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

Chair, Advisory Board, *Digital Discovery & e-Evidence* (a Bloomberg BNA publication)

Co-Senior Editor, *The Sedona Conference® Cooperation Proclamation Resources for the Judiciary* (Dec. 2014 and earlier editions)

Etc.

NOTE TO THE READER (1)

These slides — and any accompanying comments — are not intended to be an exhaustive review of the laws governing electronically stored information ("ESI") or, more broadly, electronic information. The slides are intended to further consideration of the topics addressed. And there will be always be more to consider as governing rules change, case law develops, and technology advances.

NOTE TO THE READER (2)

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* (Fourth Edition) (Apr. 2014).

NOTE TO THE READER (3)

Something new related to ESI appears on a daily basis, be it in the context of civil actions, criminal investigations and prosecutions, regulatory investigations and proceedings, or ethics. So:

- **We need to "fit" whatever is new (including new technologies) into existing legal frameworks.**
- **We need to replace complacency and "old text" with flexibility.**
- **And we need to reinvent focus on a regular basis.**

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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

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 (disks, flash drives)

WHAT MAKES ESI DIFFERENT? (4) PLACES TO LOOK

Third-party providers (incl. social media)

“Wearable technology”

Vehicular ESI

Drones

Body Cameras

WHAT MAKES ESI DIFFERENT? (5) PLACES TO LOOK

Random Access Memory ("RAM")

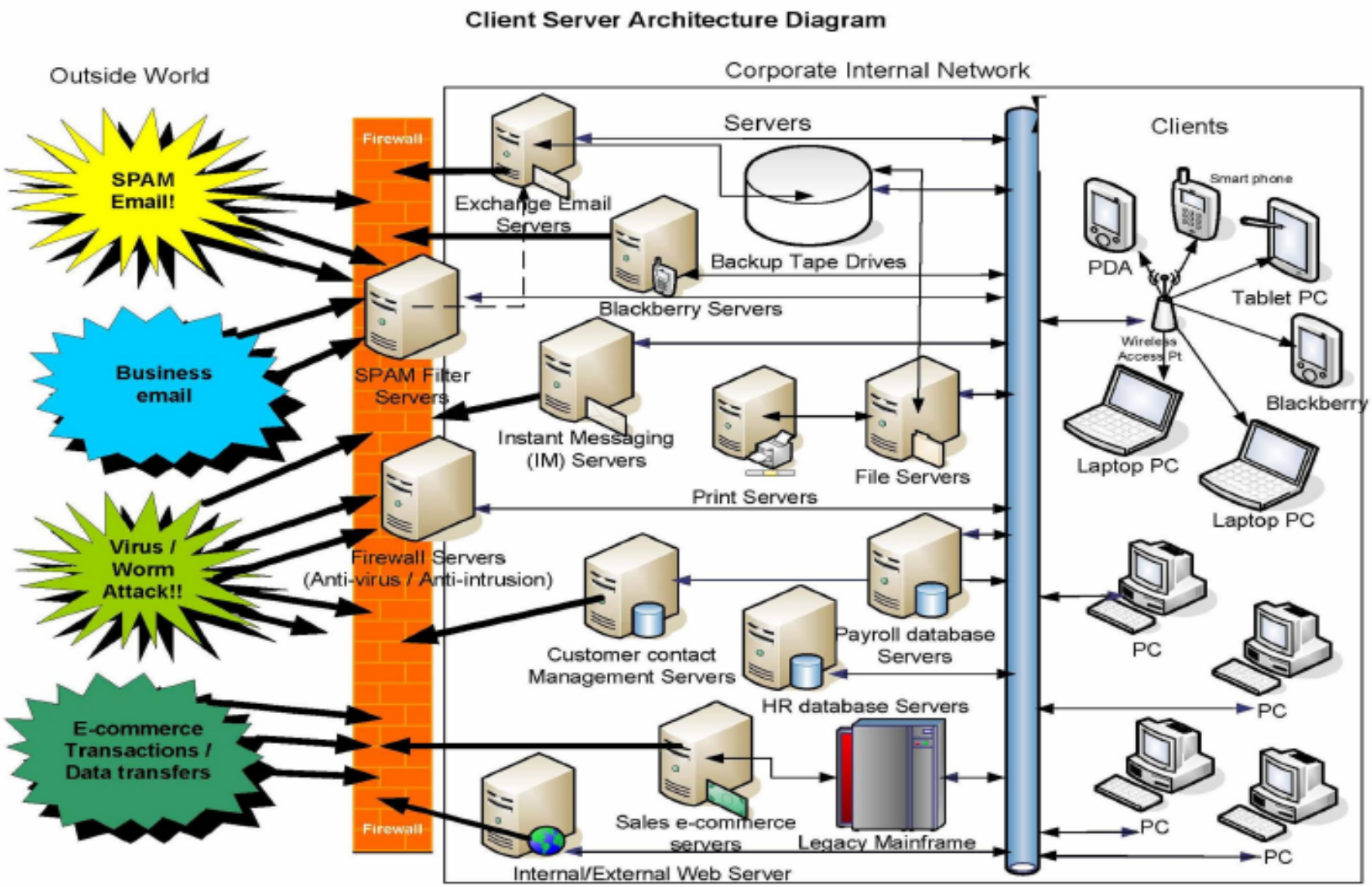
Slack space

Residual data

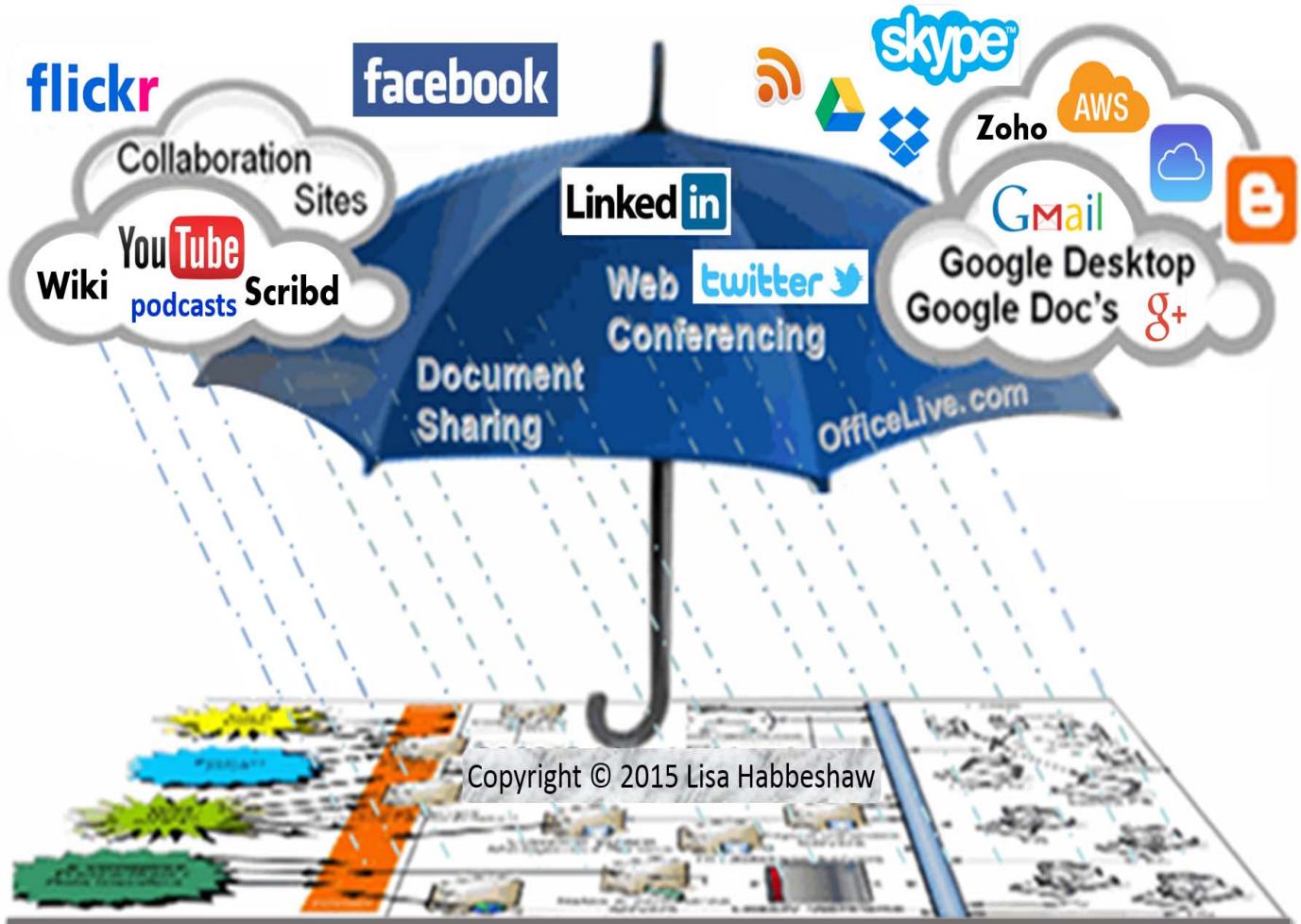
System data

Disaster recovery backup media

WHAT MAKES ESI DIFFERENT? (6)



WHAT MAKES ESI DIFFERENT? (7)



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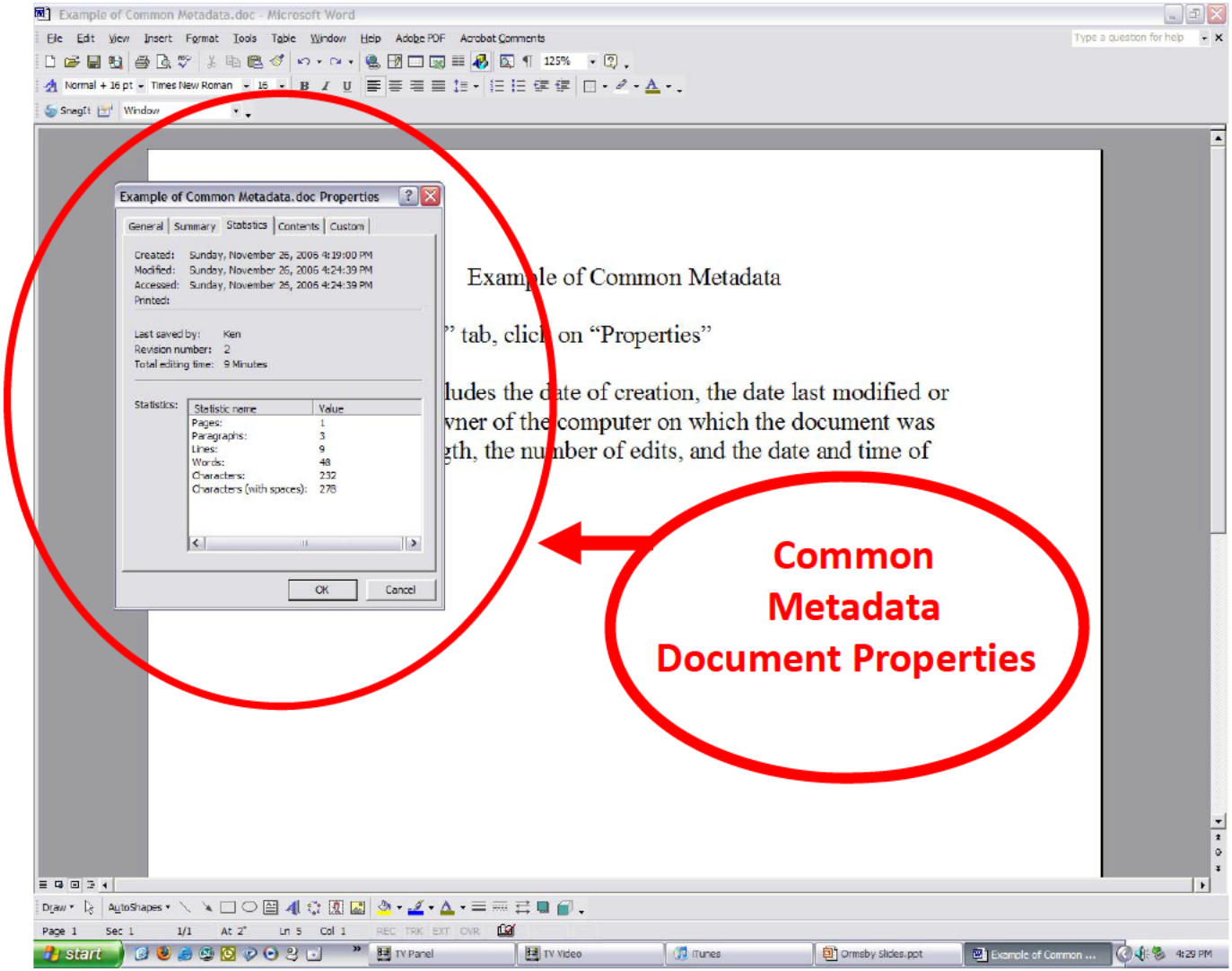
WHAT MAKES ESI DIFFERENT? (8)



WHAT MAKES ESI DIFFERENT? (9)

Eudora - [Ken Withers, 12:00 PM 11/17/2006, RE: Request for Help re Electronic Discovery]

File Edit Mailbox Message Transfer Special Tools Window Help

Search Web

Subject: RE: Request for Help re Electronic Discovery

Ken Withers
The Sedona Conference
201 East Washington Street
Suite 1430
Phoenix, AZ 85004-2428
Tel: 602-258-4910
Fax: 602-258-2499

From: Peter_Ormsby@txs.uscourts.gov [mailto:Peter_Ormsby@txs.uscourts.gov]
Sent: Thursday, November 16, 2006 2:22 PM
To: kwithers@sedona.net
Subject: Request for Help re Electronic Discovery

Typical header information

Ken, I hope things are going well for you at the Sedona Conference.

