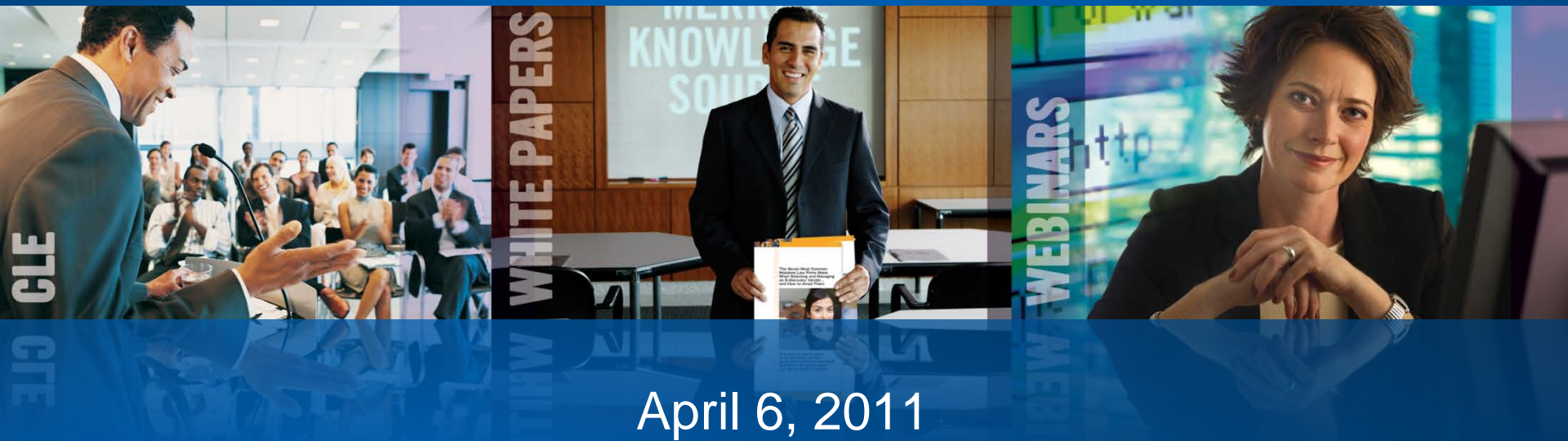


E-DISCOVERY PRACTICAL GUIDE

*What Everyone Should Know About
the Mechanics of eDiscovery*



CHIEF JUDGE JAMES F. HOLDERMAN

Chief Judge James F. Holderman has been a United States district judge in Chicago since 1985 and was named chief judge of the U.S. District Court for the Northern District of Illinois in July 2006.

During his tenure on the bench, Judge Holderman has presided over numerous cases in all areas of federal jurisdiction, including intellectual property cases. He has also served by designation as a judge of the United States Court of Appeals for the Seventh Circuit.

Before his appointment to the United States District Court, Judge Holderman was a partner in the law firm of Sonnenschein Nath & Rosenthal where he specialized in federal court litigation across the United States. Before his years in private practice, he was an assistant United States attorney in Chicago.



PROTOCOL

Please submit any questions you have for our Panel through the “question and answer” screen during the Webinar.

If we do not answer your question during today’s session we will post those responses after the event and provide the link to view those answers to all attendees via e-mail.



