NEW JERSEY LAWYER

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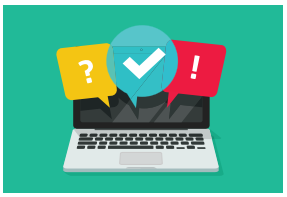
In this Issue: **E-Discovery**

FEATURES



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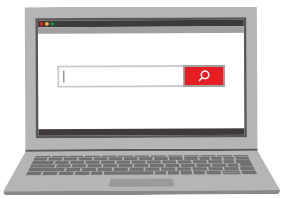

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DOMENICK CARMAGNOLA

NJSBA Advocates for More Nuanced Analysis, Variety of Sanctions for *Wilson* Rule

Tracking and analyzing the issues that affect lawyers' ability to practice is an essential role the New Jersey State Bar Association plays as the state's largest organization of legal professionals.

That is one of the reasons why the Association, as the voice of New Jersey attorneys, sought amicus involvement this fall in a pair of attorney disciplinary cases that rose to the state Supreme Court. The cases each involved recommendations for disbarment from ethics committees and attorney disciplinary agencies in cases that don't fit the traditional interpretation of knowing misappropriation.

New Jersey has one of—if not the—strictest disbarment rules for attorneys in the nation. In some states attorneys can be readmitted once they've proven rehabilitation; in the Garden State disbarment is forever. It comes from *In re Wilson*, a case decided in 1979 that held disbarment is the only appropriate discipline for knowing misappropriation when there is clear and convincing evidence of an intent to steal money or defraud a client. While that is an important policy for the sanctity of the entire legal system, the NJSBA saw these cases as an important opportunity to ask the Court to clarify the *Wilson* Rule given how it was being applied by those involved in the disciplinary process.

The NJSBA appeared as amicus in *Office of Attorney Ethics v. Wade*. In that case, the OAE recommended disbarring an attorney under Rule of Professional Conduct 1.15 for knowing misappropriation of client and escrow funds from her attorney trust account. The NJSBA argued the *Wilson* Rule is meant to be applied where an attorney's intent was to steal a client's money or to defraud a client. That is not what occurred in *Wade*. The NJSBA asked the Court to clarify the *Wilson* Rule and the distinction between knowing misappropriation in circumstances where trust accounting errors or insufficiencies are alleged, rather than outright theft.

"The NJSBA believes that absent clear and convincing evidence of theft or fraud, notions of justice and fairness based on the merits of the particular facts presented require consideration of alternative appropriate sanctions, if any, short of disbarment," it said in briefs. The outcome of that is case pending.

The Association was also granted friend-of-the-court status in *In re Lucid*. The NJSBA again asked the Court to examine the balance of maintaining public trust and a disciplinary system that is not overly punitive. The NJSBA further argued that all facts should be considered in analyzing a disciplinary matter where the *Wilson* Rule may apply, including motive and intent, to determine if they are consistent with a finding of conduct tantamount to theft or fraud.

"It is time to eliminate the attractive incentive to push the limits of what knowing misappropriate is beyond *Wilson's* focus, addressing thievery and fraud against clients, to any conscious act by a lawyer that results in an adverse impact to a trust account," the Association argued in its brief.

Indeed, not long after those arguments were held, the Court granted Karina Pia Lucid a censure, seemingly agreeing there is an alternate path for other cases where it is clear an attorney did not plan to steal from or defraud a client.

The NJSBA is honored to be a part of the amicus process, but as we know, a court case can take years to make its way through the system and for an opinion to have a tangible impact on policies and rulemaking. In addition to amicus advocacy, the NJSBA offers several avenues to help attorneys who are struggling with practice-related issues, such as trust accounting, that can be put into use immediately.

For instance, members of the Association have access to PracticeHQ, a suite of resources to help attorneys address practice management issues, including trust accounting. Some of the resources include a checklist on bank reconciliations and whitepapers on basic accounting information that lawyers need to know and client trust funds.

The New Jersey Institute for Continuing Legal Education regularly presents programs aimed at addressing a random audit, keeping accurate trust records and generally steering clear of ethics issues.