I had the pleasure of attending your presentation on Electronic Discovery at the new magistrate judge's program las
by our Federal Bar Association local chapter to give an overview of the amendments to the Federal Rules that will b

I have put together some PowerPoint slides and hope to add some slides illustrating concepts such as the various p
trememdous amount of ESI that may be involved (e.g., multiple copies of emails), metadata, and "deleted" or shad
program, you used some slides that I found very helpful in understanding some of these concepts. I was wonderinc
(and able) to share some of those slides for use in my presentation. I will, of course, credit you and the Sedona co
use. I found one version of your slides on the FJC website but some of the slides seemed different from what I rem

We miss having you directly assisting federal judges but know you are doing good things with the Sedona Conferen

Best regards,

Peter

Peter E. Ormsby
U.S. Magistrate Judge
Southern District of Texas
1701 W. Bus. Hwy. 83, Suite 820

WHAT MAKES ESI DIFFERENT? (10)

Metadata .mbx - Notepad

File Edit Format View Help

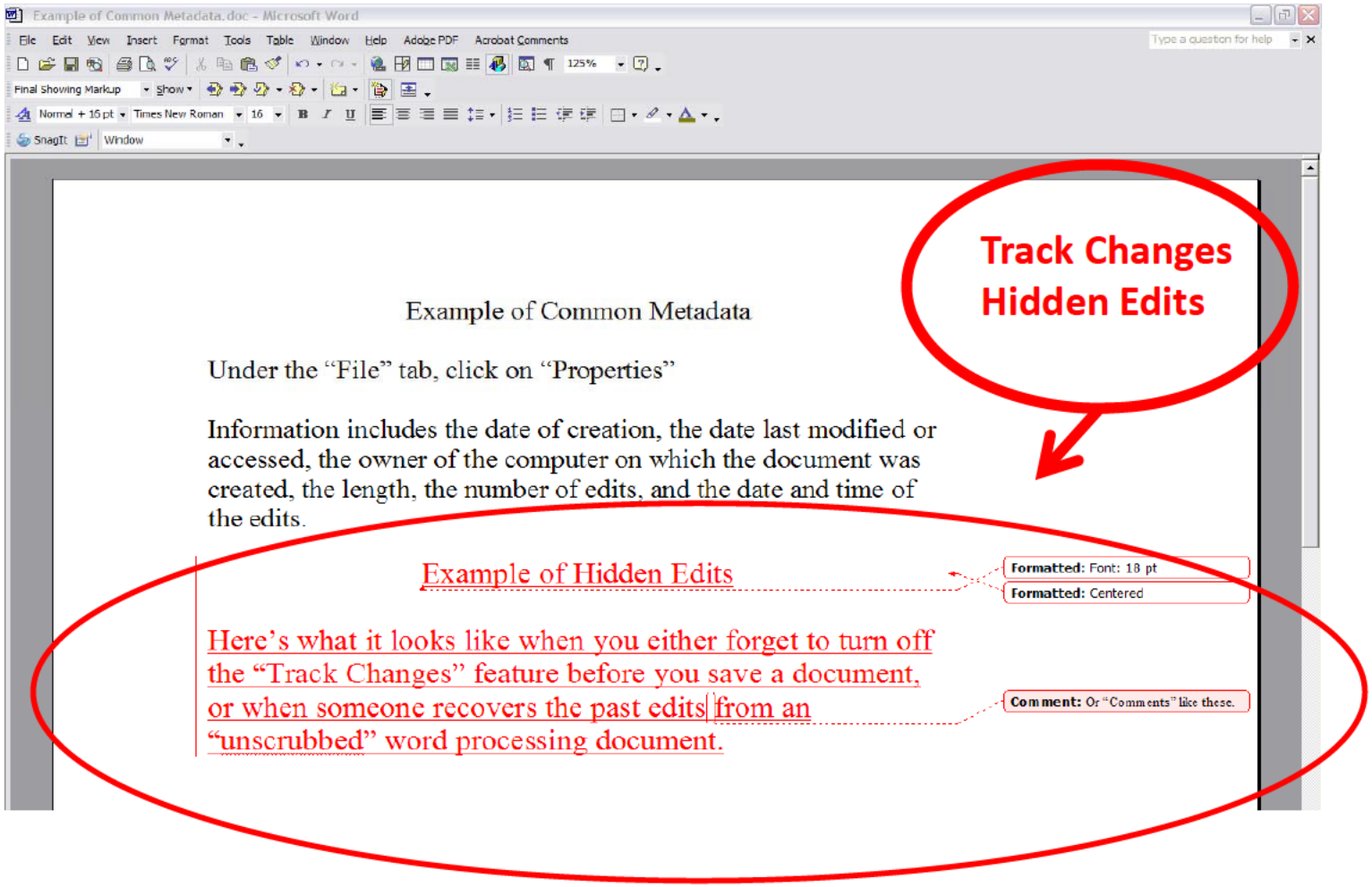
```
From ???@??? Fri Nov 17 14:35:26 2006
Received: from london.bitwise.net (smtp.bitwise.net [204.97.222.13])
        by mailbox.bitwise.net (8.9.3/8.9.3) with ESMTP id OAA18124
        for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:15 -0500
Received: from localhost (localhost [127.0.0.1])
        by london.bitwise.net (Postfix) with ESMTP id C2698511D1
        for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:15 -0500 (EST)
Received: from london.bitwise.net ([127.0.0.1])
 by localhost (smtp.bitwise.net [127.0.0.1]) (amavisd-new, port 10024)
 with LMTP id 24989-01-15 for <ken@kenwithers.com>;
 Fri, 17 Nov 2006 14:00:12 -0500 (EST)
Received: from mpls-qmqp-04.inet.qwest.net (mpls-qmqp-04.inet.qwest.net [63.231.195.115])
        by london.bitwise.net (Postfix) with ESMTP id 6E89951189
        for <ken@kenwithers.com>; Fri, 17 Nov 2006 14:00:12 -0500 (EST)
Received: from mpls-pop-14.inet.qwest.net (mpls-pop-14.inet.qwest.net [63.231.195.14])
        by mpls-qmqp-04.inet.qwest.net (Postfix) with QMQP
        id 91FBA22DC4E; Fri, 17 Nov 2006 19:00:11 +0000 (UTC)
Received: from unknown (HELO SEDCON1) (71.39.236.20)
  by mpls-pop-14.inet.qwest.net with SMTP; 17 Nov 2006 19:00:11 -0000
Date: Fri, 17 Nov 2006 12:00:40 -0700
Message-ID: <002501c70a7a$ad433820$0500a8c0@SEDCON1>
From: "Ken Withers" <kwithers@sedona.net>
To: Peter_Ormsby@txs.uscourts.gov
Cc: "'Kenneth J. Withers'" <ken@kenwithers.com>
Subject: RE: Request for Help re Electronic Discovery
MIME-Version: 1.0
Content-Type: multipart/alternative;
        boundary="----=_NextPart_000_0026_01C70A40.00E46020"
X-Mailer: Microsoft Office Outlook 11
In-Reply-To: <OFB1E53FBF.146E2976-ON86257228.00723CCB-86257228.00755C1E@uscmail.uscourts.gov>
X-MimeOLE: Produced By Microsoft MimeOLE V6.00.2800.1807
Thread-Index: AccJxUmEk5EUifJVSK6bOf+aZFEjngAtAmcg
X-Virus-Scanned: amavisd-new at bitwise.net
X-Spam-Status: No, score=-0.69 required=5 tests=[BAYES_00=-2.599,
 DNS_FROM_RFC_ABUSE=0.2, DNS_FROM_RFC_POST=1.708, HTML_MESSAGE=0.001]
X-Spam-Score: -0.69
X-Spam-Level:
X-UIDL: (15"!%D>!!~!W"!A-0"!

<x-html>
<html xmlns:v="urn:schemas-microsoft-com:vml" xmlns:o="urn:schemas-microsoft-com:office:office"
xmlns:w="urn:schemas-microsoft-com:office:word" xmlns:st1="urn:schemas-microsoft-com:office:smarttags"
xmlns="http://www.w3.org/TR/REC-html40">

<head>
<meta http-equiv=Content-Type content="text/html; charset=us-ascii">
<meta name=Generator content="Microsoft Word 11 (filtered medium)">
<!--[if !mso]>
<style>
```

Expanded header information

WHAT MAKES ESI DIFFERENT? (11)



WHAT MAKES ESI DIFFERENT (12) THE FUTURE IS HERE

Hammacher Schlemmer **(Last Minute Gift 2014):**

"The High Definition Camera Drone"

"The Best WiFi Security Camera"

"The 8,000 Picture Digital Photo Storage Vault"

"The Live Video Camera Drone"

"The Only Read and Write iPad Flash Drive"

"The Secret Spy UFO"

WHAT MAKES ESI DIFFERENT? (13) THE FUTURE OF DATA

"Every day, we create 2.5 quinbillion bytes of data – so much that 90% of the data in the world today has been created in the last two years alone. This data comes from everywhere: sensors used to gather climate information, posts to social media sites, digital pictures and videos, purchase transaction records, and cell phone GPS signals to name a few, This data is <u>big data</u>."

WHAT MAKES ESI DIFFERENT? (14) THE FUTURE OF DATA

Big data spans four dimensions:

- **Volume**
- **Velocity**
- **Variety**
- **Veracity**

"Bringing Big Data to the Enterprise," available at http://www-01.ibm.com/software/data/bigdata/

WHAT MAKES ESI DIFFERENT (15) PROBLEMS WITH BIG DATA?

G. Marcus & E. Davis, "Eight (No, Nine!) Problems With Big Data," *New York Times* (Apr. 6, 2014):

1. **"[A]lthough big data is very good at detecting correlations ***, it never tells us which correlations are meaningful."**
2. **"[B]ig data can work well as an adjunct to scientific inquiry but rarely succeeds as a wholesale replacement."**
3. **"[M]any tools that are based on big data can be easily gamed."**

WHAT MAKES ESI DIFFERENT (16) PROBLEMS WITH BIG DATA?

4. "[E]ven when the results of a big data analysis aren't intentionally gamed, they often turn out to be less robust than they initially seem."
5. "Whenever the source of information for a big data analysis is itself a product of big data, opportunities for vicious cycles abound."
6. There is a "risk of too many correlations."

WHAT MAKES ESI DIFFERENT (17) PROBLEMS WITH BIG DATA?

7. "[B]ig data is prone to giving scientific-sounding solutions to hopelessly imprecise questions."
8. "[B]ig data is at its best when analyzing things that are extremely common, but often falls short when analyzing things that are less common."
9. "The hype."

INFORMATION GOVERNANCE (1)

For an overview, see *The Sedona Conference® Commentary on Information Governance* (Dec. 2014).

For a 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).

INFORMATION GOVERNANCE (2) COMPLIANCE & ETHICS PROGRAMS

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

- **Uses two factors in determining whether to mitigate fines**
  - **The existence of effective compliance and ethics programs**
  - **Efforts at self-reporting, cooperating with authorities, and accepting responsibility**

INFORMATION GOVERNANCE (3) 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 goverance 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 (4) CYBERSECURITY RISK

Cybersecurity Assessment General Observation **(FFIEC: Nov. 3, 2014):**

Questions to Consider– Connection Types:

- **What type of connections does my financial institution have?**
- **How are we managing these connections in light of the rapidly evolving threat and vulnerability landscape?**

INFORMATION GOVERNANCE (5) CYBERSECURITY RISK

- **Do we need all our connections? Would reducing the types and frequency of connections improve our risk management?**
- **How do we evaluate evolving cyber threats and vulnerabilities in our risk assessment process for the technologies we use and the products and services we offer?**
- **How do our connections, products and services offered, and technologies used collectively affect our financial institution's overall inherent cybersecurity risk?**

INFORMATION GOVERNANCE (6) CYBERSECURITY RISK

Questions to Consider – Risk Management and Oversight

- **What is the process for ensuring ongoing and routine discussions by the board and senior management about cyber threats and vulnerabilities to our financial institution?**
- **How is accountability determined for managing cyber risks across our financial institution? Does this include management's accountability for business decisions that may introduce new cyber risks?**
- **What is the process for ensuring ongoing employee awareness and effective response to cyber risks?**

INFORMATION GOVERNANCE (7) CYBERSECURITY RISK

Questions to Consider – Threat Intelligence and Collaboration:

- **What is the process to gather and analyze threat and vulnerability information from multiple sources?**
- **How do we leverage this information to improve risk management practices?**
- **What reports are provided to our board on cyber events and trends?**
- **Who is accountable for maintaining relationships with law enforcement?**

INFORMATION GOVERNANCE (8) CYBERSECURITY RISK

Questions to Consider – Cybersecurity Controls:

- **What is the process for determining and implementing preventive, detective, and corrective controls on our financial institution's network?**
- **Does the process call for a review and update of controls when our financial institution changes its IT environment?**
- **What is our financial indtitution's process for classifiyng data and determining appropriate controls based on risk?**
- **What is our process for ensuring that risks identified through our detective controls are remediated?**

INFORMATION GOVERNANCE (9) CYBERSECURITY RISK

Questions to Consider – External Dependency Management:

- **How is our financial institution connecting to third parties and ensuring they are managing their cybersecurity controls?**
- **What are our third parties' responsibilities during a cyber attack? How are these outlined in incident response plans?**