EDUCATION OBLIGATION

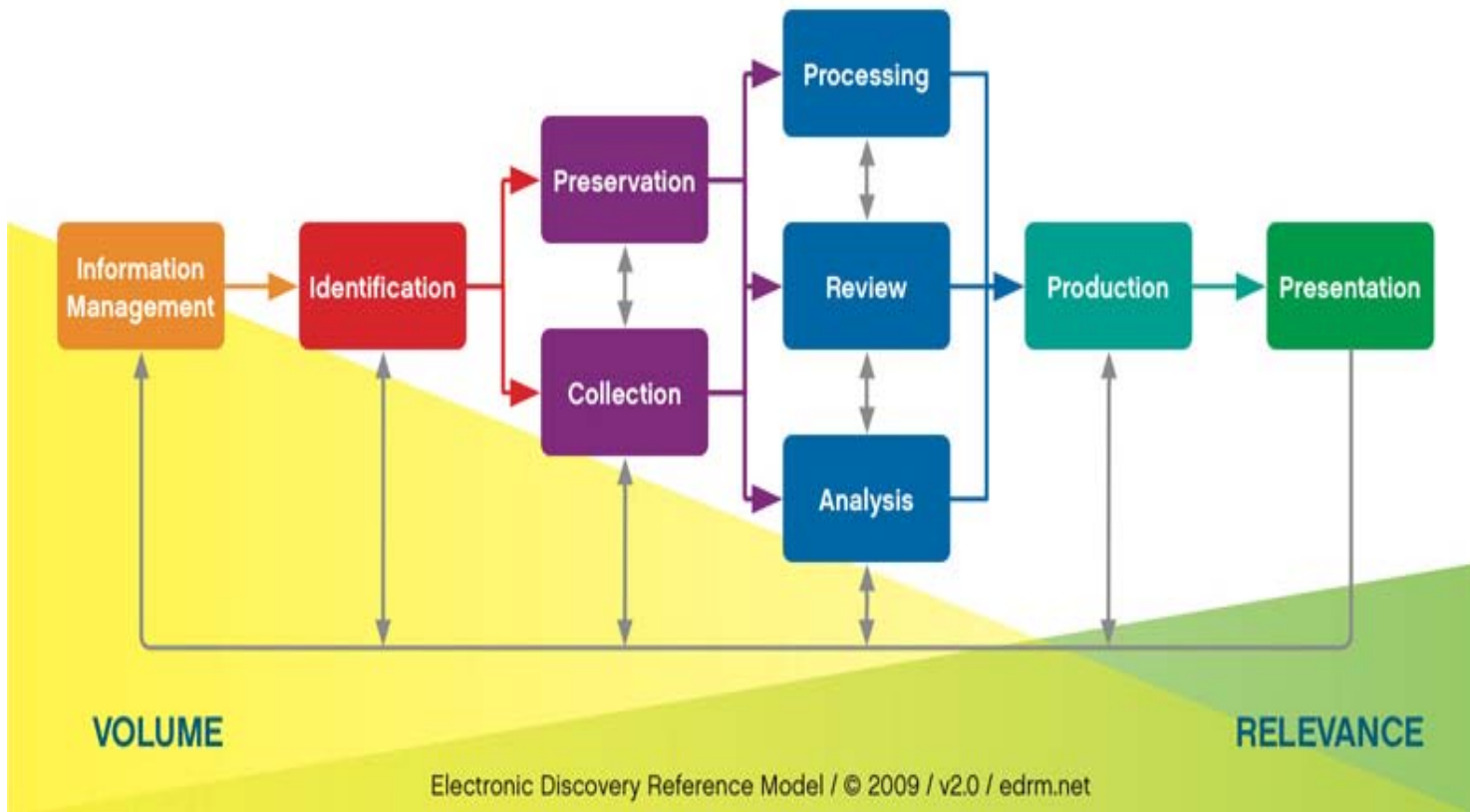
Principal 3.02

Judges, attorneys and parties to litigation should also consult The Sedona Conference® publications relating to electronic discovery, additional materials available on web sites of the courts, and of other organizations providing educational information regarding the discovery of ESI.



E-DISCOVERY PROCESS

Electronic Discovery Reference Model



OVERRIDING INTENT

Principal 1.01 (Purpose)

The purpose of these Principles is to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of electronically stored information (“ESI”) without Court intervention. Understanding of the feasibility, reasonableness, costs, and benefits of various aspects of electronic discovery will inevitably evolve as judges, attorneys and parties to litigation gain more experience with ESI and as technology advances.



WHAT IS ELECTRONIC DISCOVERY?

The collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

ESI can include:

- E-mail and attachments
- Text files, such as Word[®], Excel[®], PowerPoint[®], Access[®]
- Data stored on BlackBerry[®] smartphones and PDAs
- Data on archival and backup tapes
- Proprietary applications and databases
- Internet cache files, cookies, favorites
- Instant and text messages
- Voicemail
- Audiotape and videotape
- Evolving technology and media
- Data stored on home computers and home e-mail



WHAT IS ELECTRONIC DISCOVERY?

Electronic discovery is the collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

Hardware can include:

- **Desktop Computers/Hard Drives/Laptops**
- **Backup Tapes**
- **Portable Flash Drives, Floppy, Zip and Jaz Diskettes**
- **Optical Media - CDs, CD-Roms, DVDs**
- **Home Computers**
- **PDA's, Blackberry® smartphones and Cell Phones**
- **Digital Cameras and Flash Media**
- **Voicemail**
- **Fax Machines, Copiers and Printers**
- **iPod® and iPad® mobile digital devices, Kindle™ and Nook™ eReaders, etc.**



WHAT IS ELECTRONIC DISCOVERY?

Electronic discovery is the collection, preparation, review and production of ESI which is relevant to a legal or government proceeding.

Additional “Novel” Hardware:

- **Life/Safety Systems**
- **Manufacturing Monitoring Systems**
- **Vehicle “Black Box” Devices**
- **Emergency Dispatch System Record**



THE ELECTRONIC LANDSCAPE

Storage Amounts or Quantities

CD = 650 MB (325,000 pages of text)

DVD = 8.5 GB (4,250,000 pages of text)

Blu-Ray Disc = 25-50 GB (up to 25 million pages of text)

DLT Tape = 160 GB (80 million pages of text)

Super DLT Tape = 320 GB (1.6 billion pages of text)

MB = 500 pages of text

GB = 500,000 pages of text



THE ELECTRONIC LANDSCAPE

Translating Data Units of Measure

Name	Number of Bytes	Amount of Text
Kilobyte (KB)	2^{10} or 1,024	1/2 page
Megabyte (MB)	2^{20} or 1,048,576	500 pages or 1 thick book
Gigabyte (GB)	2^{30} or 1,073,741,824	500,000 pages or 1,000 thick books
Terabyte (TB)	2^{40} or 1,099,511,627,776	1,000,000 thick books
Petabyte	2^{50} or 1,125,899,906,842,624	180 Libraries of Congress
Exabyte	2^{60} or 1,152,921,504,606,846,976	180 thousand Libraries of Congress



E-DISCOVERY REALITY

Principal 3.01

Because discovery of ESI is being sought more frequently in civil litigation and the production and review of ESI can involve greater expense than discovery of paper documents, it is in the interest of justice that all judges, counsel and parties to litigation become familiar with the fundamentals of discovery of ESI. It is expected by the judges adopting these Principles that all counsel will have done the following in connection with each litigation matter in which they file an appearance:

- (1) Familiarize themselves with the electronic discovery provisions of Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, as well as any applicable State Rules of Procedure;**
- (2) Familiarize themselves with the Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at: http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf; and**
- (3) Familiarize themselves with these Principles.**



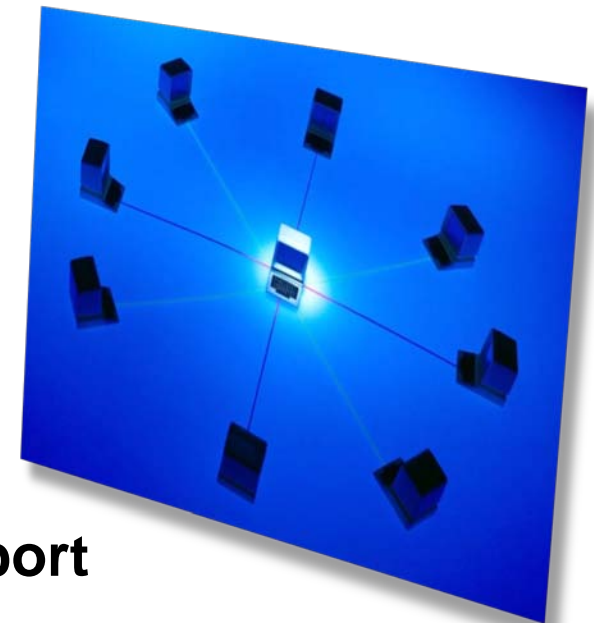
IDENTIFICATION OF ESI

Data Mapping

- **Network Architecture - Map a baseline understanding of the physical structures and layout of corporation data centers**

- **Perform complete Media Inventory:**
 - Identify all legacy systems;
 - Identify all “rogue” systems
 - Identify all data destruction policies
 - Identify actual implementation realities of destruction policies