In addition, the Association administers the Ethics Diversionary Program that provides a series of educational sessions

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FROM THE SPECIAL EDITOR

The Evidence is Increasingly Electronic—and Attorneys Must Know How to Manage the Rules and Technology Surrounding It

Consider this: How many emails, professional or personal, do you send or receive each day? How many documents, and versions of documents, do you create, review, modify, and exchange on a daily basis? Do you use an instant messaging platform, like Slack or Jabber, to communicate with colleagues in your office? How many electronic devices do you have and how do you use them? Do you have social media accounts and if so, what do you post there? As attorneys, we are creators, consumers, and recipients of electronic information every single day, both in our professional and private lives. And so are our clients, and exponentially so. Our clients' electronically stored information (ESI) is often important to the cases we handle.

The articles in this issue of *New Jersey Lawyer* deal with the topic of electronic discovery (E-discovery). If you are a litigator, you have undoubtedly been faced with the preservation, collection, review and production of ESI, either because you have requested it from an adverse party or received a demand for ESI from your client. Either way, the law and the Rules of Professional Responsibility impose obligations on attorneys to understand and comply with their obligations, and to work with their clients to ensure that they do the same.

Our first article addresses the interesting topic of discovery on discovery—where a party seeks information on the process that the other party followed to preserve, collect and produce ESI. Ordinarily, the responding party is in the best position to know where to look for potentially responsive ESI. There are occasions, however, where the propounding party challenges the responding party because of a perceived deficiency or delinquency in that process. The authors explain that cooperation in the discovery process can help to avoid discovery motions and requests for discovery on discovery but acknowledge the interplay between cooperation and transparency. They also analyze recent cases addressing discovery on discovery and share their strategies for making and responding to such requests.

Our second article considers social media discovery. It is not surprising that social media content is frequently the subject of electronic discovery demands. For many, the world plays

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out on social media, and attorneys should pay attention to the wealth of information that it sometimes contains. The article addresses the discoverability, preservation, collection, and production of social media content and the privacy rights that some courts consider when deciding whether to order the production of social media evidence.

Our third article brings us into the thick of electronic discovery and the process of developing and sharing suggested search terms for ESI. The authors outline how rules and case law require attorneys to carefully construct search terms because the failure to do so could have severe consequences, including sanctions. The concepts of cooperation and transparency are paramount in these situations.

Next, we examine the impact of key rule changes regarding e-discovery. Significant amendments to Federal Rule of Civil Procedure 37(e) in 2015 took a tiered approach to help curtail spoliation of electronic evidence without being too harsh with sanctions for instances where ESI loss was unintentional and inconsequential. Six years later, there remains a similar volume of motions and penalties, but there are some lessons to be learned from federal court decisions.

Finally, we look at e-discovery through the lens of products liability litigation, which can involve thousands of plaintiffs, and how to manage the sheer volume of ESI from diverse sources, and the host of trade secrets, confidentiality issues, and international regulations that come with it. Attorneys should be well-trained in e-discovery in order to manage large-scale ESI obligations, including crafting appropriate protocols that will satisfy the court.

Whether your client is a sophisticated company with thousands of employees and piles of ESI, or a small shop with few employees and a less sophisticated IT set up, ESI is often meaningful in the prosecution or defense of the matter, regardless of the issue at hand. ⚖

President's Perspective

Continued from page 5

for attorneys who have been recommended for rehabilitation as the result of an ethics infraction that does not rise to the level of a formal complaint being filed. Dedicated volunteers work closely with the participants of the program to teach them the best practices to use at work.

And all attorneys, judges and law students in the state have access to the services of New Jersey Lawyers Assistance Program. NJLAP is a free, confidential program that can help attorneys with their practice issues, as well as those who are confronting issues like depression, anxiety, or substance abuse that may have long-term implications on the day-to-day operations of their law office.

The NJSBA is here to advocate for our members, speak up for the profession, and to assist attorneys with their everyday challenges. Simply put, we are here for you. ⚖

WRITER'S CORNER

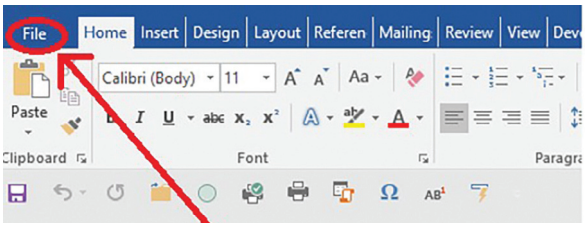
Assessing the Readability of your Writing

