

**E-Discovery: Best Practices
and the 2015 Amendments to
the Federal Rules**

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Outline

- I. Background on Concepts
- II. Federal Rule Amendments
- III. Practical Tips

What is E-discovery?

E-discovery is the process of either:

- 1. Identifying, preserving, collecting, reviewing and producing Electronically Stored Information (ESI) in response to a production request [Responding Party]
- 2. Requesting, receiving, and reviewing ESI in the context of an investigation or litigation. [Requesting Party]

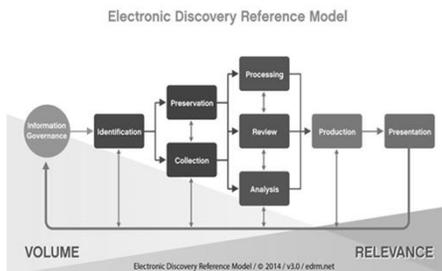
ESI Is the Present and the Future

- " Paper discovery has been dwindling in importance for decades.
- " Worldwide ESI:
 - " 2013: 4.4 zettabytes
 - " 2020: 44 zettabytes
- " Average Worker Email:
 - " 2014: 108.7 emails/day
 - " 2018: 139.4 emails/day

ESI vs. Paper

- " ESI is much more voluminous
- " More complex and difficult to manage and analyze
- " Dynamic vs. fixed state (easily modified, deleted, lost, hidden)
- " Metadata provides additional information and evidence

E-Discovery Life-Cycle



Source: www.edrm.net

Information Governance

Source: www.edrm.net

Information Governance

- “ Records Management Policies
 - “ Retention policies for preservation and destruction of records
 - “ Retention schedules
- “ No policies = inconsistent retention

Resulting in:

- “ Unnecessary records complicating e-discovery response
- “ Additional discovery costs
- “ Indefensible destruction of documents and possible sanctions

Identification

Source: www.edrm.net

Identification

- ~ Duty to preserve relevant information
 - ~ When litigation is “reasonably anticipated.”
-Doctor John’s, Inc. v. City of Sioux City, IA, 486 F.Supp.2d 953 (N.D. Iowa 2007)
 - ~ Litigation Holds
- ~ Identify:
 1. Sources of relevant materials
 2. Relevant custodians
 3. Relevant search terms
- ~ Cooperation with opposing counsel is essential

Preservation and Collection

Source: www.edrm.net

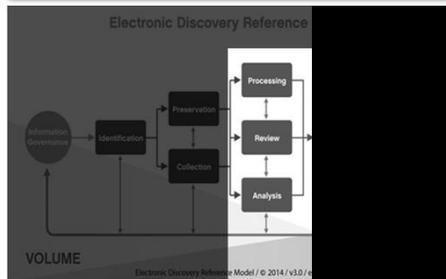
Preservation

- ~ Preserve data in a matter that is:
 - ~ Legally defensible
 - ~ Auditable
- ~ Suspend automatic/manual deletion
- ~ Active vs. Legacy data
- ~ Metadata may also need to be preserved (Author, Dates created and modified)

Collection

- “ Harvesting” data for review.
- Can accomplish by:
 - Employee self-collection
 - IT-assisted collection
 - 3rd party collection
- Must be proportionate to the matter involved, auditable, and defensible.
- Include unadulterated metadata.

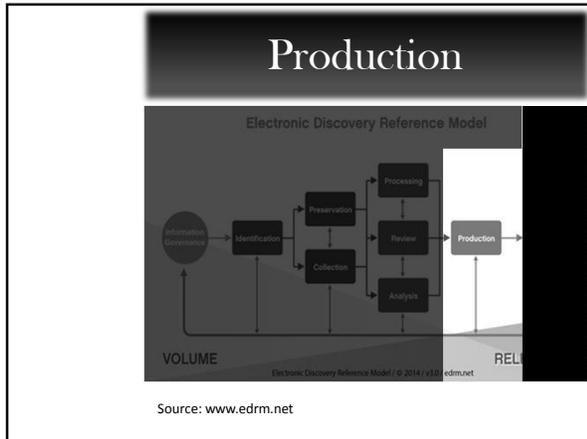
Processing/Analysis/Review



Source: www.edrm.net

Processing/Analysis/Review

- Processing: Formatting ESI for a review tool
- Analysis: Identify key topics, players, jargon, and documents
- Review: Identify responsive and privileged documents
 - Increase understanding of case
 - Improved by emerging technologies such as concept-searching and predictive coding