- **Generate complete Data Mapping Report**



IDENTIFICATION OF ESI

Principle 2.05 (Identification of Electronically Stored Information)

- (a) At the Rule 26(f) conference or as soon thereafter as possible, counsel or the parties shall discuss potential methodologies for identifying ESI for production.**

- (b) Topics for discussion may include, but are not limited to, any plans to:**
 - (1) eliminate duplicative ESI and whether such elimination will occur only within each particular custodian's data set or whether it will occur across all custodians;**
 - (2) filter data based on file type, date ranges, sender, receiver, custodian, search terms, or other similar parameters; and**
 - (3) use keyword searching, mathematical or thesaurus-based topic or concept clustering, or other advanced culling technologies.**



IDENTIFICATION OF ESI

Legacy Data or Systems

Data stored on old or outdated computer system or media usually after more modern technology has been installed. Retained because a company has invested considerable time and money in data or systems and they may still hold value.

- **A DBMS (database management system) running on mainframes or minicomputers (versus new technology solutions, which continue to move toward PC-based systems).**
- **An entrenched data management platform that contains proprietary, custom-designed software and systems.**



E-MAIL AS ESI

50% to 100% of the Evidence Being Presented in Civil Court is E-mail in its Origin

- E-mail may prove that a business-related event or activity did, or did not, occur. E-mail may demonstrate purchase or sale, pricing, quantity, delivery of goods/services, and customer/client.
- E-mail may identify participants in a business activity or who had knowledge of an event. All address lines (To, From, Cc, and Bcc) may be equally important.
- E-mail may have legal or compliance value.
- E-mail may support facts that you claim to be true, because the person who has direct knowledge of the facts is not available to testify.
- E-mail may address a public official's activities, an investment broker's client communications, or another topic specifically covered by law or regulation.



UNDERSTANDING E-MAIL

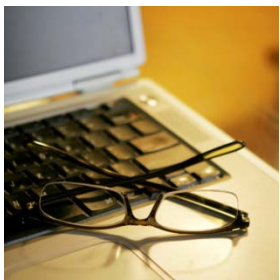
.OST and .PST Files

.OST Files

- When working on Outlook with Exchange Server in Offline Mode. Creates an .OST file stored on local computer (laptop). Creates essentially a Cache file that holds data in place on the C drive until the system is synched with the network.

.PST Files

- Generally an e-mail archive file. May be saved to the C: drive of the creator's computer.
 - No copy of .PST file is on Exchange Server
 - .PST file may be located on either user's computer or on network file share



TEXTING AS ESI

The New E-Mail?

- **292.8 MILLION US subscribers** ⁽¹⁾
- **72% of U.S. adult cell phone users text** ⁽²⁾
- **173.2 BILLION text messages sent each month** ⁽¹⁾
- **2400% - increase in number of text messages sent from June 2005 to June 2010** ⁽¹⁾
- **593 – average number of text messages per cell phone/month.**

(1) Wireless Quick Facts from CTIA – The Wireless Association

(2) Pew Research Center, “The Rise of Apps Culture”, September 15, 2010



TEXTING AS ESI

Recovery Options

Mobile Carrier

- Retains content on their server for no more than 3 days generally.

Mobile Device

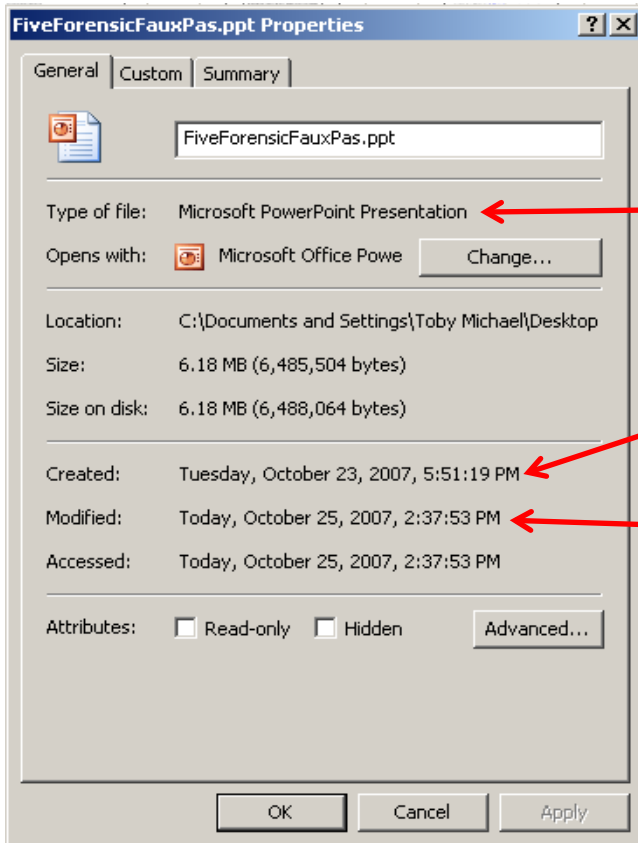
- Retains content locally up to the device capacity and then content is overwritten and lost.

Retention Expectation

- Typically, information about text messages – such as the sender, recipient and location of sender – is stored for billing purposes. The software used to store that information can also store content of those transmissions. (Kobe Bryant Case)



METADATA AS ESI



Type of Data...

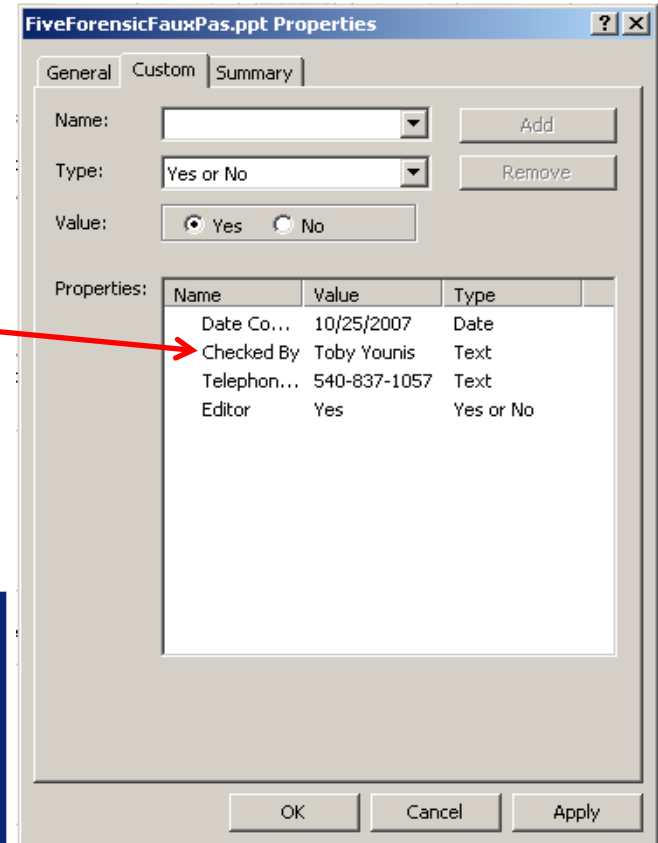
Created by...

