

The Top Twenty-Two Most Interesting e-Discovery Opinions of 2016

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This essay describes the e-Discovery Team's top twenty-two most interesting cases in 2016. We provide an analysis and key quotes of each, lessons learned and, where appropriate, practice pointers. We also explain why we find these opinions interesting. We start with the twenty-second ranked case, *GN Netcom v. Plantronics*,, 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016) and work our way up to the most interesting e-discovery case of the year, *Hyles v. New York City*, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016). Before we begin the discussion here is a handy reference chart of the top 2016 cases with links to each opinion.



1. *Hyles v. New York City*, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016).
2. *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, No. 2685-11, 8393-12, 2016 WL 4204067 *In re Takata Airbag Prods. Liab. Litig.*, No. 15-02599-CIV-Moreno, MDL No. 5-2599 (S.D. Fla. Mar. 1, 2016).
3. *In re Takata Airbag Prods. Liab. Litig.*, No. 15-02599-CIV-Moreno, MDL No. 5-2599 (S.D. Fla. Mar. 1, 2016).



4. *In re Bard IVC Filters Prods. Liab. Litig.*, D. Ariz., No. MDL 15-02641-PHX DGC, 2016 U.S. Dist. LEXIS 126448 (D. Ariz. Sept. 16, 2016).
5. *Cohn v. Guaranteed Rate, Inc.*, N.D. Ill., No. 1:14-cv-9369, (N.D. Ill. Dec. 8, 2016).
6. *Hespe v. City of Chicago*, No. 13 C 7998, 2016 BL 417422 (N.D. Ill. Dec. 15, 2016).
7. *Arrowhead Capital Fin., Ltd. v. Seven Arts Entertainment, Inc.*, No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016).
8. *Cahill v. Dart*, No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).
9. *McQueen v. Aramark Corp.*, 2016 BL 396068, D. Utah, No. 2:15-CV-492-DAK-PMW (D. Utah, Nov. 29, 2016).
10. *Venturedyne v. Carboonyx*, 2:14-CV-351-RL-JEM (N.D. Ind. Nov. 15, 2016).
11. *Johnson v Serenity Transportation*, Case No. 15-cv-02004-JSC (N.D. Cal. October 28, 2016).
12. *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).
13. *September 27, 2016 Post-Trial Order in Oracle America Inc. v Google Inc.*, No. C 10-03561 WHA (ND Ca., Sept. 27, 2016)
14. *Odeh v. City of Baton Rouge / Parish of E. Baton Rouge*, No. 14-793-JJB-RLB, 2016 U.S. Dist. LEXIS 41079 (M.D.La. Mar. 29, 2016).
15. *Elkharwily v. Franciscan Health Sys.*, Case No. 3:15-cv-05579-RJB (W.D. Wash. July 29, 2016).
16. *Stinson v. City of New York*, 2016 U.S. Dist. LEXIS 868 (S.D.N.Y. Jan. 2, 2016).
17. *Mitchell v. Reliable Sec., LLC*, 2016 U.S. Dist. LEXIS 76128 (N.D. Ga. May 23, 2016).
18. *Wagoner v. Lewis Gale Med. Ctr., LLC*, No. 7:15cv570 (W.D. Va. July 13, 2016)
19. *In re Eisenstein*, 2016 BL 107979, Mo., No. SC95331, (4/5/16).

20. *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, No. 1:14-cv-01734-WTL-DML, 2016 WL 1162553 (S.D. Ind. Mar. 24, 2016)
21. *CAT3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016).
22. *GN Netcom v. Plantronics*,, 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016)

TWENTY-SECOND – GN Netcom v. Plantronics



Chief United States District Judge Leonard Stark of the USDC for the District of Delaware

The twenty-second ranked case is interesting because of the size of fees and damages involved. *GN Netcom v. Plantronics*, 2016 U.S. Dist. LEXIS 93299 (D. Del. July 12, 2016). The author of the opinion is U.S. District **Judge Leonard P. Stark**. Here the defendant intentionally destroyed emails in bad faith. The very upset, for good cause I might add, Judge Leonard P. Stark taxed the defendant **\$3,000,000** in punitive damages plus other sanctions for the “nearly 18 months of discovery to get [to] the bottom of the deletion story.”

Here is the award, the amounts of which are on the high-end of monetary sanctions.

As sanctions for spoliation, Plantronics, Inc. (“Plantronics”) shall be subject to: (1) monetary sanctions in the form of the reasonable fees and costs incurred by GN in connection with the disputes leading to today’s Order; (2) punitive sanctions in the

amount of \$3,000,000; (3) possible evidentiary sanctions, if requested by GN and found by the Court to be warranted as this case progresses toward trial; and (4) instructions to the jury that it may draw an adverse inference that emails destroyed by Plantronics would have been favorable to GN's case and/or unfavorable to Plantronics' defense.

The opinion by **Chief Judge Stark** makes the **e-Discovery Team's Top 22** list of most interesting e-discovery cases in 2016 not only because of the size of the cash award, but also because of the location of the court itself, namely Delaware, where many large corporate disputes are litigated.

The opinion contains an excellent discussion of case law and background on sanctions and Amended Rule 37(e). Here is how Chief Judge Stark sums up Third Circuit law on sanctions:



In *Schmid*, 13 F.3d at 79, the Third Circuit listed three "key considerations" for determining appropriate sanctions for spoliation of evidence: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." A court may impose dispositive sanctions for spoliation to remedy prejudice and deter future misconduct. See *Micron*, 917 F. Supp. 2d at 328 ("Any lesser sanction would, in effect, reward [the spoliator] for the gamble it took by spoliating and tempt others to do the same.").

Judge Stark summarizes the bad faith conduct of the defendant that required the sanctions.

In light of all this evidence, including Plantronics' repeated obfuscation and misrepresentations related to Mr. Houston's email deletion and its investigation of it, the Court finds that

Plantronics did act in bad faith, “intend[ing] to impair the ability of the other side to effectively litigate its case.” *In re Wechsler*, 121 F. Supp. 2d at 423 ; see also *Micron* , 917 F. Supp. 2d at 318 (“In light of the full record, the court finds that *Rambus*’ litigation misconduct further evidences bad faith.”).

The court’s analysis of burden of proof is instructive and follows revised Rule 37(e).

Because the Court has found that Plantronics acted in bad faith, the burden shifts to Plantronics to show a lack prejudice to GN resulting from Mr. Houston’s deletion of emails. See *Micron*, 917 F. Supp. 2d at 319. Plantronics makes three arguments for why GN has not been prejudiced from Mr. Houston’s deletion of emails.

If you prove intent and bad faith, then you do not have to prove that you have been prejudiced by the ESI deletion. Instead the defending party must try to prove no prejudice. That is hard to do when you do not know what the deleted files were.

TWENTY-FIRST – *CAT3, LLC v. Black Lineage, Inc.*

The twenty-first ranked case is interesting because of its examination of the burden of proof issues and its reminder that the “inherent power” of the court remains as an independent grounds for spoliation sanctions. *CAT3, LLC v. Black Lineage, Inc.*, 2016 U.S. Dist. LEXIS 3618 (S.D.N.Y. Jan. 12, 2016). The author of this well-written, lengthy, fact intensive opinion, is **U.S. Magistrate Judge James C. Francis, IV.**



Judge Francis is known inside the field as a top e-discovery expert. We found his opinion here on Rule 37(e) interesting because it examines the burden of proof issue, specifically the shift after the moving party establishes intent. Judge Francis found in *CAT3* that there was “clear and convincing” evidence of intent to alter electronic evidence, namely email domain names. The high standard of clear and convincing is only applicable to the issue of intent. The lower “preponderance of evidence” standard is applicable to other issues, such as proof of prejudice.

Third, the appropriate standard of proof depends in part on the specific issue to be decided. For example, clear and convincing evidence of bad faith may be appropriate, see *id.* at 1477, while prejudice is better judged by the preponderance standard, see *Residential Funding*, 306 F.3d at 109; *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998) (“[To] hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction.”), overruled on other grounds, *Rotella v. Wood*, 528 U.S. 549 (2000); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010) (holding “[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction.” (quoting *Heng Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048, 2005 WL 1925579, at *7 (S.D.N.Y. Aug. 11, 2005))). ...

There is clear and convincing evidence, then, that the plaintiffs manipulated the emails here in order to gain an advantage in the litigation. To be sure, that evidence is largely circumstantial. But circumstantial evidence may be accorded equal weight with direct evidence, see *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992), and standing alone may be sufficient to support even a determination that requires proof beyond a

reasonable doubt, see *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014), cert. denied, *U.S.* , 136 S. Ct. 242 (2015); *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008).

These findings provide the basis for relief under Rule 37(e). First, each of the threshold requirements of the rule is met. The emails are plainly “electronically stored information.” There is no dispute that the plaintiffs were obligated to preserve them in connection with this litigation. As discussed above, information was “lost” and cannot adequately be “restored or replaced.” And the plaintiffs’ manipulation of the email addresses is not consistent with taking “reasonable steps” to preserve the evidence.



Next, remedies are available under subsection (e)(1) of Rule 37. The defendants have been prejudiced by the fabrication of the substitute emails because, as discussed above, the existence of multiple versions of the same document at the very least obfuscates the record. This was demonstrated by the presentation of the doctored email to the president of Black Lineage at his deposition. Moreover, the defendants have been put to the burden and expense of ferreting out the malfeasance and seeking relief from the Court.

CAT3, LLC is also instructive for the clarification that the Court’s inherent power encompasses that of Rule 37(e) and more.

If the plaintiffs were correct that Rule 37(e) is inapplicable here, relief would nonetheless be warranted under the Court’s inherent power. A “particularized showing of bad faith” is necessary to justify exercising that power. *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1345 (1991); accord *Braun ex rel. Advanced Battery Technologies, Inc. v. Zhiguo Fu*, No. 11 Civ. 4383, 2015 WL 4389893, at *17 (S.D.N.Y. July 10, 2015); *Novick v. AXA Network, LLC*, No. 07 Civ. 7767, 2014 WL 5364100, at *5 (S.D.N.Y. Oct. 22, 2014). Spoliation designed to

deprive an adversary of the use of evidence in litigation qualifies as bad faith conduct.

Thank you **Judge James C. Francis** for this excellent contribution to the fast evolving jurisprudence of electronic discovery, especially sanctions under Rule 37(e). To us all of the 2016 cases that interpreted new Rule 37(e) were interesting. Your opinion set the stage perfectly.

I would have ranked this case higher but for the mysterious ending to the case which throws the facts recited in the opinion in doubt. On Apr. 4, 2016 the parties stipulated to dismissal, with prejudice, of all remaining claims in the case. Not surprising there to settle, but the language in the stipulation stated that in light of newly discovered evidence provided by the plaintiffs, "*neither plaintiffs nor any of their owners or agents engaged in any discovery misconduct or wrongdoing.*" This suggests that the domain name changes to the emails were merely an artifact of a the migration of the email system as one expert had speculated, but not yet proven. This surprise ending shows the necessity to use good computer experts and avoid over speculation.

TWENTIETH – *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co*

This is a helpful case on Proportionality under new rule 26(b)(1) and 45 and thus very interesting to attorneys like me who have been beating the drum of proportionality for over a decade. *Noble Roman’s, Inc. v. Hattenhauer Distrib. Co.*, No. 1:14-cv-01734-WTL-DML, 2016 WL 1162553 (S.D. Ind. Mar. 24, 2016). The opinion was written by **Debra McVicker Lynch, United States Magistrate Judge, Southern District of Indiana.**



The Defendant served a third party subpoena on a “major shareholder” of the Plaintiff in franchise litigation. In response to Plaintiff’s motion, Defendant “*beat the drum of ‘relevancy’*” but “*never attempt[ed] to demonstrate that the discovery [wa]s in any way proportional to the needs of the case.*” That, the court determined, was “*not good enough.*”

The court granted Plaintiff’s motion for a protective order and prohibited the Defendant from obtaining the discovery sought from Plaintiff’s subpoenas. The court concluded that Defendant’s subpoenas constituted “discovery run amok” and “fail[ed] the proportionality test under Rule 26(b).”

This is a nice scholarly opinion on Rules history in addition to the colorful language at pg. 9:

In response, Hattenhauer beats the drum of “relevancy.” It asserts that all of its deposition topics and document requests are “relevant.” That’s not good enough. Hattenhauer never attempts to demonstrate that the discovery is in any way proportional to the needs of this case, considering such things as the amount in controversy, the importance of the information in resolving contested issues, whether the burden of the discovery outweighs its likely benefits, whether the information can be obtained from other and more convenient sources, or whether the information is cumulative to other discovery Hattenhauer has obtained. See Rule 26(b). Two examples help illustrate the abject disproportionality of the discovery Hattenhauer wants from Privet Fund. ...

The court finds that Hattenhauer’s documents and deposition subpoenas to Privet Fund constitute discovery run amok. Asking Privet Fund to provide every document and every piece of information it has—including information it may have obtained orally from Noble Roman’s personnel— about every aspect of Noble Roman’s business operations, finances, marketing plans, and management structure is discovery too far afield from the contested issues in this case. Hattenhauer’s subpoenas to Privet

Fund fail the proportionality test under Rule 26(b). Therefore, the court GRANTS Noble Roman's motion for a protective order.

NINETEENTH – *In Re Eisenstein*

The nineteenth most interesting e-discovery case in 2016 is *In re Eisenstein*, 2016 BL 107979, Mo., No. SC95331, (4/5/16). It is indeed a fascinating case because it is a decision by a state supreme court and deals with e-discovery ethics. A Missouri attorney was charged and found guilty of ethical violations and suspended from the practice of law for six months. The majority *en banc* opinion by the Supreme Court of Missouri (shown below) was written by **Justice Richard B. Teitelman**. Two dissenting opinions were also written.



Joel Eisenstein is an attorney well known to the Missouri Supreme Court from five prior disciplinary proceedings. Why they allow a person like this to continue practicing law is beyond me. In this latest incident Eisenstein was caught using email that his client, the husband in a divorce, had hacked and stolen from his wife's private email account.

The stolen email included confidential payroll information, but, even worse, it included the privileged communications between the wife and her lawyer.

Eisenstein had the gall to argue that he did not use improper means to obtain the evidence because it was his client, the husband, who obtained the information, not him. Oh brother. Eisenstein knew full well it was stolen, hacked and, as he put it, was "verboten." He should have disclosed the theft and disclosure of privileged information immediately, instead he used it at trial. Opposing counsel for the wife recognized a list of trial questions that she had prepared in a trial exhibit that Eisenstein prepared. Only when opposing counsel saw this, and challenged Eisenstein, did he admit what happened. I cannot tell you how bad that is, which is why I think the court let him off too easily here with just a six month suspension. One of the dissenting opinions agrees with me and would have imposed a more severe penalty.

Here are excerpts from Justice Teitelman's majority opinion summarizing the standard ABA model Rules of Professional Responsibility that were violated by the concealment and use of electronic evidence improperly obtained by a client.



Rule 4-4.4(a) prohibits a lawyer from using "methods of obtaining evidence that violate the legal rights" of a third party. Comment 1 to Rule 4-4.4(a) specifically notes that the rule is intended to prevent "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." ... The comment accompanying Rule 4-4.4(a) recognizes that lawyers "sometimes receive documents that were mistakenly sent or procured by opposing parties or lawyers." However, when a lawyer knows that he or she has improperly received information, "Rule 4-4.4 requires the lawyer to promptly notify the sender in order to

permit that person to take protective measures.” In this case, Rule 4-4.4 required Mr. Eisenstein to promptly disclose his receipt of the information to Ms. Jones so that appropriate protective measures could be undertaken. Mr. Eisenstein did not do so.

Rule 4-8.4(c) prohibits a lawyer from engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Mr. Eisenstein’s violation of Rule 4-4.4(a) by obtaining evidence procured through improper means and failing to immediately disclose the same to opposing counsel demonstrates a violation of Rule 4-8.4(c).

Rule 4-3.4(a) provides, in part, that a lawyer shall not “unlawfully [**4] obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.” Mr. Eisenstein violated Rule 4-3.4(a) by concealing his possession of Wife’s payroll information and Ms. Jones’ direct examination questions until the second day of trial. ...

ABA Standard 6.12 provides that “suspension is generally appropriate when a lawyer knows that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.” ABA Standards 6.1 and 6.12 provide that suspension is appropriate when the case involves “conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to the court.” *In re Madison*, 282 S.W.3d 350 , 361 (Mo. banc 2009).

According to the ABA Standards, “knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result. ABA Standards Definitions, p. 17. Mr. Eisenstein admitted that he reviewed the information and concluded that it was “verboten.” Yet Mr. Eisenstein did not disclose his discovery of the improper evidence to Ms. Jones. Mr.

Eisenstein's recognition that he should not have possession [*764] of the information and his decision to not disclose his receipt of that information demonstrate that he acted knowingly. Mr. Eisenstein's retention and use of the improperly obtained evidence warrants a suspension.

This opinion serves as a warning to all attorneys. *In re Eisenstein*, 2016 BL 107979, Mo., No. SC95331, (4/5/16). If you rely on your clients to help with investigations, you must carefully look all *gift horses in the mouth*. If the client comes up with emails by the other side, or any other information, you must investigate the providence, the chain of custody. If it was stolen, especially if it contains attorney client information, you must disclose this fact immediately. This can get tricky if a crime was committed by your client. You may have to withdraw in the process. But you certainly cannot hide and use the stolen evidence.

EIGHTEENTH – *Wagoner v. Lewis Gale Med. Ctr., LLC*

The eighteenth most interesting case for us in 2016 is *Wagoner v. Lewis Gale Med. Ctr., LLC*, No. 7:15cv570 (W.D. Va. July 13, 2016). This opinion is written by **U.S. Magistrate Judge Robert S. Ballou** out of District Court in Virginia. Judge Ballou denied the defendant hospital's motion to prevent eDiscovery or for cost shifting. This was a very small single Plaintiff ADA case, so you would think that defense counsel could have made out a strong proportionality case to limit discovery, but they did not.



This is proportionality case where we can learn from another attorney's mistake. Defense counsel here (who, from the order at least, seems clueless about e-discovery) did at least three things here that the e-Discovery Team constantly warns against:

1. The costs cited to buttress the proportionality argument were exaggerated. Defendant claimed it would cost \$45,570 to search email of two witness during only a four month time period, with very specific search terms designated. Judge Ballou saw right through that.

2. No alternatives were proposed to the discovery sought. Defense counsel failed to propose any alternative search and review procedure to the one requested by Plaintiff. Judge Ballou did not like that either. Never just say no. Provide a reasonable alternative. That did not happen here.

3. The defendant here stated it had already produced some emails by using only *self-search*, meaning the defendant witnesses looked at their own email and decided what was relevant, and sent along a few to defense counsel to produce. This procedure was mentioned by Judge Ballou, and was obviously a factor, but was not expressly criticized.

To make things worse, the client here, a hospital, apparently had a quick email deletion policy in place, and there was no assurance that anything 'deleted' by a user would survive more than three days. Bottom line, if you seek protection under Rule 26(b)(1) for disproportionately excessive discovery in a small case, carefully follow the terms of the rule and do your homework and report only valid, unexaggerated burdens.

SEVENTEENTH – *Mitchell v. Reliable Sec., LLC*

This is another case where we can learn from another's mistakes. *Mitchell v. Reliable Sec., LLC*, 2016 U.S. Dist. LEXIS 76128 (N.D. Ga. May 23, 2016). This one is so bad that it was circulated in 2016 in e-discovery social media (not by me) as a *WTF* type e-discovery case on proportionality. The



author of this seventeenth most interesting case of 2016 is **U.S. Magistrate Judge Alan J. Baverman in Atlanta.**

Here plaintiff in a pregnancy discrimination case asked for the Defendant's ESI production of relevant emails and spreadsheets to be in Native file format. The defendant employer objected to the format request, saying it was too burdensome to produce in the original format, that it would be less burdensome and cheaper to change the format to PDF and produce that way. That is the WTF moment. Cheaper to pay a vendor to change the format. Huh? I've never heard of a vendor charging more not to transform data to PDF. Apparently no one else has either; and, thus the case has people shaking their heads and talking.