By Veronica J. Finkelstein and Jack Foley

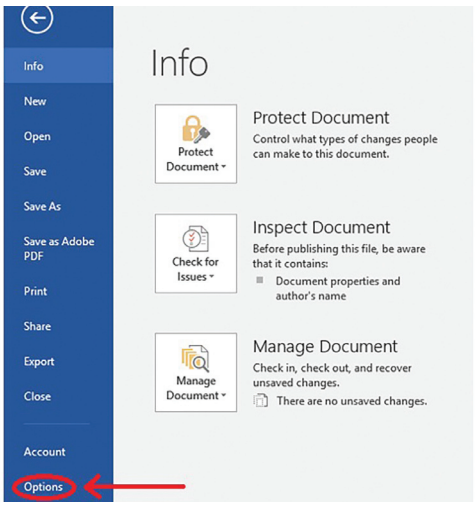
Last time we discussed why readability is a key consideration for effective legal writing. Judges, like most readers, prefer clear, concise, and engaging writing. The easier your brief is to read, the more likely you are to convince the judge (or the judge's clerk) of the merits of your case. Yet many lawyers default to long quotations, passive voice, and legalese—all of which decrease readability. Before you can improve the readability of your writing, you must assess the readability. Then you can edit with readability in mind.

How do you assess the readability of your writing? Microsoft Word contains embedded analytics you can use. The following instructions are for Word 2016 for Windows. Other versions work similarly. If you are using a different version of Word, simply type "Test your document's readability" in the help box for instructions. There are also numerous tutorials available online.

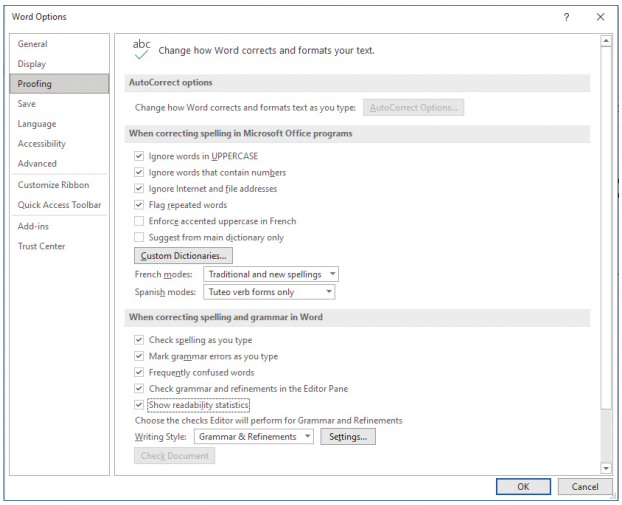
First, click on "File" at the top-left of your screen.



Then, click on "Options..."

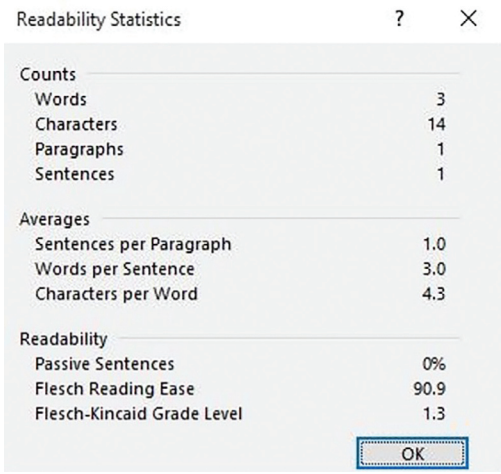


Toggle to the "Proofing" tab. Your screen should look like the one below. Under the "When correcting spelling and grammar in Word" heading, make sure your settings are like these:



With the "Show readability statistics" option checked, you will get a readability report after you conclude a spell check (note that you must run a complete spell check to receive the report). To run a spell check, click on "Review" and choose "Spelling and Grammar..." or, hit the F7 key. After the spell check concludes, Word will show you the readability report.

Below is an image of what this report will look like:



Remember that legal writing experts recommend a readability score in the 30s for briefs. If your brief is scoring lower, you should consider continuing to revise. Even if you score in the 30s or higher, consider this—the more complex the substance of your brief is, the easier you want its reading level to be. If the legal

issues in your case are complicated, aim for a score well above one in the 30s.

How can you improve the readability of your writing? Less is more. Be brief. This is difficult, especially where you must address complicated legal issue. When you edit for readability, focus on the style rather than the substance. Look for places to trim each paragraph, sentence, and phrase. Being brief will immediately boost your readability score.