When...

Edited...

MAC Data

- Modified
- Accessed
- Created



METADATA AS ESI

Types of Metadata

Application Metadata

Metadata which is embedded with the file it describes and moves with the file when you copy it. The metadata is information which is not present on the printed page and is of particular concern because of it may contain sensitive information such as deleted text as well as the identification of who else has viewed the document.

System Metadata

Which is not embedded with the file it describes but is stored externally and used by the computer's file system to track file locations and store demographics about each file's name, size, location, creation, modification, access and usage.



METADATA AS ESI

Impact of Flawed Preservation

- **Lost or permanently altered data**
- **E-mail threading may be impacted**
- **Impact on search functionality**
- **Damage to the Chain of Custody**



BACKUP DATA AS ESI

Backup data is an exact copy of system data that serves as a source for recovery in the event of a system problem or disaster. Backup data is generally stored separately from active data on portable media, for example, magnetic backup tapes.

Reasons for a Backup System

- Disaster Recovery
- Hardware protection/restore if disk or server fails

Types of Backup

- Tape drives
- Vault Systems
- Cloud-based



PRESERVATION OF ESI

General Duty of Party to Preserve and Disclose

“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”

***Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)**



PRESERVATION OF ESI

Once the preservation obligation has been triggered, failure to do any of the following will **support a finding of gross negligence**

- To issue a written litigation hold;
- To identify all of the key players and to ensure that their electronic and paper records are preserved;
- To cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and
- To preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.”

Pension Committee v. Banc of America Securities LLC, et al, ___ F.R.D. ___, 2010 WL 184312, *7 (S.D.N.Y. 1/15/10, J. Scheindlin)



PRESERVATION OF ESI

Duty to Preserve

In Response to the Pension Committee Case, the court stated that:

“depending upon the circumstances of an individual case, the failure to abide by such standards does not necessarily constitute negligence, and certainly does not warrant sanctions if no relevant information is lost. For instance, in a small enterprise, issuing a written litigation hold may not only be unnecessary, but it could be counterproductive, since such a hold would likely be more general and less tailored to individual records custodians than oral directives could be. Indeed, under some circumstances, a formal litigation hold may not be necessary at all.”

The court further held that failure to adopt good preservation practices is just one factor to be considered when considering sanctions for spoliation and should only be applied when “discovery relevant” data has been destroyed.

Orbit One Communications, Inc. v. Numerex Corp., et. al., 271 F.R.D. 429, 441 (S.D.N.Y. 2010)



PRESERVATION OF ESI

Types of Litigation Holds

Internal

- Issued to internal actors to prevent destruction of evidence

Opposing Party

- Issued proactively to opposing party to put party on notice of duty to preserve

Third Party to the Action

- Informs non-party of preservation need and also informs court about need to issue a preservation order



PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

(a) Appropriate preservation requests and preservation orders further the goals of these Principles. Vague and overly broad preservation requests do not further the goals of these Principles and are therefore disfavored. Vague and overly broad preservation orders should not be sought or entered. The information sought to be preserved through the use of a preservation letter request or order should be reasonable in scope and mindful of the factors set forth in Rule 26(b)(2)(C).



RECIPIENTS OF THE LITIGATION HOLD

Foundational Requirement

- **General (Inside) Counsel and Corporate Leadership**
- **Key Players**
- **IT, HR and those responsible for implementation of the Litigation Hold**
- **All others identified during the investigation as having relevant information regarding the facts and circumstances giving rise to the case/investigation**

Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003)



COMMUNICATION OF THE HOLD

Foundational Requirement

- **Certified and regular mail**
- **Hand delivery**
- **Facsimile**
- **As part of an email or email attachment**



COMMUNICATION OF THE HOLD

An Issue of Privilege?

- **Generally, Litigation Hold Notice Letters are privileged and not subject to discovery.**
In re eBay Seller Antitrust Litigation, 2007 WL 2852364 (N.D. Cal., Oct. 2, 2007).
- **What is not privileged is what company employees are doing to preserve and collect relevant ESI.**
- **The opposing party is entitled to know “what kinds and categories of ESI eBay employees were instructed to collect, and what specific actions they were instructed to undertake to that end.”**
Id. at *2; see also *Gibson v. Ford Motor Co.*, 2007 WL 41954 (N.D. Ga., Jan. 4 2007)



PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

(b) To the extent counsel or a party requests preservation of ESI through the use of a preservation letter, such requests should attempt to ensure the preservation of relevant and discoverable information and to facilitate cooperation between requesting and receiving counsel and Seventh Circuit Electronic Discovery Pilot Program – Report on Phase One 6 parties by transmitting specific and useful information. Examples of such specific and useful information include, but are not limited to:

- (1) names of the parties;**
- (2) factual background of the potential legal claim(s) and identification of potential cause(s) of action;**
- (3) names of potential witnesses and other people reasonably anticipated to have relevant evidence;**
- (4) relevant time period; and**
- (5) other information that may assist the responding party in assessing what information to preserve.**



PRESERVATION OBLIGATION

Principle 2.03 (Preservation Requests and Orders)

- (c) If the recipient of a preservation request chooses to respond, that response should provide the requesting counsel or party with useful information regarding the preservation efforts undertaken by the responding party. Examples of such useful and specific information include, but are not limited to, information that:**