Once again defense counsel felt compelled to exaggerate the costs and expenses in a Rule 26(b)(2)(B) accessibility, proportionality argument. That has long been one of the e-Discovery Team's rules: *don't exaggerate costs to bolster an excessive burden argument.*

Even more fundamentally, they broke another cardinal Team rule, never fight over "**FORM of Production.**" If the requesting party wants Native, give them Native. If they want PDF, give them that. Format doesn't matter. Do not waste time, client money and your energy fighting over an inconsequential issue like *format*. (The only reason to oppose Native is to protect confidentiality by use of **redaction**. You can't redact a native document. But that was not the case here.)

One thing that parties did right here was raise the defendant's objection to the plaintiff's request for native file format at the 26(f) conference and discovery plan report. Kudos to both sides for that. Waiting until the request is made would have made the defendant's position much worse. Judge Baverman saw this dispute in the CMR and scheduled a telephone hearing on the issue. After the hearing the Judge ordered Defense counsel to file a "status report" with the court "*estimating the size of the production and the cost differential between native and PDF production.*"

At that point they should have conceded the issue and moved on. But no. Instead they filed a report by defense counsel estimating the

volume of “potentially relevant ESI” to be 3 GBs. (After you dedupe that you are probably down to 2 GBs.) Remember that is “potentially relevant ESI” not production, which is most everyone’s experience is 10% or less of a total mailbox collection, maybe far less. So they did not do what they were asked, but Judge Baverman let that part slide (many would not have been so kind). But then defense counsel starts with the exaggerated costs, which I quote from the opinion at pg. 2 of 5:

Defendant further represents that it will cost approximately \$3,000 more to process and produce 3GB of ESI in native format than it would in PDF format, “comprised of a flat rate of \$2,000 for ESI processing and production, plus approximately \$1,000 for hourly paralegal time (\$150/hour) to manage the production of native emails and Excel spreadsheets.”

Huh? That makes no sense. One wonders what vendor they used. The firm may their own “Lit-Support Dept.,” never a good idea in the Team’s opinion, as we advocate for outsourcing. The personnel in most Lit Support Departments are, shall we say, less skilled than you might assume, and certainly less skilled than any national vendor. How else do you explain such an “representation” to the court by defense counsel. I am sure that defense counsel thought what they were saying was true and made sense. That is probably what their Lit Support Department told them. They did not realize what was perfectly obvious to P’s counsel, and the Judge, (and the rest of the world now reading about this case online), that this representation was wrong. Silly even.

In response, the Plaintiff argued a need to see the original files, the native format, “because the emails and spreadsheets supporting the defense theory are susceptible to *post hoc* manipulation.” In other words – they did not trust the defendant (or defense counsel) and wanted to see if they altered the data, either accidentally or on purpose. That is not a valid argument on its own, or shouldn’t be (you should not assume fraud & negligence without some supporting evidence), but Plaintiff also argued, quite successfully:

[T]hat Defendant's statement regarding the estimated additional costs to produce native files rather than PDF files is insufficient because Defendant did not explain how it arrived at the estimated cost it provided, did not provide an actual estimate from an ESI expert or vendor, and did not explain its contention that production of emails and spreadsheets in native format would require more paralegal time to manage the production of native emails; because defense counsel's own marketing communications suggest that it employs discovery management software commonly used to streamline ESI production; because there are other free or low-cost means of production of the native files; and because Plaintiff's counsel has offered to assist in downloading emails in electronic format to minimize costs and avoid the retention of an expert or vendor to do the same.

That was a good argument for plaintiff's counsel. Judge Baverman ruled as you would expect:

the Court remains—as it was at the time of the teleconference—at a loss to understand why the production of native documents is more costly than production of PDF files. The Court therefore finds that Defendant has not made an adequate showing that production of the native files is cost prohibitive.

Now the Judge, obviously annoyed (and who could blame him) goes on to say more, which may come back to harm other defense counsel someday:

Additionally, the Court finds that even had Defendant made a showing that it costs \$3,000 more to produce the native files than to produce the PDF files, Plaintiff has shown good cause for the Court to order the production. While there has been no specific reason so far to believe that the emails and scheduling spreadsheets would have been modified since the time period at issue in the suit, it is not at all unreasonable for Plaintiff to wish to verify herself whether the emails or spreadsheets had been subsequently manipulated, modified, altered, or changed. Moreover, while it does appear that Plaintiff's suit is unlikely to be of an especially high dollar value, the Court finds that the

public value of allowing a civil-rights plaintiff opportunity to access information relevant and quite possibly necessary to her pregnancy-discrimination suit far outweighs the asserted \$3,000 cost.

Note that the court had not previously disputed defendant's contention that this was only a \$10,000 case. So now we have on record an Order arguably saying (albeit in *dicta*) that an e-discovery expense of 30% of total case value is not unreasonable due to "public value" of this discrimination case. This is an example of bad facts, and bad lawyering, resulting in bad law, albeit just *dicta*.

In case you are unsure if Judge Alan Baverman is pissed or not at defense counsel for wasting his time with this motion and "representations" to the court, take a look at his closing sentences. First he gives defendant 14 days to complete the production, then he adds:

Failure to timely comply with this Order may result in sanctions, which could include the striking of pleadings.

Do not aggravate your judge with unnecessary format disputes and nonsense, exaggerated claims of burden.

SIXTEENTH – *Stinson v. City of New York*

This case implements the terms of the old Rule 37(e) and is of interest because it provides a good contrast between the old and new versions of the rule. *Stinson v. City of New York*, 2016 U.S. Dist. LEXIS 868 (S.D.N.Y. Jan. 2, 2016). This sixteenth most interesting case of 2016 was authored by **U.S. District Judge Robert W. Sweet in New York.**



In *Stinson* Judge Sweet entered an *Adverse Inference Sanction* for defendant's spoliation. The loss of evidence was caused by defendant's grossly negligent preservation efforts. The inference granted was not outcome dispositive as the plaintiff had requested. Instead, the jury instruction "would be inference that helpful evidence may have been lost, not relief from their obligation to prove their case."

The court did not apply the new Rule 37(e), so you can argue that the points in the opinion are not applicable under the revised rule. Still, under these facts, I think a court interpreting the new rule would make the same kind of order but slightly different holding. The line of intent to destroy evidence is sometimes not so clear.

Judge Sweet expressly held that the proof in the case was inadequate to establish BAD FAITH. It just proved GROSS NEGLIGENCE. Here are the highlights of Judge Sweet's opinion (record citations omitted). It is so clear and well-written that we will refrain from our usual editor comments.

Plaintiffs, a class of individuals who were allegedly issued summonses without probable cause, have filed a letter-motion seeking sanctions for spoliation of evidence against the Defendants, the City of New York, fifty unnamed New York Police Department ("NYPD" or the "Department") officers, and former NYPD Commissioner Raymond W. Kelly. ... the motion is granted in part and denied in part. ...

The City did not issue any litigation hold until August 8, 2013, more than three years after the filing of the Complaint in this case. A preservation notice to NYPD members of service was distributed via a FINEST message on August 20, 2013, which was to be read to all commands. The evidence indicates that the litigation hold was not effectively communicated, and none of the officers who were named in the City's initial disclosures acknowledged receiving it. ...

[A]lthough the NYPD did not have a specific policy with regards to the destruction of email communications, it did impose a hard

size limit on officers' inboxes, and that when officers hit that limit, "they delete." ...

The Plaintiffs allege and the Defendants do not dispute that the City has not made any effort to preserve or produce text messages between NYPD officers.

Defendants produced few or no documents from the accounts of several key custodians, which the Plaintiffs argue is indicative of spoliation. ... The City explains that the relative paucity of ESI produced is a result of the fact that "the Police Department on the whole did not operate via email." ... However, these assertions are contradicted by emails that the Plaintiffs have obtained through other means. ...

In order to merit an adverse inference, the party seeking sanctions must establish 1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed, 2) that the records were destroyed with a culpable state of mind, and 3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Chin v. Port Auth. of N.Y. & N.J.*, 685 F. 3d 135, 162 (2d Cir. 2012).

In this case, the latest point at which that duty would have arisen would be May 25, 2010, the day the Plaintiffs filed their Complaint. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

At multiple points in its briefing, the City argues that because it would be unreasonable to require it to preserve any and all documents indefinitely, it should be held to no preservation obligations at all. It notes that due to the size and scope of the NYPD's work, and the frequency of litigation involving the Department, a rule that any labor grievance or tangentially-related lawsuit triggers a broad duty to preserve would amount to a "perpetual litigation hold." That statement is inarguable, but it does not justify a three-year failure to issue a litigation hold in this action, ...

Similarly, the Defendants argue that the motion for sanctions should be denied because Plaintiffs demanded that the City preserve “every arguably relevant document within the NYPD.” (D.’s Opp., Dkt. No. 246 at 2.) While the Plaintiffs have made overbroad discovery requests before, *see, e.g., Stinson v. City of New York*, No. 10 Civ. 4228, 2015 WL 4610422, at *4 (S.D.N.Y. July 23, 2015), the reasonableness or unreasonableness of one party’s demands does not determine the scope of the other party’s obligation to preserve documents. The Plaintiffs’ putative overbroad demands do not excuse the City’s failure to issue a litigation hold, to properly supervise its implementation, or to suspend document retention policies that would foreseeably lead to the spoliation of evidence. ...

The City has similarly failed to make any effort to preserve text messages sent between NYPD personnel using department-issued smartphones. In its briefing, the City argues that it was under no obligation to preserve messages kept on officers’ personal electronic devices, without discussing any preservation obligation regarding texts sent on Department-issued devices. (See D.’s Opp., Dkt. No. 246 at 6.) While the federal courts are divided on when and how a party seeking discovery can access ESI stored on an employee’s personal device, compare *Alter v. Rocky Point Sch. Dist.*, No. 13 Civ. 1100, 2014 WL 4966119, at *10 (E.D.N.Y. Sept. 30, 2014) (“However, to the extent that the School District employees had documents related to this matter, the information should have been preserved on whatever devices contained the information (e.g. laptops, cellphones, and any personal digital devices capable of ESI storage).”) with *Cotton v. Costco Wholesale Corp.*, No. 12-2731, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013)(rejecting document request for text messages on employees’ personal phones), the City does not adequately consider its obligations with respect to information stored on officers’ Department-issued devices. Lieutenant Scott acknowledged in his 30(b)(6) deposition that all officers above the rank of Captain, and some below it, were issued such devices, and that they could use those devices to text each other. (Dkt. No. 222 Ex. J. at 158-59.) As such, those devices

were within the possession, custody, or control of the City, and were subject to the same preservation obligation as the City's other ESI. *See Congregation Rabbinical Coll. Of Tartikov, Inc. v. Village of Pomona*, No. 07 Civ. 6304, 2015 WL 5729783, at *17 (S.D.N.Y. Sept. 29, 2015).[4] ...

The first and most egregious instance of gross negligence was the City's failure to issue any litigation hold during the first three years of this litigation. Although the failure to issue a litigation hold does not necessitate a finding of gross negligence, it is a factor in determining whether sanctions should issue. *Chin*, 685 F.3d at 162. While the Second Circuit's decision in *Chin* leaves open the question of whether a sufficiently indefensible failure to issue a litigation hold could justify an adverse inference on its own, the question need not be addressed here because there are additional factors supporting such a finding.

One such factor is the failure to properly implement the litigation hold even after it was issued. "[A] litigation hold is not, alone, sufficient; instead compliance must be monitored." *Mastr Adjustable Rate Mtgs. Trust 2006-OA2 v. UBS Real Estate Sec. Inc.*, 295 F.R.D. 77, 85 (S.D.N.Y. 2013). Here, the communication of the litigation hold was inconsistent at best; although the hold was to be read to all commands via a FINEST message, none of the police officers named in the City's initial disclosures acknowledged receiving it. ...

The failure to circulate a litigation hold, and to ensure that it was properly implemented, was particularly damaging in the context of the NYPD's standing document retention policies, which ensured that inaction on the part of the City would result in the destruction of evidence. ... Although the paucity of relevant emails produced from the inboxes of key decision makers does not establish that ESI was deleted, it is consistent with such spoliation and with Lieutenant Scott's acknowledgement that deletion of emails was a foreseeable consequence of the NYPD's storage policy. ...

Given the City's lack of bad faith in its spoliation of evidence and the relatively limited showing of relevance made by the Plaintiffs, a permissive, rather than a mandatory adverse inference is warranted.

FIFTEENTH – *Elkharwily v. Franciscan Health Sys.*

Elkharwily v. Franciscan Health Sys., Case No. 3:15-cv-05579-RJB (W.D. Wash. July 29, 2016) is an interesting case because an inaccessibility objection was enforced under Rule 26(b)(2)(B). The opinion was authored by **United States District Judge Robert J. Bryan**. He is, by the way, well-known as one of the *founders of the American Inns of Court*.



Elkharwily is the flip side of the *Wagoner* case, which I ranked as the eighteenth most interesting, where that objection was overruled, along with a separate proportionality objection. Part of the reason for the different result is that Plaintiff's counsel in *Elkharwily* made concessions he should not have and otherwise made poor legal arguments. Judge Robert Ryan heard the arguments and granted a protective order that shifted costs to the requesting party.

The plaintiff doctor in *Elkharwily* requested the defendant hospital to produce both "live" and "archived" emails relevant to the dispute. The defendant objected to production of both types of ESI. The plaintiff moved to compel. We do not know the basis of the objection to the "live" emails, but the motion to compel was granted as to the "live" emails. The ruling on the "archived" emails was at first withheld, then denied. In this case "live" emails were those emails maintained in the hospital's email server. The "archived" emails were emails that resided only on back-up tapes. These would be emails that were deleted by users after the backups were made. The defendant's objection under Rule 26(b)(2)(B) to production of the archived emails was based on an argument that the emails were not accessible due to high cost.

Just as in *Wagoner* the defendant in *Elkharwily* came up with what looks like a grossly inflated cost (\$157,500) by a vendor to restore and search the back-up tapes for very short time period. But here in *Elkharwily* the plaintiff doctor did not contest the cost at all (it seems he had not retained any vendor for advice), but instead placed the entire argument on the hospital's poor preservation. Here is the court's summary:

Plaintiff does not discredit Defendant's argument about the burden or cost of producing the archived emails, but, Plaintiff argues, Defendant is at fault. Defendant should have preserved emails in an accessible format, rather than archiving them, because around July of 2013 Plaintiff expressly requested them after his appeal was denied, and he warned Defendant of future litigation, which also triggered their preservation.

This looks to us like the concession of burden by plaintiff was a big mistake. (Also, a lucky break for the defendant.) This concession meant that under Rule 26(b)(2)(B) the producing party, here the defendant hospital, had met its burden of proving unreasonable accessibility. Under the terms of the Rule this shifted the burden upon the requesting party to show *good cause* why the producing party should be required to meet the burden and produce the documents anyway. Furthermore, and this is critical, the Judge Ryan did not believe the plaintiff's allegations that he had put defense counsel on notice, in a phone call, that he would sue, and so triggered a duty to preserve. Defense counsel denied any such conversation and the judge believed the lawyer, not the doctor. Here is the analysis of Judge Ryan:

Plaintiff has not met his burden. Tellingly, Plaintiff does not name individuals that Plaintiff believes exchanged emails about Plaintiff, nor does Plaintiff describe suspected content of the emails. Plaintiff does not even represent with any surety that responsive emails exist. Because Plaintiff has not met his burden for good cause, compelling production of the discovery at expense to Defendant is not warranted.

Plaintiff's blame-shifting is unpersuasive, because as between Mr. Megard's and Plaintiff's conflicting declarations, Mr. Megard's should be given more weight, for two reasons. First, Mr. Megard, who practices law and bills time to clients for telephone conferences, has no record of any phonecalls from Plaintiff. Second, Mr. Megard's memory is consistent with the email exchange between Plaintiff and Mr. Weaver in July 2013, where Plaintiff stated that "I guess there is nothing else I can do [to appeal denial of privileges]."

Although Plaintiff has not met his burden to show good cause, which would overcome Defendant's showing that producing the archived emails is costly and burdensome, the archived emails are "discoverable" under Fed. R. Civ. P. 26(b)(1). Therefore, upon a request by Plaintiff, Defendant should facilitate access to the discovery, but should do so only at Plaintiff's expense, payable in advance. Plaintiff should be responsible for all costs, such as retrieving and restoring the backup tapes to an accessible format, except for costs relating to Defendant's review of the information for privileged material (which is like any other discovery request, e.g., the live emails).

Defendant should not otherwise be compelled to produce the archived emails, and to that extent Plaintiff's motion should be denied.

Lessons of the case. Here are the primary lessons we see from *Elkharwily v. Franciscan Health Sys.*, Case No. 3:15-cv-05579-RJB (W.D. Wash. July 29, 2016).

- Objections to discovery that would require the producing party to examine back-up tapes are often successful. The argument is properly made under Rule 26(b)(2)(B), not (b)(1). Restoration of back-up tapes is the perfect example, one made in the Rules Committee Commentary, of ESI that is protected from discovery as not reasonably accessible. We never review backup tapes and always object if we are asked to. I believe that our objections have always been sustained and we have never been ordered to search and produce ESI from back-ups.

- Never agree with an opposing party’s allegations of excessive e-discovery costs without obtaining expert input as to validity. These estimates are often exaggerated.
- Do not rely on testimony of your client over that of opposing counsel as to phone conversations that supposedly took place between them before you were retained. This is especially true if your client version of what was said is not corroborated by anyone or thing, and would mean that opposing counsel spoliated evidence.
- Sometimes you get lucky because of incompetent opposing counsel, but you should never count on that. Here defense counsel was allowed to produce only five pages of emails in response to a Request For Production. That is all the non-privileged “active” emails they claim existed for five identified custodians. Apparently the Plaintiff did not argue effectively that this is a ridiculously small amount and suggests that all of the relevant emails must have been deleted and now exist only on the tapes. This could have been established, for instance, by the deposition testimony of these five custodians, four of whom were doctors. Such an argument could constitute “good cause” under 26(b)(2)(B) for many judges.

FOURTEENTH – *Odeh v. City of Baton Rouge / Parish of E. Baton Rouge*

The fourteenth most interesting case of the year comes out of the District Court in Baton Rouge, Louisiana. *Odeh v. City of Baton Rouge / Parish of E. Baton Rouge*, No. 14-793-JJB-RLB, 2016 U.S. Dist. LEXIS 41079 (M.D.La. Mar. 29, 2016). It was authored **U.S. Magistrate Judge Richard L. Bourgeois, Jr.**

It is an employment case. The description of it by Judge Bourgeois sounds like many cases that we see:

In his Complaint, Plaintiff claimed he was subjected to a hostile work environment, transferred to a less-desirable position and



constructively discharged based on his national origin and in retaliation for opposing employment discrimination. Plaintiff additionally alleged that he was retaliated against for engaging in protected whistleblower activities in violation of Louisiana Revised Statute § 23:967.

