remanded for consideration of whether the search is reasonable.

ESI IN CRIMINAL ACTIONS (11) POST-*GRADY* QUESTIONS

- *Grady* relied in part on *Jones.* Will *Grady* be limited to physical intrusions?
- Will the unanimity continue beyond physical intrusion?

ESI IN CRIMINAL ACTIONS (12) THE SUPREME COURT

City of Los Angeles, California v. Patel, 135 S.Ct. 400 (2015):

- "the provision *** that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them any opportunity for pre-compliance review."
- Rejects argument that the hotel industry is "closely regulated."

ESI IN CRIMINAL ACTIONS (13)
THE SUPREME COURT

United States v. Microsoft Corp., No. 17-02, *cert.* granted, Oct. 16, 2017:

Question Presented:

"Whether a United States provider of email services must comply with a probable-cause-based warrant issued under 28 U.S.C. 2703 by making disclosure in the United States of electronic communications within that provider's control, even if the provider has decided to store that material abroad."

Dismissed as moot with passage of CLOUD Act, 138 S.C. 1186 (Apr. 17, 2018) (*per curiam*).

ESI IN CRIMINAL ACTIONS (14)
THE SUPREME COURT

Carpenter v. United States, 138 S.Ct. 2206 (June 22, 2018):

5 to 4 decision:

"This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements."

ESI IN CRIMINAL ACTIONS (15)
THE SUPREME COURT

"We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search."

ESI IN CRIMINAL ACTIONS (16)
THE SUPREME COURT

Kennedy, with Alito and Thomas, dissenting:

"This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case."

ESI IN CRIMINAL ACTIONS (17)
REASONABLE EXPECTATIONS OF PRIVACY

- *United States v. Caira,* 833 F.3d 803 (7th Cir. 2016) (none in I.P. address shared with third-party).
- *United States v. De I'sle,* 825 F.3d 426 (8th Cir. 2016) (none in credit card strips).

ESI IN CRIMINAL ACTIONS (18)
EX ANTE CONDITIONS

- *In re Appeal of App. for Search Warrant,* 2012 VT 102 (Sup. Ct. 2012), *cert.* denied, 569 U.S. 994 (2013) (*ex ante* conditions).
- *United States v. Comprehensive Drug Testing Inc.,* 621 F.3d 1162 (9th Cir. 2010) (*en banc*), "recommended" *ex ante* conditions:
  - Government waives "plain view."
  - Independent personnel segregate nonresponsive ESI.
  - Applications and subpoenas disclose risk of destruction.
  - Search procedure used to locate only responsive ESI.
  - Government destroys or returns nonresponsive ESI.

ESI IN CRIMINAL ACTIONS (19)
EX ANTE CONDITIONS

- *I/M/O ODYS LOOX Plus Tablet,* 28 F. Supp. 3d 40 (D.D.C. 2014).
- *I/M/O Search of Information Associated with [Redacted] @mac.com that is Stored at Premises Controlled by Apple, Inc.,* 13 F. Supp. 3d 157 (D.D.C. Aug. 8, 2014).
- *I/M/O Matter of the Search of Premises Known as: Three Hotmail Email Accounts, etc.,* No. 16-mj-8036, 2016 WL 1239916 (D. Kan. Mar. 28, 2016).

ESI IN CRIMINAL ACTIONS (20)
EX ANTE CONDITIONS

- *United States v. Johnston,* 789 F.3d 935 (9th Cir.), *cert.* denied, No. 15-5642 (U.S. May 26, 2015).
- *United States v. Brooks,* No. 15-11015, 2016 WL 1534225 (11th Cir. Apr. 15, 2016) (*per curiam*).
- *In re Microsoft Corp.,* No. 16-MJ-8036 (D. Kan. Sept. 28, 2016).

ESI IN CRIMINAL ACTIONS (21) SEARCH WARRANT-RELATED REPRESENTATIVE DECISIONS

- *United States v. Woerner,* 709 F.3d 527 (5th Cir. 2013) (good faith exception).
- *United States v. Ganias,* No. 12-240-cr, 2016 WL 3031285 (2d Cir. May 27, 2016) *(en banc*) *(*good faith exception).
- *United States v. Katzin,* No. 12-2548 (3d Cir. Oct. 1, 2014 (*en banc*) (good faith exception).