 - (1) identifies what information the responding party is willing to preserve and the steps being taken in response to the preservation letter;**
 - (2) identifies any disagreement(s) with the request to preserve; and**
 - (3) identifies any further preservation issues that were not raised.**

- (d) Nothing in these Principles shall be construed as requiring the sending of a preservation request or requiring the sending of a response to such a request.**



KEY ELEMENTS OF A LITIGATION HOLD

Best Practices

- **Use plain English and identify what it is: A Litigation Hold**
- **Explain why the hold has been issued to that person and context for the hold**
- **Explain the obligation to immediately preserve all copies of any evidence relating to the case/investigation**
- **List what should be retained: Any and all hardcopy and electronic documents and information relating to...and what this includes, such as letters, emails, faxes, instant messages, text messages, notes, memoranda, spreadsheets, meeting agendas and minutes, summaries, calendar entries and voicemails**



KEY ELEMENTS OF A LITIGATION HOLD

Best Practices

- Identify where this information may be found (computers, networks, databases, PDAs, servers, etc.) including any legacy or archive systems
- Clearly demand that all routines for filing, modifying, deleting or recycling any and all such documents **MUST BE SUSPENDED** and that the person **MUST** take steps necessary to preserve responsive documents and information, including giving appropriate instructions to their direct reports or employees
- Provide Counsel's contact information for questions or concerns



JUDICIAL REVIEW OF A LEGAL HOLD

Applicable Legal Standard

- **Judicial evaluation of a legal hold decision should be based on the good faith and reasonableness of the decision, including whether the legal hold is necessary and how the legal hold should have been executed, at the time it was made.**
- **Along with the client, counsel should document the decision-making process and the decision itself as to the scope and issuance of the Litigation Hold.**
- **The reason for the documentation is that if facts not known at the time of the decision are later revealed, the decision may be deemed reasonable and justifiable at the time it was made.**

Sedona Conference Commentary on Legal Holds: The Trigger and The Process (August 2007 Public Comment Version) Guideline 5



PRESERVATION OF ESI

Refusal to Produce Document Retention Plan

Spoliation claim resulted from Defendant concealing their DRP from Plaintiff during discovery.

Court stated:

“[T]his Court does not understand why defendant did not produce this broader document retention policy when the Court ordered it to reveal its record retention policies... It is inexplicable that defendant could not produce the DRP. This failure is another example of the defendant's negligence in handling preservation and production of electronic documents in this litigation.”

Jones v. Bremen High School Dist. 228, 2010 WL 2106640, *9 (N.D. Ill., 2010)



PRESERVATION OF ESI

Passive Spoliation

Court concluded that the defendant's attempts to preserve evidence were reckless and grossly negligent.

- **Plaintiff also was able to prove that the defendant did not take reasonable steps to prevent employees from destroying documents concerning the case, had failed to adequately supervise their employees' efforts at preservation of evidence and that these failures resulted in spoliation and loss of relevant e-mails.**
- **This conduct, along with tardy production of significant amounts of ESI, resulted in prejudice.**

Jones v. Bremen High School Dist. 228, 2010 WL 2106640, *9 (N.D. Ill., 2010)



PRESERVATION OF ESI

Boundaries and Duties of Enforcement

“Identifying the boundaries of the duty to preserve involves two related inquiries:” *when* does the duty to preserve attach, and *what* evidence must be preserved?” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y.2003) (“*Zubulake IV*)

There are also two additional questions pertinent to satisfying preservation requirements: *how* must a party go about fulfilling its ultimate obligation, and *who* is responsible for seeing that it is fulfilled...

Until a more precise definition is created by rule, a party is well-advised to “retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches. *Zubulake IV*, 220 F.R.D. at 218.

***Orbit One Communications, Inc. v. Numerex Corp., et. al.*, 271 F.R.D. 429, 436-437 (S.D.N.Y. 2010)**



PRESERVATION OF ESI

Deliberate Spoliation

Defendant downloaded 6GB of music onto their hard drive the night before it was to be examined by opposition. Court found this “troubling” and did not believe the plaintiff’s explanation.

Court stated:

“[D]iscovery is a meaningful part of our adversarial system, and were parties to circumvent discovery requests by selectively destroying potentially damaging information, the process would become ineffectual.”

Result: Adverse Inference Instruction upheld.

***Minnesota Mining & Mfg. v. Pribyl*, 259 F.3d 587, 606
(7th Cir. 2001)**



PRESERVATION OF ESI

Destruction Of Computer

- Defendant claimed that communications on a computer were irretrievably lost as it had “crashed” and claimed that he had been instructed that “the mother board and hard drive were shot, and that the computer was not worth fixing.”
- 6 days after the lawsuit commenced, two days after initial appearance, Defendant threw away the computer at a construction site 20 miles from his home.

Result: Defendant sanctioned and required to pay plaintiff’s costs and attorney’s fees in connection with motion for sanctions; third-party discovery that was made necessary by the destruction of the computer; and cost of retaining a computer expert.

APC Filtration Inc. v. Becker, 2007 WL 3046233 (D. Ill., October 12, 2007)



PRESERVATION OF ESI

Passive and Active Spoliation

Court entered sanctions against the defendant arising from the reckless, if not intentional spoliation of evidence involving:

- (1) The alleged erasure or replacement of an audiotape...**
- (2) The destruction/failure to preserve relevant ESI on police department computers;**
- (3) The failure to preserve ESI on six computer hard drives produced for the first time in the fall of 2008 and;**
- (4) The failure to back-up any relevant ESI.**



Plunk v. Village of Elwood, Ill., 2009 WL 1444436 (N.D. Ill., 2009)



INACCESSIBLE ESI

Principle 2.04 (Scope of Preservation)

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

- (1) “deleted,” “slack,” “fragmented,” or “unallocated” data on hard drives;**
- (2) random access memory (RAM) or other ephemeral data;**
- (3) on-line access data such as temporary internet files, history, cache, cookies, etc.;**
- (4) data in metadata fields that are frequently updated automatically, such as last-opened dates;**
- (5) backup data that is substantially duplicative of data that is more accessible elsewhere; and**
- (6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.**



WHERE COURTS ARE HEADED

7th Circuit Electronic Discovery Pilot Program

Principle 2.02 (eDiscovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of an eDiscovery liaison(s) as defined in this Principle. In the event of a dispute concerning the preservation or production of ESI, each party shall designate an individual(s) to act as eDiscovery liaison(s) for purposes of meeting, conferring, and attending court hearings on the subject. Regardless of whether the eDiscovery liaison(s) is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, the eDiscovery liaison(s) must:

- (a) be prepared to participate in eDiscovery dispute resolution;
- (b) be knowledgeable about the party's eDiscovery efforts;
- (c) be, or have reasonable access to those who are, familiar with the party's electronic systems and capabilities in order to explain those systems and answer relevant questions; and
- (d) be, or have reasonable access to those who are, knowledgeable about the technical aspects of e-discovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.



