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Overcoming Class Action ESI Challenges: Preserving and Reviewing ESI; Limiting Discovery, Arguing Proportionality

Assessing the Impact on Proportionality and Sanctions of
2015 Amendments to FRCP Rule 26(b)(1) and Rule 37(e)

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Overcoming Class Action ESI Challenges: Preserving and Reviewing ESI; Limiting Discovery, Arguing Proportionality

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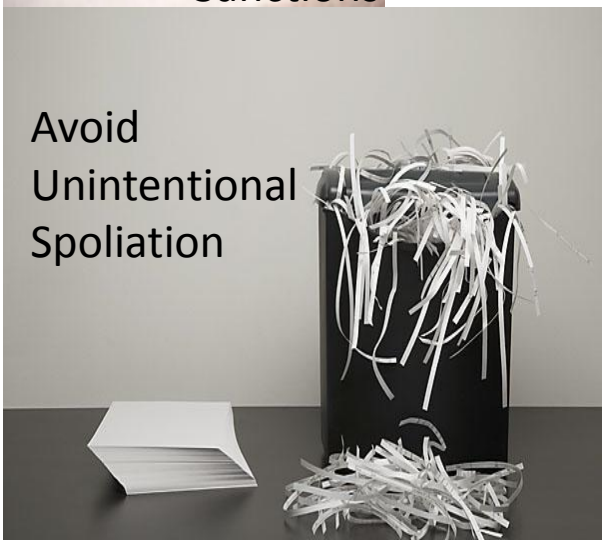
Agenda

I. Preservation of ESI
II. Strategies for review of ESI
III. Proportionality and discovery planning
IV. Strategies for limiting the scope of e-discovery
V. Questions

I. Preservation of ESI

- CLIENTS MUST IMPLEMENT COST-EFFECTIVE MEASURES FOR PRESERVING INFORMATION.
- ATTORNEYS MUST BECOME FAMILIAR WITH THEIR CLIENTS' DOCUMENT RETENTION POLICIES AND PROCESSES, AND ANTICIPATE THEIR CLIENTS' E-DISCOVERY CHALLENGES.
- CLIENTS SHOULD IMPLEMENT SYSTEMS OF RECORDS AND DATA SOURCE CATALOGS – SO THAT THEY MAY KNOW THE CONTENT OF THEIR DATA, AND CAN PROACTIVELY SORT AND STORE DOCUMENTS THAT WILL LIKELY BE RELEVANT TO FUTURE LITIGATION.

ADVISE CLIENTS TO USE SYSTEMS OF RECORDS AND SOURCE CATALOGS:



To reduce the risk that a court will find that the client is guilty of spoliation and sanction the client for failing to produce relevant documents

To reduce the risk that a client will under-produce relevant documents

To reduce the risk that the court will issue an adverse inference against the client at trial

ADVISE CLIENTS TO USE SYSTEMS OF RECORDS AND SOURCE CATALOGS:

To avoid over-preserving data

WHEN DOES THE DUTY TO PRESERVE BEGIN?

The client has a duty to preserve documents when it receives notice that the evidence is relevant to litigation, or when it should have known that the evidence may be relevant to future litigation

Some courts have found that parties have engaged in spoliation even when the documents at issue were destroyed before the lawsuit began

The Attorney must send a formal written litigation hold notice to the client

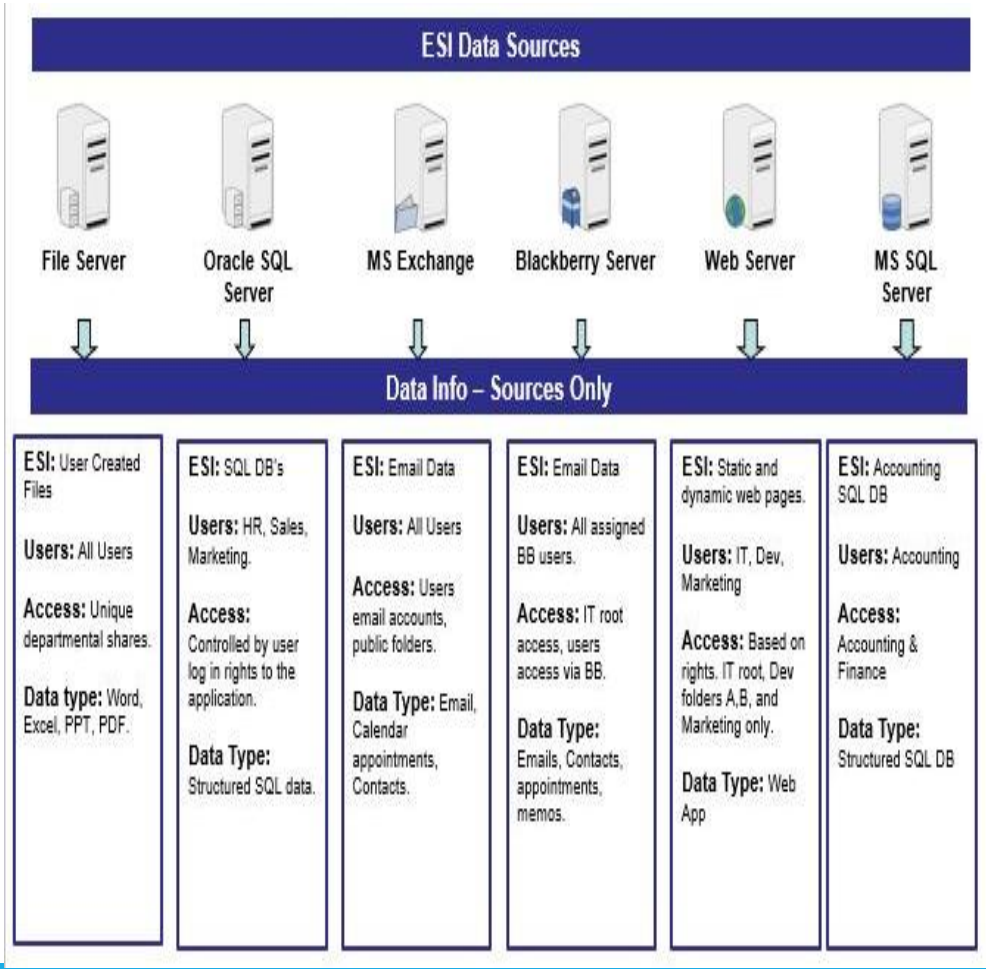
IDENTIFY THE CLIENT'S DATA SOURCES

Know your client's data sources and have a plan

Data Sources include:

- ❑ Databases
- ❑ Emails
- ❑ Networks
- ❑ Servers
- ❑ Archives
- ❑ Personal Digital Assistants – ex. cellphones
- ❑ Laptops and Personal Computers
- ❑ Computer Systems
- ❑ Storage Media

CREATE A DATA MAP



- Key stakeholders across the client's company must assess and determine the company's goals and risks
- Does the data map contain all data sources or only those potentially responsive to litigation
- Define the underlying data elements (i.e. exporting formats, length of time data sources maintained, information retention requirements, etc.) that you are going to capture for each data source.
- Leverage a software solution to help catalog and track these data sources.

Assign an E-Discovery Liaison

Collaboration is key. The E-Discovery Liaison functions as the intermediary between the IT and Legal departments. He/she must have a working knowledge of both departments to function as an effective liaison.