INFORMATION GOVERNANCE (10) CYBERSECURITY RISK

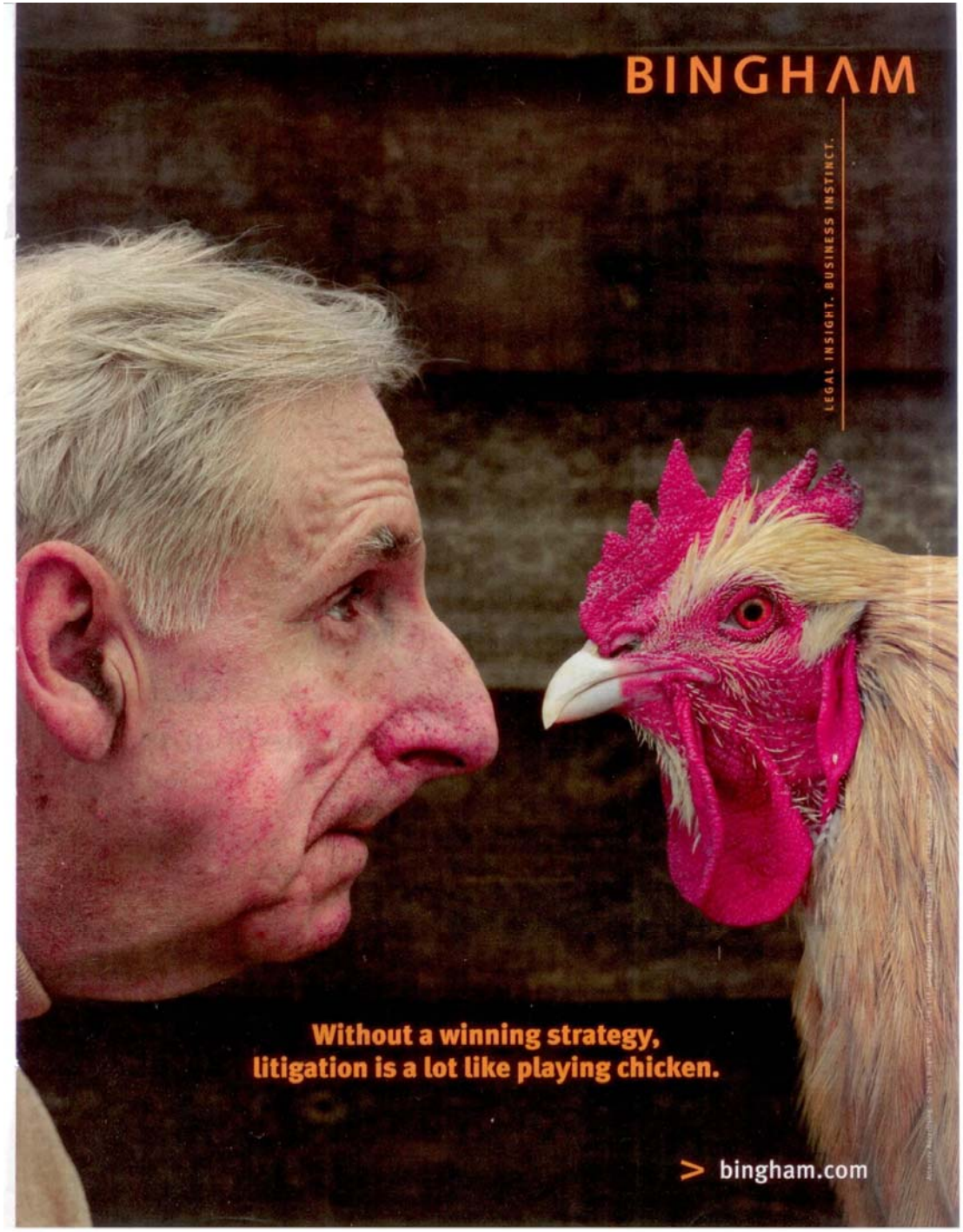
Questions to Consider – Cyber Incident Management and Resilience

- **In the event of a cyber attack, how will our financial institution respond internally and with customers, third parties, regulators, and law enforcement?**
- **How are cyber incident scenarios incorporated in our financial institution's business continuity and disaster recovery plans? Have these plans been tested?**

INFORMATION GOVERNANCE (11) PRACTICAL & IMMEDIATE THINGS TO DO?

D. Yadron, "Five Simple Steps to Protect Corporate Data," *Wall St. J.* R1 (Apr. 20, 2015):

- **Keep up with patches**
- **Keep your online doors closed**
- **Encrypt your data**
- **Get rid of passwords**
- **Check out your vendors**


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* 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 **("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 the litigation saga that began in 2005 with an adverse inference instruction and a jury award of $600 million in compensatory damages and $800 million in punitive damages)**

***Qualcomm Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D. Ca. Apr. 2, 2010) (an ethics "twist" to discovery problems)**

WHAT STATES ARE DOING (1)

Many States have adopted e-discovery rules:

- **Some States mirror the 2006 amendments to the Federal Rules of Civil Procedure.**
- **Some States adopt one or more federal rules. *See, e.g., In re: Amendments to the Florida Rules of Civil Procedure—Electronic Discovery* (No. SC11-1542) (Fl. Sup. Ct. July 5, 2012 (*per curiam*); *In re Amendment of Rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23, and 40.11 of the Pennsylvania Rules of Civil Procedure,* No. 564, App'x at 1-4 (June 6, 2012).**
- **Some States and State courts are on their own. *See, e.g.,* (Delaware) *Court of Chancery Guidelines for Preservation of Electronically Stored Information.***

WHAT STATES ARE DOING (2)

Would a party prefer to be in a State court?

- **Are there specialized State courts?**
  - **See New Jersey's "Complex Business Litigation Program" authorized on November 13, 2014:**
    - **Assigned cases will be individually case managed.**
    - **One basis for assignment is "case management of *** a substantial amount of documentary evidence (including electronically stored information)"**

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

WHAT FEDERAL COURTS ARE DOING (1)

- **Guidelines for Cases Involving Electronically Stored Information (D. Kan.)**
- **Electronic Discovery Guidelines and Checklist (D. Colo.)**
- **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.)**
- **Default Standard for Discovery of Electronically Stored Information ("E-Discovery") (N.D. Ohio)**

WHAT FEDERAL COURTS ARE DOING (2)

For a listing of local initiatives, etc., see "Local Rules, Forms and Guidelines of United States District Courts Addressing E-Discovery Issues," available at http://www.ediscoverylaw.com/local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-e-discovery-issues/ (last visited July 4, 2015)

Shades of the Civil Justice Reform Act of 1990 and the "balkanization" of the Rules!

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

- "E-Discovery" amendments adopted effective December 1, 2006
- Duke Conference in 2010
- Two subcommittees of Civil Rules Advisory Committee formed
- Proposed amendments published August 15, 2013
- 100+ persons testified at three public hearings
- 2,000+ written comments submitted
- Revised amendments adopted by Civil Rules Advisory Committee on April 11, 2014

AMENDING THE FEDERAL RULES (3) THE PROCESS

- **Revised amendments adopted by Standing Committee on Rules of Practice and Procedure on May 30, 2014**
- **Amendments approved by Judicial Conference September 16, 2014**
- **Approval of amendments and transmittal to Congress by the Supreme Court on May 1, 2015**
- **No congressional action anticipated**
- **Absent congressional action, amendments will automatically go into effect December 1, 2015**

AMENDING THE FEDERAL RULES (4) IN GENERAL

- **Explicit mention of "cooperation" in new Note to Rule 1**
- **Allows parties to exchange Rule 34 requests before the Rule 26(f) "meet and confer" conference under Rule 26(d)(2)**
- **Addition of preservation and Federal Rule of Evidence 502 to required topics for "meet and confer" under Rule 26(f)(3) and scheduling conference under Rule 16(b)(3)(B)**
- **Encouragement of informal discovery dispute resolution under Rule 16(b)(3)(B)**
- **No more "blanket" objections to discovery requests under Rule 34(b)(2)**

AMENDING THE FEDERAL RULES (5) 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 (6) 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 as to have been served at the first Rule 26(f) conference.

AMENDING THE FEDERAL RULES (7) RULE 26(f)(3)

Discovery Plan. **A discovery plan must state the parties' views and proposals on: * * ***

(C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

AMENDING THE FEDERAL RULES (8) RULE 16(b)(3)

(B) *Permitted Contents*. The scheduling order may:

* * *

(iii) provide for disclosure, ~~or~~ 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 agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

AMENDING THE FEDERAL RULES (9) RULE 34(b)(2)

Responding to Each Item. **For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an ~~objection to the request~~ 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.**

(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 (10)

Note that courts already strike conditional objections. *See, e.g., Fay Ave. Properties, LLC v. Travelers Prop. Cas. Co.,* No. 11-2389-GPC (S.D. Ca. July 1, 2014); *Sprint Comm. Co., L.P. v. Comcast Cable Comm.,* No. 11-2684-JWL (D. Kan. Feb. 11, 2014).

AMENDING THE FEDERAL RULES (11) TIGHTENING TIMES

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 (12) PROPORTIONALITY

Rule 26(b)(1)

- **Proportionality factors in Rule 26(b)(1)**
- **"Subject matter" discovery eliminated**
- **"Reasonably calculated" language tightened**

Rule 26(c)(1)

- **Explicit recognition of judicial power to allocate discovery costs**

AMENDING THE FEDERAL RULES (13) RULE 26(b)(1)

Will amended Rule 26(b)(1), if adopted, bar "discovery about discovery?"

Such discovery is allowed under current Rule 26(b)(1), at least if there in no "record of what defendants did or did not do to find ESI, or what the actual state of defendants' ESI happens to be" (and citing to Rule 26(g)(1) and criticizing the parties for not having taken a "collaborative approach" to resolve the dispute about how the search was "constructed or organized"). *Ruiz-Bueno v. Scott,* Case No. 2:12-cv-0809 (S.D. Ohio Nov. 15, 2013).

For another decision that allowed a 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, *see Marchand v. Simonson,* 3:11-CV-348 (TLM) (D. Conn. Dec. 30, 2013).

AMENDING THE FEDERAL RULES (14)
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 <u>or the allocation of expenses</u>, for the disclosure or discovery; * * ***

AMENDING THE FEDERAL RULES (15) 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:**

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

AMENDING THE FEDERAL RULES (16) 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.**

AMENDING THE FEDERAL RULES (17) RULE 37(e)

- **Applies only to loss of ESI**
- **Defers to common law for trigger and scope of preservation**
- **Applies only if party failed to take "reasonable steps"**
- **Applies only when lost ESI cannot be restored or replaced with additional discovery**
- **Does not restrict judicial case management powers under Rules 16 or 26**

INTERLUDE

Recent non-ESI sanctions decisions:

- ***Williams v. BASF Catalysts,* No. 13-1089 (3d Cir. Sept. 3, 2014) (test results and reports documenting presence of asbestos in products)**
- ***Kettler Internat'l, Inc. v. Starbucks Corp.,* Civil Action No. 2:14cv189 (E.D. Va. Apr. 7, 2015) (allegedly defective chairs)**

There will be a Circuit split on physical objects as opposed to ESI. Will might happen after 12/1/15?

AMENDING THE FEDERAL RULES (18) RULE 37(e)(1)

- **Does not use words “sanction” or “spoliation”**
- **Requires finding of “prejudice”**
- **Allows court to order curative measures “no greater than necessary” to cure prejudice**

AMENDING THE FEDERAL RULES (19) RULE 37(e)(2)

- **Does not use words “sanction” or “spoliation”**
- **Requires finding of “intent to deprive”**
- **Allows court to presume loss was prejudicial**
- **Allows court to instruct jury that they may presume loss was prejudicial**
- **Allows entry of judgment or dismissal**

AMENDING THE FEDERAL RULES (20) NOTE TO RULE 37(e)

- **Explicitly rejects *Residential Funding dicta* allowing spoliation sanctions for negligence or gross negligence**
- **Permits so-called "spoliation instruction," distinct from "adverse inference jury instruction"**
- **Allows jury to make finding regarding "intent to deprive," and if so, to presume prejudice**

AMENDING THE FEDERAL RULES (21) NOTE TO RULE 37(e)

What are "reasonable steps?"

- **Perfection not required**
- **Elimination of strict liability**

See T.Y. Allman, "'Reasonable Steps': A New Role for a Familiar Concept," 14 *DDEE* 591 (2014)

For consideration of a "window of inexperience afforded to attorneys as mitigating factor," *see Premium Pet Health, LLC. v. All American Pet Proteins, LLC,* Case No. 2014CV31356 (Colo. Dist. Ct. June 11, 2015)

AMENDING THE FEDERAL RULES (22) RULE 37(e) QUESTIONS

Who has burden of demonstrating prejudice?

- Depends on circumstances of the case

What are "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

AMENDING THE FEDERAL RULES (23) RULE 37(e) QUESTIONS

Can an organization guard against intentional loss of relevant ESI that is subject to a duty to preserve? (maybe yes, maybe no)

AMENDING THE FEDERAL RULES (24) RULE 37(e) QUESTIONS

Absent intentional conduct, reasonableness is central to avoiding remedies under Rule 37(e)(1), correct?