PREPARATION FOR THE MEET AND CONFER

eDiscovery Liaison and 30(b)(6) Witnesses

- **May require more than one witness be identified by system, by demand, by location, by division, by specific area of focus.**
- **Do not trust that the witness produced by your client is qualified. Do independent review of the witness' qualifications and knowledge base.**
- **eDiscovery Liaison (7th Circuit Pilot Program) is not necessarily the 30(b)(6) witness. Liaison only has to have access to those with the knowledge – not necessarily hold the knowledge.**



PREPARATION FOR THE MEET AND CONFER

What Courts Want To See – Cooperation!

Cooperative Discovery is Required by the Rules of Civil Procedure

- **When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, “discovery” was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial.**
- **Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself.**
- **The 2006 amendments to the Federal Rules specifically focused on discovery of “electronically stored information” and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.**



PREPARATION FOR THE MEET AND CONFER

Sedona Conference Cooperation Proclamation

Courts see these rules as a mandate for counsel to act cooperatively and encourage:

- Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses;
- Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of ESI;
- Jointly developing automated search and retrieval methodologies to cull relevant information;
- Promoting early identification of form, or forms, of production;
- Developing case-long discovery budgets based on proportionality principles; and
- Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf



PREPARATION FOR THE MEET AND CONFER

What Courts Want To See – Cooperation!

“The Court is most troubled by the fact that there was no dialogue to discuss specific search terms or data custodians to be searched in advance of Huron conducting its searches. Although Defendants' counsel and Huron's counsel spent a significant amount of time exchanging letters and emails with each other relating to the motion to compel, they did not engage in meaningful discussions with each other.” *DeGeer v. Gillis*, 2010 WL 5096563, *20 (N.D. Ill., 2010)

“Counsel are on notice that going forward the Court expects them to genuinely confer in good faith and make reasonable efforts to work together and compromise on discovery issues whenever possible.” *Ibid* at *21



COOPERATION

Principle 1.02 (Cooperation)

An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.



PREPARATION FOR THE MEET AND CONFER

Cost Shifting

General Philosophy

“the presumption is that the responding party must bear the expense of complying with discovery requests ... In the subpoena context, cost-shifting should occur when an order requiring compliance subjects a non-party to “significant expense.”

DeGeer v. Gillis, 2010 WL 5096563, *19 (N.D.Ill., 2010)



PREPARATION FOR THE MEET AND CONFER

Cost Shifting

Parties to Litigation

In *Quinby*, the court refused to shift discovery costs in favor of the party that had allowed the downgrading, reasoning that “if a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.” *Orbit One Communications, Inc. v. Numerex Corp., et. al.*, 271 F.R.D. 429, 437 (S.D.N.Y. 2010) citing to *Quinby v. WESTLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y., Sept. 5, 2006).

Third Parties to Litigation

In addition, The Sedona Commentary notes that the few reported cases that have addressed the acquisition of ESI from non-parties “recognize that the costs and burdens of preservation and production that the law imposes on litigants should not be the same for non-parties. Third parties should not be required to subsidize litigation to which they have no stake in the outcome.” *DeGeer v. Gillis*, 2010 WL 5096563, *8 (N.D. Ill., 2010) see also The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas, 9 SEDCJ 197-199 (2008).



MEET AND CONFER

Principle 2.04 (Scope of Preservation)

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.



MEET AND CONFER

Preservation Scenarios

Snapshot – point in time copy of relevant data. Back-up tapes preserve a snap-shot of all the data on a server or computer system at a specific point-in-time. May involve preserving the status of an information system as it continues to evolve.

Historical – Recovery and preservation of ESI involves an event in the past and collection can be achieved in one phase.

Ongoing – collection is initiated and requires additional collection of data as it is created.



MEET AND CONFER

Make or Arrange for Initial Disclosures

FRCP 26(a)(1)(A) requires disclosure of the following:

- The name, addresses and telephone numbers of each individual likely to have discoverable information – along with the subjects of that information
- A copy – or description by category and location – of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment
- A computation of each category of damages claimed by the disclosing party - who must also make available for inspection and copying - the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based and the underlying materials supporting the computation.



MEET AND CONFER

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

- (a) **Prior to the initial status conference with the Court, counsel shall meet and discuss the application of the discovery process set forth in the Federal Rules of Civil Procedure and these Principles to their specific case. Among the issues to be considered for discussion are:**
- (1) the identification of relevant and discoverable ESI;**
 - (2) the scope of discoverable ESI to be preserved by the parties;**
 - (3) the formats for preservation and production of ESI;**
 - (4) the potential for conducting discovery in phases or stages as a method for reducing costs and burden; and**
 - (5) the procedures for handling inadvertent production of privileged information and other privilege waiver issues under Rule 502 of the Federal Rules of Evidence.**



MEET AND CONFER

Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution)

- (b) Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the initial status conference, Fed. R. Civ. P. Rule 16(b) Scheduling Conference, or as soon as possible thereafter.**
- (c) Disputes regarding ESI will be resolved more efficiently if, before meeting with opposing counsel, the attorneys for each party review and understand how their client's data is stored and retrieved in order to determine what issues must be addressed during the meet and confer discussions.**
- (d) If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process or is impeding the purpose of these Principles, the Court may require additional discussions prior to the commencement of discovery, and may impose sanctions, if appropriate.**



MEET AND CONFER

Principle 2.04 (Scope of Preservation)

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.



MEET AND CONFER

Discovery Plan

Pursuant to FRCP 26(f)(3), a Discovery Plan must state the parties' views and proposals on:

- What changes should be made in the timing form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
- The subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced”;
- 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;
- What changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- Any other orders that the court should issue under Rule 26(c) or under Rule 16(b).