Next time we will discuss five easy ways to edit your writing to increase its readability.

Veronica Finkelstein is an Assistant United States Attorney for the Eastern District of Pennsylvania and is an Adjunct Professor at Rutgers Law. Jack Foley is a legal intern working for the U.S. Attorney's Office.

WORKING WELL

Some Tips on Civility and Dealing With Difficult Adversaries and Judges

By Megan S. Murray
Family Law Offices of Megan S. Murray

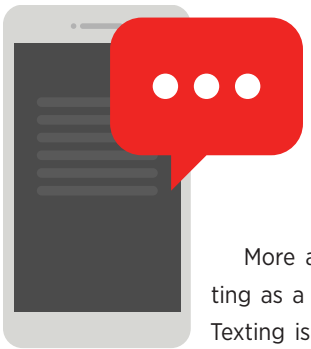
Family law attorneys practice in a very stressful field with high emotions. However, all attorneys must be vigilant about not allowing the emotion of a case to cause impetuous case handling decisions that may reflect poorly upon the attorney—not only in the case at hand but for their reputation going forward. Remember, you have one opportunity to make a first impression.

Integral to being a successful attorney is the ability to act in a professional manner regardless of the difficulty or emotional intensity of the case. Unprofessionalism and uncivility leads to a needless increase in counsel fees, a dissatisfied client and possibly a bad reputation for you.

The following are tips for all practitioners to follow to maintain civility with even the most difficult of adversaries and judges.

1. **Pick up the phone and personalize your adversary:** If my client's spouse has already retained an attorney, I make it a priority to make a telephone call to the adversary—especially in a case where I have not worked with or do not know opposing counsel. Calling an adversary allows you to build a rapport with them. Find common ground with your adversary on common interests; share a humorous story about the practice or bring up a (non-inflammatory) current event. The next time your adversary thinks about writing you a nasty letter, they are likely to give much more pause if they have a personalized relationship with the person on the receiving end.
2. **It's often true that you get more flies with honey than vinegar:** When dealing with abrasive adversaries or judges, reciprocating with gratuitous hostility has almost never yielded good returns in my experience. A friendly tone in raising disagreement with a judge also helps to convince a judge that you are not attempting to attack them.
3. **Don't add fuel to a non-substantive fire:** Nasty-gram letters could be one of the worst ways to move a case forward. Nothing productive comes of it—so don't engage.
4. **Make the life of the judge easier:** Do what you can to free up time for the judge. Make sure your motion is in compliance with the Rules of Court. Make sure your letters are succinct and relay your client's position clearly. Prior to trial, meet with your adversary to reach stipulations to reduce trial issues. Trial binders should be prepared well in advance of the trial and exchanged with the adversary.
5. **Quit while you're ahead:** When arguing a case, recognize when you have won, are winning or losing the argument and sit down. Over-speaking does not endear attorneys to judges with very limited time.

TECHNOLOGY



SMS SOS: The Do's and Don'ts of Texting Your Clients

Cyara Hotopp
Affinity Consulting Group

More attorneys than ever are using texting as a primary method of client contact. Texting is one of the easiest, most efficient means of communication and is completely pervasive in our society. It's familiar, it's fast, and it's easy to fall into the habit of regularly texting clients without fully considering both the ramifications and the ways we can take advantage of technology geared toward lawyers and texting.

Do: Weigh the Pros and Cons

While you may have a gut reaction one way or the other, take your time and make the decision that is best for your clients and your firm. Here are some things to consider:

Pros

Ease of communication
Record of communication
Potential for automation

Cons

Need for constant availability
Security pitfalls
Potential for message to be misunderstood

Don't: Rely on misinformation

The topic of texting clients is rather divisive among attorneys, with some schools of thought denouncing the practice under any circumstance, and others engaging in it without another thought. Find a middle ground and question sources provided by either side.

Do: Make the decision on a case-by-case basis, even if your general policy leans one way or the other

Whichever school of thought you belong to, the final decision on texting should be made based on what's best for each client. Perhaps your client works constantly and can only be reached via text during the day. Each case comes with a unique set of circumstances that should be factored into the equation.

Don't: Engage in complex legal discussion via text

For those of you who are social-media savvy, think of texting in terms of Twitter's old 160-character limit. That is, if you can't say it briefly, consider a phone call instead.