Motions by Plaintiff to compel discovery were heard, including oral argument. The employer lost most of the argument on one issue (Production No. 4) and was required to search for and produce all complaints against it “based on national origin or race,” and not just national origin complaints (Plaintiff is of Arab descent) as employer argued. The court did, however, limit the time from the ten years to five years. Here is the legal basis for the ruling (with helpful Google hyperlinks preserved) (bold highlighting added to original):

Other claims of discrimination against an employer have been found relevant to a discrimination claim if limited to the (a) same form of discrimination, (b) the same department or agency where plaintiff worked, and (c) a reasonable time before and after the discrimination occurred.” *Willis v. U.S.*, 2012 WL 5472032, at *1 n.6 (M.D. La. Nov. 9, 2012); see also *Marchese v. Secretary, Dep’t of the Interior*, 2004 WL 2297465, at *2 (E.D. La. Oct. 12, 2004) (same); *Mitchell v. Nat’l Railroad Passenger Corp.*, 208 F.R.D. 455, 460 (D.D.C. 2002) (same). The relevant timeframe may range, depending on the facts of each case. **However, courts have generally limited discovery of other employees’ claims of discrimination to 3 to 5 years.** *Gillum v. ICF Emergency Management Services, L.L.C.*, 2009 WL 2136269, at *6 n.5 (M.D. La. July 16, 2009) (limiting discovery of other claims of discrimination to “the past five (5) years”) (collecting cases); *Marchese v. Secretary, Dep’t of the Interior*, 2004 WL 2297465, at *2-3 (E.D. La. Oct. 12, 2004) (3 years).

To begin, Plaintiff’s Request, including his proposed limitation, is overly broad to the extent it seeks complaints filed within the past ten years. Consistent with the case law cited above, Plaintiff’s Request will be limited to complaints made during the last 5 years of Plaintiff’s employment.

Second, the Court rejects Defendant's argument that complaints of race discrimination are irrelevant. Plaintiff, "who is of Arab decent, . . . contends he has been discriminated against and harassed on account of his national origin. . . ." (R. Doc. 6 at 1). "[I]n the Title VII context, the terms [race and national origin] overlap as a legal matter." *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (The "line between discrimination based on 'ancestry or ethnic characteristics' and discrimination based on 'place or nation of origin,' is not a bright one."); *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981) ("In some contexts, national origin discrimination is so closely related to racial discrimination as to be indistinguishable."); *Godbolt v. Hughes Tool Co.*, 63 F.R.D. 370, 374 (S.D. Tex. 1972) ("[A]s a practical matter, discrimination against 'national origin' minorities differs little, if at all, from discrimination against 'racial minorities.'"); EEOC Compliance Manual § 15-II (Aug. 2009) ("Discrimination against a person because of his or her ancestry can violate Title VII's prohibition against race discrimination." While they are not identical, "there can be considerable overlap between 'race' and 'national origin'. . . ."); EEOC Compliance Manual § 15-IV(A) (Aug. 2009) ("National origin and race often overlap because persons who themselves are, or whose ancestors were, of the same national origin frequently are of the same race."). In fact, the Supreme Court has found that discrimination based on a person's Arabic-ancestry can constitute discrimination on the basis of race. *St. Francis College*, 481 U.S. at 613. As such, Plaintiff is entitled to complaints of discrimination, harassment or retaliation based on race or national origin.

So far this is pretty routine, but the ruling on the other production requests (No. 6) is more interesting and instructive. Here Plaintiff sought production of all of **his own email**, a request we frequently encounter. Defendant employer objected, as it should. Here is the excellent language Defendant used:

The City-Parish objects to this Request for Production as overly broad, unduly burdensome, and vague and as seeking matters

that are not relevant to any party's claim or defense and not proportional to the needs of the case. Plaintiff's email inbox for his brgov.com account includes approximately 64,685 email messages. Prior to production, any such emails would have to be reviewed for privilege.

The Defendant supported this objection in opposition memos with the Rule 26(b)(1) argument on disproportionate burden, summarized by the court as follows:

Aside from its privilege argument, Defendant additionally suggests that reviewing all 64,685 emails would be unduly burdensome considering Plaintiff has not shown how his entire email inbox from 2001 until 2014 is relevant or proportional to the needs of the case. (R. Doc. 60 at 3). Specifically, "Plaintiff did not limit the scope of this request to email messages he received from a certain person, . . . during a certain time, or. . . that include certain search terms." (R. Doc. 60 at 4). Moreover, in responding to Plaintiff's other discovery requests, Defendant has diligently searched Plaintiff's email inbox and presumably produced any responsive emails. (R. Doc. 60 at 4).

Of course Plaintiff said there were no privileged communication to him, so the City would not have to review them. (He may also have argued, or could in other cases, that the Defendant was anyway protected by clawback and confidentiality agreements, orders.) Plaintiff also argued there is no burden in just turning over the Plaintiff's own email box to him, after all he had already seen them. There would be no need for the Defendant to review them first. These arguments are very familiar to us. If you have not heard them already, you will soon enough.

Now for the best part of the opinion, Judge Bourgeois (love the name) ruled as follows (**emphasis** added):

Plaintiff has not shown how his entire email inbox between 2001 and 2014 is relevant and discoverable. As the Court explained during the hearing, **an email inbox, in general, has little relevance. Instead, it is the information and communications contained within those emails that may**

be relevant. Plaintiff has not demonstrated that the existence of the inbox or any particular email is in any way relevant in this matter. If Plaintiff needs certain types of information, regardless of whether that information is found in an internal memorandum, email, letter, etc., he may specifically request the type of information sought, regardless of whether it may be found in an email inbox or stored in some other more conventional manner. **As the requesting party, Plaintiff has an obligation to sufficiently describe each item or category of items he desires. Fed. R. Civ. P. 34(b)(1)(A) (a request for production should describe the sought after items with “reasonable particularity”).** He has failed to do so in this request. Plaintiff’s Motion to Compel is therefore DENIED as to Request for Production No. 6.

This is good language that we suggest you save and use. *Odeh v. City of Baton Rouge / Parish of E. Baton Rouge*, No. 14-793-JJB-RLB, 2016 U.S. Dist. LEXIS 41079 (M.D.La. Mar. 29, 2016). Before you do, however, you should ask opposing counsel for clarification and particulars. Document the request with an email. After they refuse or fail to do so, you have also set them up for a failure to cooperate argument. Once the judge sees that, well, its *game over* for opposing counsel.

THIRTEENTH – Oracle v. Google

The **September 27, 2016 Order** by **District Judge William Alsup, Northern District of California**, in *Oracle America Inc. v Google Inc.*, No. C 10-03561 WHA (ND Ca., Sept. 27, 2016) is an e-discovery shocker. The order came out of a motion for new trial after Oracle lost a major jury trial. The basis of the



motion was alleged e-Discovery abuses by Google, primarily the withholding of key evidence. Tsk, tsk. Bad Google?

Oracle v Google is a MULTI-BILLION DOLLAR copyright infringement case. Probably the biggest jury trial of the year in 2016. Tens of millions of dollars have, I presume, been spent on legal fees by Oracle. And yet, a major e-discovery blooper was made by Plaintiff's counsel in the motion for new trial.

You are not going to believe what Oracle's lawyers did wrong. THEY DID NOT READ THE ELECTRONIC DOCUMENTS PRODUCED TO THEM. THEY DID NOT KNOW THAT CRITICAL EVIDENCE HAD BEEN PRODUCED TO THEM BY GOOGLE, AND INSTEAD ACCUSED THEM OF WITHHOLDING THAT EVIDENCE. Sorry, but that deserves all caps IMO. This case shows the critical importance of electronic document review.

Here is the key language from [Judge Alsup's lengthy opinion](#) explaining the issue and how it unfolded (emphasis added):

Oracle's motion for a new trial challenges several discretionary decisions made at trial. Oracle's primary argument, however, is that Google perpetrated discovery-concealment misconduct. The charged misconduct, Oracle says, rates as a "game changer." ...

With the benefit of the foregoing history of the smartphones and tablets limitation, we turn to Oracle's charge of discovery misconduct. This charge is not anchored in any claimed error by the judge but is anchored in claimed misconduct by Google and its counsel. ...

Oracle now accuses Google of withholding evidence in discovery that allegedly would have shown that Google was, by the close of our retrial, expecting soon to implement Android on desktops and laptops too. ...

The oral argument on Oracle's motion for a new trial, which lasted two hours, focused almost exclusively on Oracle's "game changer" allegation of discovery misconduct. Following the

hearing, counsel for both sides were ordered to file sworn declarations detailing Oracle's discovery requests on this point and Google's responses. After reviewing the parties' submissions, the Court called for sworn replies.

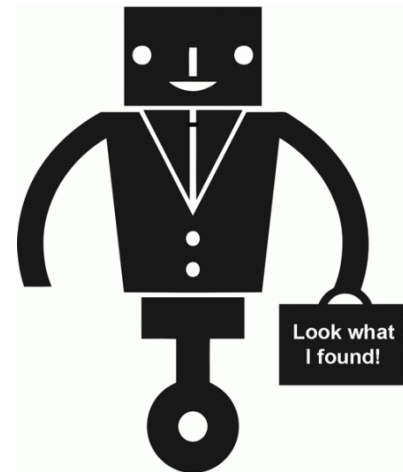
Throughout the briefing and argument on this motion, Oracle left the distinct impression — more accurately distinct misimpression — that Google had stonewalled and had completely concealed the ARC++ project. This was an unfair argument. In fact, Google timely produced at least nine documents discussing the goals and technical details of ARC++ and did so back in 2015, at least five months before trial. Counsel for Oracle now acknowledges their legal team never reviewed those documents until the supplemental briefing on this motion (Hurst Reply Decl. ¶ 12). The Court is disappointed that Oracle fostered this impression that no discovery had been timely provided on the ARC++ project eventually announced on May 19.3 ...

Oracle should have known that items produced in response to its own document requests potentially contained information that supplemented Google's earlier written discovery responses. Oracle's failure to review the ARC++ documents is its own fault.
...

Oracle already had evidence of ARC++, but didn't realize it. Thus, to the extent Google's recent announcement had any value at our trial (or in discovery), Oracle already had evidence of the same project (and its predecessor), and it passed on any opportunity to introduce that evidence.

Contrary to Oracle, ARC++ documents were in fact timely produced. They laid out the basic goals and technical details of the very product referenced on May 19. Since Oracle had that information, there was no need to supplement the written discovery to the extent evidence of ARC++ was responsive at all. Moreover, any further disclosure of ARC++ would have been of no consequence in Oracle's preparation for our trial or its presentation at trial, which later became limited in scope to smartphones and tablets. This ground for a new trial is rejected.

Trial Prep Tip – review the documents that are produced to you, even if it is a document dump in a giant case. You will be presumed to know every document that was produced. Especially review the documents produced to you before you accuse the other side of unethical with holding of evidence, a “real game changer” as Oracle’s attorneys put it. Yes it was a game changer, just not the way they thought.



If you do not know what documents have been produced to you, then not only can you lose the case, but you can lose all credibility with the judge, and others. There is no safety in numbers. One high quality e-discovery specialist could have stopped this mistake. Here are the attorneys shown in Judge Alsup’s opinion to be of record for Oracle.

Oracle America, Inc., Plaintiff, was represented by Annette L. Hurst, Orrick, Herrington & Sutcliffe LLP, Gabriel M. Ramsey, Orrick Herrington & Sutcliffe LLP, Karen G. Johnson-McKewan, Orrick Herrington & Sutcliffe LLP, Alanna Rutherford, Boies, Schiller, Flexner LLP, pro hac vice, Alyssa M. Caridis, Orrick, Herrington & Sutcliffe LLP, Andrew David Silverman, Orrick, Herrington and Sutcliffe LLP, Ayanna Lewis-Gruss, Orrick Herrington Sutcliffe LLP, pro hac vice, Beko Osiris Ra Reblitz-Richardson, Boies Schiller & Flexner LLP, Christina Marie Von Der Ahe, Orrick, Herrington & Sutcliffe, LLP, Daniel Pierre Muino, Morrison & Foerster LLP, David Boies, Boies Schiller and Flexner, pro hac vice, Deborah Kay Miller, Oracle USA, Inc. Legal Department, Denise Marie Mingrone, Orrick, Herrington & Sutcliffe LLP, Dorian Estelle Daley, Geoffrey Gavin Moss, Orrick Herrington Sutcliffe LLP, Jeffrey Larter Cox, Orrick Herrington & Sutcliffe LLP, pro hac vice, Kenneth Alexander Kuwayti, Morrison & Foerster LLP, Lisa T. Simpson, Orrick, Herrington, Sutcliffe LLP, Marc David Peters, Morrison & Foerster LLP, Matthew Lee Bush, Orrick, Herrington and Sutcliffe LLP, pro hac vice, Matthew M. Sarboraria, Oracle Corporation, Meredith Richardson

Dearborn, Boies Schiller et al, Michael A. Jacobs, Morrison & Foerster LLP, Michelle OMeara Cousineau, Orrick Herrington and Sutcliffe LLP, Nathan D. Shaffer, Orrick, Herrington & Sutcliffe LLP, Peter A. Bicks, Orrick Herrington Sutcliffe LLP, pro hac vice, Randall Scott Luskey, Orrick Herrington & Sutcliffe, Robert P. Varian, Orrick Herrington & Sutcliffe LLP, Ruchika Agrawal, Oracle America, Inc., Steven Christopher Holtzman, Boies, Schiller & Flexner LLP, Vickie L. Feeman, Orrick Herrington & Sutcliffe & Yuka Teraguchi, Morrison Foerster LLP.

All of these attorneys, and I suspect hundreds more, including document review contract lawyers, and they still did not know that Google produced key documents to them? They still did not know when they decided to accuse Google's attorneys and base a new trial request on the alleged withholding of critical evidence? I have never heard of anything like this.

The *Oracle v Google* opinion by Judge Alsup again shows the importance of quality electronic document review. *Oracle America Inc. v Google Inc.*, No. C 10-03561 WHA (ND Ca., Sept. 27, 2016). Remember, you are required to produce relevant evidence. You are not required to highlight the hot documents you produced. It is up to the receiving party to do their own due diligence.

If you get hit with a document dump in a big case, let somebody like our *e-Discovery Team* know about it and handle it for you. Groups like ours love to look at millions of files (even a few hundred thousand is fun). We can help you to unearth the key evidence. Never take it for granted that you know there is nothing worthwhile in a production. Never assume that careful document review is not needed. That is a big budget mistake, as the Oracle trial team now knows.



TWELFTH – *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*

The twelfth most interesting opinion arises out of an unfair competition case in West Palm Beach, Florida, District Court involving the destruction of text messages. *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016). The opinion was written by **Magistrate Judge William Matthewman**. It provides some good news for defendants struggling to preserve all ESI that might be relevant to a case and so avoid spoliation sanctions. On the other hand, the ruling will make it more difficult to prove spoliation by former employees who have deleted text messages. This is, we know, a fairly common issue these days



Judge Matthewman denied Plaintiff’s motion for sanctions under new Rule 37(e) for a Defendant’s deletion of text messages. The motion was against one of several individual defendants included in the suit, Daniel Leyden. As background note that District Court Judge Kenneth Marra later – 9/9/16 – granted SJ for Leyden because he found that “Leyden was not covered by a non-solicitation agreement and was therefore free to compete against Living Color once he resigned.” In the **Judge Marra Order**, Leyden appears to have won a Summary Judgment on all other counts against him, and is no longer a party to the case, albeit still a key witness on the remaining counts. We suspect the absence of wrongdoing on his part may have colored the earlier sanctions ruling by the Magistrate.

A key fact in Judge Matthewman’s sanctions ruling is that text messages were admittedly deleted, but Defendant claimed it happened because “he has always used the cell phone feature that automatically deletes text messages after 30 days and that he, admittedly, neglected to disable the feature when the lawsuit was filed.” Oops.

Defendant argued no harm, however, because the other key party to most of the text messages, Mark Vera, had preserved his messages and they were produced.

Plaintiff countered that text messages were still missing and explained that a “subpoena to Defendant’s cell phone carrier yielded no results and that Plaintiff is still entitled to other communications that Leyden had with other potential witnesses regarding the circumstances at issue in this case.” Note subpoena’s to carriers are always a fruitless way to obtain the content, although you can get information on the existence of the account, etc. The carriers do not maintain the messages after a user deletes, and even if they did have them, that are not permitted to produce them without the message owners consent or court order.

The sanctions motions was decided based on a series of counter-affidavits, not live testimony. Other courts might well convene an evidentiary hearing, but, as mentioned, it looks like Judge Matthewman was disinclined to believe the “trumped up” charges against this defendant and other exaggerated rhetoric plaintiff’s counsel here seemed fond of.

The opinion has a good summary of the law of spoliation under new Rule 37(e), citing to 11th Circuit law. You will want to refer to this opinion in any sanctions research. I will not bother repeating the black letter here, but suggest you read it for a good summary (pgs. 9-13). All criteria were met for imposition of sanctions except for the final criteria of prejudice or bad faith. Rule 37(e)(1) (“if there is a finding of prejudice’) and (e)(2) (“if there is a finding of intent to deprive.”) On this issue the court followed the Committee Commentary which says “*The rule does not place a burden of proving or disproving prejudice on one party or the other.*”



Under the affidavits presented the court did not see any prejudice to the plaintiff by the destruction of evidence. Moreover, “*if there was any prejudice to Plaintiff at all, it was so minimal that the Court does not find it necessary to order measures to cure the alleged prejudice.*”

(pg 11). The court's further explanation of the ruling shows plaintiff counsel's failure of proof and thus provides a guide for what you need to do to obtain sanctions under Rule 37(e):

Plaintiff argues in its Motion that Stlweyden's participation in the scheme outlined in the Second Amended Complaint (D.E. 1 18) is crucial to Plaintiff's claims against Leyden and the evidence would have established he was involved in the scheme to misappropriate Plaintiffs business and customers." This is an extremely conclusory statement that really does not establish any prejudice to Plaintiff. Plaintiff has not explained any direct nexus between the missing text messages and the allegations in its Complaint. ...

The asserted missing text messages appear to be unimportant, and the abundance of preserved information appears sufficient to meet the needs of Plaintiff. The Court does not find spoliation sanctions to be proper pursuant to Rule 37(e)(1).

Next the court considered the alternate grounds for sanctions under 37(e)(2) – "intent to deprive." Evidence of bad faith intent can support sanctions even without evidence of prejudice. The court did not find any bad faith here noting:

... it is common practice amongst many cell phone users to delete text messages as they are received or soon thereafter. There is nothing nefarious about such a routine practice under the facts presented here.

While Defendant clearly had an obligation to retain the relevant text messages after this law suit was initiated, the Court finds that Defendant simply acted negligently in erasing the text messages either actively or passively. ... There is no evidence that he intended to deprive Plaintiff of the text messages or that he acted in bad faith. No sanctions should be imposed pursuant to Rule 37(e)(2).

ELEVENTH – *Johnson v Serenity Transportation*

The eleventh most interesting case is by **U.S. Magistrate Judge Jacqueline Scott Corley of San Francisco**. *Johnson v Serenity Transportation*, Case No. 15-cv-02004-JSC (N.D. Cal. October 28, 2016).

This is a putative class action involving alleged improper classification of independent contractor status. As the court explained in an earlier decision in this case:

Plaintiffs are “mortuary transportation drivers who carry dead bodies and other human remains from various locations (including nursing homes, hospitals, and homes) to Defendants’ facilities.”



Yup. *Hearse today, gone tomorrow*; or, as I prefer to call the case “**Uber meets the after-life**.” A good summary of the holding here might be: *Discovery is not disproportionate just because you say so*.

The attorneys for one of the many defendant funeral home operators decided that they were tired of producing emails in response to Plaintiffs’ requests, and so they invoked new Rule 26(b)(1) and said they were done, that they had already made proportional efforts. The Plaintiffs argued that Defendant had prematurely pronounced the effort dead and had, in the court’s paraphrasing of the argument:

... withheld emails responsive to Plaintiff’s proposed search terms and custodians that are relevant to the joint employer question at issue in SCI’s pending motion for partial summary judgment and has waived attorney-client and attorney work product privilege by producing only a belated and insufficient privilege log. Plaintiff asks the Court to order SCI to produce all documents responsive to Plaintiff’s search terms forthwith.

Here is the counter argument of the morticians' attorneys, again as paraphrased by the court:

SCI, for its part, urges that (1) it has produced all relevant, non-privileged responsive documents so any production of further documents is duplicative and not proportional to the needs of the case; and (2) Plaintiff has waived any argument about privilege by making no effort to meet and confer on that issue.