IMPLEMENT A DOCUMENT RETENTION POLICY

A document retention policy includes a set of company guidelines to control the volume of information the company retains, stores, organizes, and destroys

An effective retention policy allows a company to simultaneously meet its discovery obligations and lower its discovery costs

The retention policy must include the preservation of documents belonging to employers who leave the company

EFFECTIVE ESI PRESERVATION POLICIES REQUIRE THAT ATTORNEYS WORK WITH THEIR CLIENTS TO DO THE FOLLOWING:

- ✓ Create a data map to facilitate easy retrieval of documents and information
- ✓ Create a company culture in which employees are familiar with the workings of the document retention policy
- ✓ Create and consistently improve the company's system of records
- ✓ Ensure that the company's ESI preservation strategy will allow it to adequately respond to actual or potential litigation
- ✓ Comply with applicable regulations and preserve documents the company is required to preserve
- ✓ Implement mechanisms to destroy documents that the company is not required to keep and that are duplicative

II. Strategies for review of ESI

- ✓ IDENTIFY AND INTERVIEW KEY CUSTODIANS
- ✓ MEET & CONFER
- ✓ DEVELOP SEARCH CRITERIA FOR DETERMINING RESPONSIVENESS
- ✓ SEARCH AND COLLECT POTENTIALLY RESPONSIVE DOCUMENTS
- ✓ CULL DATA
- ✓ REVIEW DOCUMENTS FOR RESPONSIVE, PRIVILEGE AND CONFIDENTIALITY
- ✓ CONDUCT QUALITY CHECKING REVIEW FOR ACCURACY AND DEFENSIBILITY
- ✓ PRODUCE DOCUMENTS

INTERVIEW CENTRAL PLAYERS

IDENTIFY ANERVIEW KEY CUSTODIANS

- The discovery process starts when litigation or an investigation is reasonably anticipated.
- When faced with litigation or an investigation, talk with those individuals who are central to the matter and identify the key legal issues.
- It is important that counsel properly identify the issues in the case before collecting the data.
- Create a custodian interview template that includes a checklist, such as other possible sources of info., and other employees the interviewee thinks may have responsive documents

MEET & CONFER – FCRP Rule 26(f)

- Rule 26(f) provides a framework to plan for the meet and confer. It materially reduces the risks of e-discovery disputes and sanctions.
- Use the information obtained via custodian interviews as a leverage in meet & confer with opposing counsel.

MEET & CONFER

I'm almost done with that meet and confer letter.

-- Keri E. Borders

Via meet and confer, the parties can narrow the scope of discovery and negotiate important issues such as the search terms, date range, custodians, forms of production and data sources to produce relevant documents.

DATA COLLECTION METHODS

ESI Collection Methods include the following:

- Manual Imaging
- Snapshot Collection
- Spidering
- Policy-based Collection

COMPUTER ASSISTED REVIEW (CAR)

- Attorney review is the largest cost-driver in a legal dispute.
- The computer assisted review process involves using Machine Learning Algorithm.
- A reviewer reviews and tags a document as relevant or non-relevant. The computer takes the human input and uses it to draw inferences about other documents. Ultimately, the computer orders the documents by relevance to guide the review process.
- Predictive coding is one kind of CAR. It can facilitate a small group of attorneys reviewing hundreds of thousands of documents in a short period of time. A CAR review produces more accurate and consistent results than traditional review methods.

- Some clients opt to reduce review costs by outsourcing the document review and support services to offshore locations. This is called legal process outsourcing (LPO).

DOCUMENT REVIEW – BEST PRACTICES CHECKLIST

1. Devise Review Strategy
2. Attend to Resource Planning and Create Timelines
3. Conduct Team Training
4. Attend to Production Set Creation and Tracking
5. Review Workflow and Reviewer Procedures
6. Conduct Data Analysis
7. Review Progress Tracking
8. Perform Quality Control

III. Proportionality and Discovering Planning

Discovery planning requires a balanced approach. Does the burden or expense of the proposed discovery outweigh its likely benefit given the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of discovery in resolving the issues?

FRCP Rule 26 requires that discovery requests, responses and objections have a proper purpose and not be imposed to harass or needlessly increase litigation costs.

Defining the scope of the dispute and relevant ESI is essential to right-sizing the e-discovery process.

Who has the Burden of Proof?

Judges are increasingly limiting discovery where they think it is outside the scope of the case.

Consider how to make effective proportionality arguments.

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SPOLIATION OF ESI UNDER NEW FEDERAL RULE OF CIVIL PROCEDURE 37(e) AND SAMPLING OF RECENT CASES

Pre-December 2015 Rule 37(e)

Prior to the enactment of new Rule 37(e), which became effective on December 1, 2015, motions for sanctions due to the spoliation[1] of electronically stored information ("ESI") were decided under a rule that was intended to provide a safe harbor for parties who had destroyed or lost ESI due to inadvertence. It was enacted to address the challenges presented by the exponential expansion of ESI, its complex nature, and the use of automated deletion systems to manage it.

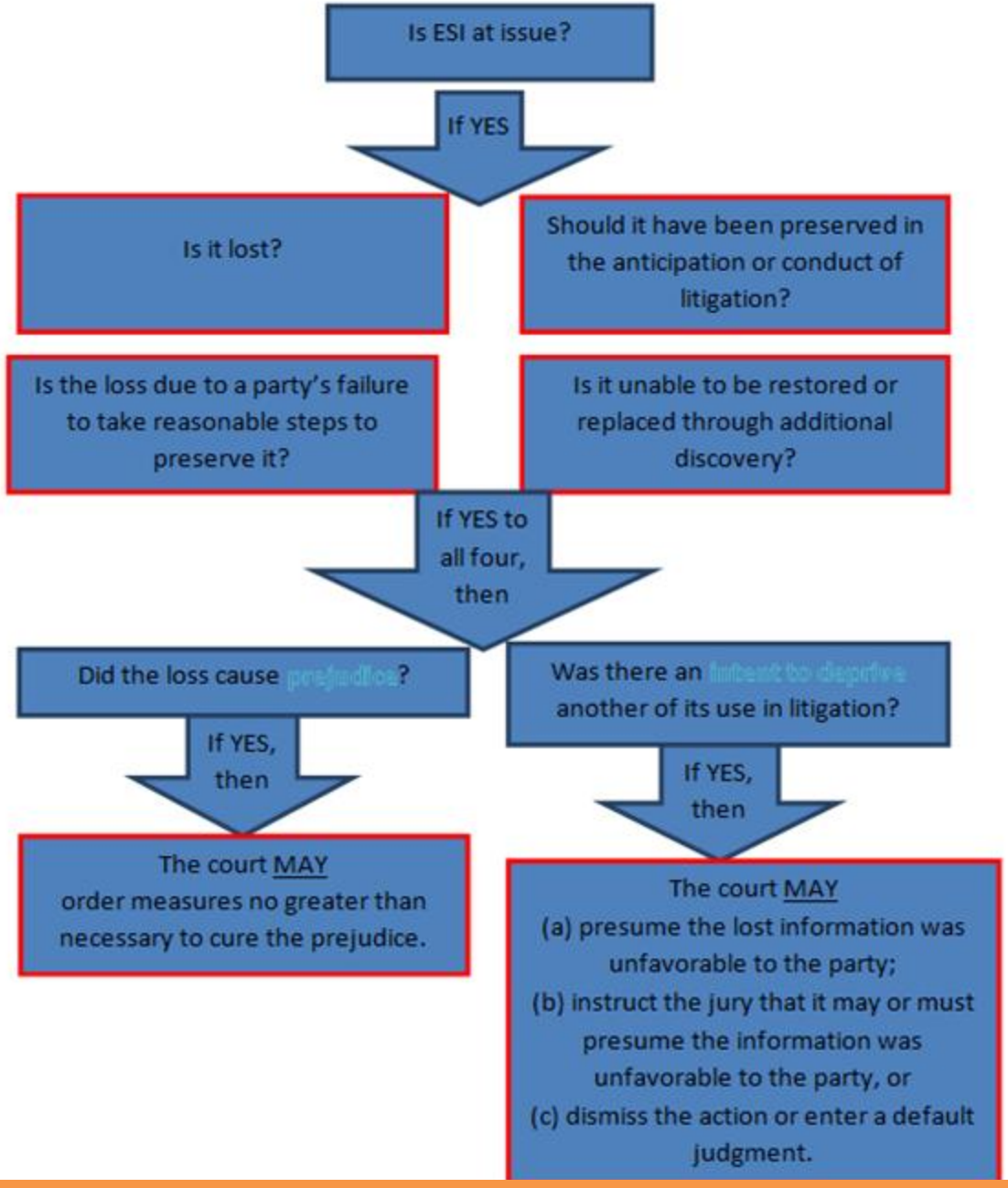
Old Rule 37(e) provided that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." Application of this Rule proved problematic and resulted in inconsistent court decisions. A circuit split developed regarding the level of culpability necessary to impose harsh sanctions, with certain circuits such as the Second Circuit in *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) authorizing an adverse-inference jury instruction upon a finding of negligence or gross negligence and other circuits requiring intentionality.