- **Doesn't process become central to any analysis of reasonableness? Yes or no, shouldn't process be documented and monitored for effectiveness and modified as necessary?**
- **What about *Automated Solutions Corp?* Doesn't it undercut the "centrality" of process?**

AMENDING THE FEDERAL RULES (25)

- **What does reasonableness mean in context of Rule 37(e)(1)? (And note variations among the courts as to what it means under *Fed. R. Evid.* 502(b)). Will we see similar variations? Likely, especially given need for case-by-case analysis.**

AMENDING THE FEDERAL RULES (26) RULE 37(e) QUESTIONS

What might be post-amendment "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 splits might 37(e) lead to?**

AMENDING THE FEDERAL RULES (27) IMPOSING SANCTIONS WITH RULE 37(e) IN MIND

- ***Automated Solutions Corp. v. Paragon Data Sys,. Inc.,*** **756 F.3d 504 (6th Cir. 2014)**
- ***Vicente v. City of Prescott,*** **No. 3:11-cv-08204 (D. Ariz. Aug. 8 and 13, 2014)**
- ***Pettit v. Smith,*** **No. 2:11-cv-02139 (D. Ariz. Sept. 9, 2014)**
- ***Malibu Media, LLC v. Harrison*****, No. 1-12-cv-01117 (S.D. Ind. 2014)**

AMENDING THE FEDERAL RULES (28) A STATE ANALOG TO RULE 37(e)

Petroleum Solutions, Inc. v. Head, **No. 11-0425 (Tex. Sup. Ct. July 11, 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)?

AMENDING THE FEDERAL RULES (29) ADDITIONAL RESOURCES

- **T.E. Brostoff, "The State of Sanctions in 2013: Recent Developments, Rule Amendments," 13 *DDEE* 530 (2013)**
- **T.E. Brostoff, "Amending the Federal eDiscovery Rules: Tackling the Comments on 26(b) and 37(e)," 13 *DDEE* 593 (2013)**
- **T.E. Brostoff, "Webinar Panel Discusses FRCP Proposals, Public Comments and Key Controversies," 14 *DDEE* 108 (2014)**
- **T.E. Brostoff, "eDiscovery Experts Discuss How Proposed Amendments Will Possibly Shake Out in Court," 14 *DDEE* 329 (2014)**
- **T.Y. Allman, "Thoughts on the 2015 Amendments to Federal Rule of Civil Procedure 37(e)," 15 *DDEE* 245 (2015)**

THE MEET-AND-CONFER (1)

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

See H.C. Boehning & D.J. Toal, "Are Meet-and-Confer Efforts Doing More Harm Than Good?" *N.Y.L.J.* (Aug. 9, 2012).

THE MEET-AND-CONFER (2)

Becoming an iterative process in complex actions

Involving specialized consultants in complex actions

Developing its own protocols and conventions in individual districts

Electronic discovery is not an end unto itself. *See* R.J. Hedges, "Case Management and E-Discovery: Perfect Together?" 9 *DDEE* 220 (2009) *and* "An Addendum to 'Case Management and E-Discovery: Perfect Together?" 9 *DDEE* 262 (2009).

THE MEET-AND-CONFER (3)

Rule 26(d)(1) allows pre-Rule 26(f) discovery. *See, e.g., Assef v. Does 1-10,* Case No. 15-cv-01960-MEJ (N.D. Ca. May 28, 2015) ("good cause standard").

Rule 26(f)(2) – "any issues about preserving discoverable information *"**

Rule 26(f)(3)(C) – "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produce *.**

Rule 26(f)(3)(D) – "any issues about claims of privilege or of protection as trial-preparation material, 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 *"**

THE MEET-AND-CONFER (4) 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 (5)

The results of meet-and-confers in two <u>complex</u> actions:

- **"Rule 26(f) Stipulation and [Proposed] Order Regarding Discovery Protocols," *In re: Freight Fuel Surcharge Antitrust Litigation,"* MDL Docket No. 1869 (D.D.C. Oct. 8, 2009)**
- **"Joint Initial Report – Revised July 6, 2012," *United States v. Apple, Inc.,* Civil Action No. 12-cv-2826 (S.D.N.Y. July 6, 2012)**

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

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

- **"(iii) provide for disclosure or discovery 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;"**

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

Miller v. York Risk Services Grp., **2014 WL 1456349 (D. Ariz. Apr. 15, 2014)**

- **Plaintiffs moved for order compelling defendant to participate in 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 THE 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 address 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).**

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? (see the 30(b)(6) slide below).**

AN ALTERNATIVE TO DISCOVERY?

Rule 36 requests for admissions:

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

THE NONCOMPLEX CIVIL ACTION (1)

Connecticut Gen'l Life Ins. Co. v. Karl Scheib, Inc., **Civil No. 11-CV-0788-GPC (WVG) (S.D. Ca. Feb. 6, 2013)**

S.B. Harris & R.J. Hedges, "Small Stakes Claims Can Mean Big Headaches," 13 *DDEE* 96 (2013)

G.S. Freeman, P.S. Grewal, R.J. Hedges & C.B. Shaffer, "Active Management of ESI in 'Small' Civil Actions," *FMJA Bulletin* (Jan. 2014)

THE NONCOMPLEX CIVIL ACTION (2)

"Short Trial Rules," United States District Court, District of Nevada

"Adopting Pilot Rules for Certain District Court Civil Cases," Office of the Chief Justice, Supreme Court of Colorado (Chief Justice Directive: Amended June 2013)

Rule 9, Sec. 202.70(g), Uniform Rules for the Supreme Courts (Rules of Practice for the Commercial Div.) ("Accelerated Adjudication Actions")

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)).

THE DUTY TO CONFER (1)

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.

THE DUTY TO CONFER (2)

"Woefully inadequate" effort to confer warrants denial of motion to compel discovery. *U-Haul Co. v. Gregory J. Kamer, Ltd.,* Case No. 2:12-cv-00231-KJD-CWH (D. Nev. Sept. 17, 2013).

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

The duty to confer does <u>not</u> 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).

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).

COOPERATION (1)

"Cooperation" is not a new concept: It was the "key" to the 1993 amendments to the Rules. *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.R. 863* (Spring 2009)

COOPERATION (2)
REPRESENTATIVE DECISIONS

***Apple Inc. v. Samsung Elec. Co. Ltd.*, 2013 WL 1942163 (N.D. Ca. May 9, 2013) ("The court finds that production of Google's search terms and custodians to Apple will aid in uncovering the sufficiency of Google's production and serves greater purposes of transparency in discovery.")**

COOPERATION (3)
RULE 29

Rule 29(b) provides that, "[u]nless 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 CRB (DMR) (N.D. Ca. Feb. 24, 2014) (quashing subpoena on nonparty that violated expert stipulation agreed on by parties).**

COOPERATION (4)
DISINCENTIVES TO COOPERATE?

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

Are there economic disincentives to cooperate?

RECURRING TOPICS

- Preservation
- Ephemeral Information
- Discovery in General
- Transnational Discovery
- Inspect, Copy, Test, or Sample
- Accessibility
- Proportionality
- The 30(b)(6) Deposition
- Rule 45 Subpoenas
- Search
- Form of Production
- Cost-shifting
- Privilege
- Privacy Expectations
- Sanctions
- The Cloud & the Web
- Admissibility
- Juror Misconduct
- Postjudgment Costs
- Ethics

PRESERVATION (1)
THINGS TO THINK ABOUT

- **Obligation to retain vs. duty to preserve**
- **Records retention policies and both duties**
- **"Triggering" duty to preserve**
- **Scope of duty to preserve**
  - **Temporal**
  - **"Geographic"**

PRESERVATION (2)
THINGS TO THINK ABOUT

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

INTERLUDE

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,* CV09-407 (JFB) (WDW) (E.D.N.Y. Aug. 10, 2010), *aff'd* (June 28, 2011).

PRESERVATION (3)

"Key Preservation Indicators," Executive Summary, *Legal Hold and Data Preservation Benchmark Survey 2014 Results* (Zapproved Inc. Aug. 2014) (n = 536):

- ***"*While a majority of those managing the preservation process are continuing to oversee the process manually, the percentage of those automating with software is rapidly approaching half."**
- **"A majority of organizations issue legal holds in most pending litigation matters. *** Slightly less than a quarter issue holds for less than 10 percent of matters."**

PRESERVATION (4)

The Executive Summary continued:

- **"The survey measured the confidence levels in existing litigation hold processes. We learned that when comparing attitudes of automated users to those on manual processes, the manual users were more than 5 times more likely to indicate a rating of unsatisfactory."**
- **"Across the board, 3 out of 4 preservation managers believe that custodians will follow through on their preservation obligations. This trust increases for those using automated processes."**

PRESERVATION (5)

"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? The latter sentence is correct, but * ?**

PRESERVATION (6)

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) (by Maura Grossman):

"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 (7)

***State of Texas v. City of Frisco*, 2008 WL 828055 (E.D. Tex. Mar. 27, 2008) ("preemptive strike")**

***In re John W. Danforth Grp.,* 2013 WL 3324017 (W.D.N.Y. June 30, 2013) (denying prefiling petition pursuant to Rule 27(a) to preserve ESI)**

PRESERVATION (8)
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 the answer?

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 (9) "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**
  - ***See, e.g.,* New Jersey P.L. 2016, c. 60, Sec. 3(a).**

What in the interaction between the above and the duty to preserve?

PRESERVATION (10) "OVERPRESERVATION"

Is there "overpreservation?" See "Overreaction to Potential Sanctions Can Lead to Overpreservation, Panelists Warn," 12 *DDEE* 258 (2012).

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

How might Big Data affect this debate?

PRESERVATION (11)

Sedona Principle 5: **"The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information."**

Can a party be sanctioned when it acted reasonably but didn't get "it" right? Or is that a contradiction?

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.,* Case No. 13-cv-06500 (N.D. Ill. May 5, 2014).**

PRESERVATION (12)
REPRESENTATIVE DECISIONS

***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):**

INTERLUDE
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**

INTERLUDE
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 (13) 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, **01cv5694 (JGK) (RLE) (S.D.N.Y. July 21, 2014) (failure to preserve ESI held by third-party given "practical ability" to obtain it)**

PRESERVATION (14)

Does preservation require restoration?

- ***Best Buy Stores, L.P. v. Developers Diversified Realty Corp.* 247 F.R.D 567 (D. Minn. 2007) (costs)**
- ***Great American Ins. Co. v. Lowry Dvlpt., LLC*, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) (duty to preserve hard drive whether or not in working order)**
- ***Rockwood v. SKF USA Inc.,* 2010 WL 3860414 (D.N.H. Sept. 30, 2010 ("better practice" would have been to preserve damaged hard drives)**

INTERLUDE

A nonparty to a civil action has been advised by the attorney for a party to expect a subpoena for the production of certain 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

A widget manufacturer has brought an action against one of its buyers for nonpayment:

- **Does the manufacturer have a duty to preserve evidence relevant to a yet-unasserted counterclaim?**
- **What facts, if any, might the existence of the duty turn on?**

***YCB Internat'l v. UCF Trading,* 2012 WL 3069526 (N.D. Ill. July 25, 2012).**

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

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

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

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:

- **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 neither a factual nor a legal basis to file a civil action.**

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

PRESERVATION (15)
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 (16)
RECORDS RETENTION POLICIES

Note: 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 both are subject to duty to preserve!

PRESERVATION (17)
RECORDS RETENTION POLICIES

Note: Management of "non-records" is complicated given an organization's fear of spoliation and collection of all types of ESI.

And definitions can be tricky: See, *e.g.*, http://www.youtube.com/watch?feature=player_embedded&v=PZbqAMEwtOE

(With thanks to Ken Withers)

PRESERVATION (18)
RECORDS RETENTION POLICIES

What, if anything, might be a consequence of an organization's *failure* to comply with its own records 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 ***")**

Begs the question: 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 (19)
RECORDS RETENTION POLICIES

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

- ***Crawford v. New London,*** **Case No. 3:11cv1371 (JBA) (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 (20)

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

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

PRESERVATION (21)
"BYOD"/"COPE"

Speaking of records retention policies, 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 effects on 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 (22)
"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 (23)
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) (finding Facebook account "clearly within his control, as [p]laintiff had authority to add, delete, or modify his account's content" and imposing permissive adverse inference against plaintiff for loss of ESI when he deactivated account).**

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

C. Ball, "Preserving Social Media Content," *Texas Bar J.* 196 (Mar. 2015)

PRESERVATION (24)
WHEN CAN A LITIGATION HOLD BE RELEASED?

- **See M.D. Berman, "When Does a Litigation Hold End?" 9 *DDEE* 317 (2009)**
- **M. Michels, "When Can You Lift a Litigation Hold?" *Law Tech. News* (Nov. 25, 2013)**

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?

PRESERVATION (25)
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 and 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 (26)
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," *Lexology* (Feb. 9, 2015) (originally posted by Barnes & Thornburg LLP)

EPHEMERAL INFORMATION

***Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (oscilloscope readings)**

***Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007) (random access memory)**

***Arista Records, LLC v. Usenet.com Inc.*, 608 F. Supp. 2d 409 (S.D.N.Y. 2009) ("transitory" ESI)**

DISCOVERY IN GENERAL (1) SPECULATION

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, Little Hocking's contention that information *** has been destroyed is speculative at best.").**

DISCOVERY IN GENERAL (2) 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-CM-DJW (D. Kan. Mar. 20, 2012).**

DISCOVERY IN GENERAL (3) EXPERTS

United States v. O'Keefe, 537 F. Supp. 2d 14 (D.D.C. 2008)

Equity Analytics v. Lundin, 248 F.R.D. 331 (D.D.C. 2008)

R.J. Hedges, "Rule 702 and Discovery of Electronically Stored Information," 8 *DDEE* 122 (2008)

Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008)

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

Assured Guar. Mun. Corp. v. UBS Real Estate Sec. Inc., 2012 WL 5927379 (S.D.N.Y. Nov. 21, 2012)

DISCOVERY IN GENERAL (4) 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**

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 (Ohio Ct. App. 2013).**

DISCOVERY IN GENERAL (5) EXPERTS

An example of "cooperation" between adversarial experts: S.E. Snyder. D. Luecke & J.E. Thorson, "Adversarial Cooperation: Court-Mandated Collaboration Between Opposing Scientific Experts in Colorado's Water Courts," 28 *NR&E* 1 (2013).