So defense counsel raised proportionality under the new rules and should win, right? No. They did it all wrong. You cannot just say it's disproportionate and let it go at that. You cannot just make unilateral decisions and stop work. You have to communicate. You have to offer some evidence, some facts. They did not. They just decided. Judges do not like that. Deciding disputed issues is their job.



When you look at the facts that came out of the briefing, and hearing, the facts seem almost laughable as to burden. The only relevance argument on which the Defendant prevailed pertained to the Plaintiff's extreme position that all docs with hits should be produced without any consideration of relevance. This is such a blatantly wrong argument. Will attorneys all of the country on both sides of the "v" stop making this crazy argument please?

The Plaintiffs also lost on the waiver by poor privilege log argument, but the court did order defense counsel to do the log over again and provide more detail this time.

Here is Judge Corley's key language and one reason why we find her opinion in *Johnson* so interesting:

... a defendant does not have discretion to decide to withhold relevant, responsive documents absent some showing that producing the document is not proportional to the needs of the case. See Fed. R. Civ. P. 26(b)(1). SCI has made no such showing. ...

A party cannot unilaterally decide that there has been enough discovery on a given topic.

SCI's withholding of these four relevant documents—emails that are responsive to the search terms and say either "Serenity" or "Friedel"—without any showing of burden that would render production out of proportion to the needs of the case was improper. These four emails suggest that SCI may be withholding other relevant ESI. Accordingly, the Court ORDERS SCI to produce all non-privileged, relevant documents (emphasis added) that include the search terms "Serenity" or "Friedel"—by November 4, 2016. (Editorial note: that was just one week for the redo.)

As to P's waiver by inadequate log argument (for which there is authority by the way, so be careful out there), Judge Corley disposed of that as follows:

Plaintiff asks the Court to deem SCI to have waived privilege over its ESI for having failed to produce a sufficient log for these three emails, or a log at all for the remainder of ESI documents withheld since production began. (Dkt. No. 150 at 3-4.) Courts have discretion to deem failure to produce a timely privilege log as a complete waiver of privilege. *See Coalition for a Sustainable Delta v. Koch*, No. 1:08-CV-00397 OWW GSA, 2009 U.S. Dist. LEXIS 100728, 2009 WL 3378974, at *3 (E.D. Cal. Oct. 15, 2009) (citing *Burlington No. & Santa Fe Ry. Co. v. United States*, 408 F.3d 1142, 1149 (9th Cir. 2005)). The Court declines Plaintiff's invitation to find waiver here, where the dispute appears to turn on an insufficient log regarding only three documents and where it appears that the parties have not yet met and conferred on this issue, contrary to the requirements of the Court's Standing Order. Instead, the Court ORDERS SCI to produce an adequate privilege log by November 4, 2016 for every responsive document withheld on privilege grounds.

Primary lesson learned in *Johnson v Serenity Transportation*: Do not bluff when it comes to burden. Assume your hand will be called. Line up actual, unexaggerated facts to support any proportionality

argument. Ask the court for relief and put your cards on the table. “A party cannot unilaterally decide that there has been enough discovery on a given topic.” If you bluff and exaggerate, it may well come back to haunt you. That is what happened here in this *Uber meets the after-life* case.

Further, and this is critical, do not try to hide the ball behind 26(b)(1), which is what *may* have happened here. If you find relevant documents, you have to produce them. Unless they are privileged, there is simply no excuse or grounds under (b)(1), or anywhere else, to refuse to produce relevant documents you have already found.

TENTH – *Venturedyne v. Carboonyx*

Magistrate Judge John E.

Martin wrote an e-discovery opinion of interest that starts our top ten ranking because of its discussion on cooperation and the negotiation of keywords. *Venturedyne v. Carboonyx*, 2:14-CV-351-RL-JEM (N.D. Ind. Nov. 15, 2016).



The case started off in typical fashion with a general objection by defendant Carboonyx. They then did a good thing (their last) and “turned over sample emails related to this case to help determine what keywords would be appropriate.” Smart move – avoid the *Keyword Fish* mistake of negotiating in the blind. Plaintiff Venturedyne responded with a revised Request for Production that narrowed the first request. What happened next should sound familiar. In the words of Judge Martin:

On February 25, 2016, Venturedyne’s counsel sent Carboonyx’s counsel a list of 126 keywords. Venturedyne’s counsel proposed these keywords as a method by which Carboonyx could satisfy its burden to produce material responsive to the Revised Request.

On March 10, 2016, Carbonyx's counsel sent an email to Venturedyne striking 20 search terms from the list of 126, leaving 105 terms. On April 28, 2016, Venturedyne's counsel responded by voluntarily removing 28 additional terms, leaving 78 terms. Venturedyne also objected to 7 of the 20 terms deleted by Carbonyx. In all, neither party objected to 78 of the original 126 search terms until Carbonyx responded to this Motion to Compel.

Venturedyne's counsel sent Carbonyx's counsel follow-up emails on May 6, May 24, June 3, June 13, and June 30, 2016. Carbonyx's counsel did not respond to any of these five emails. On July 12, 2016, Venturedyne filed this Motion.

Poor move on the part of Carbonyx's counsel. Not respond to five emails trying to resolve a discovery dispute?! Judge John Martin was not pleased. No judge would be. Here are our favorite relevant excerpts of Judge Martin's opinion.

To assist in producing responsive electronically stored information, parties frequently use keyword searches. Keyword searches "have long been recognized as appropriate and helpful for ESI search and retrieval," but "there are well-known limitations and risks associated with them." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008). "Chief among [those limitations] is that such a search necessarily results in false positives (irrelevant documents flagged because they contain a search term) and false negatives (relevant documents not flagged since they do not contain a search term)." *Makowski v. SmithAmundsen LLC*, No. 08-C-6912, 2012 WL 1634832, at *1 (N.D. Ill. May 9, 2012). As a result, "[e]lectronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI." *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). . . .

In response to Venturedyne's requests for production of documents, Carbonyx contends that it has produced "more than 12,000 pages of documents, consisting of emails and their

attachments, as well as paper documents.” According to Carbonyx, these documents were generated using the search terms “Scientific Dust Collectors”—the name Venturdyne does business under—and “Scientific.” Carbonyx has not objected to the Revised Requests for Production. Instead, Carbonyx argues that a search using Venturedyne’s list of 126 keywords to satisfy its production obligations would be too broad and would include a significant number of non-responsive and irrelevant documents.

Carbonyx here makes the mistake we warn about, they used a very general “too burdensome” argument. They needed to have specific metrics on things like the “false positives” and “false negatives” as mentioned in the prior quote. You need to be specific in your objections as to the burden. To do that you need to get your hands in the digital mud and actually runs searches and do some analysis. For instance, we have done samples of Plaintiff’s keyword requests in some cases and found that only 2% of the docs with hits were in fact relevant. That is the false positives problem. That is very persuasive.

Judge Martin goes on with his good, common sense analysis of defendant’s feeble argument.

Carbonyx’s assertion that the documents it has already produced—retrieved by searching “Scientific Dust Collectors” and “Scientific”—are completely responsive is not convincing. Carbonyx has not told the Court that all documents relating to the Venturedyne contract contained either “Scientific Dust Collectors” or “Scientific.” It seems likely that there are documents in Carbonyx’s possession that do not contain those words but that nonetheless contain information about the contract between Venturedyne and Carbonyx.

Similarly, there are likely other documents in Carbonyx’s possession that had nothing to do with Venturedyne or its equipment but that would still be relevant to this case. For example, . . .

Accordingly, Carbonyx has not satisfied its burden of demonstrating the inappropriateness of Venturedyne's discovery request. *McGrath*, 625 F. Supp. 2d at 670. Carbonyx did not object to any of the Revised Requests. Instead, Carbonyx contends that it has completed its discovery obligations by turning over all documents flagged by the "Scientific Dust Collectors" and "Scientific" search terms. As discussed above, that production is an incomplete response to the Revised Request, and additional search terms are appropriate.

Now for the part where the Judge Martin criticizes Carbonyx's counsel for their apparent refusal to cooperate. What else would you call ignoring five emails on the subject?

Carbonyx had the opportunity to limit the search terms at issue in this case. Before Carbonyx's counsel cut off email contact with Venturedyne's counsel, the parties appeared to be making progress toward an agreed list of search terms. This would have been the better solution and likely would have limited Carbonyx's expenses in reviewing the results of the searches. But Carbonyx's refusal to participate in that process now requires that the Court intercede.

That is never a good thing to do. The result is a punishment of the client by granting Plaintiff's last request in full:

Accordingly, Carbonyx must produce documents flagged by the 78 unopposed search terms contained in DE 48-7. Those terms appear "reasonably calculated to lead to discovery of admissible evidence" in that the terms were based on sample emails related to this case and the parties already eliminated many generic words like "money." See Fed. R. Civ. P. 26(b)(1).

Ok, so note that Judge Martin did get the relevance law wrong, which again I blame on all of the attorneys involved. The "reasonably calculated" standard was eliminated by the 2015 revision to Rule 26(b)(1), and that revision in turn voided the



case law that relies upon the old rule.

Magistrate Judge Martin does get it right on requiring the documents themselves to be relevant, and clarifies that although all documents with the hits must be reviewed, only the relevant ones need be produced:

Furthermore, Carboxy is free to review the results of the keyword searches and to withhold documents that are truly irrelevant to this case. However, Carboxy did not object to any of the 28 requests in Venturedyne's Revised Requests and all 28 requests appear relevant. *See Oppenheimer*, 437 U.S. at 351. So, any documents that are returned by the 78 keywords and that are within the scope of the 28 Revised Requests must be produced.

Judge Martin concluded by awarding costs under Rule 37(a)(5)(A) with the amount to be determined.

NINTH – *McQueen v. Aramark Corp*

The ninth most interesting opinion in 2016 arises out of Salt Lake City and was written by **U.S. Magistrate Judge Paul M. Warner**. *McQueen v. Aramark Corp.*, 2016 BL 396068, D. Utah, No. 2:15-CV-492-DAK-PMW (D. Utah, Nov. 29, 2016).



This wrongful death case of a construction worker involving late or no preservation notices by Defendant and the destruction of ESI and related paper records. The ESI destruction and paper shredding were allegedly done in accordance with regular practices of the corporation, but after the time in which a hold should have been implemented that suspended such practices. This spoliation was discovered by Plaintiff during a deposition of a key witness who made an off-hand reference to work orders. He later tried to "correct" (change) his testimony with an

affidavit, but of course this was denied as not permitted under Rule 30(e).

It is interesting to note that Judge Warner had to order the parties to file supplemental briefs on the impact of revised Rule 37(e). Apparently both sides failed to know that this was the governing law. This kind of mistake is especially damaging to the party defending the sanctions motion, here the Defendant, as the revisions to Rule 37(e) favor the accused. Incredible that defendant missed that.



Following in a general way the elements of 37(e) (we must assume that the briefing eventually provided by counsel was not very good), “the court finds that Defendant acted with gross negligence, which is insufficient to show bad faith or intent. See *Browder*, 2016 U.S. Dist. LEXIS 76397, 2016 WL 3397659, at *8.” The court then sanctioned the Defendant as follows:

Thus, the court concludes that a lesser sanction is appropriate. The court orders that the parties will be permitted to present evidence to the jury regarding the spoliation of the work orders and ESI and to argue any inferences they want the jury to draw. The jury will not, however, be specifically instructed regarding any presumption or inference regarding the destruction of those materials. To avoid impinging on the trial judge’s purview in presiding over and conducting the trial, this court leaves to the trial judge to determine the appropriate mechanism for permitting the presentation of the evidence and argument at trial on this issue.

Although a “lesser sanction,” the ultimate ruling here may well still be case dispositive. Just allowing this to be argued to a jury can be very damaging. An actual instruction on presumption (adverse inference instruction) is a guaranteed loss, but the argument alone is a very close second. *Motion in limines* may be required when, unlike in *McQueen*, there is some ambiguity on this point in the court’s ruling.

EIGHTH – *Cahill v. Dart*

The eighth most interesting opinion in 2016 is a sanctions order by **District Judge John Z. Lee in Chicago**. *Cahill v. Dart*, No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016). The order affirmed in part, and reversed in part, Magistrate Judge Cox’s prior report and recommendation on Plaintiff’s motion for sanctions.



The Plaintiff had sued the Chicago Police Department alleging false arrest by planting a bag of cocaine. A portion of the video of the Plaintiff’s incarceration that showed the first appearance of the cocaine was destroyed by the police. The Plaintiff moved for sanctions based on the partial destruction of the video after the duty to preserve had been triggered.

Magistrate Cox’s recommendation for sanctions was based on her determination that the Plaintiff was severely prejudiced by the loss of the video. Judge Cox also found that there was no intent to deceive by the Sheriff’s Department’s partial destruction of the video, and so denied the case dispositive remedies under 37(e)(2), namely striking defense or adverse inference instruction. The Plaintiff complained that this let the Defendant off too easily and, on review, Judge Lee agreed.

Revised Rule 37(e) is fairly short and simple, so every e-discovery lawyer should start to memorize this. You are going to see it for years, but note that it does not apply to paper records destruction, only to the destruction of ESI:



Rule 37(e)

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.

First note that the finding of prejudice is not required for the drastic remedies under subsection two, but, as a practical matter, it helps. Still, remember the moving party does not have to prove prejudice to obtain case dispositive sanctions. They only have to prove intentional destruction. You do not have to prove both prejudice and intent. The Rules Commentary leaves no room for doubt on that point and neither does *Cahill v. Dart*.

If a judge finds any kind of prejudice under subsection one, then you are entitled to lesser sanctions under subsection one without proof of intent. Lesser sanctions include, without limitation, additional discovery, cost shifting and attorney fee awards. The lesser sanctions can also include allowing presentation of evidence to the jury concerning the destruction of the ESI. The idea is to try to "cure the prejudice" with the judge having wide discretion of what is reasonably required, and what might be overkill. Note again that the moving party does not bear the burden of proof of prejudice. It is a shared burden.

The Sheriff defendant in *Cahill v. Dart* did not appeal the Magistrate's finding of "severe" prejudice, still the District Judge Lee reviewed all evidence *de novo* and also concluded there was severe prejudice. He went on to slightly disagree with Judge Cox on the intent issue. Judge Lee found that it was a close question and should be put to the jury to

decide the Defendant's intent. Thus Judge Lee's ruling keeps alive Plaintiff's request for dispositive sanctions and opens the door to presentation of all arguments and fact presentation to jury.

Here is Judge Lee's language:

... the jurors will be instructed that, if they are persuaded that the destruction was intended to deprive Cahill of the evidence, they must presume the lost evidence would have been unfavorable to Defendants.

Note Judge Lee's ruling is completely inline with the meaning and intent of new rule 37(e). The Commentary expressly states that a judge may put the issue of intent to a jury (unlike the issue of prejudice in subsection one). Here is the appropriate Commentary extract:

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a 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. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

This is a short, well written opinion and easy read. *Cahill v. Dart*, No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016).

SEVENTH – Arrowhead Capital Fin., Ltd. v. Seven Arts Entertainment, Inc.

This is another interesting sanctions case where both defendant **and its attorney** were sanctioned under Rule 37 for e-discovery misconduct. It was written by **District Judge Katherine Polk Failla, of the Southern District of NY**. She called the misconduct “*as deep as it is wide.*” *Arrowhead Capital Fin., Ltd. v. Seven Arts Entertainment, Inc.*, No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016).



The sanctions were severe. They included issue preclusion, spoliation instructions, a contempt finding, and attorneys’ fees. The misconduct included a blatant violation by defense counsel of Rule 37(e). He simply forwarded the ESI collected by the client without even reviewing the documents. He completely abdicated the attorney’s duty under Rule 37(e) to supervise the document search, review and production. Here is the description in the opinion by District Judge Katherine Failla:

And during a September 3 telephone conference between the parties, defense counsel allegedly admitted that he had not been reviewing the discovery responses — even as he had personally signed several of them — and was merely forwarding what he had received from Mr. Hoffman.

Practice Pointer: Please do not let this ever happen in your law office. You cannot just sign the response under Rule 26(g) based on your merely forwarding documents that the client finds and decides are relevant. You must closely supervise the response. Your signature vouches for the reasonability of the efforts. You cannot possibly do that unless you have knowledge of what was done.

Another thing defense counsel here did wrong here was designate all documents as confidential. The documents so produced included press releases.

Other mistakes made by Defense counsel include, in Judge Failla's words:

(i) made untimely and improper objections to Plaintiff's discovery requests; and (ii) "[p]uff[ed] up" their document production with non-responsive documents, while simultaneously refusing to produce obviously responsive documents (including bank records for various Seven Arts entities).

Defendant also failed to preserve documents located on a third party server by failing to download all of them before they lost access by non-payment.

There were also numerous instances of deposition misconduct, with defense witnesses not showing up, etc. That only aggravated the e-discovery misconduct.

Defense counsel blamed the client for the non-production of documents, causing this reaction by Judge Failla:

Because Mr. Hoffman seemed to be directing defense counsel not to produce responsive documents, Plaintiff's counsel asked the Court to find Mr. Hoffman in contempt of court.

This led to a contempt hearing where the judge questioned the defendant, Mr. Hoffman. The questioning went on for five hours! In this Sept. 16, 2016 Order months later Mr. Hoffman was held in contempt. This is one of the reasons we found this order so interesting.

In addition to the sanctions mentioned, another unusual sanction was entered. The Defendant was stripped of its right to contest the court's jurisdiction. I had never seen that before. Here is Judge Failla's ruling on the point:

However, the Court need not reach the merits of Defendants' jurisdictional arguments because those arguments have been forfeited. The Second Circuit has long recognized that a defendant can "forfeit[] its argument that personal jurisdiction is lacking." *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, ___ F.3d ___, No. 13-4022, 2016 WL 4087215, at *5 (2d Cir. Aug. 2, 2016); see also, e.g., *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 139 (2d Cir. 2011); *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 62 (2d Cir. 1999). One way to accomplish such a forfeiture is "noncompliance with discovery orders." *Robertson v. Dowbenko*, 443 F. App'x 659, 661-62 (2d Cir. 2011) (summary order). Here, the Court believes that Defendants' persistent violations of the Court's discovery orders prevented Plaintiff from obtaining evidence that could be used to prove its jurisdictional allegations. The Court will not allow these violations to go unredressed. As one of several sanctions for Defendants' misconduct, the Court now precludes Defendants from contesting the issue of personal jurisdiction.

Here are more excerpts from Judge Failla's extended bench slaps, slaps which were, in our opinion, well deserved by this defendant and it's attorney:

Defendants' misconduct in this litigation is as deep as it is wide.[15] ...

Defendants' failure to make prompt arrangements to move or copy all of their documents from the Zed One server could be seen as reckless. See Fed. R. Civ. P. 37(e) (noting that a party can be sanctioned if it does not take reasonable steps to preserve discoverable electronic information). But, on this record, the Court is convinced that Defendants' conduct transcended recklessness. At the December 15 hearing, Mr. Hoffman offered a laundry list of excuses for the deficiencies in Defendants' document production. (See generally, Goldin Decl., Ex. 10). As this list grew longer, the excuses grew flimsier and Mr. Hoffman grew simultaneously angrier and less credible. By the end of the hearing, and particularly after observing Mr.

Hoffman's demeanor throughout that hearing, the Court was left with the distinct impression that Mr. Hoffman was making it up as he went along in order to conceal his true motive: shielding assets, and the information relating to those assets, from Defendants' creditors, including Plaintiff in this litigation. ,,,

In light of Defendants' willful efforts to derail the discovery process, the Court considered entering default judgment against Defendants on all counts in the Amended Complaint. However, precluding Defendants from litigating the issue of personal jurisdiction — and giving a spoliation instruction, as appropriate, on any claims that are ultimately submitted to the jury — are intermediate steps that will give Plaintiff a fair opportunity to present its case to the ultimate finder of fact. This intermediate course of action is sufficient. ...