New Rule 37(e)

Revised Rule 37(e) provides as follows:

> **(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
>
> **(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.

The following flow chart provides a helpful summary of the Rule:



The Advisory Committee Notes are instructive on the Rule's intended application and are summarized below. *See* Fed. R. Civ. P. 37(e) Advisory Committee's notes to 2015 amendment.

I. The Four Gateway Inquiries

A. Lost information

Rule 37(e) only applies where information has actually been lost and not where it is obtainable through other means.

B. Duty to preserve

The Rule's requirement that the "lost information should have been preserved in the anticipation or conduct of litigation and that the party failed to take reasonable steps to preserve it" merely restates the common law duty to preserve when litigation is reasonably foreseeable that is found in federal case law. The Notes explicitly caution that new Rule 37(e) does not create a new duty to preserve.

C. Reasonable steps to preserve

The requirement that the loss of information be a result of a party's failure to take reasonable steps to preserve it addresses the reality that in dealing with the "ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible." Of interest, the Notes direct courts to consider the sophistication of the party handling ESI in making its reasonableness inquiry. In addition, that inquiry also creates the possibility of no liability even when ESI is lost, due for example to unforeseen circumstances such as a flood, if reasonable steps were in fact taken to protect against the loss. The Notes emphasize the role of proportionality in the reasonableness inquiry, directing courts to consider a party's resources and the costs of preservation efforts.

D. Restoration or replacement of information

When determining if lost ESI can be restored or replaced, courts are encouraged to use their powers under Rules 16 and 26 to obtain the information, citing the use of "Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible" or "Rule 26(c)(1)(B) on allocation of expenses." Proportionality is once again emphasized in weighing the importance of the lost information to issues in the case.

II. Sanctions

A. Court's inherent authority

The Notes state that the Rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." This suggests that a court's ability to rely upon its inherent authority to impose other sanctions for spoliation of ESI may be foreclosed.

Nevertheless, certain courts have interpreted the Rule as not doing so and have relied upon their inherent authority to impose sanctions for spoliation outside those provided for in new Rule 37(e). *See CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488 (S.D.N.Y. 2016) (interpreting notes as meaning courts cannot impose the sanctions prohibited by new Rule 37(e)); *Oppenheimer v. City of La Habra*, Case No. SACV 16–00018 JVS (DFMx), 2017 WL 1807596 (C.D. Cal. Feb. 17, 2017) ("When conduct is not in violation of any discovery order governed by Rule 37, then a district court will rely on its 'inherent authority' to sanction.").

B. Discretion

The Rule's text grants discretion in deciding whether to order sanctions by explicitly providing that a court "may" take certain measures once all four prerequisite inquiries have been met.

C. Prejudice of the loss (Rule 37(e)(1))

In evaluating a sanctions request when all four conditions are met, a court must first make an inquiry whether there was "prejudice to another party from loss of the information." Examples where prejudice may not be deemed to exist that are cited in the Notes are when "the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties." Noting the difficulty in proving prejudice due to lost ESI, whose contents may be unknown, the Notes highlight the courts' discretion in making that inquiry.

Once a finding of prejudice is made, a court is limited to "order[ing] measures no greater than necessary to cure the prejudice." Examples of severe permissible measures cited in the Notes are "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument." The Notes caution that sanctions that fall within subdivision (e)(2), which requires a showing of intent to deprive, should not be used based upon prejudice alone.

D. Intent to deprive (Rule 37(e)(2))

Satisfaction of this subsection permits a court to impose the most severe sanctions for spoliation of ESI. It was "designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve [ESI]." Its provisions explicitly reject "cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence, . . . permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation." Allowing the imposition of an adverse inference instruction is based upon the notion that it is permissible to assume that information lost due to a party's intentional acts was unfavorable to such party.

With respect to finding an intent to deprive a party of the use of ESI during trial, the Notes state that the finding may be made by a court in ruling upon a pretrial motion, during a bench trial or in the course of giving jury instructions or by a jury. If the determination is to be made by the jury, "the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation."

III. Sample Cases

Two trends in the case law since new Rule 37(e)'s enactment noted by one commentator are:

(i) Courts are *broadly* construing what constitutes "lost ESI" subject to "measures no greater than necessary to cure the prejudice under Rule 37(e)(1); and

(ii) Courts are *narrowly* construing what constitutes intentional deprivation of information warranting sanctions under Rule 37(e)(2).

See Jones Day, *Noteworthy Trends from Cases Decided under the Recently Amended Federal Rules of Civil Procedure*, 5/13/2017 at www.jonesday.com/noteworthy-trends-from-cases-decided-under-the-recently-amended-federal-rules-of-civil-procedure-09-06-2016/.

Sample Cases:

CAT3, LLC v. Black Lineage, Inc.,
164 F. Supp. 3d 488 (S.D.N.Y. 2016)

In this trademark infringement case, defendants asserted that plaintiffs had altered email domains before production, which implicated the issue of whether defendants had notice of plaintiffs' use of the mark at issue. The court found that the emails had in fact been altered intentionally by plaintiffs. The court first found that information had been lost because the authenticity of the near-duplicate emails was cast into doubt by their alteration. As a sanction, the court ordered the preclusion of plaintiffs' reliance upon the emails to show notice and imposed the attorneys' fees and costs of the motion upon plaintiffs.

NuVasive, Inc. v. Madsen Medical, Inc.,
No. 13-cv-2077 BTM (RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)

This case demonstrates the different results that may be reached under the old Rule 37 and the new version. At issue there was the spoliation of text messages. After initially ordering an adverse inference instruction under the prior Rule, the court granted reconsideration and, applying the new Rule, vacated its order and found an adverse inference to be improper in the absence of a finding of intent to deprive. It then ordered that the parties could "present evidence to the jury regarding the loss of [ESI] and . . . [that it would] instruct the jury that the jury may consider such evidence along with all other evidence in the case in making its decision."

Ericksen v. Kaplan Higher Education, LLC,
No. RDB-14-3106, 2016 WL 695789 (D. Md. Feb. 22, 2016)

This case is an example of a court's belief that new Rule 37(e) presents a high standard for the imposition of harsh sanctions. There, a plaintiff had run several data destruction programs on her computer post-litigation that had removed certain data. Plaintiff was attempting to introduce into evidence a letter and an email that allegedly supported her employment discrimination claim. The court granted defendants' request for sanctions but did not dismiss the case, finding it too harsh. Instead, it precluded plaintiff from introducing the letter and email, permitted defendants to present evidence about the loss at trial and awarded attorneys' fees.