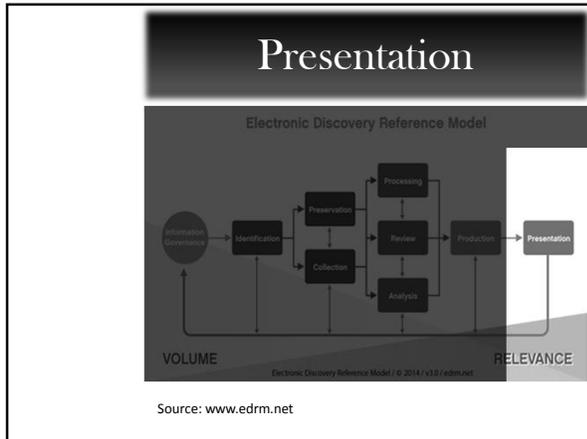


- ## Production
- “ Increased volume of ESI leads to production costs and challenges
 - “ Native or reasonably usable form
 - “ Cooperate with counsel to avoid disputes as to form
 - “ Metadata and natives may contain privileged and confidential information

Load Files

Name	Type	Compressed size
Data	File folder	
Image	File folder	
Native	File folder	
Text	File folder	

(Note: The table below contains a large number of rows of data, which are mostly illegible due to the small font size in the original image.)



Presentation

- ~ How will you present ESI in depositions, hearings, trial or other contexts?
- ~ Not all ESI can be effectively converted into paper format
- ~ Understand the technology options and use them to improve presentation

2015 FRCP E-discovery Amendments

- ~ Effective December 1, 2015
- ~ Themes of the amendments:
 - ~ Cooperation
 - ~ Proportionality
 - ~ Uniformity for Preservation and Spoliation

Cooperation

- “ Amendments focus on reducing delay and improving cooperation between the parties and the court.
- “ Rule 4(m) and Rule 16(b)(2): reduces time before scheduling order
- “ Rule 16(b)(1): removes telephone and mail options for scheduling conferences.

Cooperation

- “ Cooperation inherent part of E-discovery: Negotiation of manner, timing, search terms, custodians, etc.
- “ Rule 16(b)(3) (Sched Order) and Rule 26(f)(3) (Discovery Plan)- may/must:
 - “ (iii) - “provide for disclosure, discovery, or preservation of [ESI]”
 - “ (iv) include agreements reached under FRE 502, which allows limiting privilege waiver

Cooperation

- “ Requests for ESI invite objections, but beware of “boilerplate” objections
- “ Rule 34(b)(2) (Requests for Production):
 1. Parties must be specific in objections.
 2. State whether documents will be withheld pursuant to each objection
 3. State whether they will provide copies or permit inspection

Proportionality

- ~ 2006 Amendment: Rule 26(b)(2) limited discovery of ESI deemed not reasonably accessible due to costs and burdens.
- ~ Advisory Committee Notes noted that “reasonably accessible” can be considered using a proportionality analysis (e.g. Burden v. Benefit)

Proportionality

- ~ Despite 2006 amendments and notes, courts did not always apply proportionality or describe it as such.
- ~ 2015 Amendments address inconsistent application and enshrine “proportionality” within the rules.

Proportionality

- ~ Rule 26(b)(1):
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:
 1. the importance of the issues at stake in the action
 2. the amount in controversy
 3. the parties' relative access to relevant information
 4. the parties' resources
 5. the importance of the discovery in resolving the issues
 6. whether the burden or expense of the proposed discovery outweighs its likely benefit.

Proportionality

- “ All but one of the Proportionality factors appear in Rule 26(b)(2)(C) governing court-ordered limitations on discovery,
- “ NEW: “[P]arties’ relative access to relevant information” – Advisory Committee notes recognition of information asymmetry in cases.

Proportionality

- “ Advisory Committee on Proportionality:
 - “ Burden is not placed on requesting party to address all proportionality considerations.
 - “ Opposing party not permitted to refuse discovery with boilerplate objections
 - “ Collective responsibility on parties and court to consider proportionality in all discovery and consider it in resolving discovery disputes.