Do: Secure your mobile device

Take steps to secure your mobile device. Lock your phone with your fingerprint or a password. Consider encrypting your data. Set up a remote wipe. Do as much as possible to ensure the safety of both your client's information and your own.

Don't: Give out your personal cell

Assuming you want the option to break contact should you move firms, or even quit practicing, there are numerous options available to avoid giving out your personal cell phone number. Apps like SendHub and ZipWhip provide enterprise solutions to texting clients, and as a plus ZipWhip *allows you to text from your existing business phone number.*

Do: Keep a record in the client file

Treat texting just like any other form of client communication. Back up your texts with clients, and store copies in your client's file. You never know when you may need them.

Don't: Text without discussing it first with your client

Review methods of communication as part of your standard intake procedure. Make sure your client understands that you will not text the details the case, and any other boundaries you choose to implement.

When 'Something Doesn't Feel Right' About the Evidence

The Nuts and Bolts of Requesting Missing Information Through Discovery on Discovery

By Scott A. Etish and Brielle A. Basso

Most attorneys have been involved in a litigation where they suspect that an adversary has failed to produce all relevant electronically stored information (ESI). Whether the failure to produce was intentional or due to a failure by the adversary to preserve ESI (leading to the destruction of ESI), the requesting party is confronted with the difficult decision of whether to pursue discovery regarding its adversary's efforts to search for, locate, preserve and collect relevant ESI (aka "discovery on discovery" or "metadiscovery"). This article will: (1) discuss the interplay between cooperation and transparency in the context of discovery; (2) explore judicial decisions involving requests for discovery on discovery; and (3) provide practical advice for avoiding discovery on discovery and strategic considerations for the potential offensive use of discovery on discovery.

Much has been written about the general expectation that parties cooperate in litigation to avoid discovery disputes. The Sedona Conference Cooperation Proclamation, Federal Rules of Civil Procedure, and countless judicial decisions extol the benefits of cooperation, and cooperation remains critical. Several of the Sedona Conference Principles discuss discovery on discovery as it relates to the intersection of the expectation of cooperation and the recognition that a responding party will be in the best position to respond to discovery. For instance, Sedona Conference Principle 3 provides that, "in some circumstances a party may effectively immunize itself from the risk of facing 'discovery on discovery' by cooperatively working to reach agreement on key ESI issues. Conversely, the failure to engage in meaningful

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BRIELLE A. BASSO, *an associate in the Gibbons P.C. Commercial & Criminal Litigation Group and a member of the Gibbons E-Discovery Task Force, handles a wide range of complex business and commercial litigation matters in both state and federal courts throughout New York and New Jersey. Her practice focuses primarily on various aspects of general and complex commercial litigation, including factual investigation, discovery and strategy, legal research, and briefing and motions practice in connection with class action defense, consumer fraud, business torts, insurance coverage matters, and bankruptcy litigation.*

discussions about ESI discovery can lead to expensive motion practice, which may lead to adverse court orders."[1]

The Sedona Conference Principle 6 provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[2] The "Introduction" to Principle 6 explains that this "is premised on each party fulfilling its discovery obligations without direction from the court or opposing counsel, and eschewing 'discovery on discovery,' unless a specific deficiency is shown in a party's production."

While refusing to cooperate is extremely risky in light of the availability of sanctions under Federal Rule of Civil Procedure 37(f), there is no explicit requirement that a party be transparent as to what exactly was done to respond to discovery requests. Litigants should remain vigilant in recognizing when an adversary seeks to extend the concept of cooperation by demanding that a responding party also be transparent in responding to discovery requests.[3]

Judicial Treatment of Requests for Discovery on Discovery

Consistent with Sedona Conference Principle 6, courts are generally reluctant to permit discovery on discovery.[4] While there is very little New Jersey state case law addressing discovery on discovery, courts within the Third Circuit have held that discovery on discovery is "impermissible" and will usually deny such requests, unless the requesting party can demonstrate that the responding party acted in bad faith or unlawfully withheld documents.[5] Without any showing of bad faith or unlawful withholding of documents, requiring such discovery on discovery would "unreasonably put the shoe on the other foot and require a producing party to go to herculean and costly lengths…."[6]

While refusing to cooperate is extremely risky in light of the availability of sanctions under Federal Rule of Civil Procedure 37(f), there is no explicit requirement that a party be transparent as to what exactly was done to respond to discovery requests.