Kelm v. ADF Midatlantic LLC,
Case No. 12-CV-80577, 2016 WL 7048835 (S.D. Fla. Dec. 5, 2016)

In a putative class action case under the TCPA, defendant brought a motion for sanctions under subsection one of Rule 37(e) based upon plaintiff's inability to produce text messages that were relevant to his claim. The court found the Rule inapplicable because of the court's uncertainty over satisfaction of the duty to preserve element where the deletion may have occurred prior to its attachment. Nevertheless, the court noted that it would have been better for plaintiff's counsel to "sequester and copy the contents of a plaintiff's cell phone at the time that litigation is anticipated."

Alabama Aircraft Industries, Inc. v. Boeing Company,
Case No. 2:11-cv-03577-RDP, 2017 WL 930597 (N.D. Ala. Mar, 9, 2017)

Here, plaintiff, an aircraft maintenance company, was suing Boeing Company ("Boeing") in a contract-related dispute. After the contract's termination, Boeing issued a firewall plan regarding the preservation of all ESI related to plaintiff. Nevertheless, two categories of ESI had been lost – (i) all the ESI of a CFO had been gathered and deleted and (ii) two CD's of ESI forwarded to the legal department created by an analyst who had been involved in the deal were removed and missing. The court found all four requisite elements for spoliation met. For example it found "[b]ecause the information at issue is not even identifiable, and certain other ESI was not preserved, the allegedly spoliated ESI cannot be restored or replaced through additional discovery." The court found no prejudice existed with respect to the two CD's of information, but found prejudice and intent regarding the CFO's files based upon defendant's "unexplained, blatantly irresponsible behavior" which led the court to speculate why it was destroyed. As a result, it ordered that the jury be given an adverse inference instruction and imposed attorneys' fees and costs.

Applebaum v. Target Corporation,
831 F.3d 740 (6th Cir. 2016)

In one of the few circuit court cases addressing the new Rule, plaintiff brought this action against Target in connection with her injuries due to an allegedly defective bike she bought from it. She challenged Target's failure to produce work orders and other ESI and sought an adverse inference instruction under Rule 37(e). The court rejected her claim fairly summarily finding none of the four conditions met as well as no intent to deprive.

Aronstein v. Thompson Creek Metals Company Inc.,
Case No. 15–cv–00204–RM–NYW, 2017 WL 1519390 (D. Colo. Apr. 27, 2017)

This case illustrates a court's refusal to apply Rule 37(e) in the face of a party's speculation that ESI must have existed and been destroyed. There, plaintiff had brought a breach of contract suit based upon the allegedly undisclosed but known increase in the cost of a project. Plaintiff challenged the lack of ESI from a director of projects for defendant and claimed that it must have existed based upon his presentation at a board meeting. Defendant claimed all of the ESI on the director's computer had been copied and transferred to the company's system. The court rejected the spoliation claim, finding that only speculation that ESI was even missing had been presented. It also relied upon an affidavit submitted on behalf of defendant stating that all files had been copied and saved.

Jenkins v. Woody,
Civil Action No. 3:15cv355, 2017 WL 362475 (E.D. Va. Jan. 21, 2017)

This case is a good example of somewhat harsh sanctions being imposed under subsection one of Rule 37(e). In this action, suit was brought by the estate of a women who had died while detained in prison against various parties, including a sheriff. At issue was a missing video of the deceased's last hours in detention. Although the sheriff claimed the video did not exist and that no employee had viewed it, he contradicted himself in saying it would not have helped her case. He asserted the video was automatically overwritten and that litigation was not anticipated at that time. Noting that the Fourth Circuit had not ruled on the issue, the court applied the clear and convincing standard of proof to the motion. The court rejected the argument that the video was routinely overwritten and found that the sheriff had a duty to take reasonable steps to preserve relevant evidence. It found all four preconditions in the Rule met. Nevertheless, in evaluating sanctions, the court found that no evidence of intent to deprive had been presented, though it did note that the facts gave it pause, and declined to award the harshest sanctions in Rule 37(e)(2). Ultimately, the court found that severe prejudice existed and ordered that the jury would be informed that the video was destroyed and allow the parties to present evidence about its destruction. It also ordered certain corroborating evidence to be excluded and allowed fees and costs.

Mazzei v. Money Store,
656 Fed. Appx. 558 (2d Cir. 2016)

In another of the few circuit cases applying new Rule 37, the Second Circuit upheld the lower court's grant of limited sanctions in the form of an award of various costs and its refusal to order an adverse inference instruction. This was a putative class action for breach of contract involving fee-splitting with respect to mortgages. The ESI at issue was from a web-based, electronic billing database through which defendants submitted fee invoices, but the original data was not kept. The lower court had found that defendants should have caused the data to have been preserved and awarded limited sanctions. Yet, it found that harsher sanctions were not merited because the data was of tangential value to the case and that plaintiffs had failed to pursue discovery from other sources that were more likely to contain relevant information. It also upheld the district court's finding of no intent to deprive.

Oppenheimer v. City of La Habra,
Case No. SACV 16–00018 JVS (DFMx), 2017 WL 1807596 (C.D. Cal. Feb. 17, 2017)

This case involved another claim against government officials and employees due to the death of a detained individual. Here, the court first found that video footage was not clearly ESI and declined to apply Rule 37(e), and instead relied upon its inherent authority. Still, no sanctions were awarded because it did not find any willful or intentional conduct in the video's missing portions. Next considering the deletion of texts and emails, the court, without much discussion, found the four conditions met, but held that entry of a default judgment was too harsh "[b]ecause Plaintiffs have not offered any evidence, or arguments, suggesting that the deleted text messages and e-mails are material to their case." It instead found that "the proper sanction is to instruct the jury that it may presume information in Williams' text messages and e-mails was unfavorable to the Defendants."

Roadrunner Transp. Services, Inc. v. Tarwater,
642 Fed. Appx. 759 (9th Cir. 2016)

In a one-page opinion that appears to have been initially decided prior to new Rule 37, the Ninth Circuit upheld a district court's entry of the severe sanction of a default judgment against a defendant based upon his deletion of data from his laptop computer during litigation. It found such information was critical to the case and noted that it was irreplaceable through other means. In a footnote, it stated that even under new Rule 37(e), the sanction would have been appropriate since an intent to deprive existed.

Strategies Addressing State and Federal eDiscovery Rules

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Strategies Addressing State and Federal eDiscovery Rules

Federal Rule of Civil Procedure 1 & Cooperation

- Courts view the modification to Rule 1 as a critical change
- Amendment added that the Federal Rules should be "employed by the court and the parties" to secure the just, speedy, and inexpensive determination of every action and proceeding
- Committee Note observes that cooperation is "consistent with – and indeed depends upon – cooperative and proportional use of procedure"
- **Effort to cooperate will influence court's view of discovery disputes**

Case Management

- Rules provide tools to facilitate early identification and resolution of discovery disputes, and to help tailor discovery to the case
- Allow for early "delivery" of requests for production prior to Rule 26(f) conference
- Include "preservation" as an issue to be discussed at Rule 26(f) conference
- **May be used to raise discovery concerns or issues early in litigation to avoid later problems**

Strategies Addressing State and Federal eDiscovery Rules

Proportionality in Production & Preservation

- Emphasis on proportionality in Rule 26 and modification of test of discovery to "claims and defenses" (instead of "reasonably calculated to lead to the discovery of admissible evidence")
- Changes to Rule 37(e) and Committee Notes emphasize proportionality in preservation; limit most severe sanctions to deliberate conduct
- May be used to **support reasonable scoping** of preservation
- May be used to **limit precertification discovery**
- May be used to **limit discovery when parties already have enough information to meet their needs**
- **Not a "get out of discovery free" card**; boilerplate proportionality arguments will not be accepted and preservation steps must still be reasonable/proportionate