Proportionality

- “ Rule 26(c)(1)(B) amended to expressly recognize allocation of expenses, or “cost-shifting.”
- “ AC Notes:
 - “ Does not imply cost-shifting should become a common practice.
 - “ Continue to assume that a responding party ordinarily bears the cost of responding.

Preservation and Spoliation of ESI

- ~ Amended Rule 37e provides test :
 1. ESI that should have been preserved in anticipation or conduct of litigation is lost
 2. Because a party failed to take reasonable steps to preserve it, and
 3. It cannot be restored or replaced through additional discovery

Preservation and Spoliation of ESI

- Rule 37e (cont.)
- ~ If party is prejudiced: “may order measures no greater than necessary to cure the prejudice”
 - ~ If intent to deprive another of use:
 - ~ Presume that the lost information was unfavorable to the party
 - ~ Instruct the jury that it may or must presume the information was unfavorable.
 - ~ Dismiss the action or enter a default judgment

Key Takeaways

- ~ Cooperate with opposing counsel.
- ~ Preserve and manage ESI early in the case.
- ~ Discuss ESI preservation and discovery expectations with client and opposing counsel.
- ~ Be specific in discovery responses.
- ~ NO boilerplate objections.
- ~ Prepare for motion practice over proportionality factors and “reasonable steps to preserve.”

Sanctions

- ~ *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008) (\$8.5 million)
- ~ *United States v. Phillip Morris USA*, 327 F.Supp.2d 21 (D.D.C. 2004) (\$2.75 million)
- ~ *Ratray v. Woodbury County, Iowa*, 761 F.Supp. 2d 836 (N.D. Iowa 2010) (adverse inference instruction for bad faith destruction of relevant video tape).



Big Data (in a tiny package)



Client Preparedness

- ~ Prepare client for worst-case scenario

Client Preparedness

- ~ Prepare client for worst-case scenario
 - ~ Information Governance.
 - ~ Data Mapping
 - ~ Move towards Structured Data
 - ~ Centralized management. (Gmail, Sharepoint)
 - ~ Search, Retain, Preserve
 - ~ Move away from Unstructured Data (Loose Data)
 - ~ Must more difficult to address in litigation.

Client Preparedness

- ~ Prepare client for worst-case scenario
 - ~ Record Retention Schedules
 - ~ Establish & enforce.
 - ~ Audit employees & third-party compliance.
 - ~ Departing employee audit process.
 - ~ Ability to stop standard auto-destruction procedures when litigation is threatened.

Client Preparedness

- ~ Standardize litigation hold procedures
 - ~ Create processes/procedure for documenting and tracking preservation efforts.
 - ~ Educate agency staff.

Client Preparedness

- ~ Develop a comprehensive preservation plan.
 - ~ Enforceable
 - ~ Ensure your litigation holds actually work
 - ~ Repeatable
 - ~ Following the same processes and procedures time and again
 - ~ "Good faith" efforts at preserving relevant information.
 - ~ Defensible
 - ~ Ensure your and your client's actions are impervious to claims of intentional destruction or bad faith.

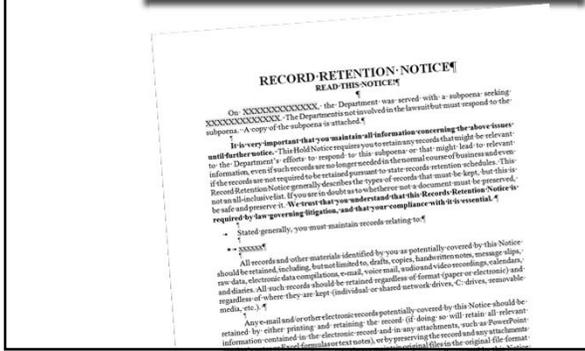
Litigation Holds

- ~ Duty to preserve when there is "reasonable anticipation of litigation"
 - ~ FRCP 37 (2015 Comments: "foreseeable").

Litigation Holds

- ~ *KCH Services Inc. v. Vanaire, Inc.*, 2009 WL 2216601 (W.D. Ky. July 22, 2009) (adverse inference instruction - failure to issue a litigation hold notice).
- ~ *Gonzalez-Bermudez v. Abbott Laboratories PR Inc.*, 2016 WL 5899147 (D. P.R. Oct. 9, 2016) (adverse inference instruction warranted - 2 month delay in issuing litigation hold notice from point of reasonable anticipation).