Could this approach work with "dueling" ESI experts?

TRANSNATIONAL DISCOVERY

Wultz v. Bank of China Ltd., **910 F. Supp. 2d 548 (S.D.N.Y. 2012)**

In re Activision Blizzard, Inc., **86 A.3d 531 (Del. Ch. Feb. 21, 2014)**

BrightEdge Technologies, Inc. v. Searchmetrics, GMBH, **Case No. 14-cv-01009-WHO (MEJ) (N.D. Ca. Aug. 13, 2014)**

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)

- *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)).
- *Sophie & Chloe, Inc. v. Brighton Collectibles, Inc.,* Case No. 12cv2472-AJB (KSC) (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").
- *Kickapoo Tribe v. Nemaha Brown Watershed Joint Dist. No. 7,* Case No. 06-CV-2248-CM-DJW (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).

INSPECT, COPY, TEST, OR SAMPLE (3)

- ***Teledyne Instruments, Inc. v. Cairns,*** **Case No: 6:12-cv-854-Orl-28TBS (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 ***").**
- ***Fasteners for Retail, Inc. v. DeJohn,*** **2014-Ohio-1729 (Ct. App. 2014) (reversing order compelling production of hard drives for forensic imaging: "The discovery order *** fails to include any protocols and procedures to adequately protect Appellants' privileged and confidential *** [ESI]."**

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-shifting or -sharing?

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)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy."**

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

Sedona Principle 8: **"The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities."**

ACCESSIBILITY (6)
EXAMPLES OF INACCESSIBLE SOURCES UNDER THEN-CURRENT TECHNOLOGY

***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

***Annex Books, Inc. v. City of Indianapolis*, 2012 WL 892170 (S.D. Ind. Mar. 14, 2012) (unreadable discs)**

***General Electric Co. v. Wilkins,* 2012 WL 570048 (E.D. Ca. Feb. 1, 2012) (backup tapes)**

***General Steel Domestic Sales, LLC v. Chumley,* 2011 WL 2415715 (D. Colo. June 15, 2011) (audio files)**

***Palgut v. City of Colorado Springs*, 2007 WL 4277564 (D. Colo. Dec. 3, 2007) (lack of hardware)**

PROPORTIONALITY (1)

Rule 26(b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."

Rule 26(b)(2)(C): "On motion or on its own, the Court must limit the frequency or extent of discovery * if it determines that:"**

- **Unreasonably cumulative, duplicative, or available from another source (Rule 26(b)(2)(C)(i))**
- **There was ample opportunity to obtain the information by discovery (Rule 26 (b)(2)(C)(ii))**
- **"the burden or expense *** outweighs its likely benefit ***" (Rule 26 (b)(2)(C)(iii))**

PROPORTIONALITY (2)
USE OF NEW TECHNOLOGIES IN CONTEXT OF UNDUE BURDEN AND COST

Chevron Corp. v. Donziger, **2013 WL 1087236 (S.D.N.Y. Mar. 15, 2013)**

PROPORTIONALITY (3) REPRESENTATIVE DECISIONS

McNulty v. Reddy Ice Holdings, Inc., **217 F.R.D. 569 (E.D. Mich. 2011)**

United States ex rel. McBride v. Halliburton Co., **272 F.R.D. 235 (D.D.C. 2011)**

Chen-Oster v. Goldman, Sachs & Co., **285 F.R.D. 194 (S.D.N.Y. 2012)**

Burnett v. Ford Motor Co., **Case No.: 3:13-cv-14207 (S.D. W. Va. Apr. 3, 2015)**

PROPORTIONALITY (4)

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:"

"not interposed for any improper purpose" (Rule 26(g)(1)(B)(ii))

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

PROPORTIONALITY (5)

"The Sedona Conference® Commentary on Proportionality in Electronic Discovery," 14 *Sedona Conf. J.* 155 (2013)

INTERLUDE

Lord Abbett Mun. Income Fund, Inc. v. Asami, **2014 WL 5477639 (N.D. Ca. Oct. 29, 2014) (following 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.**

INTERLUDE

- **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."**

INTERLUDE

Note the procedural posture of *Lord Abbett Mun. Income Fund.*

Now, 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?

THE 30(b)(6) DEPOSITION (1)

Notice or Subpoena Directed to an Organization. **In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.**

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,* 2:13-cv-1419 (D. Ariz. Apr. 15, 2014).**

THE 30(b)(6) DEPOSITION (3) ADVISORY COMM. NOTE TO 1970 AMENDMENT OF RULE 30

***Subdivision (b)(6)*. A new provision is added, whereby a party may name a corporation, partnership, association, or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. *Cf*. Alberta Sup.Ct.R. 255. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting interest in the litigation—for example, in a personal injury case—can refuse to testify on behalf of the organization.**

THE 30(b)(6) DEPOSITION (4) 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 reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." See Note, *Discovery Against Corporations Under the Federal Rules*, 47 Iowa L.Rev. 1006–1016 (1962). 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. *Cf. Haney v. Woodward & Lothrop, Inc*., 330 F.2d 940, 944 (4th Cir. 1964). 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. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. *E.g., United States v. Gahagan Dredging Corp*., 24 F.R.D. 328, 329 (S.D.N.Y. 1958). *."**

THE 30(b)(6) DEPOSITION (5) REPRESENTATIVE DECISIONS

- *GTE Products Corp. v. Gee,* 115 F.R.D. 67 (D. Mass. 1987)
- *Mattel, Inc. v. MCA Records, Inc.,* 1998 U.S. Dist. LEXIS 7561 (C.D. Ca. Feb. 24, 1998)
- *Phillips v. American Honda Co., Inc.,* 2005 U.S. Dist. LEXIS 46223 (S.D. Ala. June 27, 2005)
- *Honda Lease Trust v. Middlex Mut. Assur. Co.,* 2008 U.S. Dist. LEXIS 60766 (D. Conn. Aug. 7, 2008)

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

- ***1100 West, LLC v. Red Spot Paint & Varnish Co.,*** **Inc., 2009 WL 1605118 (S.D. Ind. June 5, 2009)**
- ***In re: Actos® (Pioglitazone) Prod. Liability Litig.,*** **Case 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.,*** **Case No. 14-C-0001 (E.D. Wisc. Jan. 26, 2015)**

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

There is no "official" requirement that the issuing party and the receiving nonparty engage in a "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" sufficient to impose sanctions under Rule 45(c)(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), ***see Legal Voice v. Storman's Inc.,*** **No. 12-35224 (9th Cir. Dec. 31, 2013).**

RULE 45 SUBPOENAS (3) REPRESENTATIVE DECISIONS

For cost-shifting, *see ASUS Computer Internat'l v. Micron Tech. Inc.,* No. 14-cv-00275 (N.D. Ca. Apr. 21, 2014)

For a decision quashing a subpoena which sought to compel forensic imaging of laptops, *see Boston Scientific Corp. v. Lee*, Case No. 5:14-mc-80188-BLF-PSG (N.D. Ca. Aug. 4, 2014).

***See The Sedona Conference® Commentary on Rule 34 and Rule 45 "Possession, Custody, or Control"* (public comment version Apr. 2015)**

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 propoerly 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).

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. 8:13CV125 (Nov. 24, 2014.

SEARCH (3)

How do we search for discoverable ESI?

Manually?

With automated assistance?

Which is "better" and why?

- **For a one-page introduction, see "Efficient E-Discovery," *ABA Journal* 31 (Apr. 2012)**

- **M.R. Grossman & G.V. Cormack, "The Grossman-Cormack Glossary of Technology-Assisted Review," 7 *Fed. Cts. Law R.* 1 (2013)**
- **J.A. Thomas & E.A. Figueira, "Technology Assisted Review Goes Mainstream," 14 *DDEE* 396 (2014)**

SEARCH (4)

Some terms to know:

- **Sample**
- **Control set**
- **Seed (or training) set**
- **Recall**
- **Precision**

See M.D. Nelson, *Predictive Coding for Dummies®* 12-14 (Symantec Special ed.)

SEARCH (5)

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 (Symantec Special ed.)

SEARCH (6)

Using search terms? How accurate are these? *See In re National Ass'n of Music Merchants, Musical Instruments and Equipment Antitrust Litig.,* 2011 WL 6372826 (S.D. Ca. Dec. 19, 2011)

For orders approving search terms, *see W Holding Co. v. Chartis Ins. Co.,* Civil No. 11-2271 (GAG/BJM) (D.P.R. Apr. 3, 2013) and *EEOC v. Original Honeybaked Ham Co.,* 2013 WL 753480 (D. Colo. Feb. 27, 2013)

"Boolean searches will undoubtedly become the standard, if, for no other reason, to limit ESI documents to those most likely to be relevant to pending litigation." *Swanson v. Alza Corp.,* Case No.: CV 12-04579-PJH (KAW) (N.D. Ca. Oct. 7, 2013)

For a 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," *see United States v. University of Nebraska,* 4:11CV3209 (D. Nebr. Ayg. 25, 2014).

Noting that Federal Rules do not require perfection and denying request for to test sufficiency of adversary's search effort: *Freedman v. Weatherford Internat'l Ltd.,* 12 Civ. 2121 (LAK)(JCF) (S.D.N.Y. Sept. 12, 2014)

SEARCH (7)

"Technology-assisted review" or "predictive coding" is a type of automated review. Recent decisions which address it:

- Compare *Progressive Casualty Ins. Co. v. Delaney,* No. 2:11-cv-00678-LRH-PAL (D. Nev. July 18, 2014) with *Bridgestone Americas, Inc. v. IBM Corp.,* No. 3:13-cv-1196 (M.D. Tenn. July 22, 2014)

- *Independent Living Center of Southern California v. City of Los Angeles,* Case No. CV 12-551-FMO (PJWx) (C.D. Cal. June 13 and 26, 2014)

- *Dynamo Holdings Ltd. Partnership v. Commissioner of Internal Revenue,* No. 2685-11 (Tax Ct. Sept. 17, 2014)

- *Rio Tinto PLC v. Vale S.A.,* 14 Civ. 3042 (S.D.N.Y. Mar. 3, 2015)

SEARCH (8)

WHAT LESSONS CAN BE DRAWN FROM THE DECISIONS?

- **Judge approved automated search at a "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 do automated review must offer "transparency of process" or something close to it.**
- **"Reasonableness" of methodology is key.**
- **Speculation by the opposing party is insufficient to defeat threshold approval.**

SEARCH (9)

RECAPPING WHERE WE ARE:

- **We have yet to see a 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).**
- **It is safe to assume *at least some* transparency of process may or will be expected (but we don't know how much).**
- **If "reasonableness" is standard, how reasonable must the *results* be? Is "precision" of 80% enough? 90%?**

Remember, there are no agreed-on standards.

INTERLUDE

Assume a party makes production of ESI based on search terms proposed by an adversary. Assume further that the adversary suspects "something" is missing.

Is suspicion enough to warrant direct access to the party's databases by a consultant retained by the adversary?

If not, what proofs should be required?

- **Will an attorney's certification or affidavit suffice?**
- **Will/should the attorney become a witness?**
- **Will experts be needed?**

Note, with regard to proofs, *S2 Automation LLC v. Micron Technology, Inc.,* 2012 WL 3656454 (D.N.M. Aug. 9, 2012), where the court, relying on Rule 26(g)(1), required a party to disclose its search methodology. See *Apple Inc. v. Samsung Elec. Co. Ltd.*, *supra.*

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 <u>not</u> 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 learned later? If nothing else, will the party's attorney suffer bad "PR" if nothing else?**
- **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

AS WE THINK ABOUT SEARCH, THINK ABOUT THE ETHICS ISSUES THAT USE OF A NONPARTY VENDOR MIGHT LEAD TO!

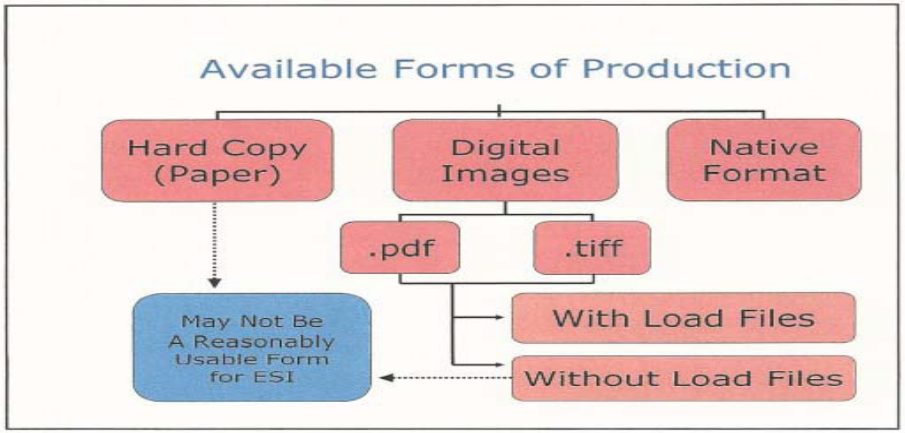
See P. Geraghty, "Duty to Supervise Nonlawyers: Ignorance is Not Bliss," *Your ABA* (ABA Ctr. for Prof. Respon. June 2013)

For discussion of two types of work performed by an ESI consultant and possible disqualification of a consulting expert, *see Gordon v. Kaleida Health,* 08-CV-378S(F) (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)



COURTESY OF MAURA R. GROSSMAN

FORM OF PRODUCTION (3)

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 (4) INTERPRETING RULE 34(b)(2)(E)

Anderson Living Trust v. WPX Energy Production, LLC, **No. CIV 12-0040 JB/LFG (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 (5)

***Sedona Principle* 12: "Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case."**

FORM OF PRODUCTION (6) REPRESENTATIVE DECISIONS

Aguilar v. Immigration and Customs Enforcement Div., **255 F.R.D. 350 (S.D.N.Y. 2008) (metadata, etc.)**

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

Romero v. Allstate Ins. Co., **271 F.R.D. 96 (E.D. Pa. 2010) (form)**

FORM OF PRODUCTION (7) REPRESENTATIVE DECISIONS

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**

Sections 5c ("Format") and 5e ("Metadata fields"), Default Standards for Discovery *, United States District Court for the District of Delaware (rev'd Dec. 8, 2011)**

EEOC v. SVT, LLC, **Cause No. 2:13-CV-245-RLM-PRC (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)**

FORM OF PRODUCTION (8) REPRESENTATIVE DECISIONS

***American Gen'l Life Ins. Co. v. Vistana Condo. Owners Ass'n*, Case No. 2:12-cv-01324-JAD-NJK (D. Nev. May 16, 2014) (interpreting Rule 34(b)(2)(E)(i) and requiring producing party to "indicate whether the documents produced are actually responsive" to specific requests)**

***Lawrence v. VB Project, LLC,* Case No. 14-60289-CV-BLOOM/VALLE (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")**

***Venture Corp. v. Barrett,* Case No. 5:13-cv-00384-PSG (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.' *** there is no serious question that a grab-bag of PDF and native files is neither how Venture[] ordinarily maintained the documents and ESI nor is 'in a reasonable usable [sic] form.'")**

INTERLUDE

Assume these facts:

- **A party in an arbitration served a subpoena on a nonparty 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,* 13 Civ. 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 counter that they would suffer an undue burden if required to comply with plaintiff's request.**

What should the court do?