Another unusual sanction is that Judge Failla ordered defendants to:

... retain a second outside counsel — other than Mr. Markovich — to do a thorough review of Defendants' files and determine whether Defendants possess additional discoverable information. This second outside counsel must represent Defendants for any remaining discovery-related proceedings.

Next the court sanctioned existing defense counsel, Mr. Markovich, by requiring him to pay "some portion" of the attorney fee award taxed on defendant. This vagueness of the allocation is, we note, bound to provoke interesting discussions between Hoffman and Markovich. Judge Failla apparently has a sense of humor.

The sanction of the defendant's attorney was made under the court's "inherent authority" as here explained:

The Court has "inherent power to supervise and control its own proceedings and to sanction counsel or a litigant for bad-faith conduct." *Sussman v. Bank of Israel*, 56 F.3d 450, 459 (2d Cir. 1995); see also 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally

the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Here, the Court believes that defense counsel Markovich acted in bad faith and in a manner that improperly lengthened the proceedings in this litigation on at least two occasions.

Bottom line: Discovery misconduct, including hide the ball tactics and sharp practices, is a sure-fire way to lose a case. Discovery abuse is bad. Do not do it. Moreover, any counsel of record who signs a document discovery response has a duty to verify that the document review was properly conducted. You cannot just accept and pass through what the client did.

SIXTH – *Hespe v. City of Chicago*

This is another interesting case out of Chicago where an employer Defendant's request for a forensic inspection of employee Plaintiff's electronic devices was denied. *Hespe v. City of Chicago*, No. 13 C 7998, 2016 BL 417422 (N.D. Ill. Dec. 15, 2016). This sixth most interesting opinion of 2016 was authored by **District Judge Jorge L. Alonso in Chicago**. Unlike the fifth ranked *Cohn* case to be discussed next, the Defendant's motion in *Hespe* was not based on spoliation sanctions. It was instead based on an allegations of incompetent, unreasonable review and production of documents by Plaintiff. We have all been there, so what happened in this case is very interesting to the e-Discovery Team.



The case itself is a charge of sex discrimination and hostile work environment by a female police officer under Title VII. This is a *bread and butter* type of case for my law firm, so I know all about them. The Plaintiff alleges, in the words of Judge Alonso, that her supervisor, in the Chicago Police Dept., defendant Gerald Breimon:

“sexually harassed her by pursuing a romantic relationship with her for over three years, . . . the City created a hostile work environment by failing to take prompt action to protect her, and . . . [defendant Sarah] McDermott threatened to harm plaintiff, in part, because she rebuffed Breimon’s attention.” (Apr. 27, 2016 Order, ECF No. 147, at 1.) The defendants’ position is that Breimon and plaintiff were in a fully consensual, romantic relationship, and there was no unwelcome harassment or discrimination.

Judge Alonso’s opinion considers the objection of the Defendant employer to the April 27th 2016 ruling of Magistrate Judge Mason on Defendant’s Motion To Compel production. The Defendant asked to inspect Plaintiff’s electronic devices for *unproduced* electronic communications between the Plaintiff and the alleged harasser, her supervisor, Gerald Breimon.

Here, in the Judge Alonso words, is the procedural, factual background that led to Defendant’s Motion To Compel Production of Plaintiff’s computers:

In response to discovery requests, plaintiff produced numerous photographs, voice mail messages, emails and text messages that she had received from Breimon.

Defendants learned during the October 22, 2015 deposition of plaintiff’s mother, Susan McKay, that McKay was in possession of thousands of additional voice mail and text messages. At plaintiff’s November 30, 2015 deposition, plaintiff confirmed that she had sent these materials to her mother for safekeeping because she was running out of space on her computer.

On December 30, 2015, pursuant to subpoena, McKay produced to defendants all the electronically stored information (“ESI”) concerning plaintiff and Breimon that was in her possession. In particular, she produced 5,748 text messages, a number that dwarfed the 850 plaintiff had initially produced in this case.



Based in part on the discovery of this additional information, defendants filed a motion to extend the discovery deadline and [*2] compel plaintiff to submit to an extension of her deposition. Magistrate Judge Mason, who supervised discovery in this case (see ECF No. 67), granted the motion in part, extending the discovery deadline to March 16, 2016, and granting defendants leave to depose plaintiff for three and a half additional hours. (See Jan. 7, 2016 Order, ECF No. 118; Feb. 17, 2016 Order, ECF No. 131.) Judge Mason warned that no further discovery extensions would be granted. (ECF No. 131, at 5.)

Defendants deposed plaintiff again on March 2, 2016. At the conclusion of the deposition, defense counsel informed plaintiff that she “would like an opportunity to inspect plaintiff’s computer . . . and her cell phone” to search for any unproduced communications with Breimon. (Excerpts of Pl.’s Dep., 516:3-7 , ECF No. 133-2, at 96.) Plaintiff’s counsel stated that he opposed the request.

After attempting to confer with plaintiff, as required under Rule 37(a)(1), defendants filed a motion to extend discovery and compel plaintiff to produce her electronic devices for inspection, arguing that they could not rely on plaintiff’s representation that she had produced all the ESI documenting her correspondence with Breimon because, at her March 2, 2016 deposition, she had made ambiguous statements about the manner and completeness of her production. According to defendants, plaintiff admitted at the March 2 deposition that “the McKay text messages were saved on her (Plaintiff’s) home computer,” although McKay produced them to defendants and plaintiff did not; plaintiff gave her attorneys “some” of the McKay text messages at one point, but she was unsure when or whether she gave them all of them; and plaintiff took no specific steps to preserve electronically stored information (“ESI”), although she did not intentionally delete anything other than “dirty” pictures Breimon had sent her. (Mot. ¶ 18, ECF No. 133; Mot., Ex. 3, Excerpts of Pl.’s Dep., 501:16-503:22 , 506:6-510:21, 512:4-516:9, ECF No. 133-2, at 84-96.) Defendants sought to perform

a forensic inspection of plaintiff's devices to search for unproduced ESI and attempt to recover any relevant ESI that may have been deleted.

As usual in discovery disputes the facts are critical. Under these facts Magistrate Judge Mason denied the motion to compel. He explained that *"the requested forensic inspection of plaintiff's electronic devices was not proportional to the needs of the case, especially considering plaintiff's privacy and confidentiality interests in her personal devices."*

On appeal of the Magistrate's order to District Judge Alonso he considered Rules 26(b)(1) on scope of relevance, 26(b)(2)(B) on inaccessible ESI, 26(b)(2)(C) on limiting discovery, and Rule 34 on production. Judge Alonso decided that the key basis of the magistrate's ruling was proportionality under Rule 26. Here is Judge Alonso's discussion on the Magistrate's ruling and the proportionality factors in Rule 26(b)(1):



Rule 26(b)(2)(C)(iii) incorporates by reference Rule 26(b)(1), which, as Judge Mason explained, requires discovery to be "proportional to the needs of the case." Judge Mason explained that defendants' request to perform a forensic inspection of plaintiff's electronic devices for ESI was not proportional to the needs of the case because plaintiff had turned over all the ESI defendants had requested, which was presumably all the ESI she possessed, and in any case "the burden and expense of inspecting plaintiff's devices and online accounts likely outweigh any benefit because copies of the documents and communications are sufficient to defend [against] plaintiff's claims in this discrimination case." (Apr. 27, 2016 Order, ECF No. 147, at 3.) Moreover, Judge Mason explained, inspection of plaintiff's electronic devices is not "proportional to the needs of this case" because any benefit the inspection might provide is "outweighed by plaintiff's privacy and confidentiality interests." (Id.)

It is important to understand that forensic inspection is an extraordinary remedy and not a routine right of discovery. It requires good cause to obtain such relief. It is surprising how many lawyers still do not know this. Here is Judge Alonso's good explanation of the law governing forensic inspections.

The discovery process is designed to be extrajudicial, and it relies on responding parties to search their own records and produce documents or other data. See *Powers v. Thomas M. Cooley Law Sch.*, No. 5:05-CV-117, 2006 U.S. Dist. LEXIS 67706 , [2006 BL 100203], 2006 WL 2711512 , at *5 (W.D. Mich. Sept. 21, 2006). The Advisory Committee Notes to Rule 34 recognize that courts must use caution in evaluating requests to inspect an opposing party's electronic devices or systems for ESI, in order [*5] to avoid unduly impinging on a party's privacy interests:

Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Fed. R. Civ. P. 34, Advisory Committee Notes—2006 Amendment (emphasis added). Numerous courts have also recognized this need to "guard against undue intrusiveness" and to be "cautious in requiring" the forensic inspection of electronic devices, in order to protect privacy interests. See *John B. v. Goetz*, 531 F.3d 448 , 459-60 (6th Cir. 2008) (citing cases and concluding that the "compelled forensic imaging orders here fail[ed] to account properly for . . . significant privacy and confidentiality concerns"). "Mere suspicion" or speculation that an opposing party may be withholding discoverable information is insufficient to support an "intrusive examination" of the opposing party's electronic devices or information systems. *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, No. 2:06-CV-899, 2007 U.S. Dist. LEXIS

43005 , [2007 BL 297417], 2007 WL 1723509 , at *2 (S.D. Ohio June 12, 2007). In particular, a court must be cautious “where the request is overly broad in nature and where the connection between the party’s claims and the [electronic device] is unproven.” *A.M. Castle & Co. v. Byrne*, 123 F. Supp. 3d 895 , 900-01 (S.D. Tex. 2015) (collecting cases); *see also Kickapoo Tribe of Indians of Kickapoo Reservation in Kan. v. Nemaha Brown Watershed Joint Dist. No. 7*, 294 F.R.D. 610 , 619 (D. Kan. 2013) (denying a request to inspect personally-owned devices of defendant’s employees in part because “the Court [had] significant concerns regarding the intrusiveness of the request and the privacy rights of the individuals to be affected”).

Judge Alonso then went on to discuss the case law where a forensic exam is sometimes still ordered:

... when the requesting party is able to demonstrate that “the responding party has failed in its obligation to search its records and produce the requested information,” *Midwest Feeders, Inc. v. Bank of Franklin*, No. 5:14CV78, 2016 U.S. Dist. LEXIS 93994 , [2016 BL 232120], 2016 WL 3945676 , at *2 (S.D. Miss. July 19, 2016), an inspection of the responding party’s electronic devices may be appropriate. *See, e.g., Kilpatrick v. Breg, Inc.*, No. 08-10052-CIV, 2009 U.S. Dist. LEXIS 52723 , [2009 BL 292853], 2009 WL 1764829 , at *3 (S.D. Fla. June 22, 2009); *Jacobson v. Starbucks Coffee Co.*, No. 05-1338, 2006 U.S. Dist. LEXIS 98174 , [2006 BL 113725], 2006 WL 3146349 , at *6-7 (D. Kan. Oct. 31, 2006). Further, courts may be somewhat less wary of requests to inspect electronic devices when there is a substantiated connection between the device the requesting party seeks to inspect and the claims in the case, or, as one court put it, where the “contents of the [device] go to the heart of the case.” *Hedenburg v. Aramark Am. Food Servs.*, No. C06-5267, 2007 U.S. Dist. LEXIS 3443 , [2007 BL 322260], 2007 WL 162716 , at *2 (W.D. Wash. Jan. 17, 2007); *see Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681 , 686 (S.D. Fla. 2012) (forensic search of responding party’s information systems might reveal maintenance records and work

orders that responding party appeared to have attempted to hide by shredding hard-copy records, and that might reveal [*6] critical facts concerning when the claimed damage to the responding party's property occurred); *Townsend v. Ohio Dep't of Transp.*, 2012-Ohio-2945 , ¶¶ 24-25 , 2012 WL 2467047 , at *7-8 (Ohio Ct. App. 10th Dist. 2012) (court permitted plaintiff to search defendant's email system for emails that two witnesses recalled exchanging but could not produce and that, if found, would prove notice to defendant of clogged drain that caused the flooding that resulted in plaintiff's injury); *cf. Kickapoo Tribe*, 294 F.R.D. at 618-19 (citing and distinguishing cases).

This law is important to follow at all times, but especially when seeking a forensic exam. There are many cases on this issue and the law itself is fairly uniform. Look for local cases in your jurisdiction before you decide whether you have good grounds to seek this extraordinary relief.

Judge Alonso explained that the Defendant employer in *Hespe v. City of Chicago* failed to provide the necessary evidence to show good cause for a forensic exam. Here is where we can all learn a lesson from the mistakes of the City of Chicago.

Defendants have not demonstrated that the contents of plaintiff's devices are likely to go to the heart of this case. This case is similar to *Hedenburg*, an employment discrimination case in which the defendant sought forensic imaging of the plaintiff's personal home computer, seeking correspondence plaintiff might have sent that might be inconsistent with her testimony in the case. The plaintiff objected to the discovery as a fishing expedition. The court recognized that it had permitted forensic imaging of computers in cases where the "contents of the computer go to the heart of the case," such as in trade secret cases, where "one party demonstrate[d] the likelihood that trade secrets were forwarded to or sent by [the computer]." *Hedenburg*, 2007 U.S. Dist. LEXIS 3443 , [2007 BL 322260], 2007 WL 162716 , at *2; *see also Byrne*, 123 F. Supp. 3d at 900-01 , 908-09 . But in *Hedenburg*, an employment discrimination case, "the central claims in the case [were] wholly

unrelated to the contents of plaintiff's computer." 2007 U.S. Dist. LEXIS 3443 , [2007 BL 322260], 2007 WL 162716 , at *2 ...

In this case, as in *Hedenburg*, defendants essentially seek a warrant to search plaintiff's devices for statements with which to impeach her.³ Their request to search plaintiff's devices is closer to a "blind" attempt to "find something useful [for their] impeachment of the plaintiff" than to a request to search devices that have been shown to contain information going to "the heart of the case." *See id.* True, plaintiff's complaint does specifically refer to text messaging in describing some of the harassment plaintiff suffered in 2012, so there is a limited sense in which text messaging is at the "heart" of this case—but there is no dispute that McKay produced to defendants several thousand text messages from that time period, and defendants have not provided any compelling reason to believe that this production is incomplete.

This is the key statement and main failure of defense counsel in this case: "*defendants have not provided any compelling reason to believe that this production is incomplete.*" The reasons they provided were dismissed by Judge Alonso as follows:

The reason defendants give for seeking a forensic search of plaintiff's devices is to find ESI to support their position that Breimon and plaintiff were in a consensual, romantic relationship (see Defs.' Objections, ECF No. 151-1, at 6), but plaintiff all but conceded that point in her brief in opposition to defendants' [*7] motion to compel before Judge Mason, in which she admitted testifying that she had been in a sexual relationship with Breimon, she believed she loved Breimon at one time, and she told Breimon she loved him in 2009. (Pl.'s Resp. Opp. Mot. Compel, ¶ 82, ECF No. 137.) Importantly, defendants do not request to search for any specifically identified text message or messages with particular content that they have shown to have existed at one point and that, if found, will conclusively resolve a contested issue in the case.

Again, the court points to a key failure of proof by defense counsel: *“defendants do not request to search for any specifically identified text message or messages with particular content that they have shown to have existed at one point and that, if found, will conclusively resolve a contested issue in the case.”* Admittedly, this is hard to prove without access to the original data, but apparently defense counsel made little effort to offer such proof. The judges clearly thought that the Defendant was just fishing and the exercise was disproportionate. In Judge Alonso’s words:

The search defendants want to perform does not go to the “heart” of this case because it does not seek evidence that will conclusively resolve critical factual issues, and even if defendants find evidence they do not already have, they have not demonstrated that the evidence is likely to be more probative than the admissions they do have.

The defense tried to add a spoliation sanction component to their argument by pointing to the Plaintiff’s poor preservation. Here is how the court dealt with that weak argument:

Defendants also argue that plaintiff had a duty to preserve any ESI bearing on her relationship with Breimon, and when asked what steps she took to preserve ESI, she answered that she never deleted anything other than nude pictures Breimon sent her, but took no other steps to preserve evidence. (Excerpts of Pl.’s Dep., at 501:16-503:22, ECF No. 133-2, at 84-86.) Again, the Court fails to see any evidence of misconduct or any reason to conclude that plaintiff is hiding any ESI. Plaintiff often seemed confused about how many text messages, voice mails and other electronically stored communications she had, when she had them, and when and to whom she produced them, but this does not strike the Court as surprising, considering there were thousands of electronic communications and this case has been going on for years. At worst, plaintiff may have failed to prevent some relevant ESI from being unintentionally deleted from her devices due to her unsophisticated grasp of how her iPhone and associated software applications (such as iTunes) store data. But defendants have not shown that this failure was anything but

accidental, nor have they shown the importance of any lost ESI, which, even if recovered, will apparently do little more than duplicate admissions plaintiff made during her deposition. (See Pl.'s Resp. Opp. Mot. Compel, ¶ 82, ECF No. 137.) Further, whether the forensic inspection might recover any lost or deleted ESI appears to be little more than speculative. ...

The evidence of fault is sparse at best, and, when this evidence is weighed against (1) plaintiff's interest in protecting her privacy rather than allowing unfettered access to her personal devices and (2) the generic and apparently inconclusive nature of the unspecified ESI for which defendants [*9] want to search, it is insufficient to justify a forensic inspection. Judge Mason did not clearly err in ruling that the inspection defendants seek is not proportional to the needs of the case.

SUMMARY: You have to show good cause to get a forensic exam of all information on a person's digital device, instead of their just producing the information that their own review determines is relevant. Good cause can come from intentional spoliation wherein the remedy is part of a sanction. This was shown in the next case, *Cohn v. Guaranteed Rate, Inc.*, N.D. Ill., No. 1:14-cv-9369, (N.D. Ill. Dec. 8, 2016). Good cause can also be established by evidence that the search already done was unreasonable and critical information was not produced. This is what the defense attempted to do in *Hespe v. City of Chicago*, No. 13 C 7998, 2016 BL 417422 (N.D. Ill. Dec. 15, 2016).

The defense failed to show that any ESI existed that, if found, "will conclusively resolve a contested issue in the case." Instead, they made it seem like they were just seeking redundant information, namely the fact that the sex between Plaintiff and Defendant was once consensual. The Plaintiff admitted that fact. It was uncontested. The request for such an invasion of privacy to review all contents on a computer was burdensome, and yet "the importance of the discovery in resolving the issues," a proportionality requirement under Rule 26(b)(1), was little or nothing. For this reason the two federal judges in Chicago denied the request for inspection as disproportionate under Rule 26(b)(1) and thus outside of the scope of discovery.

PRACTICE POINTER: The defense here made a serious strategic error. They would have done much better, and probably would have obtained useful information, if they had immediately moved to compel the Plaintiff, under the supervision of her attorney, to search the computer with the additional information. Plaintiff's counsel had a duty to supervise this review all along and it is apparent from the decision that counsel did not do so. Instead, the P. herself, who was clearly incompetent, did everything. The defense should have pointed this out, and cited to Rule 26(g) case law. They should have sought a re-do of the prior production, this time under the direct supervision of Plaintiff's counsel as the rules require, instead of a production of the entire computer. They got greedy and paid the price.

FIFTH – *Cohn v. Guaranteed Rate, Inc.*

This case is the counter point to *Hespe v. City of Chicago*, and is slightly more interesting, because the Defendant employer was allowed full access to the employee's personal Gmail account. *Cohn v. Guaranteed Rate, Inc.*, N.D. Ill., No. 1:14-cv-9369, (N.D. Ill. Dec. 8, 2016). This type of forensic inspection was allowed in *Cohn* as part of a sanction for spoliation, namely the employee's deletion of relevant emails before she filed suit. The fifth most interesting e-discovery opinion of the year was written by **District Judge John Robert Blakey of the Northern District of Illinois**. Yes, Chicago again.