Litigation Holds



Litigation Holds

- ~ Document your Litigation Hold distribution
 - ~ Excel chart
 - ~ Access database
 - ~ "Event" in ProLaw

Litigation Holds

- ~ Following Litigation Hold:
 - ~ Follow up with custodians. (ID new ones).
 - ~ Understand what they know and what information they have relevant to the case.
 - ~ Establish an approach to gathering their relevant information.
 - ~ Standard form: document information capture and get signature. {chain of custody}.
 - ~ {Maintain the capture by custodian}

Preservation

- ~ F.R.C.P. 37(e): "Reasonable steps" to preserve relevant ESI - not "perfection."
 - ~ 2015 FRCP comments: "[P]erfection . . . is often impossible."
- ~ Comments also speak to "proportionality" of preservation duties.
 - ~ 2015 FRCP Comments: "The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (*including governmental parties*) may have limited staff and resources to devote to those efforts."

Preservation

- ~ Basic Rule: Don't underpreserve ESI.
- ~ Even if "unduly burdensome," if litigant can show "good cause" the court may compel discovery. I.R.C.P. 1.504(2); I.R.C.P. 1.1701; F.R.C.P. 26(b)(2)(B).
 - ~ *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (no adverse inference instruction given when backup tapes were overwritten and plaintiff could not show information on the tapes would have supported her claims).

Preservation

- ~ What should be "held?"
 - ~ Very case dependent
 - ~ Documents (docs, PowerPoints, Excel)
 - ~ Email/Calendars
 - ~ Databases?
 - ~ Mobile platform information
 - ~ Texts? (2011 Sedona - maybe not)
 - ~ Voice mail, cell data, browser history, etc.
 - ~ Computer code?
 - ~ Backups?
 - ~ Social media entries
 - ~ Photographs/video
 - ~ Possibly bit-for-bit copies of some hard drives
 - ~ Metadata of all of the above
 - ~ (system and embedded)

Preservation

~ Q: Is it OK to "preserve information in place or self-collect relevant information?"

Preservation

~ Q: Is it OK to "preserve information in place or self-collect relevant information?"

- ~ F.R.C.P. 37(e): "reasonable steps to preserve" relevant electronic evidence.
- ~ *Green v. Blitz U.S.A., Inc.*, 2011 U.S. Dist. LEXIS 20353 (E.D. Tex. Mar. 1, 2011) (party sanctioned re: self-production)
- ~ *Northington v. H&M Intl.*, 2011 WL 663055 (N.D. Ill. Jan 12, 2011) ("[i]t is unreasonable to allow a party's interested employees to make the decision about the relevance of such documents. . . .")
- ~ *Jones v. Bremen High School District 228*, 2010 WL 2106640 (N.D. Ill. May 25, 2010) (school district was reckless and grossly negligent in its handling of the litigation hold).

Preservation - offense

“ Consider going on the offense:

INTERROGATORY NO. 12: Identify all document retention policies employed by Appellant since XXXXXXXXXXXX, and identify any alterations made to such policies because of this litigation.

ANSWER:

Request No. 3: All documents reflecting Appellant's document retention policies from XXXXXXXXXXXX to the present and any changes to such policy or policies made pursuant to the instant action.

Metadata



Metadata

IMG_2641.JPG	
Focal Length in 35 mm	121 mm
Flash	Flash did not fire, auto mode
Date Taken	10-10-2016 11:39:38 AM
Speed	63.04 Miles per hour
Altitude	973.858299 feet above sea level (+/- 0.00)
FlashpixVersion	1.0
Digital Zoom Ratio	2.779412
Exposure Bias Value	0.00

Metadata

Lens Model	iPhone 7 back camera 3.99mm f/1.8
Lens SerialNumber	
GPS	41.5931° -93.6612°

Map Location

Metadata

- ~ Metadata:
 - ~ can be incredibly valuable.
 - ~ adds to the trustworthiness of the file.
- ~ Metadata can be faked, but it's very hard.
- ~ Two types:
 - ~ Embedded Metadata
 - ~ System Metadata
- ~ You only get metadata if you ask for it.
- ~ *State v. Wemer*, 882 N.W.2d 873 (Iowa Ct. App. 2016) (Table) (metadata of a police dash camera destroyed, but video still found admissible).