MEET AND CONFER

Failure to Effectively Meet and Confer

- Urged parties to estimate the likely range of provable damages that foreseeably could be awarded if Plaintiffs prevail at trial. Goal is to quantify a workable **“discovery budget”** that is proportional to what is at issue in the case.
- Counsel should discuss the amount and type of discovery already provided, and then discuss the additional discovery still sought, in order to evaluate the Rule 26(b)(2)(C) factors, and to determine if legitimate additional discovery needs could be fulfilled from **non-duplicative, more convenient, less burdensome, or less expensive sources** than those currently sought.
- Counsel should reach agreement, in full or at least in part, about what additional discovery (and from what sources), should be provided. Suggestion is to consider **“phased discovery”**, so that the most promising, but least burdensome or expensive sources of information could be produced initially, which would enable parties to reevaluate their needs depending on the information already provided.

Mancia v. Mayflower, 253 F.R.D. 354 (D. Md. 2008)



PROPORTIONALITY

Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan.

To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.



MEET AND CONFER

Suggested Discussion Points

- Who determines the keywords?
- How many keyword searches (30-50)?
- Search what data sources?
- Type of data to be searched such as Word[®] docs, e-mails, etc.
- Last names, nicknames, first names, surnames of key persons.
- Key event terms
- Key phrases
- Thesaurus important terms
- Consider misspellings
- Test run search strings



COLLECTION

Data Collection Plan

- Design an approach to locate responsive ESI
- Locate custodians and computer systems
- Determine file types and media
- Collect data in a way that ensures preservation of the original metadata and avoids spoliation
- Document method of collection to satisfy any authentication of evidence needs (Chain of Custody)

PLAN FIRST!



COLLECTION

FORENSIC COPY

Exact copy of everything on the hard drive including slack space, latent data, metadata and unallocated space. Creates a mirror image/clone without alteration.

TARGETED ACQUISITION

Process employed to copy just the relevant files or folders by going to each drive/server/ media or through the use of ECA tools and technology. Metadata for the documents is copied but slack space, unallocated space, latent data and system metadata are not copied.

The hash value on the source drive must still match the hash value on the evidentiary/forensic copy or on the working copy.



COLLECTION

What is a Hash Value?

A hash value is an electronic fingerprint.

“A hash value can be applied to a file, a section of a disk, or a whole disk, and recorded. The hash value will change if the data in a file, section or disk is changed or altered.”

Hash Value

Verify / Create Hash

File Volume

File: C:\Windows\regedit.exe

Hash Function: SHA-1

Upper case output:

Progress: [Progress Bar]

Data Hashed: 417.0 KB

Calculated Hash: f48138dc476e040b8a9925c7d2650b706178e863

Comparison Hash: f48138dc476e040b8a9925c7d2650b706178e863

Hashes are equal

Selected Hash Function Description

SHA-1 is part of the broader set of SHA hash functions developed by the NSA. Although not the most secure, SHA-1 is by far the most widely used.

At this point in time SHA-1 is considered to have been broken, however finding collisions is still a somewhat computationally intensive task and SHA-1 continues to be used for many applications.



COLLECTION

Hash Values

Common Hash Functions are MD5 and SHA. These commonly used cryptographic hash functions have been employed in a wide variety of security applications, and are also commonly used to check the integrity of files.

The integrity of the data can be “checked” at any later time by re-computing the hash and comparing it with the original value. If the hash values do not match, the data was almost certainly altered (either intentionally or unintentionally).

It is critical that the hash value of the original ESI be recorded at the time of acquisition and then matched against the hash value of the copied versions to maintain the standards essential for authentication.



COLLECTION

Basics Of Laying A Foundation For ESI

“One method of authenticating electronic evidence under rule 901(b)(4) is the use of ‘hash values’ or ‘hash marks’ when making documents. A hash value is: a unique numerical identifier that can be assigned to a file, a group of files, or a portion of a file, based on a standard mathematical algorithm applied to the characteristics of the data set.

The most commonly used algorithms, known as MD5 and SHA, will generate numerical values so distinctive that **the chance that any two data sets will have the same hash value, no matter how similar they appear, is less than one in one billion.** ‘Hashing’ is used to guarantee the authenticity...”



Lorraine v. Markel American Insurance Co, 241 F.R.D. 534, 546 (D.Md. 2007)



SEARCHING ESI

Keyword Search – Is it Enough?

A “series of targeted keyword searches” is often the best means to search for relevant documents in an electronic database. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)



Keyword searches are never perfect because language is not perfect. For example, searching for a “car” will not yield a “Mercedes” or a “CLK.”



SEARCHING ESI

Search Functionality

- Boolean searches and, or, not)
- Wildcard searches (*auto*, *tion)
- Proximity searches
- Sound-alikes
- Synonym search
- Similar document searching
- Fuzzy searching
- Statistical searching
- Conceptual searching
- Content-based searching
- Topical searching
- Weighted relevance searching
- Adaptive pattern recognition
- Associative retrieval
- Natural language or non-boolean retrieval
- Clusters of related phrases



SEARCHING ESI

- **Each review tool is equipped with a variety of search mechanisms. While the actual search label may be the same the actual search functionality may be radically different in each application.**
- **To further complicate the issue each tool comes equipped with its own methods of reporting the search results.**
- **Search is a rapidly evolving area and there may be a difference in capabilities between different versions of a vendor's platform.**
- **The level of support to utilize the tool to maximum effectiveness is variable between vendors.**



BREADTH OF THE SEARCH

Plaintiff

- Claimed that Tandem only produced content from 10 out of 34 back-up tapes and refused to produce a set of monthly back-up tapes that contained additional ESI.

Defendant

- Claimed third party vendor declared several tapes “unrestorable”, several had “file mark errors” and several did not contain responsive material.

Court Ruled

- “This information is reasonably calculated to lead to the discovery of admissible evidence, this Court believes that restoration of the back-up tapes containing documents is reasonable. Tandem has asserted that in its usual course of business it maintains its documentation in an electronic format. The Court will limit this request to production of the back-up tapes of documents saved to the network system from September 2004 until September 2005.”