In *Cohn* the Defendant employer's motion for sanctions against Plaintiff employee was granted in part after the court found that the employee, a former Vice President, intentionally destroyed ESI. As a sanction the Defendant was allowed full access to the employee's personal Gmail account.

The opinion is by Judge John Blakey contains a good analysis of Rule 37, especially 37(e) and general spoliation law. Judge Blakey's section

on the early pre-litigation trigger of a Plaintiff's duty to preserve is especially helpful to defense lawyers:

Federal courts across the country have recognized that a "plaintiff's duty [to preserve] is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010), *abrogated on other grounds by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012); *see also Innis Arden Golf Club v. Pitney Bowes, Inc.*, 257 F.R.D. 334, 340 (D. Conn. 2009) (duty to preserve arose when plaintiff retained counsel in connection with potential legal action); *Cyntegra, Inc. v. Idexx Labs., Inc.*, No. 06-cv-4170, 2007 U.S. Dist. LEXIS 97417, 2007 WL 5193736, at *3 (C.D. Cal. Sept. 21, 2007) ("Unlike defendants, plaintiffs may be imputed notice of the duty to preserve potentially relevant evidence prior to the filing of the complaint. Plaintiffs are in control of when the litigation is to be commenced and must necessarily anticipate litigation before the complaint is filed.") (internal citation omitted).

In this case the Defendant employer requested production of documents, including emails from Plaintiff's personal "Gmail" account and LinkedIn account, that pertained to Plaintiff's communications with any of Defendant's competitors. After some haggling the Plaintiff admitted that she had deleted all such emails, but had done so well *before* she filed suit. She never produced any such emails. Still, the Defendant employer was able to obtain some copies of these emails by third party discovery requests of its competitors.

The Defendant's efforts at third party discovery is an important point. It is a necessary step, but also somewhat dangerous. You need to conduct this kind of remedial third party discovery to buttress your case against the spoliator. Still, you should expect that these actions will, if successful, be used against you, as seen in this case. Nevertheless, you are required to perform such third party discovery because Rule 37(e) requires proof that the data lost – spoliated – "cannot be restored or replaced through additional discovery."

Here in Judge Blakey's words is how these facts played out in *Cohn* to trigger the Plaintiff's pre-litigation preservation duty and lay the grounds for this spoliation sanction.



The Court finds that Cohn had a duty to preserve her communications with GRI's competitors by at least November 30, 2013. By that point Cohn was making explicit references to legal action against GRI and its officers, and she had retained the attorney who represents her in this lawsuit. [64], Ex. 1. She was also making overtures to certain of GRI's competitors by that time. *See supra* at 3-4. In light of those facts and her clear obligations under the APA and BMA, Cohn and her counsel should have been able to "foresee" by November of 2013 that her communications with GRI's competitors "would be material (and thus relevant) to a potential legal action." *Jones*, 2010 U.S. Dist. LEXIS 51312, 2010 WL 2106640, at *6.

B. Breach

As discussed above, Cohn admits that she "deleted the subject emails with third-parties from her personal Gmail account in November of 2013, April-June of 2014, and July of 2014." [68] at 2. These deletions are an obvious breach of her duty to preserve those same materials.

The legal argument that ensued was whether the Defendant moving party would have to prove prejudice from the spoliation, or not. Remember Rule 37(e) reads as follows:

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 Defendant movant here was seeking sanctions under subsection two, and so did not have to provide evidence of prejudice. Such evidence is only required in subsection one where there is no proof of *intent to deprive another party of the information's use in the litigation*. In *Cohn* the intent was proven and so there was no need to prove prejudice. With intent such prejudice is presumed and the only remaining issues are remedies under subsection two: (A), (B) or (C).

Here is Judge Blakey's ruling on this issue, including an explanation of the facts upon which he found intent:

C. Harm/Bad Faith

Cohn insists that GRI cannot demonstrate the requisite harm here, as "GRI is in possession of the emails at issue" by virtue of its third party discovery practice. [68] at 12.

GRI conversely argues that no demonstration of harm is required, as "harm or prejudice is presumed where, as here, the moving party has shown bad faith." [69] at 13 (internal citation omitted); *see also Fuery v. City of Chicago*, No. 07-cv-5428, 2016 U.S. Dist. LEXIS 135086, 2016 WL 5719442, at *11 (N.D. Ill. Sept. 29, 2016) (The "Court may still impose sanctions even where there is no prejudice but the actions of the party exhibit such flagrant contempt for the court and its processes that to allow the offending party to continue to invoke the judicial mechanism for its own benefit would raise concerns about the

integrity and credibility of the civil justice system that transcend the interests of the parties immediately before the court.”) (internal quotation omitted).¹

GRI’s argument best reflects contemporary Seventh Circuit precedent. Indeed, the “prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.” *Crabtree v. Nat’l Steel Corp.*, 261 F.3d 715, 721 (7th Cir. 2001). A document is destroyed in bad faith if it was done “for the purpose of hiding adverse information.” *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) (internal citation omitted); see also *Norman-Nunnery v. Madison Area Tech. College*, 625 F.3d 422, 428 (7th Cir. 2010) (“The crucial element in a spoliation claim is not the fact that the documents were destroyed but that they were destroyed for the purpose of hiding adverse information.”).

In this case, Cohn moved her conversations with GRI’s competitors to her Gmail account, and then asked those same competitors to “hide the info” she sent because “it was the max that [her] atty will allow—actually more. [She] simply cannot put more in writing.” See *supra* at 3. She acknowledged that her conversations with GRI’s competitors over Gmail were undertaken “against all advise [sic].” *Id.* She sent data to GRI’s competitors over Gmail that she herself labelled “**CONFIDENTIAL.**” *Id.* at 4. Worse yet, she instructed a subordinate at GRI to “delete our grate [Guaranteed Rate] emails to permanent tras[h].” *Id.*

The explicit language of these communications belies any suggestion that Cohn’s deletion of the subject emails was simply part of her regular business practice. The Court finds that Cohn deleted the subject emails to, in her own words, “hide” adverse information. Deleting material “for the purpose of hiding adverse information” compels a finding of bad faith. *Norman-Nunnery*, 625 F.3d at 428. This bad faith determination in turn gives “rise to a strong inference that production of the [subject emails]

would have been unfavorable” to Cohn. *Crabtree*, 261 F.3d at 721.

The only part of the *Cohn* opinion I do not like is the *remedy*. It was pretty weak, just accessing Plaintiff’s personal Gmail account. The apparent reason for this remedy at this point is that the parties, or at least Judge Blakey, did not know whether or not the emails had actually been deleted as Plaintiff claimed. They wanted to provide Defendant’s experts an opportunity to examine the account and contents to verify that claim. Maybe there was relevant email remaining that she never found to delete.

Based on experience it is quite possible that they will find powerful evidence in this large collection of mails to support the Defendant’s case. If so, they may obtain a summary judgment and not need a sanction remedy to prevail. Still, since according to Plaintiff’s vague testimony there may well be several hundred thousand emails in Plaintiff’s Gmail account, it will take considerable attorney skill, time and expense to find these emails.

Further, if the inspection shows that emails were spoliated, at least most of them, as she alleged, then the Defendant’s lawyers stated that they wanted to determine whether the deleted email could be retrieved. They should have known better. All they needed to do was contact Google where they would learn that they are not recoverable, especially at this late date, over two years after the alleged deletion. *They are now ghosts, never to be found, in near infinite array of cloud-hosted anonymity.*

Judge Blakey’s Order is, in our reading of it, still open as to the award of additional remedies for the defense, including fee awards, inferences and testimony allowance. We predict there will be another ruling after this one after they inspect Plaintiff’s Gmail account.

Here is how Judge Blakey explained the remedy granted to date in this case:

GRI’s request for an adverse inference instruction is denied without prejudice. Hopefully, the production of Cohn’s full Gmail

account will obviate the need for such instructions.² If, at the time pretrial submissions come due, GRI nevertheless remains convinced that such instructions are appropriate, it is invited to renew its motion with specific proposals regarding the same.

Although it is a close call, I personally think that Judge Blakey erred on this final ruling. Since the judge held that *intent* had been proven under subsection two, then one of the three remedies listed under subsection two should have been granted. The judge did not do that, instead he invented a lesser remedy (“no greater than necessary”) of the kind that is only talked about in subsection one.

I recognize that the rule in subsection two refers to remedies which the court “may” impose, not *must*, but I think the court *should have exercised its discretion* with these facts to impose remedy under (2)(B): “*instruct the jury that it may or must presume the information was unfavorable to the party.*” The court may well reverse its position after it hears all of the facts, especially the fact that the deleted Gmail cannot be recovered. If it does, it should limit its remedies to one of the three listed in subsection two. This rule interpretation issue is one reason we find this case so interesting.

Bottom Line: The takeaway is how preservation is now both a *sword* and a shield. It is not only a problem faced by corporate clients defending their preservation efforts, but it is also sometimes an opportunity to attack where the plaintiff has failed to preserve. *Cohn* is important precedent to provide an example of a Plaintiff’s early, pre-litigation duty to preserve. It also shows the importance and dangers of third party discovery in sanctions cases.

Practice Pointer: Be sure to confront Plaintiff’s counsel with questions on his or her client’s pre-litigation preservation at your Rule 26(f) conference or other early opportunity. Be ready with your own response to the same questions (boomerang effect).

FOURTH – *In re Bard IVC Filters Prods. Liab. Litig.*

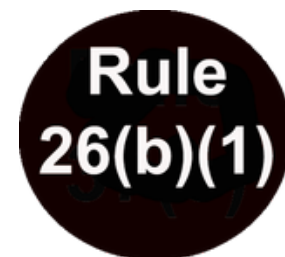
Here is the e-Discovery Team’s fourth most interesting e-discovery opinion of 2016. *In re Bard IVC Filters Prods. Liab. Litig.*, D. Ariz., No. MDL 15-02641-PHX DGC, 2016 U.S. Dist. LEXIS 126448 (D. Ariz. Sept. 16, 2016). The opinion, which discusses the new rules, was written by the one judge who should really know their intent, **District Judge David G. Campbell**. Judge Campbell was the chair of the Rules Committee when the 2015 amendments were passed.



Judge David G. Campbell

In Re Bard is a very helpful case on limiting discovery and the intent of the new rules, especially Rule 26(b)(1) on scope of discovery and proportionality. *In re Bard IVC Filters Prods. Liab. Litig.*, D. Ariz., No. MDL 15-02641-PHX DGC, 2016 U.S. Dist. LEXIS 126448 (D. Ariz. Sept. 16, 2016). The primary source of our interest in this case, and why we rank it thirteenth, is the author himself. This opinion by Judge Campbell, former Chair of the Rule Committee, is an impeccable authority that can be cited to all courts.

You may want to use some of the language in this decision by Judge Campbell in your briefs going forward. Here is the main language explaining the new rule and commenting on how many judges are not yet following it yet and still operating under the old rules with more expansive discovery:



I. New Legal Standards Governing the Scope of Discovery.

Rule 26(b)(1) of the Federal Rules of Civil Procedure was amended on December 1, 2015. The new rule defines the scope of permissible discovery as follows:

Parties may obtain discovery regarding any non-privileged 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 party's access to relevant information, the party's resources, the importance of the discovery in resolving the issues, and whether the burden and expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1).

A. Relevancy.

To be discoverable under the first part of this test, information must be "relevant to any party's claim or defense." *Id.* This language has not changed from the previous version of Rule 26(b)(1).

Before the 2015 amendments, Rule 26(b)(1) also provided that inadmissible evidence was discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." Some courts – and many lawyers – used this language to define the scope of discovery. *See, e.g., Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) ("Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence.'") (quoting *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992)).

This phrase was eliminated by the 2015 amendments and replaced with a more direct declaration of the phrase's original intent: "Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). The Advisory Committee on the Federal Rules of Civil Procedure provided this explanation for the deletion:

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use

of the “reasonably calculated” phrase to define the scope of discovery “might swallow any other limitation on the scope of discovery.” The 2000 amendments sought to prevent such misuse by adding the word “relevant” at the beginning of the sentence, making clear that “relevant” means within the scope of discovery as defined in this subdivision” The “reasonably calculated” phrase has continued to create problems, however, and is removed by these amendments.

Rule 26, Advis. Comm. Notes for 2015 Amends.

The 2015 amendments thus eliminated the “reasonably calculated” phrase as a definition for the scope of permissible discovery. Despite this clear change, many courts continue to use the phrase. Old habits die hard.¹ In this circuit, courts cite two Ninth Circuit cases – *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005), and *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992) – for the proposition that information is relevant for purposes of Rule 26(b)(1) if it is “reasonably calculated to lead to the discovery of admissible evidence.”² But these cases, and others like them, simply applied the earlier version of Rule 26(b)(1).

FN 1 – Last month alone, seven cases relied on the “reasonably calculated” language to define the scope of permissible discovery. See *Fastvdo LLC v. AT&T Mobility LLC*, No. 16-CV-385-H (WVG), 2016 WL 4542747, at *2 (S.D. Cal. Aug. 31, 2016); *Sierra Club v. BNSF Ry. Co.*, No. C13-0967-JCC, 2016 WL 4528452, at *1 (W.D. Wash. Aug. 30, 2016); *Shell v. Ohio Family Rights*, No. 1:15-CV-1757, 2016 WL 4523830, at *2 (N.D. Ohio Aug. 29, 2016); *Arrow Enter. Computing Sols., Inc. v. BlueAlly, LLC*, No. 5:15-CV-00037-FL, 2016 WL 4287929, at *1 (E.D.N.C. Aug. 15, 2016); *Ecomission Sols., LLC v. CTS Holdings, Inc.*, No. MISC. 16-1793 (EGS), 2016 WL 4506974, at *1 (D.D.C. Aug. 26, 2016); *Clouser v. Golden Gate Nat’l Senior*

Care, LLC, No. CV 3:15-33, 2016 WL 4223755, at *4 (W.D. Pa. Aug. 9, 2016); *Scott Hutchinson Enters., Inc. v. Cranberry Pipeline Corp.*, No. 3:15-CV-13415, 2016 WL 4203555, at *2 (S.D.W. Va. Aug. 9, 2016). Several other cases cited the language as though it were still part of Rule 26(b)(1). See *Fairley v. Wal-Mart Stores, Inc.*, No. CV 15-462, 2016 WL 4418799, at *2 (E.D. La. Aug. 19, 2016); *Kuczak v. City of Trotwood, Ohio*, No. 3:13-CV-101, 2016 WL 4500715, at *1 (S.D. Ohio Aug. 26, 2016); *Kubik v. Cent. Michigan Univ. Bd. of Trustees*, No. 15-CV-12055, 2016 WL 4425174, at *2 (E.D. Mich. Aug. 22, 2016).

FN 2 – See *Fastvdo*, 2016 WL 4542747, at *2 (quoting *Survivor Media*, 406 F.3d at 635); *Sierra Club*, 2016 WL 4528452, at *1 (quoting *Brown Bag*, 960 F.2d at 1470).

Amended Rule 26(b)(1) was adopted pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, et. seq. That statute provides that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Id.*, § 2072(b). Thus, just as a statute could effectively overrule cases applying a former legal standard, the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1). The test going forward is whether evidence is “relevant to any party’s claim or defense,” not whether it is “reasonably calculated to lead to admissible evidence.”

B. Proportionality.

The 2015 amendments also added proportionality as a requirement for permissible discovery. Relevancy alone is no longer sufficient – discovery must also be proportional to the needs of the case. The Advisory Committee Note makes clear, however, that the amendment does not place the burden of proving proportionality on the party seeking discovery. The amendment “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 addressing all proportionality considerations.” Rule 26, Advis. Comm. Notes for 2015 Amends. Rather, “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.” Id. (emphasis added)

The inquiry to be conducted under the proportionality requirement, therefore, requires input from both sides. As the Advisory Committee explained:

A party claiming undue burden or expense ordinarily has far better information – perhaps the only information – with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court’s responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

Id. The Court therefore will look to evidence and arguments from both sides in deciding whether discovery from the Bard foreign entities is permitted under Rule 26.

Our friend, retired Judge Ron Hedges, publicly commented on this case and said the “*collective responsibility*” language is vague. “*If there is no allocation of burden for showing discovery is proportional, and the committee note refers to a ‘collective responsibility,’ then maybe the burden should fall on the judge, as opposed to both parties.*” You probably do not want to make that comment to the judge hearing your case, but you should argue that the burden is not upon you (assuming you are opposing the discovery).



It is interesting to see how many attorneys and judges alike just do not get it. As Judge Campbell said – *Old habits die hard*. Also remember that the other side may be citing to cases in their discovery briefs that are no longer valid since the change of the rules. Judge Campbell makes a good point on that: “*the 2015 amendment effectively abrogated cases applying a prior version of Rule 26(b)(1).*” You may need to make this important point in all discovery briefs going forward. Look out for the old phrases in cases Plaintiff’s counsel cites, especially “*reasonably calculated.*”

It is interesting to note how harshly some judges will react when an attorney before them does not cite to the new rules. *Fulton v. Livingston Fin., LLC*, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016). In *Fulton* an attorney at a prominent firm in Seattle cited the old rule and related case law in a memorandum filed with the court pertaining to relevance. The judge called the mistake “inexcusable” and imposed harsh sanctions on the attorney, including requiring him to personally pay opposing counsel fees and costs and to provide a copy of the sanctions order and “offending briefing to senior members of Mr. Ryan’s law firm.” *Ouch*.

Back to *In Re Bard*, Judge Campbell went on to deny the discovery request under Rule 26(b)(1) primarily because the requesting party had not shown how the information sought would be of any importance to the case. Here is the operative language from pg. 6 of the opinion:



Courts generally recognize that relevancy for purposes of discovery is broader than relevancy for purposes of trial. Even still, the Court concludes that the discovery sought by Plaintiffs is only marginally relevant. With no foreign-based Plaintiffs, and mere conjecture that communications between foreign entities and foreign regulators might be inconsistent with Defendants’ communications with American regulators, the discovery appears to be only potentially relevant – more hope than likelihood.

I especially like that phrase – “*more hope than likelihood.*” We see so much of that from opposing counsel.

Judge Campbell went on to analyze the benefit/burden factors in 26(b)(1), some “pro” the discovery sought, and concluded the opinion with the following:

The Court concludes that the burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery – a mere possibility of finding a foreign communications inconsistent with United States communication.

Because the proposed discovery is not proportional to the needs of the case considering the factors set forth in Rule 26(b)(1), the Court concludes that Defendants need not search the ESI of foreign Bard entities for communications with foreign regulators.

Again, note his use of the phrase “*a mere possibility of finding*” relevant evidence. That kind of language is appropriate in many discovery disputes we now see.

This fourth most interesting case of 2016 is one that should be in all court memorandums. It provides a persuasive, authoritative discussion of the new rules, especially scope of relevance under 26(b)(1). *In re Bard IVC Filters Prods. Liab. Litig.*, D. Ariz., No. MDL 15-02641-PHX DGC, 2016 U.S. Dist. LEXIS 126448 (D. Ariz. Sept. 16, 2016).

THIRD – *In re Takata Airbag*

Here is the e-Discovery Team’s third most interesting e-discovery opinion of 2016. *In re Takata Airbag Prods. Liab. Litig.*, No. 15-02599-CIV-Moreno, MDL No. 5-2599 (S.D. Fla. Mar. 1, 2016) written by **Chief District Court Judge Federico A. Moreno of the Southern District of Florida in Miami.**



The number three ranked case is primarily interesting because it adds the voice of the U.S. Supreme Court concerning the new scope of relevance specified in Rule 26(b)(1) and other revisions contained in the 2015 Amendments. *In re Takata Airbag Prods. Liab. Litig.*, No. 15-02599-CIV-Moreno, MDL No. 5-2599 (S.D. Fla. Mar. 1, 2016).