Metadata

- ~ Agree to exchange native format in Trial Scheduling Order.

5. **PLEADINGS.** Pleadings shall be closed 4-29-2015.

6. **DISCOVERY.** All discovery shall be completed by ALL WRITTEN DISCOVERY 03-30-2015 ALL DEPOSITIONS 4-29-2015 THE PARTIES WILL PRODUCE ANY ELECTRONICALLY STORED INFORMATION IN ITS NATIVE FORMAT TO THE EXTENT FEASIBLE

7. **EXPERT WITNESS.**

a. A party who intends to call an expert witness, including rebuttal expert witnesses, shall certify to the court and all other parties the expert's name, subject matter of expertise and qualifications, within the following time period, unless the Iowa Code requires an earlier designation (Code, e.g. Iowa Code 668.11):

(1) Plaintiff:
12-02-2014

Metadata

- ~ Exchange or native format aligns I.R.C.P. 1.500 and the duty to disclose documents "as they are kept in the usual course of business."
- ~ I.R.C.P. 1.512: Duty to produce information in a "reasonably usable form."

Metadata

~ Definition of "Document" in interrogatories:

2. ~ "Document." The term "document" shall mean any written, printed, typed or other graphic or photographic matter (including, without limitation, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings and motion pictures) and shall include the original, identical copies and all non-identical copies, whether different from the original by reason of any variation made in such copy or otherwise and shall include, without limiting the generality of the foregoing, all letters, telegrams, teleprints, correspondence, contracts, agreements, notes, mechanical and electronic sound recordings or transcripts thereof (including, without limitation, tapes, cassettes and discs), computer print-outs or other matter stored on or produced through computers, cellular or other wires, memos, notes, or records of all telephone or personal conversations, meetings or any other communication, intra-office and inter-office communications, e-mail, messages, manuals, summaries or compilations, minutes of meetings, changes, maps, reports, analyses, studies, graphs, prospectuses, resumes, minutes, pamphlets, books, offers, bulletins, order papers, articles, catalogs, records, tables, books of account, ledgers, vouchers, cancelled checks, invoices, bills, receipts, tickets, worksheets and all drafts, alterations, modifications and changes of memos to any of the foregoing. Document shall include any e-mail or other electronic record that is retrievable or recoverable regardless of whether it has been "deleted." The term Document includes the metadata embedded in or associated with each document.¶

Metadata

~ Definition of "Document" in interrogatories.
 ~ {make sure you read all the way to the end}

~~drafts, alterations, modifications and changes of memos to any of the foregoing. Document shall include any e-mail or other electronic record that is retrievable or recoverable regardless of whether it has been "deleted." The term Document includes the metadata embedded in or associated with each document.¶~~

eDiscovery

Rulings of Interest

Note: The following cases are in chronological order. The federal rules related to ESI changed effective December 2015.

Capellupo v. FMC Corp., 126 F.R.D. 545 (D. Minn. 1989)

- Court found that defendant corporation “ordered and participated in the knowing and intentional destruction of documents and evidence” relevant to the case after being aware that litigation was reasonably anticipated and even after litigation had commenced. The court deemed that entry of a default judgment was inappropriate. Instead, the Court determined that the appropriate sanction was award to the plaintiff of “all expenditures resulting from defendant’s document destruction” and multiplication of those fees and costs by a factor of two. The court also held open the option of further corrective measures following further estimation of the documents believed to have been destroyed by defendant. Finally, defendant was ordered to pay court costs “for two days of otherwise unnecessary expense.”

Doctor John’s Inc. v. City of Sioux City, Iowa, 486 F.Supp.2d 953 (N.D. Iowa 2007).

- City failed to preserve tape recordings of closed-session meetings of city council. The court retained jurisdiction after the case had settled to address the appropriate sanction for the bad faith destruction of the relevant evidence.
- Ultimately, the court imposed a monetary sanction of \$50,000 and then declined to impose the monetary sanction. “[T]he court finds that the scales of justice tip ever so slightly in favor of declining to impose sanctions against the City for destruction of relevant records. Any similar litigation misconduct in the future, however, will be dealt with severely, in light of the City’s ‘get out of jail free’ card here.”