Strategies Addressing State and Federal eDiscovery Rules

Cost Allocation

- Change to Rule 26(c)(1)(B) to provide that, for good cause, a court may order "the allocation of expenses" if necessary to address "undue burden or expense"
- Assumption still is that responding party will still bear the costs of responding to discovery requests
- May be used to address **undue costs associated with burdensome discovery** where court is not inclined to deny requests on proportionality or other grounds

Specificity & Preparation

- Rule 34 now requires objections to discovery requests to state "with specificity the grounds for objecting," and that discovery responses state "whether any responsive materials are being withheld on the basis of that objection"
- Requires greater precision in responses; thus, greater preparation and knowledge of discovery issues
- Designed to put parties on notice of *actual* issues and facilitate dialogue
- **Bolierplate objections provide avenues for challenges to a party's responses**

Rule 1 – Scope and Purpose

Rule 1

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, administered, **and employed by the court and the parties** to secure the just, speedy, and inexpensive determination of every action and proceeding

2015 Advisory Committee Notes – Rule 1

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way…. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules

Rule 26 – Duty to Disclose; General Provisions; Governing Discovery

Rule 26(b)(1) Scope in General

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit**

2015 Advisory Committee Notes – Rule 26(b)(1)

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses or objections

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations

Rule 26 – Duty to Disclose; General Provisions; Governing Discovery

Rule 26(d)(2) Early Rule 34 Requests

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

i. to that party by another party, and
ii. by that party to any plaintiff or to any other party that has been served.

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

Rule 26(f)(3) Discovery Plan

A discovery plan must state the parties' views and proposals on:

(C) any issues about disclosure, 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**

Rule 34(b)(2) – Responses and Objections

Rule 34(b)(2) Responses and Objections

(B) Responding to Each Item. For each item or category, the responses must either state that inspection and related activities will be permitted as requested or state **with specificity the grounds for objecting to the request, including** the reason. The responding party may state that it will produce copies of the 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 specified 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

Rule 37 – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

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

(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

Rule 37 – Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

2015 Advisory Committee Notes – Rule 37

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information… Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. …Courts may, however, need to assess the extent to which a party knew of and protected against… risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts

Overcoming Class Action ESI Challenges: Preserving and Reviewing ESI; Limiting Discovery, Arguing Proportionality

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Disclaimer

This is not legal advice nor should it be considered legal advice

This presentation and the comments contained therein represent only the personal views of the participants, and do not reflect those of their employers or clients

This presentation is offered for educational and informational uses only

Agenda

I. Preservation of ESI
II. Strategies for review of ESI
III. Proportionality and discovery planning
IV. Strategies for limiting the scope of e-discovery
V. Questions

IV. Strategies for Limiting the Scope of E-Discovery

- Agreements – Judges now increasingly suggest that, to limit costs, attorneys try to knock out as many issues as possible by agreement - figure out, by meeting and conferring with opposing counsel, what specific facts are in dispute and, from the start, enter into an agreement limiting the scope of discovery. FRE 502(d) privilege waiver agreements are increasingly used by courts to facilitate agreements. FRE 502(d) states that privilege or protection is not waived by disclosure connected with litigation before the court.

- Sampling – Provide samples of large data sets to opposing counsel, regarding specific topics, to avoid broad document requests. And document what you have done to later demonstrate reasonableness to the court.

Strategies for Limiting the Scope of E-Discovery

- Computer Assisted Review – Use machine/predictive coding for internal investigations, and to initially assess for the client the documents they have, especially if there are litigation holds in place. Predictive coding may also be used for non-traditional review tasks, and to initially assess the strengths and weaknesses of a case.

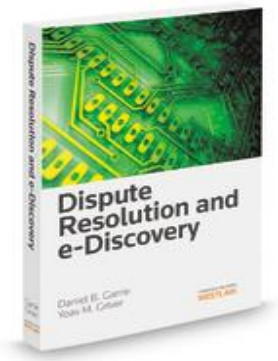
- Systems of Records – Urge clients to implement systems of records and data source catalogs so that they may know the content of their data, and can proactively sort and store documents that will likely be relevant to future litigation.

Strategies for Limiting the Scope of E-Discovery

- Special Master – Consider using a Special Master. A Special Master may assist in reducing the discovery burdens on all parties by working to lower costs, assisting with cost allocation, and aiding the court to police and address discovery abuses.

Additional Reading

BOOKS



Dispute Resolution and e-Discovery

Software and the Law: Digital Forensic Investigations and E-Discovery

ARTICLES

E-Discovery and Class Actions: Limiting Discovery Disputes with Special Masters

The Federal lawyer

The Neutral Corner: How to Effectively Use a Technical E-Discovery Neutral

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Daniel Garrie is the co-head of ZEK's Cybersecurity Practice, and coordinates the firm's privacy, forensics and e-discovery practices. Daniel Garrie is one of the most sought-after cyber security and e-discovery experts in the country having advised federal and state judges.

Mr. Garrie's unique technical skills allows the Cybersecurity Practice to provide unparalleled substantive assistance to clients before, during and after Cybersecurity breaches. This allows clients to prevent incidents, get faster and deeper clarity concerning ongoing breaches, respond to litigation, and reduce their overall Cybersecurity liability. Mr. Garrie works with clients to create and implement global effective responses to cybersecurity attacks, including data breach notifications, incidence response plans and crisis management counseling. In addition, Mr. Garrie has written over 100 articles on legal and technology topics and has lectured to the bench and bar all over the United States. He is also the author of "Plugged in Guide to Software", "E-Discovery & Dispute Resolution", and "Cyber Warfare and the Law" published by Thomson Reuters.

Mr. Garrie holds a Bachelor's and Master's in computer science and appears as comfortable talking with entrepreneurs as he is with developers, lawyers, and judges. Mr. Garrie has garnered a national reputation at the intersection of computer forensics and the law, and he remains the Executive Managing Partner of Law & Forensics, a legal-consulting firm that works with clients across industries on software, cyber security, e-discovery, and digital forensic issues. Prior to joining the practice of law Mr. Garrie built and sold several technology start-up companies. With an affinity for building start-ups and shaping a leadership team, Daniel is an active advisor and board member for a number of different companies, including Get.it, Norse Corp, and Eccentex.

Today, Mr. Garrie serves as the Executive Managing Partner for Law & Forensics, a legal consulting firm, and as general counsel to Pulse Advisory, a venture development group. Daniel is a seasoned E-Discovery Special master retained for complex high stakes cases nationwide in both federal and state courts in cases involving claims into the billions of dollars. He has acted as Discovery Referee in disputes worldwide arising out of employment termination; failed mergers and patent licensing issues; valuation disputes involving software and internet technology companies ranging from $500,000 to $25 million. He has served as an Electronically Stored Information Liaison, Neutral and Expert for the L.A. Superior Courts, 2nd Circuit, 3rd Circuit, 7th Circuit, New York Supreme Court, and Delaware Supreme Court.

Daniel is active in many charitable organizations and serves on the Board of Friends of Yemin Orde. He is an avid skier.