The *Takata Airbag case* is one of the largest multi-district class actions in the country. Chief Judge Federico Moreno in Miami was overseeing the *Takata Airbag* multi-district litigation when he authored this e-discovery order pertaining to the new relevancy rule. Fortunately, Judge Moreno had previously made time to read Chief Justice Roberts *2015 Year-End Report on the Federal Judiciary*. He cited to and quoted **Chief Justice John Roberts** on discovery in his *Takata opinion*.

On March 1, 2016 Judge Moreno considered a recommendation of a Special Master to accept the defendants' proposal to withhold or redact irrelevant parent documents from responsive families. This is an issue that can arise in any case involving the production of emails. It is often known informally in the trade as the *Orphan Child* issue. It arises when an email attachment is relevant and so must be produced, but the email transmitting the attachment, called the "parent," is not relevant. In other words, the *parent* is irrelevant on its face, but the *child*

attachment is relevant. Typically such parent transmittal emails are produced to help place the relevant attachments (children) into context.

The defendants in *Takata* proposed to redact information on irrelevant parent emails pertaining to seven categories of irrelevance. This request to withhold or redact was made to protect irrelevant trade secrets from disclosure, while at the same time avoiding *orphan child* production; in other words, avoiding production of attachments without also producing and identifying the transmittal emails.

The Plaintiffs had objected to, in Judge Moreno's words:

... redacting information pertaining to seven proposed categories and argue the [special master's] report is based on an inaccurate premise that Plaintiffs consented to irrelevance redactions in responsive documents, is inconsistent with the *Federal Rules of Civil Procedure* in allowing irrelevance redactions that will potentially allow redaction of highly relevant information from responsive documents, will impair Plaintiffs' discovery efforts; and will lead to unnecessary litigation over the redactions.

Judge Moreno reviewed the Special Master's recommendation *de novo* and agreed in part with the plaintiffs that the redactions allowed by the Master were too broad. Judge Moreno allowed redaction of the parent emails, but limited the categories of information that could be redacted. Judge Moreno reached this result by interpreting the language of amended Rule 26(b)(1).

Judge Moreno quoted Chief Justice John Roberts' comments in the *2015 Year-End Report* that the newly amended Fed.R.Civ.Pro. 26 "**crystalizes the concept of reasonable limits in discovery through increased reliance on the common-sense concept of proportionality.**" *2015 Year-*



End Report on the Federal Judiciary. Here are additional excerpts of the *Supreme Court's 2015 Year-End Report*:

The amendments may not look like a big deal at first glance, but they are. That is one reason I have chosen to highlight them in this report. For example, Rule 1 of the Federal Rules of Civil Procedure has been expanded by a mere eight words, but those are words that judges and practitioners must take to heart. Rule 1 directs that the Federal Rules “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.” The underscored words make express the obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation—an obligation given effect in the amendments that follow. The new passage highlights the point that lawyers—though representing adverse parties—have an affirmative duty to work together, and with the court, to achieve prompt and efficient resolutions of disputes.

Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality:



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.”

The amended rule states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case. Specifically, the pretrial process must provide parties with efficient access to what is needed to prove a

claim or defense, but eliminate unnecessary or wasteful discovery. The key here is careful and realistic assessment of actual need. That assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.

The amended rules accordingly emphasize the crucial role of federal judges in engaging in early and effective case management. The prior rules—specifically Rule 16—already required that the judge meet with the lawyers after the complaint is filed, confer about the needs of the case, and develop a case management plan. The amended rules have shortened the deadline for that meeting and express a preference for a face-to-face encounter to enhance communication between the judge and lawyers. The amendments also identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge before filing formal motions in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.

Recognizing the evolving role of information technology in virtually every detail of life, the amended rules specifically address the issue of “electronically stored information,” which has given birth to a new acronym—“ESI.” Rules 16 and 26(f) now require the parties to reach agreement on the preservation and discovery of ESI in their case management plan and discovery conferences.

Amendments to Rule 37(e) effect a further refinement by specifying the consequences if a party fails to observe the generally recognized obligation to preserve ESI in the face of foreseeable litigation. If the failure to take reasonable precautions results in a loss of discoverable ESI, the courts must first focus on whether the information can be restored or replaced through alternative discovery efforts. If not, the courts may order additional



measures “no greater than necessary” to cure the resulting prejudice. And if the loss of ESI is the result of one party’s intent to deprive the other of the information’s use in litigation, the court may impose prescribed sanctions, ranging from an adverse jury instruction to dismissal of the action or entry of a default judgment. ...

The 2015 civil rules amendments are a major stride toward a better federal court system. But they will achieve the goal of Rule 1—“the just, speedy, and inexpensive determination of every action and proceeding”— only if the entire legal community, including the bench, bar, and legal academy, step up to the challenge of making real change. ...

Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation. Faced with crushing dockets, judges can be tempted to postpone engagement in pretrial activities. Experience has shown, however, that judges who are knowledgeable, actively engaged, and accessible early in the process are far more effective in resolving cases fairly and efficiently, because they can identify the critical issues, determine the appropriate breadth of discovery, and curtail dilatory tactics, gamesmanship, and procedural posturing.



As for the lawyers, most will readily agree—in the abstract—that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship. I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests or evading legitimate requests through dilatory tactics. The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-

effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results.

Judge Moreno's opinion also quoted Chief Justice Robert's comment that "*a party is not entitled to receive every piece of relevant information,*" and concluded that "*it is only logical*" that "*a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld.*" Here is the full quote from Judge Moreno, one that you are likely to see in memorandums, at least in part:

The recently amended Rule 26(b)(1) of the Federal Rules of Civil Procedure crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality." Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* 6 (2015). Specifically, Rule 26(b)(1) states:

Parties may obtain discovery regarding any nonprivileged matter that is relevant 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.

Fed. R. Civ. P. 26(b)(1). As the Chief Justice's comments highlight, a party is not entitled to receive every piece of relevant information. It is only logical, then, that a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld.

Judge Moreno disagreed with all of the categories the Special Master allowed to be redacted because he found they could contain "*highly relevant*" information. Still, Judge Moreno agreed with the defendants'

overall point about the confidentiality and sensitivity of some of the irrelevant information. To balance the parties' "*desire to protect their competitively sensitive information*" against "*the importance of the issues at stake in this action and the importance of the discovery in resolving the issues at hand,*" Judge Moreno accepted seven categories of information that could be redacted, but he also added a caveat that the defendants would not be permitted to redact any information in those seven categories that related to airbags.

The Court modifies the Report's recommendation as to irrelevance redactions, such that a producing party may redact only information pertaining to the above-mentioned seven categories, so long as that information does not concern airbags.

Judge Moreno also held "*it would make little difference if the producing party provides a fully redacted document or does not provide the document at all.*" Therefore, the court accepted the Special Master's recommendation and permitted the parties to withhold parent documents, with the requirement that the defendants produce a list or slip sheet for the removed documents and share the context of any withheld parent document.

The reliance in part of Judge Moreno's Order on the [2015 Year-End Report on the Federal Judiciary](#) by Chief Justice Roberts makes this the third most interesting opinion of the year. *In re Takata Airbag Prods. Liab. Litig.*, No. 15-02599-CIV-Moreno, MDL No. 5-2599 (S.D. Fla. Mar. 1, 2016). Both the [Opinion](#) and [Report](#) should be considered and cited henceforth. What the Supreme Court says on discovery, especially e-discovery, is always of great interest. The same goes for Judge Moreno.

SECOND – *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*

Here is the e-Discovery Team’s second most interesting e-discovery opinion of 2016: *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, No. 2685-11, 8393-12, 2016 WL 4204067 (T.C. July 13, 2016). It was written by **Ronald L. Buch, Judge of the United States Tax Court**. The *Dynamo Holdings* case is of great interest to the e-Discovery Team because it is all about our favorite topic, the thing we do best, *Predictive Coding*. *Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue*, No. 2685-11, 8393-12, 2016 WL 4204067 (T.C. July 13, 2016). Judge Ronald Buch’s opinion contains an excellent discussion of the law and application of predictive coding.



Recall that this is the second opinion by Judge Buch on predictive coding in this case. In 2014 the Court approved the use of predictive coding. It was one of the first courts to do so after Judge Peck’s *Da Silva Moore. Dynamo Holdings Limited P’ship v. Commissioner*, 143 T.C. 183 (2014). In *Dynamo One*, Judge Buch first stated his views on predictive coding:

Predictive coding is an expedited and efficient form of computer-assisted review that allows parties in litigation to avoid the time and costs associated with the traditional, manual review of large volumes of documents.

Id. at 190. In *Dynamo One* Judge Buch granted the Commissioner’s motion and compelled the plaintiffs to produce the backup tapes, but also granted the plaintiffs’ request for permission to use predictive coding. *Id.* at 194. In *Dynamo Two* Judge Buch considered objections to the plaintiff’s predictive coding work and rejected the

Commissioner's motion for the plaintiff to redo the document review using keyword search. *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, No. 2685-11, 8393-12, 2016 WL 4204067 (T.C. July 13, 2016).

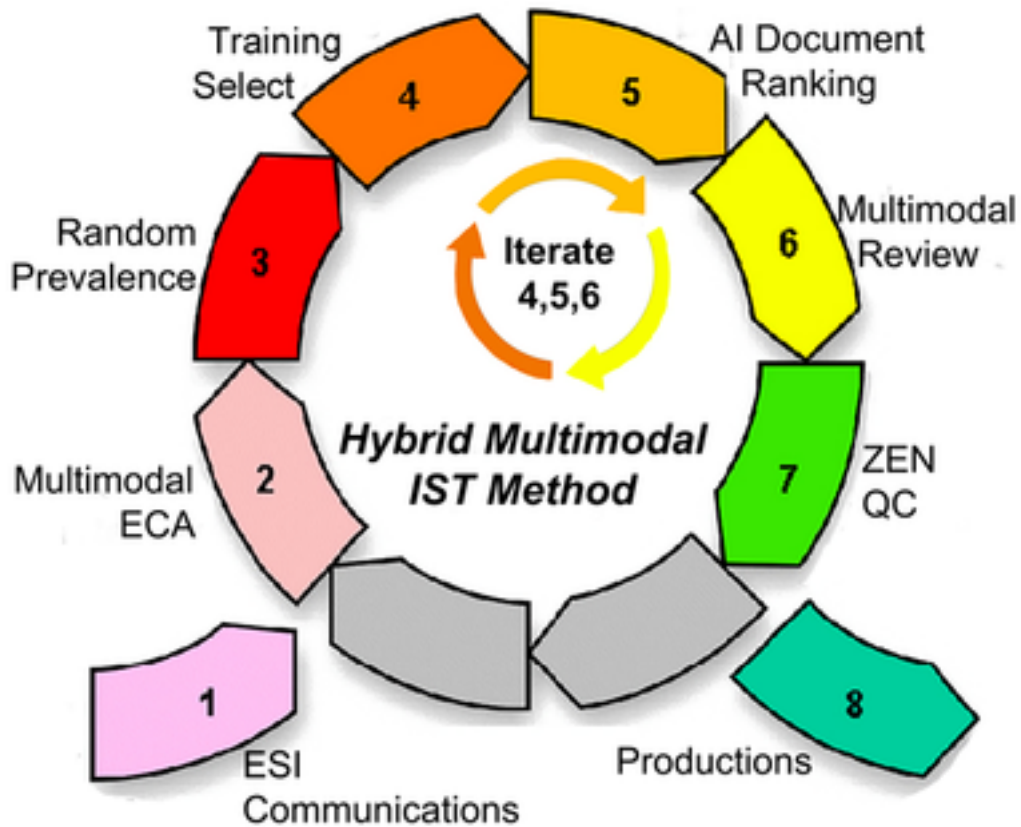
With this background *Dynamo Holdings Two* had a good chance at the top ranked case of 2016 but for two things. One, the top of the opinion contains this statement: *Pursuant to Tax Court Rule 50(f), orders shall not be treated as precedent, except as otherwise provided.* Not the kind of statement you want to see on a great opinion like this, but there it is.

The second reason *Dynamo Two* has to settle for number two is the fact that the predictive coding methodology used by the parties in *Dynamo* was totally bonkers. This is not the judge's fault, of course. Indeed, the author of the second most interesting e-Discovery opinion of 2016 did a good job of explaining the crazy, random based predictive coding protocol the attorneys in this case came up with. *Also* see Judge Buch's *Order Concerning ESI Discovery* (Dec. 11, 2015) that sets forth more detail of their ill-informed, compromise protocol.

The e-Discovery Team's interest in *Dynamo Holdings* is *in spite of* our misgivings concerning the way predictive coding was used in this case back in 2014. We cannot get past the pathetic random based methods for training document selection, not to mention the old-fashioned version 1.0 methods they used. Suffice it to say that predictive coding can be done far, far better than it was here, and that the Team, like the Defendant in *Dynamo Holdings*, has serious misgivings as to the predictive coding based document review done by the Plaintiffs. So too do many others. See: Tredennick & Gricks, *Discussion About Dynamo Holdings: Is 43% Recall Enough?*.

Our objection is not to the predictive coding software, or the idea of predictive coding, it is an objection as to the specific method of use. The *Dynamo Holdings* method had very little in common with today's state of the art methodology. See *PREDICTIVE CODING 4.0*. (method shown in diagram below.) Still, putting this objection aside, it is the second most interesting e-discovery opinion of 2016.

Predictive Coding 4.0 Document Review



Ralph Losey Copyright 2016

The Plaintiffs in this case, called in Tax Court lingo, the *Petitioners*, did the document production using a predictive coding method that the Defendant, the Commissioner of the Internal Revenue Service, obviously had a hand in developing in a semi-cooperative fashion. (Reminds me of the explanation of the *Camel*, a *Horse* designed by a committee.) The attorneys for both sides were obviously responsible for the mess of a compromise method they came up with. If they had any actual predictive coding experts to advise them, and I assume they did, it is obvious that their advice was not followed. This kind of thing happens all too often, especially when all experts are not keeping up with the latest research. See eg: *Predictive Coding 3.0* article, [part](#)

one and part two (part one describes the history and part two describes the method. Superseded by Predictive Coding 4.0 article, but still good background); *Latest Grossman and Cormack Study Proves Folly of Using Random Search For Machine Training – Part One, Part Two, Part Three, and Part Four.*

When the *Petitioners* completed the document review with predictive coding, the Defendant basically objected to the work and said it was bad, unreasonably inadequate, and the result was “*incomplete.*” They argued that the Petitioner’s attorneys should keep on looking for relevant documents, but this time use keyword search, not predictive coding (as if they were mutually exclusive, which they are not). We agree with the defense that the Petitioner’s work was bad, due to poor choice of method. It probably was an *incomplete response*, as the Commissioner defendant put it. But we also agree with Judge Buch’s refusal to order the Petitioner to redo or supplement the project. The Commissioner’s attorney helped create this error, so we think some estoppel applies here. But the main reason we agree with Judge Buch’s denial of any relief is the Commissioner’s failure to provide proof of the inadequacy of the review, nor an alternative method that would be better.

Here is how Judge Ronald Buch, obviously a very intelligent, well-informed judge, described the dispute resolved by this opinion:



The quality of that response (by Petitioner) is now before us. Using a process described in more detail below, petitioners responded to the discovery requests by using predictive coding. The Commissioner, believing the response to be incomplete, served petitioners with a new discovery request asking for all documents containing any of a series of search terms. (Those same search terms had been used in a Boolean search during the predictive coding process to identify how many documents in the electronic records had each term.) Petitioners objected to this new discovery request as duplicative of the previous discovery responses made through the use of predictive

coding. On June 17, 2016, the Commissioner filed a motion under Tax Court Rules 72(b)(2)¹ to compel the production of documents responsive to the Boolean search that were not produced through the use of predictive coding. The petitioners object.

Now we get into the excellent language used by Judge Buch to describe the new technology, language that we fully endorse, but with a caveat that methods differ and some, as we see in *Dynamo Holdings*, are downright defective.

When responding to a document request, technology has rendered the traditional approach to document review impracticable. The traditional method is labor intensive, with people reviewing documents to discern what is (or is not) responsive, with the responsive documents then reviewed for privilege, and with the responsive and non-privileged documents being produced. When reviewing documents in the dozens, hundreds, or low thousands, this worked fine. But with the advent of electronic recordkeeping, documents no longer number in the mere thousands, and various electronic search methods have developed.

When electronic records are involved, perhaps the most common technique that is employed is to begin with keyword searches or Boolean searches to a defined universe of documents. Then, the responding party typically reviews the results of those searches to identify what, in fact, is responsive to the request. Implicit in this approach is the fact that some of the documents that are responsive to the word or Boolean search are responsive, while others are not.

An emerging approach, and the approach authorized in this case in our Opinion at 143 T.C. 183, is to use predictive coding to identify those documents that are responsive. A few key points of that Opinion are worth highlighting.

First, the Court authorized the responding party (petitioners) to use predictive coding, but the Court did not, in either its Opinion

or its subsequent Order of September 17, 2014, mandate how the parties proceed from that point. ...

Second, the Court held open the issue of whether the resulting document production would be sufficient, expressly stating "If, after reviewing the results, respondent believes that the response to the discovery request is incomplete, he may file a motion to compel at that time." *hl.* at 189, 194. To state the obvious, (1) it is the obligation of the responding party to respond to the discovery, and (2) if the requesting party can articulate a meaningful shortcoming in that response, then the requesting party can seek relief. We turn now to those two points.

The opinion then goes into the tedious task of describing the predictive coding protocol used here. As mentioned, there is no educational value in reviewing that, except to say, do not do this. It was all wrong, including the discussion by both sides on recall and precision. See *eg: Predictive Coding 3.0* article, [part one](#) and [part two](#) (part one describes the history and part two describes the method. Superseded by Predictive Coding 4.0 article, but still good background); *Introducing "ei-Recall" – A New Gold Standard for Recall Calculations in Legal Search – Part One, Part Two and Part Three*; *In Legal Search Exact Recall Can Never Be Known*; *Concept Drift and Consistency: Two Keys To Document Review Quality*, [part one](#), [part two](#) and [part three](#).

Judge Buch's bottom line on the argument in *Dynamo Two* was correct, and in line with that of the e-Discovery Team, when he *assumed* that the predictive coding done in this case was "flawed," but held that "*the question remains whether any relief should be afforded.*" It was a flawed method all right, but the Defendant failed to provide good cause to justify the relief sought of an expensive do-over using keyword search.

Judge Buch correctly surmised that the Defendant's request for relief was predicated upon two false premises, which he colorfully calls "*myths.*"

Respondent's motion is predicated on two myths.

The first is the myth of human review. As noted in *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*: “It is not possible to discuss this issue without noting that there appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible – perhaps even perfect – and constitutes the gold standard by which all searches should be measured.” 15 Sedona Conf. J. 214, 230 (2014). This myth of human review is exactly that: a myth. Research shows that human review is far from perfect. Several studies are summarized in Nicholas M. Pace & Laura Zakaras, RAND Corp., *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery* (2012) at 55. To summarize even further, if two sets of human reviewers review the same set of documents to identify what is responsive, research shows that those reviewers will disagree with each on more than half of the responsiveness claims. As the RAND report concludes:

Taken together, this body of research shows that groups of human reviewers exhibit significant inconsistency when examining the same set of documents for responsiveness under conditions similar to those in large-scale reviews. Is the high level of disagreement among reviewers with similar backgrounds and training reported in all of these studies simply a function of the fact that determinations of responsiveness or relevance are so subjective that reasonable and informed people can be expected to disagree on a routine basis? Evidence suggests that this is not the case. Human error in applying the criteria for inclusion, not a lack of clarity in the document’s meaning or ambiguity in how the scope of the production demand should be interpreted, appears to be the primary culprit. In other words, people make mistakes, and, according to the evidence, they make them regularly when it comes to judging relevance and responsiveness.