ADS Holdings, Inc. v. Federal Ins. Co., 2008 WL 2781157 (D. Minn. Mar. 28, 2008)

- Negative inference instruction to be given to jury regarding failure to disclose pursuant to F.R.C.P. r. 26(e)(1), and plaintiff ordered to pay defendant reasonable fees and costs as a sanction for violating court’s preservation order.

Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009)

- Police officer sought to compel the release of metadata in an electronic version of his performance report notes concerning him that included creation date, access date, all access dates for each access, and information of who accessed the file. The court

addressed the question of whether “metadata is a public record.” “The pertinent issue is not whether metadata considered alone is a public record. Instead, the question is whether a ‘public record’ maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata.”

- The court determined that metadata was in fact part of a public record subject to public inspection. “It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record.”

In the matter of John M. Irwin, 895 N.Y.S.2d 262 (N.Y. App. Div. 2010)

- Plaintiff sought information under the New York freedom of information statute. He specifically wanted the system metadata associated with certain pictures. The court held that system metadata was in fact a record subject to disclosure. “Records stored in electronic format are subject to FOIL [the state’s Freedom of Information act]. . . . We are therefore constrained to conclude that the subject ‘system’ metadata, which is at its core the electronic equivalent of notes on a file folder indicating when the documents stored there were created or filed, constitutes a ‘record’ subject to disclosure under FOIL.”

Peterson v. Seagate U.S. LLC, 2011 WL 861488 (D. Minn. Jan. 27, 2011)

- RIF at Seagate in 2004 resulted in a number of employment terminations. Others took early retirement soon thereafter pursuant to a retirement incentive program.
- EEOC issues a probable cause determination in Nov. 2006.
- Action filed in May 2007.
- Plaintiff motion filed to authorize nationwide class notice.
- Subsequently, Plaintiffs file a motion for sanctions asserting employee email was destroyed when they were terminated, and other backups of email of key decision makers from the period were either “lost or made inaccessible as a result of normal policies and procedures whereby the computers used by former employees are recycled for use by other employees and e-mails are deleted approximately 30 days after separation,” and other computer backups were deleted “when server storage limits are reached.”
- Plaintiff asserted that Seagate was on notice of the likelihood of litigation, apparently dating back to the R.I.F. firings.
- The Court ruled, “A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’” *Greyhound Lines, Inc., v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting *Stevenson v. Union Pac. R.R. Col.*, 354 F.3d 739, 746 (8th Cir. 2004)). Moreover, imposition of sanctions for destruction of

evidence requires a finding of prejudice to the opposing party. *Id.* (citing *Stevenson* at 748). Justification for spoliation sanctions is typically provided by circumstantial evidence because the requisite intent is rarely shown by direct evidence, *Greyhound* at 1035, and prejudice is established by the nature of the evidence. *Stevenson* at 748.

- In this case, there was no evidence that Seagate intentionally destroyed information. Deletions or archiving of information was “for the purposes of complying with company policy and/or making computer assets available to other employees.” “[T]he record does not support the contention that the defendant should have been aware of a looming nationwide class action with respect to a matter that did not patently appear to reach outside of Minnesota, even as the complaint in the this matter was prepared and filed in May 2007. The court concludes that there is no merit to plaintiffs’ spoliation claim and therefore no basis for sanctions.”
- Per the court, the unavailability of information “is the result of Seagate’s usual and normal computer data retention policy; the unavailability was not a result of a concerted effort to suppress evidence or purge data pertinent to litigation; and Seagate was not under any duty to preserve the evidence in a readily accessible format at the time it was deleted or stored on backup tapes. *See Best Buy Stores, L.P. v. Developers Diversified*, 247 F.R.D. 567, 569-71 (8th Cir. 2007).

AtHome Care, Inc. v. Evangelical Lutheran Good Samaritan Society, No 1:12-cv-00053-BLW (D. Ohio Apr. 30, 2013) (slip copy)

- Defendant Good Samaritan agreed to produce metadata but inadvertently changed the creation date of some documents.
- Plaintiff requested “system metadata” of certain document in an effort to confirm the creation dates.
- “System metadata reflects information created by the user or by the organization’s information management system. . . . This type of metadata can generally be retrieved from whatever operating system is in use Examples include ‘data concerning the author, date and time of creation, and the date a document was modified.’ System metadata may be relevant ‘if the authenticity of a document is questioned or if establishing who received what information and when is important to the claims or defenses of a party.’” Citing *Aguilar v. Immigration and Customs Enforcement Div of U.S. Department of Homeland Security*, 255 F.R.D. 350, 357 (S.D.N.Y 2008).
- Court rules that requiring production of metadata for certain documents is appropriate.