Puckett v. Tandem Staffing Solutions, Inc., 2007 WL 7122747, *3 (N.D. Ill., 2007)



SHIFTING THE BURDEN OF SEARCH

- Plaintiff sought four terabytes (500 billion typed pages) of documents, notes, memos, e-mails and metadata existing on two external hard drives.
- The court ordered keyword searches of e-mails be split 50/50 but ordered defendants to pay 100% of privilege review costs.

Haka v. Lincoln County, 2007 U.S. Dist Lexis 64480
(W.D. Wis., Aug. 29, 2007)



FOUNDATION FOR PRIVILEGE

FRCP 26(b)(5) states:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.



CLAWBACK

Federal Rule of Evidence 502:

FRE 502(b) states that a disclosure of privileged information or work-product does not operate as a waiver if:

- 1. The disclosure was inadvertent;**
- 2. The holder of the privilege or protection took reasonable steps to prevent disclosure;**
- 3. The holder promptly took reasonable steps to rectify the error, including (if applicable) following FRCP 26(b)(5)(B).**



CLAWBACK

Reasonability Defined

“The standard of Rule 502(b)(2) is not “all reasonable means,” it is “reasonable steps to prevent disclosure.”

- **[T]he decision appears to be contrary to the view of the Judicial Conference Rules Committee that Rule 502 “does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.” Rule 502 comm. explanatory n.(2007); see also *Heriot*, 257 F.R.D. at 660**
- **The court finds that Whitecap took reasonable steps to prevent disclosure. That Whitecap made a mistake in producing the e-mail despite those steps is not fatal to its claim for protection. *Coburn Group, LLC v. Whitecap Advisors LLC*, 640 F.Supp.2d 1032, *1040 (N.D. Ill.,2009)**



FORMAT OF PRODUCTION

Federal Rules: Format of Production

FRCP 34(b) requires that unless the parties agree, or the court orders otherwise:

- Production of ESI should be as it is **“kept in the usual course of business”**.
- If no format is specified then production should be in the form in which the ESI is **“ordinarily maintained”** or in a form that is **“reasonably usable”**.
- A party need not produce ESI in more than one form.



FORMAT OF PRODUCTION

Principle 2.06 (Production Format)

- (a) At the Rule 26(f) conference, counsel and the parties should make a good faith effort to agree on the format(s) for production of ESI (whether native or some other reasonably usable form). If counsel or the parties are unable to resolve a production format issue, then the issue should be raised promptly with the Court.
- (b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.
- (c) ESI and other tangible or hard copy documents that are not text-searchable need not be made text-searchable.
- (d) Generally, the requesting party is responsible for the incremental cost of creating its copy of requested information. Counsel or the parties are encouraged to discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.



FORMAT OF PRODUCTION

Spreadsheet and Databases

- Database management systems are the largest repositories of ESI. They take many forms such as flat-file or relational. Most businesses use relational databases such as Oracle[®] or Access[®].
- Field properties in a database are considered metadata.
- Principle 2.06(b) ESI stored in a database or a database management system often can be produced by querying the database for discoverable information, resulting in a report or a reasonably usable and exportable electronic file for review by the requesting counsel or party.



FORMAT OF PRODUCTION

Native vs. Image Format

Native

- Native format is proprietary and generally not transferable to other software applications
- Can only be opened, modified and saved within original application unless they are loaded to specialized review software or converted to a searchable format
- Redaction and Bates stamping are complicated
- Carries metadata such as “tracked changes”

Image Format

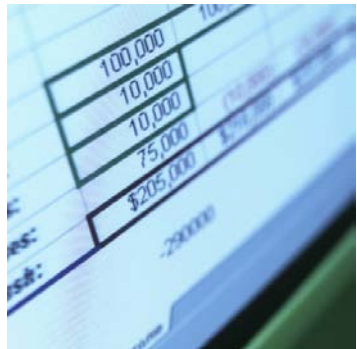
- ESI has been scanned to create a picture of the document through digitization. The ESI has been converted into “electronic paper” or a “picture”
- Does not provide metadata or allow electronic searching of the data
- May be OCR'd to make it text searchable



FORMAT OF PRODUCTION

Metadata is ESI

- Defendant produced spreadsheets in an image format.
- Court held that a responding party may not simply produce hard copy forms of electronic documents, thereby removing any opportunity to view the metadata.
- Court quoted the Fed. R. Civ. P. 34 Advisory Committee Note on the 2006 Amendments explaining “[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or degrades this feature.”



Scotts Company, LLC. v. Liberty Mutual Insurance Co., 2007 WL 1723509 (S.D. Ohio, June 12, 2007)



FORMAT OF PRODUCTION

Remember to Discuss Metadata

- “It seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format. Ordinarily, courts will not compel the production of metadata when a party did not make that a part of its request...
- [T]he conference states that “[a]lthough there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata.” *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 651 (D.Kan., 2005) (quoting The Sedona Principles, Comment 12a)
- There was no request for metadata here until recently-after production. ADC was the master of its production requests; it must be satisfied with what it asked for.” *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559-560 (N.D. Ill., 2008)



FORMAT OF PRODUCTION

Common Terminology

Text Searchable

- The quality of a document that allows it to be machine searched for targeted text

OCR (Optical Character Recognition)

- The processing of an imaged document (such as scanned hard copy) to make it searchable

Text Extraction

- Pulling out the text and populating a specified field with that text, thus allowing easy search in a document review platform



FORMAT OF PRODUCTION

Load File

- A file that accompanies a set of scanned images or electronically processed files, typically providing document information such as selected metadata, coded data, and extracted text, formatted for loading into a document review platform.
- In addition, it indicates where individual pages or files belong together as documents, where to include attachments, and where each document begins and ends.
- Load files are obtained or provided in prearranged formats to ensure transfer of accurate and usable images and data for the receiving document review platform.



ADDITIONAL RESOURCES

Seventh Circuit Court of Appeals:

<http://www.ca7.uscourts.gov/>

Seventh Circuit Pilot Program Principles:

<http://www.7thcircuitbar.org/associations/1507/files/Statement%20-%20Phase%20One.pdf>

Seventh Circuit Bar Association:

<http://www.7thcircuitbar.org>

Sedona Conference and Glossary:

<http://www.thesedonaconference.org/>

http://www.thesedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf

EDRM:

<http://edrm.net/>

Merrill Knowledge Source:

<http://www.merrillcorp.com/merrill-knowledge-source.htm>



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