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

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.**
- **Does Rule 34(a)(1) require defendant to create the reports?**

Watson Carpet & Floor Covering, Inc. v. Mohawk Industries, Inc., **No. 3:09-0487 (M.D. Tenn. Sept. 20, 2013)**

See A&R Body Specialty Works, Inc. v. Progressive Cas. Ins. Co., **Civ. No. 3:07CV929 (D. Conn. Sept. 9, 2014) (Rule 34 does not require "creation of an entirely new data set").**

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)

Remember *Zubulake* I. *See Peskoff v. Faber*, 240 F.R.D. 26 (D.D.C. 2007) (only if NRA)

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 it's adversary's discovery request does nothing more than require a party to fund it's adversary's litigation.").**

***U.S. Bank Nat'l Ass'n v. GreenPoint Mtge. Funding, Inc.,* 939 N.Y.S. 395 (Sup. Ct. App. Div. 2012) (adopting *Zubulake;* producing party bears productions cost in first instance)**

***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.,* 11-8405 (S.D.N.Y. Dec. 27, 2012) (rejecting same)**

***FDIC v. Brudnicki,* 2013 WL 2948098 (N.D. Fl. June 14, 2013) (addressing cost-shifting under Rule 26(b)(2)(C) in context of production of ESI under a protocol)**

COST-SHIFTING (3)

The proposed amendment to Rule 26(c)(1)(B) will specifically authorize courts to allocate expenses.

The Civil Rules Advisory Committee is considering cost-shifting and -sharing.

For discussions of costs, see T. Brostoff, "Fee-Shifting on Horizon for Rules Committee; State Rules, Empirical Evidence to be Studies," 14 *DDEE* 512 (2014), T. Brostoff," As eDiscovery Costs Soar, Courts and Rulemakers Seek Remedies," 14 *DDEE* 539 (2014) and T. Brostoff, "Cooperation, Case Management at Forefront of New Rules; Cost-Shifting on Horizon?" 15 *DDEE* 41 (2015).

PRIVILEGE (1)

Fed. R. Civ. P. **26(b)(5)(A) and the privilege log:**

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 it [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")**

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:" 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 include 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. 1:05-cv-01276-JSG (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) (rejected applicability of *Pullman* 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, e.g., Massachusetts Mut. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* Civil Action No. 2011-30285-PBS (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,* Case No. 2014CV31356 (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 *FED. R. CIV. P.* 26(b)(5)(B) and FRE 502(b)

Woodard v. Victory Records, Inc., **No. 11 CV 7594 (N.D. Ill. Aug. 22, 2013)**

Smith v. Allstate Ins. Co., **Civil Action No. 3:11-CV-165 (W.D. Pa. Nov. 8, 2012)**

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)**

INTERLUDE

Under these 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.**
- **Should plaintiffs' counsel be disqualified?**

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.,* Case No. C13-1034 MJP (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 ***."**

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

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) (Rule 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)

FRE 502(d) does <u>not</u> 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 FRE 502(e) agreement into a FRE 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 FRE 502(d) orders apply to <u>any</u> 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?

Note that one court has held that a FRE 502(d) order cannot "protect" intentional disclosures. *Potomac Elec. Power Co. v. United States,* 107 Fed. Cl. 725 (2012).

(With thanks to Judge Grimm)

PRIVILEGE (17)
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 (18)
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."

(With thanks to Judge Peck)

PRIVILEGE (19)
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 (20)
QUESTIONS ABOUT RULE 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 (RWS) (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 (21)
QUESTIONS ABOUT 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. 1:05-cv-01276-JSG (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 (22)
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 (23)
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 (24)
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 (25)
STATE EQUIVALENTS OF FRE 502

Arizona
Delaware
Illinois
Indiana
Iowa
Kansas
Vermont
Virginia
Washington
Note that other States have statutes that are analogous to sections of FRE 502.

REASONABLE EXPECTATIONS OF PRIVACY (1)

Privacy:

- **“We got over it?”**
- **“We never had it?”**
- **“What is it for good anyway?”**

REASONABLE EXPECTATIONS OF PRIVACY (2)

K. Hill, "Beware, Houseguests: Cheap Home Surveillance Cameras are Everywhere Now," *Fusion* (posted Feb. 18, 2015)

C. Cooper, "Preparing for Biometrics and Drones in the 'Post-Privacy' Era," *Inside Counsel* (Nov. 24, 2014)

S. Clifford & Q. Hardy, "Attention, Shoppers: Store is Tracking Your Cell," *New York Times* (July 14, 2013)

K. Sintumuang, "Google Glass: An Etiquette Guide," *Wall St. J.* (May 3, 2013)

REASONABLE EXPECTIONS OF PRIVACY (3)

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.,* Case No. 1:13-cv-00627-SAB (E.D. Ca. Aug. 15, 2013) (quashing defense subpoena for plaintiff's mobile phone records).**

REASONABLE EXPECTATIONS OF PRIVACY (4)

City of Ontario v. Quon, **540 U.S. 746 (2010) (Government employer as monitor) (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")**

Liebeskind v. Rutgers Univ., **Docket No. A-0544-12T1 (N.J. App. Div. Jan. 22, 2015 (*per curiam*) (distinguishing *Stengart* ; *public* employer as monitor)**

REASONABLE EXPECTATIONS OF PRIVACY (5)

***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?**

REASONABLE EXPECTATIONS OF PRIVACY (6)

H.B. No. 295, "An Act to Amend Title 6 of the Delaware Code Relating to Commerce and Trade and the Safe Destruction of Documents Containing Personal Identifying Information" (effective Jan. 1, 2015) ("This bill will create a new chapter regarding the safe destruction by business entities of documents containing personal information. Aggrieved customers will have a cause of action to recover potential treble damages. *."**

SANCTIONS (1)
"RON'S RULES"

"Whatever you do today to preserve is likely to be looked and judged to have been reasonable or unreasonable in a year or more. (Why? Easiest example, Rule 12(b)(6) motion practice with a stay of discovery). So, have a records retention and litigation hold policy in place, 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!" *See, e.g., EEOC v. Fry's Electronics, Inc.,* 287 F.R.D. 655 (W.D. Wash. 2012).

SANCTIONS (2)
WHAT MOTION PRACTICE DOES

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 (3)
MOTION PRACTICE

E. Lee, *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases* (FJC: 2011):

- **"A motion related to spoliation of evidence was identified in *** 0.15% of civil cases filed in the study districts ***." (p. 1)**

- **"Motions for sanctions were granted in 18% of all cases [studied] and denied in 44% of all cases. Considering only cases with an order on the motion, motions were granted 28% of the time and denied 72% of the time." (p. 1)**

SANCTIONS (4)
SOURCES OF AUTHORITY

Inherent power

28 U.S.C. Sec. 1927

- ***Haynes v. City & County of San Francisco,*** **688 F.3d 984 (9th Cir. 2012)**
- ***Parsi v. Daioleslam,*** **No. 12-7111 (D.C. Cir. Feb. 10, 2015)**

Rule 16(f)

Rule 26(g)

Rule 37(b)

Contempt

- ***Southern New England Tele. v. Global NAPs,*** **624 F.3d 123 (2d Cir. 2010)**

INTERLUDE

What might a judge do if a party's conduct causes discovery to be "more time consuming, laborious, and adversarial than it should have been" but is not in bad faith such that Section 1927 sanctions would be appropriate and does not violate a specific rule? Look to Rule 16(f)(1) and impose fees and costs as an exercise of case management?

***EEOC v. Original Honeybaked Ham Co.,* 2013 WL 752912 (D. Colo. Feb. 27, 2013)**

SANCTIONS (5)
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**

SANCTIONS (6)
APPELLATE REVIEW

In re Petition of Boehringer Ingelheim Pharm., Inc., **No. 13-3898 (7th Cir. Jan. 24, 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 (7)
SPOLIATION

Sedona Principle 14: **"Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party."**

SANCTIONS (8)
THE "TRILOGY"

Note that there are various formulations of what must be proven for an award of sanctions. Here are mine:

- **Scienter**
- **Relevance**
- **Prejudice**

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 (9)
WHAT MIGHT BE IMPOSED SHORT OF A CASE-TERMINATING ONE?

- Giving an adverse inference instruction
- Precluding the spoliator from offering evidence or testifying
- Precluding the spoliator from introducing expert testimony to explain the destruction of evidence
- Barring cross-examination at trial
- Shifting the burden at trial
- Permitting the victim of spoliation who has other proof to survive a spoliator's summary judgment motion

SANCTIONS (10)
WHAT IS AN ADVERSE INFERENCE?

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

"The magistrate judge sanctioned Enova [the spoliating defendant] 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 inference in that a 'charge' does not require the jury to presume that the lost evidence is both relevant and favorable to the innocent party."

For discussion of the difference between permissive and mandatory adverse inferences, *see Mali v. Federal Ins. Co.,* 2013 WL 2631369 (2d Cir. June 13, 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").

For the imposition of a mandatory adverse inference, *see Bozic v. City of Washington,* 912 F. Supp. 2d 257 (W.D. Pa. 2012).

SANCTIONS (11)
"LESS" THAN AN ADVERSE INFERENCE?

EEOC v. SunTrust Bank, **Case No. 8:12-cv-1325-T-33MAP (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."**

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 appropriate "lesser sanction, although the Plaintiffs do not appear to recognize it as such")**

INTERLUDE

What about a nonjury action? What might be the effect of a finding of spoliation and the imposition of an adverse inference?

***Owner-Operator Indep. Drivers Ass'n v. Comerica Bank,* 860 F. Supp. 2d 519 (S.D. Ohio 2012)**

SANCTIONS (12)
SCIENTER

Pension Comm. v. Banc of America Sec., LLC, **685 F. Supp. 2d 456 (S.D.N.Y. 2010)**

Rimkus Consulting Grp. v. Cammarata, **688 F. Supp. 2d 698 (S.D. Tex. 2010)**

SANCTIONS (13)
VARIATIONS AMONG THE COURTS

***Anderson v. Sullivan*, 2013 WL 4455602 (W.D. Pa. Aug. 16, 2013)**

***Bracey v. Grondin,* 712 F.3d 1012 (7th Cir. 2013)**

***Herrmann v. Rain Link, Inc.*, 2013 WL 4028759 (D. Kan. Aug. 7, 2013)**

***Pillay v. Millard Refrig. Serv*., 2013 WL 2251727 (N.D. Ill. May 22, 2013)**

***Sekisui American Corp. v. Hart,* 945 F. Supp. 2d 494 (S.D.N.Y. 2013)**

SANCTIONS (14)
REPRESENTATIVE DECISIONS

Omogbehin v. Cino, **485 Fed. App'x 606 (3d Cir. 2012) (spoliation cannot be based on speculation)**

Domanus v. Lewicki, **742 F.3d 390 (7th Cir. Feb. 4, 2014) (affirming default judgment after "escalating sanctions")**

Blue Sky Travel & Tours, LLC v. Al Tayyar, **2015 WL 1451636 (4th Cor. Mar. 31, 2015) (remand to determine whether a party "destroyed or vfailed to preserve the evidence at issue")**

Clear-View Technologies, Inc. v. Rasnick, **Case No. 5:13-cv-02744-BLF (N.D. Ca. May 13, 2015) (use of "crap cleaner" software)**

SANCTIONS (15)
ZUBULAKE IN DIFFERENT COURTS

Pension Committee **continues to be followed in some jurisdictions.** ***See, e.g., Voom HD Holdings LLC v. Echostar Satellite, LLC,*** **939 N.Y.S.2d 321 (Sup. Ct. App. Div. 2012).**

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 (16)
A FEW "LEADING" DECISIONS

In re Actos (Pioglitazone) Products Liability Litig., **6:11-md-02299-RFD-PJH (W.D. La. June 23, 2014) (amending decision on spoliation sanctions)**

Brown v. Tellermate Holdings, Ltd., **No. 2:11-cv-01122-JLG-TPK (S.D. Ohio July 1, 2014)**

SANCTIONS (17)
RULE 37(e)

"Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

Defined to be, "the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs."