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University of Pennsylvania Law School (J.D., 2007)
The Wharton School (Certificate in Business and Public Policy, 2007)
Benedict College (B.A., Political Science, summa cum laude, 2004)

Tarique Collins focuses his practice on a broad array of Complex Commercial Litigation, Anti-Money Laundering, Government Investigations, and Privacy Law and Cybersecurity matters. Prior to joining ZEK, Tarique was an associate at Dewey & LeBoeuf LLP. And at BakerHostetler, Tarique worked on litigation relating to the liquidation of Bernard L. Madoff Investment Securities LLC. Specifically, he assisted with the worldwide asset recovery - involving complex derivative and financial products - from hedge funds, funds of funds, investment banks, and financial institutions.

REPRESENTATIVE MATTERS include the following:

• Successfully defended large financial institution in actions involving financial fraud and breach of contract claims.

• Part of team that successfully defended environmental consulting firm in $54 billion RICO case arising out of client's services in connection with environmental damage litigation in Ecuador.

• Assisted in successfully representing major financial institutions and other clients in civil, regulatory and compliance related matters, with a focus on the Bank Secrecy Act and Anti-Money Laundering issues.

• Managed and supervised large scale, high-stakes document reviews and productions.

• Helped to prosecute civil RICO and fraud claims in federal court in California on behalf of large metals trading company.

• Assisted in successfully representing large insurer with respect to matters involving debtor-creditor relations and insurance-related disputes.

While at Penn Law, Tarique served on both the Journal of Law & Social Change and the Journal of International Law & Policy, and was Chair of the Frederick Douglass Moot Court Competition.

For over eight years, Tarique has served as a mentor in the Legal Outreach Program, which prepares urban youth from underserved communities in New York City to matriculate to and persist through college. Tarique also serves on the Social Media Committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

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ENGAGING LEGAL AND E-DISCOVERY CLASS PROCEEDINGS EXPERTS

WHAT'S AT STAKE ?

WHAT'S AT STAKE ?

YOUR CLIENT'S SCOPE OF DISCOVERY

WHAT'S AT STAKE ?

YOUR CLIENT'S SCOPE OF DISCOVERY

YOUR CLIENT'S EVIDENCE

WHAT'S AT STAKE ?

YOUR CLIENT'S SCOPE OF DISCOVERY

YOUR CLIENT'S EVIDENCE

YOUR CLIENT'S PRODUCTION

CALIFORNIA ADDRESSES THE E-DISCOVERY SKILLS ISSUE WITH A NEW ETHICS OPINION:

STATE OF CALIFORNIA:

"EITHER LEARN E-DISCOVERY YOURSELF, GET ASSISTANCE, OR DECLINE THE REPRESENTATION"

THE STATE BAR OF CALIFORNIA STANDING COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2015-193

ISSUE: What are an attorney's ethical duties in the handling of discovery of electronically stored information?

DIGEST: An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law. Attorney competence related to litigation generally requires, among other things, and at a minimum, a basic understanding of, and facility with, issues relating to e-discovery, including the discovery of electronically stored information ("ESI"). On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a matter, and the nature of the ESI. Competency may require even a highly experienced attorney to seek assistance in some litigation matters involving ESI. An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of competence in e-discovery issues also may lead to an ethical violation of an attorney's duty of confidentiality

RESOURCES FOR YOUR OWN SKILLS

- DUKE LAW SCHOOL EDRM (ELECTRONIC DISCOVERY REFERENCE MODEL)

- DUKE LAW SCHOOL EDRM (ELECTRONIC DISCOVERY REFERENCE MODEL)

-THE SEDONA CONFERENCE LIBRARY (ONLINE)

- DUKE LAW SCHOOL EDRM (ELECTRONIC DISCOVERY REFERENCE MODEL)

-THE SEDONA CONFERENCE LIBRARY (ONLINE)

- GEORGETOWN LAW SCHOOL E-DISCOVERY CONFERENCE (OCTOBER)

- DUKE LAW SCHOOL EDRM (ELECTRONIC DISCOVERY REFERENCE MODEL)

-THE SEDONA CONFERENCE LIBRARY (ONLINE)

- GEORGETOWN LAW SCHOOL E-DISCOVERY CONFERENCE (OCTOBER)

- UNIVERSITY OF FLORIDA E-DISCOVERY CONFERENCE (MARCH)

- DUKE LAW SCHOOL EDRM (ELECTRONIC DISCOVERY REFERENCE MODEL)

-THE SEDONA CONFERENCE LIBRARY (ONLINE)

- GEORGETOWN LAW SCHOOL E-DISCOVERY CONFERENCE (OCTOBER)

- UNIVERSITY OF FLORIDA E-DISCOVERY CONFERENCE (MARCH)

- ACEDS (ASSOCIATION OF CERTIFIED E-DISCOVERY SPECIALISTS)

ASSISTANCE:

ASSISTANCE:

ATTORNEY LEVEL

ASSISTANCE:

ATTORNEY LEVEL

VENDOR/TECHNICAL LEVEL

PLAINTIFFS ARE AT A STRUCTURAL DISADVANTAGE BECAUSE CORPORATE DOCUMENT PRODUCTIONS ARE NOT PART OF THEIR EXPERIENCE BASE

PLAINTIFFS ARE AT A STRUCTURAL DISADVANTAGE BECAUSE CORPORATE DOCUMENT PRODUCTIONS ARE NOT PART OF THEIR EXPERIENCE BASE

THIS MAKES PROPORTIONALITY ARGUMENTS MORE PROFESSIONALLY CHALLENGING

PLAINTIFFS TEND TO SEEK OUT SPECIALIZED COUNSEL SPECIFICALLY TO FILL IN THIS GAP:

WWW.EDCC.LEGAL

VENDORS

VENDORS

UNDERSTAND THE DIFFERENCE BETWEEN:

-SOFTWARE PROVIDERS

-SERVICE PROVIDERS

VENDORS

UNDERSTAND THE DIFFERENCE BETWEEN:

-SOFTWARE PROVIDERS

-SERVICE PROVIDERS

(LIKE THE DIFFERENCE BETWEEN GENERAL MOTORS AND YOUR LOCAL NEW CAR DEALERSHIP)

SOFTWARE DOCUMENT REVIEW PLATFORMS:

DOCUMENT REVIEW PLATFORMS:

CLASS ACTION WORK REQUIRES THE USE OF ESTABLISHED, BEST IN BREED PLATFORMS WITH:

-STABLE INFRASTRUCTURE TO HANDLE LARGER VOLUMES

DOCUMENT REVIEW PLATFORMS:

CLASS ACTION WORK REQUIRES THE USE OF ESTABLISHED, BEST IN BREED PLATFORMS WITH:

-STABLE INFRASTRUCTURE TO HANDLE LARGER VOLUMES

- ADVANCED ANALYTICS TO HANDLE LARGER VOLUMES

GARTNER MAGIC QUADRANT REVIEW SERVICE

IN SERVICE PROVIDERS LOOK FOR:

DATA SECURITY CLASS II AUDIT

IN SERVICE PROVIDERS LOOK FOR:

DATA SECURITY CLASS II AUDIT

EXPERIENCE WITH LARGE VOLUMES

IN SERVICE PROVIDERS LOOK FOR:

DATA SECURITY CLASS II AUDIT

EXPERIENCE WITH LARGE VOLUMES

DEVELOPER CERTIFIED ON THE SOFTWARE AND ITS ANALYTICS

Review of Recent eDiscovery Case Law

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Review of Recent eDiscovery Case Law

Proportionality

- Many decisions over the last year have invoked proportionality to limit discovery, particularly where:
  - Significant discovery has already been produced
  - There is no detailed showing of why the discovery sought is relevant
  - Discovery is deemed to be only marginally relevant
- Ability to provide details on burden and cost – as opposed to general objections – is critical to courts' willingness to invoke proportionality
- BUT courts have not hestitated to order costly production where the discovery is deemed to be important to the case and there is a detailed showing of its importance