ESI IN CRIMINAL ACTIONS (22) SEARCH WARRANT-RELATED REPRESENTATIVE STATE DECISIONS

- *State v. Earls,* 214 N.J. 564 (2013) (imposing warrant requirement under New Jersey Constitution).
- *State v. Andrews,* 227 Md. App. 350 (2016) (imposing warrant requirement for use of cell site stimulator).
- *Tracey v. State,* 152 So.3d 504 (Fla. Sup. Ct. 2014) (imposing warrant requirement for real time cell site information under Fourth Amendment).
- H. Kaplan, "State Courts are Divided as to How to Apply Particularity Requirement to Search of Phone," 14 *DDEE* 495 (2014) (contrasting approaches of Kentucky and Nebraska Supreme Courts).

ESI IN CRIMINAL ACTIONS (23) SELF-INCRIMINATION

In Re Grand Jury Subpoena Duces Tecum Dated March 29, 2012, 670 F.3d 1335 (11th Cir. 2012).

Commonwealth v. Gelfgatt, 468 Mass. 512 (Sup. Jud. Ct. 2014).

Commonwealth v. Baust, No. CR 14-1439, 2014 WL 6709960 (Va. 2d Jud. Cir. Oct. 28, 2014).

G.A.Q.L. v. State, 4D18-1811 (Fla. 4th Dist. Ct. App. Oct. 24, 2018).

ESI IN CRIMINAL ACTIONS (24)
THE ALL WRITS ACT

- *In re Order Requiring Apple Inc. to Assist in the Execution of a Search Warrant Issued by this Court,* No. 16-MJ-2007 (D. Mass. Feb. 1, 2016).
- *I/M/O the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate #5KGD203* (N.D. Ca. Mar. 28, 2016) (status report).
- *In re Order Requiring Apple, Inc. to Assist in the Execution of a Search Warrant Issued by this Court,* 15-mc-01902 (E.D.N.Y. Apr. 22, 2016) (letter).

ESI IN CRIMINAL ACTIONS (25) MICROSOFT

I/M/O Warrant to Search a Certain E-Mail Acct. Controlled and Maintained by Microsoft Corp., 829 F.3d 197 (2d Cir. 2016):

- Warrant issued under Stored Communications Act required Microsoft to produce information stored in Ireland. Microsoft held in civil contempt and appealed.
- Court of Appeals held the Act did not have extraterritorial effect.
- One judge concurred but did so "without any illusion that the result should even be regarded as a rational policy outcome, let alone celebrated as a milestone in protecting privacy."

Cert. granted Oct. 16, 2017. Second Circuit judgment vacated given passage of CLOUD Act. *United States v. Microsoft Corp.*, No. 17-2 (U.S. Apr. 17, 2018) (*per curiam*).

ESI IN CRIMINAL ACTIONS (26) POST-INDICTMENT

Government's obligations come into play:

- Criminal Rule 16(a).
- *Brady.*
- *Giglio.*
- Jencks Act.

Defendant's obligations set forth in Rule 16(b).

Possible remedies for failure to comply:

- "order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions" (Rule 16(d)(2)(A)).
- "grant a continuance" (Rule 16(d)(2)(B)).
- "prohibit that party from introducing the undisclosed evidence" (Rule 16(d)(2)(C)).
- "enter any other order that is just under the circumstances" (Rule 16(d)(2)(D)).

ESI IN CRIMINAL ACTION (27) POST-INDICTMENT

*Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (*JETWG: Feb. 2012):

- "Introduction to the Recommendations ***".
- "Recommendations ***".
- "Strategies and Commentary ***".
- "ESI Discovery Production Checklist".

ESI IN CRIMINAL ACTIONS (28) NEW TECHNOLOGIES

- B. Barrett, “New Surveillance Systems May Let Cops Use All of the Cameras,” *Wired* (May 19, 2016).
- T. Claburn, “Google Glass to Arm Police, Firefighters,” *InformationWeek* (Aug. 19, 2013).
- R.M. Thompson, “Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses” (C.R.S. Apr. 3, 2013).

ESI IN CRIMINAL ACTIONS (30) RESOURCES

- S. Broderick, *et al., Criminal e-Discovery: A Pocket Guide for Judges* (Federal Judicial Center: 2015), https://www.fjc.gov/content/309106/criminal-e-discovery-pocket-guide-judges.
- R.J. Hedges, "Electronic Information in Criminal Investigations and Actions" (all editions), https://www.mass.gov/service-details/understanding-electronic-information-in-criminal-investigations-and-actions.

QUESTIONS?
COMMENTS?
CORRECTIONS?

Please send any and all to:

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