SANCTIONS (18)
READING RULE 37(e)

“Absent exceptional circumstances”

“a court may not impose sanctions”

“under these rules”

“on a party”

“for failing to provide”

“electronically stored information”

“lost as a result of the routine, good-faith operation”

“an electronic information system”

SANCTIONS (19)
RULE 37(e) REPRESENTATIVE DECISIONS

***Escobar v. City of Houston*, 2007 U.S. Dist. LEXIS 72706 (S.D. Tex. Sept. 27, 2007)**

***Doe v. Norwalk Community College*, 248 F.R.D. 372 (D. Conn. 2007)**

***In Re Krause*, 367 B.R. 740 (Bkrtcy. D. Kan. 2007)**

Oklahoma *ex. rel. Edmondson v. Tyson Foods, Inc.*, 2007 WL 1498973 (N.D. Okla. May 17, 2007) (warning parties to be "very cautious in relying upon any 'safe harbor' doctrine")

INTERLUDE

Extreme examples are easy. Let's try a few that <u>may</u> be at the "margins:"

- **Assume that a key player in an organization destroys all the email he thinks will get him into trouble during an action. He is unaware that his email has been routinely archived and he only destroyed copies. He is also unaware that litigation counsel has produced this email.**
- **During the employee's deposition he initially denies the evidence he is confronted with but then his story unravels.**
- **Can sanctions be imposed on the party (the employer) based on the intentional conduct of the employee?**

INTERLUDE

Assume these facts:

- **In a copyright infringement action, a party's software engineers thought they were carefully collecting and backing up all the evidence of a competitor's infringing source code onto a secure server in the Cloud, only to realize after filing suit that the supposedly secure server was routinely overwriting metadata each time a new file was added, destroying the evidential data of whatever had been there.**
- **The competitor moves for dismissal as a sanction, but the plaintiff says that a case-ending sanction is not appropriate absent a finding of bad faith.**
- **What's the answer? Or answers?**

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 a deposition that Plaintiff's accountant had a document related to valuation. Defendant subpoenaed the accountant for the document.**
- **The accountant was prepared to produce the document. However, Plaintiff's attorney took the document before the 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,* Civil Action No. 09-0875 (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 involving the same subject matter and that party was represented by separate counsel in each.**
- **Who's responsible for spoliation:**
  - **Retained counsel?**
  - **E-discovery vendor?**
  - **Inside counsel?**

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

See T.E. Brostoff, "eDiscovery and Counsel-Client Relationships: A Discussion of Sanctions and Conduct," 13 *DDEE* 296 (2013)

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).**

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) REPRESENTATIVE DECISIONS

"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 & THE WEB (6) REPRESENTATIVE DECISIONS

- *In re Milo's Kitchen Dog Treats Consol. Cases,* **Civil Action No. 12-1011 (W.D. Pa. Apr. 14, 2015) (no unlimited access to social media account)**
- ***Nucci v. Target Corp.,* No. 4D-14-138 (Fla. Dist. Ct. App. Jan 5, 2015) (on interlocutory appeal, denying relief from order compelling discovery of photos from plaintiff's Facebook account)**
- ***Root v. Balfour Beatty Constr. LLC,* Case No. 2D13-3205 (Fla. Dist. Ct. App. Feb. 5, 2014) (on interlocutory appeal, quashing discovery order in part absent showing that postings where relevant and admissible)**

THE CLOUD & THE WEB (7) REPRESENTATIVE DECISIONS

- ***Giacchetto v. Patchogue-Medford Union Free School Dist.,*** **2013 WL 2897054 (E.D.N.Y. May 6, 2013) (directing plaintiff counsel to review postings and determine relevance)**
- ***Keller v. National Farmers Union Prop. & Cas. Co.,*** **2013 WL 27731 (D. Mont. Jan. 2, 2013) (denying access to private portions of social media cite absent threshold showing of need based on content of public portions)**
- ***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 (8) 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?"

And note that there is a vendor which states that its product is "the industry's first investigative solution specifically designed to enable * professionals to effectively address social media content and web content ***."**

THE CLOUD & THE WEB (9)

What's out there? Example:

- **H. Bradford, "Facebook Feature Makes It Much Easier for 'Friends" to Find Embarrassing Posts," *Huntington Post* (posted Dec. 17, 2014)**
- **J. Constine, "The Enormous Implications of Facebook Indexing 1 Trillion of Our Posts," *TechCrunch* (posted Dec. 28, 2014)**

THE CLOUD & THE WEB (10)
A "DECISION TREE" FOR SOCIAL MEDIA

1. **Under the liberal discovery standard of *Fed. C. 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**

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**

THE CLOUD & THE WEB (11) PRESERVATION

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 (12)
AN ADDITIONAL RESOURCE

"The Sedona Conference® Primer on Social Media," 14 *Sedona Conf. J.* 191 (2013):

"This is called a 'Primer' because the goal is to provide primary instruction to the bar and bench in the basics of social media and the law, from definitions, to the use of social media in business, to the discovery of social media in litigation, to professional responsibilities lawyers have in relation to their own use of social media."

THE CLOUD & THE WEB (13)
APPLYING THE COMMON LAW

Agency Principles

Authority Principles

- **Actual**
- **Apparent**
- **Implied**

For agency, *see Lawlor v. North American Corp.,* Docket 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.,* 1:13-cv-08395 (ALC) (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 (14) APPLYING THE COMMON LAW

Enforcement of browsewrap vs. clickwrap agreement? The former does not require user to manifest intent. The latter requires affirmative action to do so.

Brownsewraps require that user had actual or condtructive knowledge of terms and conditions.

***Hussein v. Coinabul, LLC,* No. 14 C 5735 (N.D. Ill. Dec. 19, 2014)**

THE CLOUD & THE WEB (15) 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 (16) 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 (17)
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 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)**
- ***Richmond District Neighborhood Center and Ian Callaghan,*** **361 NLRB No. 74 (2014)**

THE CLOUD & THE WEB (18)
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 (19)
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)**

NOTE: 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 (20)
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 (21) "PUBLIC ACCOMODATION"

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

For a decision addressing the split on this question, *see National Fed. of the Blind v. Scribd Inc.,* Case No. 2:14-cv-162 (D. Vt. Mar. 19, 2015 ("yes" even absent a "physical location").

THE CLOUD & THE WEB (22) "PUBLIC ACCOMODATION"

The Department of Justice is enforcing accessibility requirements of the ADA without rulemaking.

See, for example, Settlement Agreement Between the United States of America and Ahold U.S.A., Inc. and Peapod, LLC * Under the *** [ADA], DJ 202-63-169 (Nov, 17, 2014) (regarding accessibility of website and mobile application).**

THE CLOUD & THE WEB (23)
"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 (24)
"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 (25)
"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 (26)
THE PUBLIC SECTOR

J.S. v. Blue Mt. School Dist., **650 F.3d 915 (3d Cir. 2011) (*en banc*)**

Layshock v. Hermitage School Dist., **650 F.3d 205 (3d Cir. 2011) (*en banc*)**

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*)**

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)

Note that the Federal Rules of Evidence do not address explicitly electronic evidence, but the rules are easily adaptable to it.

However, some rules may make admissibility problematical:

- **Rule 801(b): What is a declarant?**
- **Rule 803(g): What is a business record?**
- **Rules 901-02: Authentication?**
- **Rules 1001-08: What is an original writing?**

(With thanks to Judge Grimm)

ADMISSIBILITY (3)

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)

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.,* Case No. 12 C 771 (N.D. Ill. Jan. 6, 2014).**

ADMISSIBILITY (4)
REPRESENTATIVE DECISIONS

***Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007)**

***United States v. Espinal-Almeida,* 699 F.3d 588 (1st Cir. 2012)**

***Gulley v. State,* 2012 Ark. 368 (Sup. Ct. 2012)**

ADMISSIBILTY (5)
REPRESENTATIVE DECISIONS

Parker v. State, **No. 38 (Del. Sup. Ct. Feb. 5, 2014)**

Commonwealth v. Grace, **84 Mass. App. Ct. 1136 (2014)**

United States v. Vayner**, 769 F.3d 125 (2d Cir. 2014)**

State v. Hanson, **No. 33,057 (N.M. Ct. App. Mar. 9, 2015)**

ADMISSIBILITY (6) 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 (7)
OTHER RESOURCES

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)

***The Sedona Conference® Commentary on ESI Evidence & Admissibility,* 9 *Sedona L. J.* 217 (2008)**

ADMISSIBILITY (8)
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).

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)**

"Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case" (Judicial Conf. Comm. on Court Admin. and Case Mgm't: June 2012)

JUROR MISCONDUCT (3)

JUROR MISCONDUCT (4)

In re: Amendments to the Florida Rules of Judicial Administration—Rule 2.451 (Use of Electronic Devices), No. SC12-764 (Fl. 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 (5)

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 (6)

And if something happens:

- ***Juror No. One v. Superior Court*, 142 Cal. Rptr. 151 (Ct. App. 2012)**
- ***Sluss v. Commonwealth,* 381 S.W.3d 215 (Ky. Sup. Ct. 2012)**
- ***United States v. Ganias,* No. 12-240-cr (2d Cir. June 17, 2014)**
- ***State v. Webster,* No. 13-1095 (Iowa Ct. App. Nov. 13, 2014)**

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."**
- **Appellate courts have addressed what e-discovery-related costs 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 (2)

What might the Supreme Court do? *Cf. Yaniguchi v. Kan 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*, 69 A.3d 559 (N.J. Sup. Ct. 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 *** 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

General Recommendation 5 for Judges, *The Sedona Conference® Cooperation Proclamation Resources for the Judiciary* (Dec. 2014 ed.):

"The above recommendation, that 'judges should demand attorney competence,' requires some extended discussion. Attorneys, for the most part, are generalists. Some focus on particular areas of the law. However, whatever area they may practice in, attorneys, as a general proposition, are not *expert in the technologies that can be encountered in eDiscovery. For example, not every attorney should be expected to develop mechanisms for, and conduct, automated searches.*

ETHICS (5)
COMPETENCE

- **What attorneys should be expected to be is competent within the meaning of the Model Rules of Professional Conduct and/or its federal and state equivalents. For example, and at a minimum, an attorney should understand how to reasonably ensure client confidences when using email. Moreover, an attorney should understand when she needs the assistance of an eDiscovery consultant. These are simply not matters of ethics: Attorney *incompetence in eDiscovery can lead to the waste of court and party resources and unnecessarily increase the costs and time of civil litigation.*"**

ETHICS (6)
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 (7)
COMPETENCE

What should a competent attorney know or do?

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

ETHICS (8)
COMPETENCE

What should a competent attorney know about research?

- **D. MacLeod, "Archival Research," *Litigation* 18 (Summer 2014)**
- **D. MacLeod, "Eight Google Skills All Litigators Should Master," *Litigation* 11-13 (Spring 2012)**

ETHICS (9)
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. 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 (10)
COMPETENCE

What should a competent attorney know in the litigation context?

- ***"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. 2011).**
- ***"The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel"*** **(Mar. 2011).**

ETHICS (11)
COMPETENCE

What should a competent attorney know in the litigation context?

The "Joint Electronic Discovery Submission * and [Proposed] Order" of the SDNY "Pilot Project Regarding Case Management Techniques For Complex Cases" requires that, "[c]ounsel certify that they are sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf."**

ETHICS (12)

What should a competent attorney know about dockets?

- ***Communications Network Internat'l, Ltd. v. MCI WorldCom Communications, Inc.,* No. 10-4588(L) (2d Cir. Jan. 24, 2013)**
- ***Two-Way Media LLC v. AT&T, Inc.,* 2014-1302 (Fed. Cir. Mar. 19, 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 (13)
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 the technical competence and skill – either by themselves, co-counsel, or expert consultants to:

ETHICS (14)
COMPETENCE

- **“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)

For a broad discussion of ESI-related competence, see R.J. Hedges & A.W. Wagner, "Competence with Electronically Stored Information: What Does It Mean in the Context of Litigation and How Can Attorneys Achieve It?" 15 *DDEE* 134 (2015).

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

S.D. Nelson, *et al.,* "Law Firm Data Breach Nightmares and How to Prevent Them: Can Your Law Firm Be Breached?" *The Brief* 16 (Tort Trial & Ins. Sec. Spring 2013)

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)

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 ***," <u>and</u> 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" <u>and</u> 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 address reference electronic media in context of attorney advertising.**

ETHICS (24)
DATAMINING

- ***"Metadata Ethics Opinions Around the U.S.,"*** **ABA Legal Technology Resource Center (last visited July 4, 2015).**
- **"The Sedona Conference® Commentary on the Protection of Privileged ESI" (public comment version: Dec. 2014)**
- **"The Sedona Conference® Commentary on Ethics & Metadata," 14 *Sedona Conf. J.* 169 (2013).**

ETHICS (25)
OTHER TOPICS

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")

ABA Formal Op. 11-459 (Aug. 4, 2011) ("Duty to Protect Confidentiality of E-mail Communications with One's Client")

ABA Formal Op. 08-451 (Aug. 5, 2008) ("Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services")

ABA Formal Op. 10-457 (Aug. 5, 2010) ("Lawyer Websites")

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?")