Phasing Discovery

- Courts have considered proportionality concerns in phasing discovery, including limiting scope of precertification discovery

Privacy

- Privacy concerns have been a factor in proportionality considerations, and have been a factor in limiting scope of discovery

Review of Recent eDiscovery Case Law

Cost Shifting

- Several cases involving cost-shifting (or potential cost-shifting) for borderline discovery that is burdensome
- “Threat” of cost shifting raised if parties cannot come to agreement on discovery issues

Precision & Transparency

- Continued reliance on boilerplate or general objections have been rejected by the Courts – occasionally with significant consequences
- Failure to be transparent regarding what is and is not being produced has led courts to doubt resistence to production

Cooperation

- Courts continue to expect parties to cooperate in resolving discovery disputes – particularly with amendments to Rule 1

Posession, Custody & Control

- Competing decisions on “possession, custody and control” of data held by third party service providers

Review of Recent eDiscovery Case Law

Spoliation Sanctions

- Many cases under Rule 37(e) considering potential spoliation and possible sanctions
- Clear impact of Rule 37(e) in avoiding sanctions for negligent conduct
- Courts have looked to whether the information can be obtained through other means in assessing whether any sanctions are warranted
- Courts have imposed lesser sanctions for non-intentional conduct, including excluding evidence, allowing parties to make arguments to jury about data loss, requiring spoliating party to pay reasonable attorneys' fees
- But deliberate conduct will still result in the most severe sanctions, including case-terminating sanctions and significant fines, even where the deliberate conduct is implied

Recent Case Law - Proportionality

- **Alaska Elec. Pension Fund v. Bank of Am. Corp.,** No 14-CV-7126, 2016 WL 6779901 (S.D.N.Y. Nov. 16, 2016): In putative securities class action, court denied plaintiffs' motion to compel further production where defendant had produced 1.5 million pages of documents previously produced to various government agencies, citing proportionality factors of Rule 26(b)(1) and "marginal utility" of further production
- **Augustyniak, et al., v. Lowe's Home Center, LLC, No. 14-CV-00488, 2016 WL 462346 (W.D.N.Y. Feb. 8, 2016):** In considering whether to grant plaintiffs leave to conduct further discovery on whether plaintiffs who "opted in" to class action prior to conditional denial of class certification were sufficiently similar to the remaining named plaintiffs to allow them to remain in action, court invoked proportionality considerations of Rule 26(b) and allowed plaintiffs to seek "leave to conduct further discovery," but provided the "request must include a specific and detailed showing of what discovery is sought, why that information is not already available to them, and how that discovery would be likely to demonstrate that the opt-in plaitiffs are similarly situated to plaintiff Glover"
- **In re Bard IVC Filters Products Liability Litigation, MDL 15-02641, 2016 WL 4943393 (D. Ariz. Sept. 16, 2016):** In pharmaceutical products liability class action, court denied plaintiffs' request to obtain communications between foreign subsidiaries and divisions of the defendant and foreign regulatory bodies because discovery was only marginally relevant, and the cost and burden of obtaining communications outside the U.S. was disproportional to the needs of this case

Recent Case Law - Proportionality

- **B&R Supermarket, Inc. v. Visa, Inc., No. 16-cv-01150-WHA (MEJ), 2017 WL 235182 (N.C. Cal. Jan. 19, 2017):** In putative class action regarding alleged conspiracy to shift liability for fraudulent card transactions from issuing banks to merchants, court found plaintiffs' requests created an "enormous burden" where it encompassed tens of millions of transactions and weekly data for more than 6 million merchants and was scattered over at leat 6 databases. Given the burden, the court found that discovery could be "tailored to reduce the burden on [defendant] while still providing sufficient information to analyze damages for class certification purposes" and ordered the parties to meet and confer on a sampling size instead of complete production
- **O'Connor v. Uber, No, 13-cv-03826, 2016 WL 107461 (N.D. Cal. Jan. 11, 2016):** In class action about the status of Uber drives as employees or independent contractors, defendant served discovery asking for the identity of class members who had communications with plaintiffs, and plaintiffs objected. The court denied the motion to compel production of this information, finding defendant's requests were "wildly overbroad" and failed the proportionality test of Rule 26(b)(1)
- **Rui He, et al. v. Rom, 1:15-cv-01869, 2016 WL 909405 (N.D. Ohio Mar. 10, 2016):** In putative real estate class action, the individual defendant objected to plaintiffs' requests for production on the grounds that the requests should be directed to the corporate entity, there was no protective order, and parties had not agreed on an ESI protocol. Citing Rule 26(b)(1), the court found that the defendant could not simply refer to another party in response to discovery requests and was required to answer requests for information within their control. The corporate defendant also raised concerns about proportionality; noting that the plaintiffs' made detailed allegations of fraud, the court found that broad discovery of financial documents were appropriate but denied request for production of personnel files

Recent Case Law - Phasing Discovery

- **Opperman v. Path, Inc., No. 3:13-cv-00453 (N.D. Cal. Feb. 11, 2016):** In putative class action alleging that Apple apps accessed user address book information without permission, defendants sought production of contact data from plaintiffs' Apple devics on the grounds that variations in the data would preclude class certification. Plaintiffs objected on privacy and relevance. The court, noting proportionality concerns given the stage of the case, proposed the production of targeted information relevant to class certification via interrogatories
- **Randolph v. Centenne Mgt. Co., No. C14-5730, 2016 WL 524259 (W.D. Wash. Feb. 10, 2016):** In putative FLSA wage and hour class action, plaintiffs notice a Rule 30(b)(6) deposition of defendant, and defendant objected and moved for protective order to prevent the deposition until the court ruled on class certification. The court agreed, holding that a ruling on class certification was necessary to define the scope of any Rule 30(b)(6) deposition

Recent Case Law - Privacy

- **In re Anthem, Inc. Data Breach Litigation, No. 15-MD-02617 (N.D. Cal. Apr. 8, 2016):** In MDL class-action alleging health care provider allowed patient data to be breached, defendant requested court order compelling each named plaintiff to submit to a forensic examination of home computers to determine whether personal information was compromised in other ways. Court acknoweldged defendants' request was relevant, but found request was disproportionately burdensome invasion of plaintiffs' privacy and indicated a more targeted request based on targeted showing that discoverable inforamtion would be obtained would be more appropriate
- **Crabtree v. Angie's List, No. 1:16-cv-00877, 2017 WL 413242 (S.D. Ind. Jan. 31, 2017):** In FLSA class action, plaintiffs claimed they were wrongfully denied overtime compensation during one year period in which they worked as Senior Sales Representatives. Defendant moved to compel production of GPS data from the employees' personal devices, as well as social media posts, texts, and emails. Court denied the motion, finding the information would impinge on the employees' privacy interests and defendant failed to demonstrate that the information would be more probative on the issue of whether employees were working certain hours than other information available to defendant.