In re Waste Management of Texas, Inc., 392 S.W.3d 861 (Tex. Ct. App. 2013)

- In response to a court order, Waste Management produced documents in a format of its choice – PDF. The production excluded metadata.
- Three years later, the trial court ordered Waste Management to produce the data again, this time in native, electronic format with all metadata. This order followed a request

from the plaintiff in the case to have Waste Management produce “electronic discovery in its native format, that is, the same format in which Waste Management maintains the data in the regular course of business.” Waste Management claimed that producing in native format was a “do over” of prior discovery, that the production in native format made redaction impossible, and that producing metadata in native format was more costly, among other things.

- The court disagreed. The court found that the claimed additional cost of producing in native format was only \$3,000 more than the cost of producing PDFs. The Court cited *In re Payment Card Interchange Fee*, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007), for the proposition that “documents stripped of metadata do not comply with Rule 34(b) of the Federal Rules of Civil Procedure.” Ultimately, Waste Management was compelled to produce the native files.

Home Instead, Inc. v. Florance, 2013 WL 5979629 (D. Neb. Nov. 8, 2013).

- Defendants were alleged to have committed various discovery abuses including destroying evidence, deleting files, selling relevant information, shredding information, and otherwise discarding files. The court noted that the defendants admitted through testimony that they did not review client paper files, did not review employee files, did not look at relevant caregiver logs or client care plans, did not review relevant service contracts, and were “unable to explain what efforts their employees used to find responsive information.” “The defendants’ electronic search consisted of looking for the words ‘Home Instead,’ and then deleting any documents found without retaining a copy or forwarding it to counsel for this litigation.”
- The plaintiff sought, among other things, an affidavit addressing whether or not a litigation hold was ever put in place, “the people to whom a litigation hold letter was sent, the directions for preservation, the sources identified for search, the terms used for the search, Defendants’ continued efforts to ensure compliance, and any other information relevant to the scope and depth of the preservation or search for documents.”
- The Court held, “The court will order the defendants to provide the requested affidavit, not only to determine the extent of the defendant’s search for production of responsive discovery, but to assess the defendants’ degree of culpability in failing to preserve evidence for use in this litigation.”
- Defendants also printed relevant documents, scanned them, and then produced all relevant documents in one large PDF file without any organization. The court ordered that all documents be “produced in electronic form and where reasonably feasible, shall be produced as searchable TIFF images with load files (that indicate the beginning and ending of each document and preserve the parent-child relationship) to allow the images to be loaded into a document production database.”

Fidelity National Title Ins. Co. v. Captiva Lake Investments, LLC, 2015 WL 94560 (E.D. Mo. Jan. 7, 2015).

- In *Fidelity*, on Captiva’s fourth discovery-related motion, the Court appointed an expert to inspect the plaintiff’s computer systems and report back findings to the court. The expert found (1) as of the date of his report – more than three years after the first discovery request was issued – Fidelity had not instituted a litigation hold; (2) Fidelity had not conducted a systematic search of its computer systems, including email archives, for discoverable information prior to May 2013; (3) in 2011 and 2012 – after the case was filed and after discovery had been served – “a contractor lost as many as 13 million email messages while implementing an email retention program”; (4) although a relevant employees PC files were able to be recovered, information in his network share was not recoverable; and (5) relevant data systems were permitted to delete relevant information, and logs of conduct in those systems was deleted after 30 days without being preserved.
- Captiva granted an adverse inference instruction, as well as an award of 50% of the forensic expert’s fees.

{New Federal Rules of Civil Procedure addressing ESI became Effective 12/2015}

Elkharwily, M.D. v. Franciscan Health System, 2016 WL 4061575 (W.D. Wash. July 29, 2016)

- Defendant archived email was discoverable. However, Defendant met its burden of showing that retrieval of the electronically stored information was unduly burdensome and costly (\$157,500 in cost to retrieve, restore, and review).
- Plaintiff entitled to the discoverable information if it first pays Defendant the cost of retrieving and restoring the information, including prior privilege review costs.