Id. at 58. (Indeed, even keyword searches are flawed. One study summarized in *Moore v. Publicis Groupe & MSL Grp.*, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), found that the average recall rate based on a keyword review was only 20%.)

The second myth is the myth of a perfect response. The Commissioner is seeking a perfect response to his discovery request, but our Rules do not require a perfect response. Instead, the Tax Court Rules require that the responding party make a “reasonable inquiry” before submitting the response. Specifically, Rule 70(f) requires the attorney to certify, to the best of their knowledge formed after a “reasonable inquiry,” that the response is consistent with our Rules, not made for an improper purpose, and not unreasonable or unduly burdensome given the needs of the case. Rule 104(d) provides that “an evasive or incomplete * * * response is to be treated as a failure to * * * respond.” But when the responding party is signing the response to a discovery demand, he is not certifying that he turned over everything, he is certifying that he made a reasonable inquiry and to the best of his knowledge, his response is complete.

Likewise, “the Federal Rules of Civil Procedure do not require perfection.” *Moore*, 287 F.R.D. at 191. Like the Tax Court Rules, the Federal Rule of Civil – 9 – Procedure 26(g) only requires a party to make a “reasonable inquiry” when making discovery responses.

The fact that a responding party uses predictive coding to respond to a request for production does not change the standard for measuring the completeness of the response. Here, the words of Judge Peck, a leader in the area of e-discovery, are worth noting:

One point must be stressed – it is inappropriate to hold TAR [technology assisted review] to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion

practice than the savings from using from using TAR for review.

Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 129 (S.D.N.Y. 2015).

We agree with this holding in *Dynamo Two* and the black letter rule that only reasonable efforts are required, not perfection. That applies to all human endeavors, including every duty imposed by the law. The real issue is whether the predictive coding method was so bad here that its use was *per se* unreasonable. The proof of unreasonable efforts in any document review project requires proof that actual relevant documents were overlooked and not produced. The defenses did not do that, they just said there were documents with keywords in them that were missed. They did not go on to say that these documents were highly relevant. Apparently the defense here did not grasp a basic fact, that the mere presence of a keyword in a document does not automatically make that document relevant.

The defense also failed to use experts to attack the dreadful method used here to incorporate active machine learning into the document search. We suspect that is because the IRS Commissioner attorneys were part of the problem. It was a practical estoppel.

The opinion by Judge Buch in *Dynamo Two* is important, and very interesting, because it shows that any method used, be it one that uses predictive coding or keywords, or a method like the e-Discovery Team uses where all methods – multimodal – are employed, including active machine learning (predictive coding), will be presumed reasonable until the challenging party proves otherwise. Again, the proof of unreasonability would, in our view, require proof of both relevant documents missed, namely highly relevant or new key relevant documents where the omission would matter, and proof by experts that the method used was flawed, including statistical evidence, with suggestions for a reasonable effort. None of this evidence and testimony was provided in *Dynamo Holdings*.

That argument is an outgrowth of what specialists living in the *Sedona bubble* sometimes call the “dancing ponies” argument. Relevant documents could be chosen by any method, even by a system where

every document that dancing ponies happen to step on are considered relevant. (The related image is one where a large stack of paper documents, typically exams, are tossed in the air at a stairway and the papers that reach the bottom of the stair are relevant (or if an exam, graded with an "A"). Many students today suspect their professors of using this grading method.) Dancing ponies, or stair tossing, are truly ridiculous methods, irrational in the extreme, but if they works, so the argument goes, then the method does not matter. The argument of the *dancing ponies* than goes on to assume that whether a method works, or not, can be determined by statistical methods. Tredennick & Gricks, *Discussion About Dynamo Holdings: Is 43% Recall Enough?* (Gricks: "As long as validation evinces (*sic* – I think he meant evidences) a reasonable production, that should be the end of the inquiry."). The later assumption is, however, predicated by the proper use of statistics for validation, which requires recall to be stated as a probability range, not a point, and is anyway suspect. *In Legal Search Exact Recall Can Never Be Known* (e-Discovery Team, Dec. 2014).

Even when the range and uncertainties inherent in random sampling are understood, the use of statistics *alone* to verify reasonability of efforts is questionable. There is just too much uncertainty, especially when low prevalence datasets are involved. Examination of the exact methods used must be included in any defense of process. Dancing pony methods must be attacked and shown for what they are, pseudoscience. At the same time, proof of missing key or highly relevant documents should be shown. That is true, or should be, for all methods, including keyword search and linear review, and also predictive coding. Judge Peck and Judge Buch are right, "*it is inappropriate to hold TAR [technology assisted review] to a higher standard than keywords or manual review.*" *Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*, No. 2685-11, 8393-12, 2016 WL 4204067 (T.C. July 13, 2016).

Still, inherent in this equality statement is the underlying premise that *all* document review methods should be held to a standard of reasonable efforts. In an important case, where proportionality factors favor it, the standard of care should be high. The courts have, in general, been somewhat lax in this department so far, but we think

that *Dynamo Two* is a herald of things to come. In the future we will see predictive coding cases, along with keyword and linear review cases, where the court holds the standard of proportional, reasonable efforts has not been met.

Document review is the essence of all e-discovery. It must be done right *for the truth, the whole truth and nothing but the truth* to be found. Just because you use some predictive coding in your document review does not mean that the review was done right. There are just as many ways to screw up predictive coding as there are to screw up keyword search or linear review. We conclude our review of *Dynamo Holdings Two* with the inverse statement to the one made by Judge Andrew Peck and approved by Judge Buch:

It is inappropriate to hold TAR [technology assisted review] to a **lower standard** than keywords or manual review. Doing so discourages parties **from using TAR properly, with expert advice, active machine learning training methods that have been proven to be effective, and statistically correct sample verifications.**

Predictive coding is not a magic pill. It is a powerful algorithm that brings active machine learning, a form of artificial intelligence, into legal document review. This requires a high degree of skill to be done properly. Some day this point will be made in a case like *Dynamo Holdings* where unreasonable, unskilled predictive coding methods are used. We foresee that the objecting party will not complain about the use of predictive coding, but rather HOW it was used. They will likely suggest an alternative predictive coding method, such as the e-Discovery Team's [Predictive Coding 4.0](#), including quality control and quality assurance tests, sampling and statistical analysis or Recall, Precision and F1. If they make this argument, and buttress it with a showing that important ESI was missed by the first amateur attempt, then we think the objection will be sustained and a redo required.

We suspect that such a ruling is still a few years down the road. In the meantime we should all exercise constant vigilance against bad science and even worse methods. When opposing counsel says they plan to use predictive coding, the appropriate response is *great, what*

type of method will you use? When I am asked that, I hand them my 97 page description, *Predictive Coding 4.0 – Nine Key Points of Legal Document Review and an Updated Statement of Our Workflow*. Others may use that as well. You can call it the *standard e-Discovery Team method*. Slight variations are expected to fit the particular assignment. In the future I expect many experts will come up with explanations and detailed description of the method they use. Right now I am the only one putting it out there. Still, I talk to lots these folks, and if they ever do get around to writing it up, it will not be very different from our Hybrid Multimodal method. Among the top experts in the field, including scientists and professors, there is wide spread agreement on basic methods.

ONE – Hyles v. New York City



Here is the e-Discovery Team’s most interesting e-discovery opinion of 2016: *Hyles v. New York City*, No. 10 Civ. 3119 (AT)(AJP),

2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016)!!!! The author is well-known e-discovery expert, **Magistrate Judge Andrew Peck of the SDNY.**

This opinion, like that of Number Two, *Dynamo Holdings*, is on the e-Discovery Team's favorite topic, predictive coding. Admittedly, that had a lot to do with the Team's pick of *Hyles* as this year's most interesting e-discovery opinion. *Hyles v. New York City*, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016). So too did the fact that it was written by Judge Peck. He is known for his excellent legal analysis, especially on the legal search topics. The *Hyles* opinion was not only spot on, it had the clarity and writing quality demanded of any opinion to be ranked one in 2016.

Although *Hyles* did not make new law, it clarified existing law on predictive coding. We like that. The specific issue addressed in *Hyles* has been discussed before, but never squarely ruled on by Judge Peck. In *Hyles* the plaintiff wanted to require the defendant City (i.e., the responding party) to use TAR (technology assisted review, aka predictive coding), instead of the method the City preferred of keyword searching. As expected, Judge Peck ruled that a party cannot be forced to do predictive coding, even if it is a better method than what the party wants to do, in this case, keyword search; and, even if the party's preferred method had not yet started. As expected, the reason for this ruling was old Sedona Principle Six.

We liked the *Hyles* opinion, over *Dynamo Two*, because *Hyles* does not include descriptions of cockamamy methods of predictive coding, like *Dynamo* does. Instead, *Hyles* involves a more basic methodology, one faced by most e-discovery practitioners today, not just predictive coding specialists, on how to cull down the ESI universe subject to review for relevance by: (1) custodian priority; and, (2) date range. This is a predictive coding case that covers pre-predictive coding methods. In that sense *Hyles* is like Judge Peck's other classic legal search opinion from the pre-predictive coding era, *Gross Construction. William A. Gross Constr. Assocs., Inc. v. Am. Mutual Mfrs. Ins. Co.*, 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

Here is how Judge Peck described counsels' efforts to agree upon a method to cull the universe of documents to be reviewed for relevance.

As to date range, the parties agreed on a start date of September 1, 2005 but disagreed on the end date. ... After hearing the parties' arguments at the conference, the Court ruled that the end date would be April 30, 2010 (when defendant Patricoff was reassigned from her First Deputy Commissioner position), without prejudice to Hyles seeking documents or ESI from a later period, if justified, on a more targeted inquiry basis.

Notice how Judge Peck ruled, but without prejudice for the requesting party to come back later, if need be. Most discovery rulings on issues like that should be open-ended, with the idea that any follow-up requests must be narrow and focused, and thus relatively inexpensive to fulfill.

Judge Peck makes the same kind of ruling as to the total number of custodians whose ESI must be reviewed.

As to custodians, the City agreed to search the files of nine custodians (including Hyles), but not six additional custodians that Hyles requested. (7/18/16 Ltr. at 5, 7.) The Court ruled that discovery should be staged, by starting with the agreed upon nine custodians (Hyles, Stark, Patricoff and six others). After reviewing the production from the nine custodians, if Hyles could demonstrate that other custodians had relevant, unique and proportional ESI, the Court would consider targeted searches from such other custodians.^[1]

Here is how Judge Peck quickly frames the dispute that the parties brought to him for resolution. (All record citations omitted.)

After the parties had initial discussions about the City using keywords, Hyles' counsel consulted an ediscovery vendor and proposed that the City should use TAR as a "more cost-effective and efficient method of obtaining ESI from Defendants." The City declined, both because of cost and concerns that the

parties, based on their history of scope negotiations, would not be able to collaborate to develop the seed set for a TAR process.

Judge Peck began his analysis as you might expect by agreeing with the plaintiff that “*in general, TAR is cheaper, more efficient and superior to keyword searching.*” Then he set out the legal precedent history embodying his thinking on predictive coding and whether a party should be required to use TAR against their will.



In March 2009, the “dark ages” in terms of ediscovery advances, this Court described problems with keywords and the need for “careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or `keywords.” [William A. Gross Constr. Assocs., Inc. v. Am. Mutual Mfrs. Ins. Co.](#), 256 F.R.D. 134, 134 (S.D.N.Y. 2009) (Peck, M.J.). Further elaborating on the deficiencies of keyword searching, my seminal *Da Silva Moore* decision in 2012 approved the use of predictive coding, aka TAR, in appropriate cases. [Da Silva Moore v. Publicis Groupe](#), 287 F.R.D. 182, 190-91, 193 (S.D.N.Y. 2012) (Peck, M.J.). In again approving the use of TAR in 2015, I wrote that “the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.” [Rio Tinto PLC v. Vale S.A.](#), 306 F.R.D. 125, 127 (S.D.N.Y. 2015) (Peck, M.J.).^[3] Dicta in a footnote in *Rio Tinto* stated that “[i]n contrast, where the requesting party has sought to force the producing party to use TAR, the courts have refused.” [Rio Tinto PLC v. Vale S.A.](#), 306 F.R.D. at 127 n.1. “The Court note[d], however, that in [the cited] cases the producing party had spent over \$1 million using keyword search (in *Kleen*) or keyword culling followed by TAR (in *Biomet*), so it is not clear what a court might do if the issue were raised before the producing party had spent any money on document review.” [Rio Tinto PLC v. Vale S.A.](#), 306 F.R.D. at 127 n.1. Since the search methodology issue arose in this case

before the City spent much, if any, money on searching for responsive ESI, this case squarely raises the issue of whether the requesting party can have the Court force the responding party to use TAR.

The plaintiff also argued that since parties should cooperate in discovery the City should cooperate and use the best technology available to find relevant evidence. Judge Peck rejected this argument as follows:

Hyles' counsel is correct that parties should cooperate in discovery. I am a signatory to and strong supporter of the Sedona Conference Cooperation Proclamation, and I believe that parties should cooperate in discovery. See *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. at 136; *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. at 129 n.6. The December 1, 2015 Advisory Committee Notes to amended Fed. R. Civ. P. 1 emphasized the need for cooperation. Cooperation principles, however, do not give the requesting party, or the Court, the power to force cooperation or to force the responding party to use TAR.

His comment that a Court does not have the "power to force cooperation" is also interesting and somewhat controversial. Perhaps it is a matter of semantics, but I have seen many judges "order" parties to cooperate. Still, his second point on cooperation is that the doctrine of cooperation does not require a responding party to use TAR if they do not want to. Cooperation does not mean capitulation.

Judge Peck then goes on to articulate the main reason that a judge should not ordinarily force a party to use a particular tool or technique to mine client data for useful evidence. That should be the litigant's independent duty and the court should not interfere without cause. This is justified in part by what is known as *The Sedona Conference Principle Six* as is well explained by Judge Peck in *Hyles*.

It certainly is fair to say that I am a judicial advocate for the use of TAR in appropriate cases. I also am a firm believer in the

Sedona Principles, particularly Principle 6, which clearly provides that:

Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production, Principle 6 (available at <http://www.TheSedonaConference.org>).

Under Sedona Principle 6, the City as the responding party is best situated to decide how to search for and produce ESI responsive to Hyles' document requests. Hyles' counsel candidly admitted at the conference that they have no authority to support their request to force the City to use TAR. The City can use the search method of its choice. If Hyles later demonstrates deficiencies in the City's production, the City may have to re-do its search.^[4] But that is not a basis for Court intervention at this stage of the case.

Notice how the decision to not compel the use of TAR is without prejudice. The plaintiff can revisit the request by demonstrating deficiencies in the defendant's production.

Judge Peck then quotes with approval the recent *Dynamo Two* opinion where Judge Buch held that it was not the court's business to dictate to attorneys how to do document review, and again relied on Sedona Six. Here is Judge Peck's concluding words.

Here, too, it is not up to the Court, or the requesting party (Hyles), to force the City as the responding party to use TAR when it prefers to use keyword searching. While Hyles may well be correct that production using keywords may not be as complete as it would be if TAR were used (7/18/16 Ltr. at 4-5), the standard is not perfection, or using the "best" tool (see

7/18/16 Ltr. at 4), but whether the search results are reasonable and proportional. Cf. Fed. R. Civ. P. 26(g)(1)(B).

To be clear, the Court believes that for most cases today, TAR is the best and most efficient search tool. That is particularly so, according to research studies (cited in Rio Tinto), where the TAR methodology uses continuous active learning ("CAL"), which eliminates issues about the seed set and stabilizing the TAR tool. The Court would have liked the City to use TAR in this case. But the Court cannot, and will not, force the City to do so. There may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. We are not there yet. Thus, despite what the Court might want a responding party to do, Sedona Principle 6 controls. Hyles' application to force the City to use TAR is DENIED.

Our view of the most interesting opinion of 2916. The e-Discovery Team agrees with Judge Peck that "*for most cases today, TAR is the best and most efficient search tool.*" To be clear, however, our agreement is predicated upon the TAR tool being used properly. The method of TAR matters. The e-Discovery Team would much rather work on a well-run, well-designed keyword search project, than a mismanaged, poorly designed predictive coding project.

We think the wise words of Judge Facciola in *O'Keefe* in 2008 about angels have been too early forgotten:

Whether search terms or 'keywords' will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics.... Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go **where angels fear to tread**. This topic is clearly beyond the ken of a layman.



United States v. O'Keefe, 537 F. Supp. 2d 14 (D.C. 2008). What Judge Facciola said about keyword search is as true today as when written. When it comes to legal search today using active machine learning, which is the true meaning of TAR, the expertise required is even greater. Predictive coding requires special skills and a unique knowledge set to do right. It is *clearly beyond the ken* of almost all attorneys practicing law today. We do not see this gap narrowing, not because the education is not available, but because most lawyers are

disinterested. For this reason the competency gap is widening and the problem noted by Judge Facciola in 2008 is still alive and well today.

In spite of this competency gap, and the *stupid fearlessness* of many trial lawyers, those *who do not even know what they do not know*,

courts continue to approve the use of TAR *carte blanche*, with no requirement of expert assistance or use of proven methodologies. For that reason

our agreement with Judge Peck on the superiority

of predictive coding must be qualified. Still, we agree, because when active machine learning is done right it is a thing of beauty, far more effective than keywords in all but the simplest projects.

Why I Love Predictive Coding: Making document review fun with Mr. EDR and Predictive Coding 3.0. (e-discovery team, 2/14/16).



We also agree with Judge Peck's speculation that there *may come a time* when a court forces the use of best practices by recalcitrant lawyers. Judge Peck may even reverse himself on this point, even before TAR is more widely used, if Sedona Principle Six were to be revised, criticized or distinguished. Is it really true, as Principle Six asserts, that "*Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information?*"

They may be in the best position for *preservation*, but are they for search and production? Legal search, especially active machine learning, is a specialty well beyond the IT capabilities and skills of responding parties. Legal search does not require special knowledge of the data itself, it requires special knowledge of the *procedures, methodologies, and technologies* for electronic document review, including especially predictive coding. This is knowledge possessed by e-discovery specialists, by lawyers who specialize in legal search, not by litigant's IT departments. [*Perspectives on Predictive Coding*](#), (ABA, 2016-2017).

It is hard to see how Principle Six applies to choice of document review software and feature utilization. We need to think this through and have a vigorous debate on the continued application of Principle Six to document review defensibility. See Ball, Craig, *Sedona Principle Six:*

Overdue for an Overhaul (10/10/14) (“*It’s time to deep six Sedona Six.*”)

In the not too remote future, when *Hyles* is someday reversed (perhaps by Judge Peck himself) and a party is ordered to use TAR, we expect (hope) that the opinion will also specify the particular method or methods of use of TAR. Otherwise, the order is too general to have any meaning. You might as well order an attorney to use a computer to do document review. There are many, many ways to do TAR. Most of them are wrong. Any attorney *angel should fear to tread* TAR without the help of experts.

If ESI continues to grow more complicated, and the volumes of data continue to explode, then in the future legal search that includes predictive coding may well be the *only* way document discovery can be conducted. Litigation lawyers of the future may still do depositions, motion practice, trials and the like, but it is unlikely they will also continue to do large volume document review. They will leave that to active machine learning experts. The improvements we see in the use of artificial intelligence and easier-to-use software will help expand the group of experts, the specialists in document review, but it is not likely to bring it within the reach of the general litigator.

The Bar is already faced with a large competency gap. A new type of legal work is emerging to fill that competency gap, a new job, where specialists in AI enhanced evidence search handle all document discovery. A dual track for trial preparation is emerging. One group of lawyers will be concerned with electronic document discovery and the other group will handle all of the other litigation tasks.

Looking a little further into the future, maybe the late 2020s or early 2030s, we expect courts to turn over the entire ESI search and production process to neutral expert specialists serving as discovery masters (or something like that). That may well be the best means for the just, speedy and efficient resolution of most lawsuits.