Recent Case Law - Privacy

- **In re Xarleto (Rivaroxaban) Products Liability Litigaiton, MDL No. 2592, 2016 WL 311762 (E.D. La. Jan. 26, 2016):** In multidistrict pharmaceutical products liability litigation, plaintiffs sought discovery of manufacturer's employees' personnel files. Defendant objected on lack of relevance and privacy interests of employees. Court found that in the context of a products liability action, plaintiff could not discover non-party employee's personnel file without an individualized showing of relevance, proportionality and particularity strong enough to overcome privacy interest
- **Laydon, et al. v. Mizuho Bank, Ltd., et al., 12 Civ. 3419, 2016 WL 1718387 (S.D.N.Y. Apr. 29, 2016):** In TIBOR price manipulation class action, plaintiffs sought production of defendants' responses to investigative inquiries from the U.K. and European Commission financial regulatory bodies. Defendants objected on privacy grounds and argued plaintiffs should follow the Hague Convention on the Taking of Evidence Abroad. Evaluating the request under *Societe Nationale Industrielle Aerospatiale*, the court found in favor of production under the Federal Rules of Civil Procedure because the discovery was highly relevant, unavailable from other sources, identified with reasonable particulartity and would be produced under a court protective order

Recent Case Law - Cost Shifting

- **In re American Nurses Ass'n, Nos. 15-1481, 2016 WL 1381352 (4th Cir. Apr. 7, 2016):** In collective class action alleging FLSA violations, Fourth Circuit upheld the shifting of non-party's costs in responding to subpoena (attorneys' fees and eDiscovery costs) to plaintiff/appellant. Court found that the shift was consistent with the purpose of the amendments, enlarging protections afforded to persons required to assist the court (Rule 45)
- **Solo v. United Parcel Serv., Co., No. 14-12719, 2017 WL 85832 (E.D. Mich. Jan. 10, 2017):** In putative consumer class action related to alleged overcharging for shipments with a declared value of more than $300, court found plaintiffs' request for "package-specific" information was not proportional to the needs of the case "at this time" based on defendant's submission on burden and questionable relevance of all data requested. Court found appropriate balance could be struck through "statistical sampling, without prejudice to production of the entire set at a later time." Court also held that if parties could not agree on sampling methodology, plaintiffs could request production of data for 6 month time period, with plaintiffs to bear the entire costs of production

Recent Case Law – Precision & Transparency

- **Estakhrian v. Mark Obenstine, No. CV 11-3480, 2016 U.S. Dist. LEXIS 66143 (C.D. Cal. May 17, 2016):** Special Master in class action issued findings of fact and conclusions finding that defendant willfully and in bad faith violated Rule 26(a) by not providing "a description by category and location" of the undisclosed documents on his laptop and in bad faith violated Rule 26(e) by not supplementing his deficient initial disclosures and discovery responses. Special Master recommended sanctions prohibiting defendant from using the documents he did not disclose, an adverse inference jury instruction, striking affirmative defenses and payment of plaintiff's expenses and attorney's fees in connection with sanctions motion
- **Labrier v. State Farm Fire and Cas. Co., No. 2:15-cv-04093, 2016 WL 2689513 (W.D. Mo. May 9, 2016):** Court found special master did not abuse discretion in ordering defendant to answer plaintiffs' interrogatories regarding amount of labor depreciation and finding such discovery was proportional to the needs of the case. The court rejected defendant's claim that it would need to conduct complex inquiries into multiple database and manually sort data to respond to interrogatories, noting that defendant had used the same data to estimate the amount of damages and would need the data to support its affirmative defenses. Court also noted that defendant failed to provide evidence of the cost and hours required to provide the data and the fact that defendant refused to provide access to its systems, concluding "[a] litigant cannot keep its own system secret and then refuse to gather the information itself"

Recent Case Law - Cooperation

- **Nelson v. Am. Fam. Mut. Ins. Co., No. 13-cv-607, 2016 WL 3919973 (D. Minn. July 18, 2016):** In putative consumer class action related to alleged inflation of project replacement value of homes to justify higher insurance premiums, plaintiffs initially sought production of all documents related to activities of third-party appraisal service employed by defendants and defendants objected. On the eve of the hearing of the second motion, the plaintiffs suggested a sampling protocol limiting production to 9 employees and 800 policies. In response, defendants objected and claimed the production would cost $7.7 million. Defendants then noted for first time in opposition to motion to compel that they had a mainframe computer database that could generate responsive notes on policies, and offered to produce notes on 200 such policies. Defendant claimed it would cost $1.3 million to produce notes on all relevant policies. Magistrate rejected both proposals as untimely and likely to lead to more discovery about discovery. The District Court chastised the parties for “losing sight” of the purpose of discovery and repeatedly failing to resolve disputes that were avoidable, and ordered the parties to develop a plan for discovery of the mainframe database notes

Recent Case Law - Possession, Custody, Control

- **Williams v. Angie's List, No. 1:16-00878-WTL-MJD, 2017 WL 1318419 (S.D. Ind. Apr. 10, 2017):** In class action employment case, plaintiffs sought production of data relating to plaintiffs' work activity stored with third-party vendor (Salesforce). Defendant produced data for one year, but refused to produce data for the other 2 years, claiming data was not in defendant's "possession, custody or control" and seeking cost shifting. Court found defendant had control of data, ordered production and declined to order cost shifting under 7th Circuit test, in part because of the importance of the data sought and the specificity of plaintiffs' request
- **Grayson v. General Electric Co., 2016 WL 1275027 (D. Conn. Apr. 1, 2016):** In putative class action, plaintiffs sought to compel the defendant to produce certain discovery from its overseas manufacturer and the defendant's factory service database, customer service documents, and any relevant policies or procedures. Court held that defendant had no practical ability to obtain documents from manufacturer and had already turned over documents wihtin their control; court found that contractual agreemment between defendant and manufacturer did not create "control." Court also held that defendant was not required to "create document meeting the document request, only to produce documents already in existence," and declined to required additional production or production in different format where spreadsheets from database were already produced

Recent Case Law - Sanctions

- **Cat3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488 (S.D.N.Y. 2016); dismissed with prejudice and Motion for Sanctions withdrawn (Apr. 6, 2016):** Court imposed sanctions under Rule 37(e) where court found that the emails at issue were manipulated and intentionally spoliated resulting in alterations to email address in emails produced, rejecting the argument that such an anomaly might have resulted from the migration of the emails from Gmail to Microsoft Office 365. Court ordered that plaintiffs were precluded from relying on their versions of the altered emails at trial and ordered payment of defendants attorneys' fees and expenses in bringing sanctions motions. Court also noted that even if Rule 37(e) did not apply, the court was still able to sanction plaintiffs pursuant to the court's inherent authority

- **GN Netcom, Inc. v. Plantronics, Inc., No. 12-1318-LPS, 2016 WL 3792833 (D. Del. Jul. 12, 2016):** Plaintiff in antitrust action moved for sanctions based on intentional deletion of emails by defendant's senior manager. After defendant issued legal hold, the senior manager sent email to his sales team calling for the deletion of email chains that addressed competition from plaintiff, and also deleted a number of his own emails. Court found defendant failed to take "all reasonable steps" to recover the lost email (including choosing not to pay a forensic expert to analyze what was deleted), and imputed the manager's conduct to defendant. Court rejected further discovery, and imposed a $3 mm monetary sanction

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- **Keim v. ADF Midatlantic LLC, 9:12-cv-80577, 2016 WL 7048835 (S.D. Fla. Dec. 5, 2016):** In putative class action under the TCPA, plaintiff was unable to produce relevant text messages, and defendant sought sanctions under Rule 37(e)(1). Court declined to order sanctions because it could not determine whether the deletions occurred prior to the attachment of the duty to preserve, but stated that the "better practice" would have been for plaintiff's counsel to "sequester and copy the contents of a plaintiff's cell phone at the time that litigation is anticipated"
- **Living Color Enter. Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216, 2016 WL 1105297 (S. D. Fla. Mar. 22, 2016):** In action for misappropriation of plaintiffs' business and customers, court found defendant deleted relevant text messages after duty to preserve arose and that the text messages could not be restored or replaced through additional discovery. However, court declined to order sanctions because plaintiffs were not prejudiced, defendant's deletion was "at worse" negligent and Rule 37(e) did not permit severe sanctions for negligent conduct