State v. Wemer, 882 N.W.2d 873 (2016) (Table).

- Metadata of a police dash camera was lost when video was transferred to a server. Defendant asserted that the court erred in admitting the tape that was not properly authenticated. Court held that even if the loss of metadata was a “loss of the original recording, Wemer furnished no evidence the department acted in bad faith.”

In re Subpoena of American Nurses Ass’n, 2016 WL 1381352 (4th Cir. 2016)

- Non-litigant’s costs and attorneys’ fees associated with responding to a third-party subpoena granted as appropriate fee shifting because (1) the Association had notified the appellants that the requested production would “entail significant expense,” (2) the appellants had delayed discussion with the association about the requested discovery, and (3) the appellants had frequently changed the scope of discovery”).

Bazzi v. YP Advertising & Publishing, LLC, 2016 WL 404059 (E.D. Mich. Feb. 3, 2016).

- Plaintiff downloaded documents from defendant's computer system onto a USB drive before leaving employment.
- Defendant sought a forensic image of the drive to obtain the documents and associated metadata.
- Plaintiff ordered to turn over the USB drive to a third party for forensic imaging.

Internmatch, Inc. v. Nxtbigthing, LLC, 2016 WL 491483 (N.D. Cal. Feb. 8, 2016)

- Defendant made no attempt to recover relevant electronic evidence that was allegedly destroyed by a power surge while the litigation was pending. Instead, defendant discarded the computer in question. Court granted the motion seeking an adverse inference instruction and precluded the defendants from offering argument or testimony that the destroyed evidence supported their arguments. Plaintiff also awarded fees for bringing the motion for sanctions.

Living Color Enters., Inc. v. New Era Aquaculture, Ltd., 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016)

- Defendant deleted text messages potentially relevant to the litigation.
- Adverse inference instruction and monetary damages sought.
- Court noted that it must find prejudice to the complaining party and, for imposition of more severe sanctions, an "intent to deprive."
- Court found that there was no evidence that the plaintiff had been prejudiced by the loss of the text messages insofar as the plaintiff failed to "explain[] any direct nexus between the missing text messages and the allegations in the complaint. Also, the court found that there was no intent to deprive the plaintiff of the evidence noting that the defendant was "relatively unsophisticated" and acted negligently at worst.

Spring v. Board of Trustees of Cape Fear Community Coll., 2016 WL 1389957 (E.D.N.C. Apr. 7, 2016)

- Court ruled that it was unduly burdensome for defendant to have to reproduce all ESI in its native format because production had already occurred in non-native format without objection from plaintiff. However, plaintiff allowed to specify specific documents or categories of documents for which it needed metadata, and the defendant would be required to provide those documents in native format.

Fiteq Inc. v. Venture Corp., 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016)

- Sanctions not appropriate where deleted emails were largely recovered from other sources and plaintiffs could not show that other responsive documents ever existed. Therefore, plaintiffs could not establish that spoliation occurred.

Crown Battery Mfg. Co. v. Club Car, Inc., 2016 WL 2625010 (N.D. Ohio May 9, 2016)

- Nonrebuttable adverse inference instruction given for defendant's failure to preserve evidence held by third parties.

Mitchell v. Reliable Security, LLC, 2016 WL 3093040 (N.D. Ga. May 24, 2016) (slip copy)

- Dispute over Defendant's proposed production in PDF, whereas Plaintiff wanted native format. Defendant claimed production of native format would cost an additional \$3,000 over PDF production in a case Defendant claimed was worth less than \$10,000. Plaintiff asserted the case was potentially worth \$50,000 to \$300,000 plus lost wages and benefits and reasonable fees and costs.
- Court found that Defendant had not shown that the claimed additional costs was in fact supported by evidence or was cost prohibitive. In addition, the court found the Plaintiff had shown good cause for the production. "[I]t 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."

Matthew Enter., Inc. v. Chrysler Group LLC, 2016 WL 2957133 (N.D. Cal. May 23, 2016)

- Plaintiff made no attempt to preserve email after threatening litigation. Defendant sought preclusion of witnesses as a remedy. The court fashioned a unique remedy allowing novel use of evidence that was not destroyed to be used as surrogate information that was destroyed and awarding attorneys' fees and costs.