Ethics Comm. of the Colorado Bar Ass'n Formal Op. 122 (as amended Oct. 16, 2010) ("The Applicability of Colo. RPC 7.3 to Internet-Based Lawyers Marketing Program")

ETHICS (27)
OTHER TOPICS

Professional Ethics of the Florida Bar, Opinion 10-2 (rev'd Aug. 24, 2011) (use of devices as "storage media")

New Hampshire Ethics Comm. Advisory Op. #2012-13/4 (Feb. 21, 2013) ("The Use of Cloud Computing in the Practice of Law")

New York State Bar Ass'n Comm. on Prof. Ethics Op. 1019 (Aug. 6, 2014) ("Confidentiality; Remote Access to Firm's Electronic Files")

ETHICS (28)
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 2011 Formal Ethics Op. 8 (July 15, 2011) ("Utilizing Live Chat Support Service on Law Firm Website")

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

ETHICS (29)
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 (30)
REPRESENTATIVE DECISIONS

Castellano v. Winthrop, **27 So.3d 134 (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)**

ETHICS (31)
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 (32)
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 (33)
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 (34)
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 (35)
ETHICS & SOCIAL MEDIA

Professional Ethics Committee of the Florida Bar Advisory Opinion 14-1 (June 25, 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 (36)
ETHICS & SOCIAL MEDIA

Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the of the New York State Bar Ass'n (June 9, 2015):

- **Guideline No. 1 Attorney Competence**
- **Guideline No. 2 Attorney Advertising**
- **Guideline No. 3 Furnishing of Legal Advice Through Social Media**
- **Guideline No. 4 Review and Use of Evidence from Social Media**
- **Guideline No. 5 Communicating with Clients**

ETHICS (37)
ETHICS & SOCIAL MEDIA

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

For a discussion of the 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 (38)
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 (39)
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 (40)
ETHICS & SOCIAL MEDIA

Some social media-specific questions:

- **Must "tweets" directed to potential clients be labeled as "attorney advertising?" New York State Bar Ass'n 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)**

Waste Mgm't v. Kattler, **No. 13-20356 (5th Cir. Jan. 14, 2015 (not social media, but …)**

ETHICS (43)
ETHICS & SOCIAL MEDIA
IN SUMMARY

"Cloud Ethics Opinions Around the U.S.," ABA Legal Technology Resource Center (last visited July 4, 2015)

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)

TRENDS TO WATCH (OUT) FOR (1)

Satellite discovery, or "discovery about discovery"

Discovery and preservation of "new" sources of electronic information:

- **Social media**
- **BYOD and the like**
- **New or "exotic" sources -- whatever those may be**

TRENDS TO WATCH (OUT) FOR (2)

Use of third-party providers to provide, services, etc., and preservation of their ESI

Proactive attempts to deal with privilege:

- **Non-waiver agreements and third parties**
- **Deferred privilege logs**
- **Categorical privilege logs**

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

Dealing with increasing volume and variety of ESI

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.

***Sedona Principle* 1**

***The Sedona Conference® Guidelines for Managing Information & Records in the Electronic Age* (Nov. 2007)**

S. "Tess" Blair & T. Lawler, "Differences Between Information Governance and Records Management," *The Legal Intelligencer* (Mar. 26, 2014)

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.

***Sedona Principle* 5**

***The Sedona Conference® Commentary on Legal Holds* (Sept. 2010)**

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.

***Sedona Principle* 6**

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.

***Sedona Principle* 3**

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.

***Sedona Principles* 8 and 9**

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.

***Sedona Principle* 12**

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.

***Sedona Principle* 12**

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.

***Sedona Principle* 11**

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.

***Sedona Principle* 4**

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, then what?

***Sedona Principle* 10**

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)**

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**

Discovery: Rule 26(c) protective orders available upon showing of "good cause"

Filings and proceedings: 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)

Five 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. **If something is to intervene to challenge an order? sealed at trial, what happens on appeal?**
4. **Are there any circumstances that would justify sealing anything on an appeal?**
5. **Should "strangers" be permitted to intervene to challenge an order?**

PROTECTIVE ORDERS & PUBLIC ACCESS (8) REPRESENTATIVE DECISIONS

***Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486 (5th Cir. 2012)**

***Delaware Coalition for Open Gov't, Inc. v. Strine*, No. 12-2859 (3d Cir. Oct. 23, 2013), *cert.* denied, 573 U.S. ___ (2014)**

***Company Doe v. Public Citizen,* No. 12-2209 (4th Cir. Apr. 16, 2014)**

PROTECTIVE ORDERS & PUBLIC ACCESS (9) REPRESENTATIVE DECISIONS

Gulliver School, Inc. v. Snay, **137 So.3d 1045 (Fla. Dist. Ct. App. 2014)**

Oahu Publications Inc. v. Ahn, **SCPW-13-0003250 (Hawai'i Sup. Ct. July 16, 2014)**

Washington State Dept. of Transp. v. Mendoza De Sugiyama, **330 P.3d 209 (Wash. Ct. App. 2014)**

Apple v. Samsung Electronics Co., **Case No. 11-CV-01826-LHK (PSG) (N.D. Ca. Sept. 19, 2014)**

ESI IN INVESTIGATIONS (1)

Government investigations can have broad scope:

- ***FTC v. Wyndham Worldwide Corp.,*** **Civil Action No. 12-1887 (ES) (D.N.J. Apr. 7, 2014) (rejecting challenge to FTC's authority to "assert an unfairness claim in the 'data-security' context")**

- ***Compare EEOC v. Burlington No. Santa Fe Rr.,*** **669 F.3d 1154 (10th Cir 2012) (affirming decision to quash subpoena as information sought not relevant to pending investigation)** ***with FTC v. Church & Dwight Co., Inc.,*** **655 F.3d 1312 (D.C. Cir. 2011) (affirming decision to enforce subpoena and CID as information sought on products not under investigation "reasonably relevant" to investigation)**

- ***In re Grand Jury Subpoenas,*** **No. 10-15758 (9th Cir. Dec. 7, 2010) (grand jury investigation)**

ESI IN INVESTIGATIONS (2)

Agency standards for production include:

- **DOJ Antitrust Division, "Request for Additional Information and Documentary Materials Issues to ***" (Mar. 2012), available at http://www.justice.gov/art/public/242694.htm**
- **FTC Premerger Notification Office, "Model Request for Production of Additional Information and Documentary Material (Second Request)" (rev. June 2010), available at http://www.ftc.gov/bc/hsr/introguides/guide.pdf**
- **SEC. "Data Delivery Standards" (rev. Nov. 30, 2012), available at http://www.sec.gov/divisions/enforce/datadeliverystandards.pdf**

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

Spoliation may be a crime *and* be used to prove of 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**

But note that Section 1519 requires that "information" be lost. *See Yates v. United States,* No. 13-7451 (Sup. Ct. Feb. 25, 2015)

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

- ***United States v. Katakis,*** **Cr. No. 2:11-511 WBS (E.D. Ca. May 9, 2014) (granting judgment of acquittal absent proof that defendant concealed or destroyed email)**
- ***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, 979 (9th Cir. 2006).**

ESI IN CRIMINAL ACTIONS (5)
THE SUPREME COURT

United States v. Jones, **132 Sup. 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 involving 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 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 Sup. 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 an analysis of *Riley,* and how it might impact on 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).

And see T. Brostoff, "*Riley's* Implications on Future Jurisprudence Discussed in Webinar," 14 *DDEE* 399 (2014).

For a post-*Riley* decision that rejects an "exigent circumstances" argument, see *United States v. Jenkins,* 2014 WL 2933192 (S.D. Ill. June 30, 2014).

For a 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 that would 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, **No. 14-593 (U.S. Mar. 30, 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 among continue beyond physical intrusion?**

ESI IN CRIMINAL ACTIONS (12)
THE SUPREME COURT

City of Los Angeles, California v. Patel, **No. 13-1175 (U.S. June 22, 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 NEXT FRONTIER?

Does the Warrant Requirement apply to cell site data or is an order under the Stored Communications Act sufficient? No:

- ***United States v. Davis,*** **No. 12-12928 (11th Cir. May 5, 2015) (*en banc*)**
- ***In re Application of United States v. Historical Cell Site Data,*** **724 F.3d 600 (5th Cir. 2013)**

ESI IN CRIMINAL ACTIONS (14)
THE SEARCH WARRANT "PUZZLE"

The 18th century vs. the 21st century: Reconciling the "particularity" requirement with the reality of "intermingled data" and extraordinary volumes of data:

Is there a "first" search and seizure?

- **Search: search the identified premises for hardware.**
- **Seizure: seize the hardware (or copy its contents).**
- **Constrained by the usual legal rules? Of course.**

Is there a "second" search and seizure?

- **Search: search the hardware or copy.**
- **Seizure: seize whatever data you want.**
- **Constrained by the usual legal rules? "It depends."**

ESI IN CRIMINAL ACTIONS (15) THE SEARCH WARRANT "PUZZLE"

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

ESI IN CRIMINAL ACTIONS (16)
THE SEARCH WARRANT "PUZZLE"

- ***I/M/O ODYS LOOX Plus Tablet,*** **No. 14-265 (D.D.C. Mar. 20, 2014)**
- ***I/M/O Search of Cellular Telephones within Evidence Facility Drug Enforcement Administration, Kansas City District Office*****, No. 14-MJ-8017 (D. Kan. Dec. 30, 2014)**

ESI IN CRIMINAL ACTIONS (17)
THE SEARCH WARRANT "PUZZLE"

- ***I/M/O Warrant for all Information Associated with the Email Account xxxxxx@gmail.com Maintained at Premises Controlled by Google, Inc.,*** **14 Mag. 309 (S.D.N.Y. July 18, 2014)**
- ***I/M/O/ Search of Information Associated with [Redacted] @mac.com that is Stored at Premises Controlled by Apple, Inc.,*** **Mag. Case No. 14-228 (D.D.C. Aug. 8, 2014)**
- ***United States v. Shah*****, No. 5:13-CR-328 (E.D.N.C. Jan. 5, 2015)**

ESI IN CRIMINAL ACTIONS (18) SEARCH WARRANT-RELATED REPRESENTATIVE DECISIONS

- ***United States v. Woerner,*** **709 F.3d 527 (5th Cir. 2013) (good faith exception)**
- ***United States v. Ganias,*** **755 F.3d 125 (2d Cir. 2014) (suppression)**
- ***United States v. Katzin,*** **No. 12-2548 (3d Cir. Oct. 1, 2014 (*en banc*) (good faith exception)**

ESI IN CRIMINAL ACTIONS (19) SEARCH WARRANT-RELATED STATE INITIATIVES

Veto Message by Gov. Brown to California Assembly Bill 1327 that would prohibit police from using drone without a search warrant (dated Sept. 28, 2014): "There are undoubtedly circumstances where a warrant is appropriate. The bill's exceptions, however, appear to be too narrow and could impose requirements beyond what is required" by State and United States Constitutions."

Senate Joint Resolution No. 27, approved by voters August 16, 2014, amended Section 15, Article I, Missouri Constitution, to impose warrant requirement for search or seizure of, or access to, electronic communications and data.

ESI IN CRIMINAL ACTIONS (20) SEARCH WARRANT-RELATED REPRESENTATIVE STATE DECISIONS

- ***States v. Earls,*** **70 A.3d 630 (N.J. Sup. Ct. July 18, 2013) (imposing warrant requirement under New Jersey Constitution)**
- ***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 (21) 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**, Docket No. CR 14-1439, 2014 WL 6709960 (Va. 2d Jud. Cir. Oct. 28, 2014)**

ESI IN CRIMINAL ACTIONS (22) POST-INDICTMENT

Government obligations comes 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 (23) 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 (24) POST-INDICTMENT REPRESENTATIVE DECISIONS

United States v. Hernandez, **14 CR 499 (KBF) (S.D.N.Y. Sept. 12, 2014) (denying request to appoint "coordinating discovery attorney" in multi-defendant criminal action).**

United States v. Suarez, **2010 WL 4226524 (D.N.J. Oct. 21, 2010) (Government spoliation)**

United States v. Skilling, **554 F.3d 529 (5th Cir. 2009), vacated in part on other grounds, 130 S. Ct. 2896 (2010) (alleged *Brady* violation by massive ESI production)**

Freeman v. State, **2013 WL 2350373 (Miss. Sup. Ct. May 30, 2013) (Government spoliation)**

ESI IN CRIMINAL ACTIONS (25) NEW TECHNOLOGIES

T. Banks, "Body-Worn Camera Systems: An Update," *The Privacy Advisor* (Privacy Ass'n: Nov. 11, 2014)

P. Shallwani, "Tablets to Help Fight Crime," *Wall St. J.* A17 (June 27, 2014)

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)

J.P. Murphy & A. Fontecilla, "Social Media Evidence in Govt. Investigations and Crim. Proceedings: A Frontier of New Legal Issues," 19 *Richmond J. of Law & Tech.* 1 (2013)

ESI IN CRIMINAL ACTIONS (26) IN SUMMARY

"ESI Experts Discuss E-Discovery Trends in Criminal Procedure During BNA Webcast," 11 *DDEE* 6 (2011)

E. Topor, "Joint Federal Criminal E-Discovery Protocol Places Cooperation Above Motion Filings," 12 *DDEE* 76 (2012)

T.E. Brostoff, "Constitutional and Practical Dimensions of ESI in Federal and State Criminal Actions," 13 *DDEE* 448 (2013)

T.E. Brostoff, "ESI in the Criminal Justice System Webinar Discusses Pre- and Post-Indictment Issues," 14 *DDEE* 152 (2014)

GENERAL RESOURCES

Lexology, **an Association of Corporate Counsel publication**

Digital Discovery & e-Evidence **("DDEE"), a Bloomberg BNA publication**

The Sedona Conference® Cooperation Guidance for Litigators & In-House Counsel **(Mar. 2011)**

The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary **(Dec. 2014)**

QUESTIONS
COMMENTS
CORRECTIONS

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PS This is certainly not intended to be legal advice or a solicitation!