Consequently, it generally takes more than a requesting party's mere suspicion or a "conclusory allegation" that it has not received all of the relevant documents to persuade a court to permit discovery on discovery.[7] Decisions involving discovery on discovery are highly fact-sensitive, and some courts within the Third Circuit have permitted discovery on discovery when a requesting party provides an "adequate factual basis" for questioning the efficacy of the responding party's practices.[8] District courts within the Third Circuit generally require a showing of "bad faith" or that the production was "materially deficient" to justify discovery on discovery.[9] A requesting party may establish "an adequate factual basis" to justify such discovery through deposition testimony that a party never issued a litigation hold notice to important custodians; failed to issue it in a timely manner; and/or based upon an absence of documents produced from certain key custodians or timeframes.[10]

There are at least three different approaches commonly followed by courts concerning the discoverability of litigation hold letters themselves, depending upon jurisdiction. Some courts, including the District Court for the District of New Jersey, permit discovery into preservation and document retention policies, but ***only*** upon a preliminary showing of spoliation or discovery misconduct.[11] Under this analytical approach, litigation hold letters are generally considered privileged; however, when spoliation occurs, the letters become discoverable.[12] On the other hand, some courts allow discovery of document retention policies ***without*** a preliminary showing of spoliation or discovery abuses.[13] Even still, several courts have taken a different approach and have concluded that preservation efforts and document retention policies are not discoverable because they are not relevant to the claims and defenses at issue, pursuant to Federal Rule of Civil Procedure 26.[14]

Practice Tips

To avoid costly discovery on discovery, parties should cooperate with one another and seek to enter into ESI protocols that outline limits for how far a party can press for details on the discovery decision-making process, and under what circumstances those limits may be relaxed. Assuming the responding party has done exactly what it agreed to do in an ESI protocol, a requesting party will have a more difficult time convincing a court to permit discovery on discovery. Parties should also consider including certain baseline showings in an ESI protocol necessary before a party is permitted to seek discovery on discovery.

The need to preserve ESI cannot be overstated, particularly when a party has been put on notice of its obligation to preserve such evidence. Whether a party intentionally or negligently destroys ESI, the potential consequence is having

to produce privileged information, particularly a litigation hold notice. Litigation holds and other preservation-related documents are generally protectable attorney-client communications and attorney work product. However, and as discussed above, in many jurisdictions, sufficient preliminary evidence of spoliation or other discovery misconduct may well give rise to court orders to disclose these documents, or, in some cases, a party's decision to voluntarily produce them to defend against claims of misconduct. As such, attorneys should take caution to avoid including information in the hold notice that might ultimately prejudice their client's position if the document is disclosed, including comments regarding litigation strategy, the merits of the claim, and confidential material that is not otherwise essential to the purpose of the hold notice.

Cases in which courts have allowed discovery on discovery are reminders of the critical importance that: (1) litigation hold notices are timely issued; (2) custodians confirm receipt of the holds; and (3) custodians understand the importance of compliance with a litigation hold. Not only does discovery on discovery have the potential to significantly escalate the cost of a litigation, but it also can completely steer a litigation away from consideration of the merits.

The potential for discovery on discovery should also serve as a reminder of the importance of preparing and formulating a discovery plan. This plan should be clear and detailed and each step taken (or not taken) must be memorialized to defend against the assumption that the requesting party will be doing everything in its power to identify inconsistencies in a production via deposition testimony (statements by witnesses indicating that documents and/or communications exist), third-party subpoenas (third-party produced communications with responding party not otherwise produced), and comparison of documents produced by the requesting party to what was produced by the responding party (to identify documents produced by requesting party that responding party failed to produce as indicative of discovery deficiencies).

Depending on how the court will approach the issue, and whether the court will require a showing of spoliation, a requesting party is likely to be given wide berth from a court in fully exploring their adversary's discovery efforts (or lack thereof) once a certain baseline showing of discovery misconduct is made. The key to the effective use of offensive discovery on discovery is restraining the impulse to seek judicial relief too early. Courts have regularly rejected discovery motions based upon a requesting party's "mere suspicion" that an adversary has engaged in discovery misconduct. While it may not be appropriate for every case, an understanding of the mechanics of discovery on discovery is of critical importance to litigators who are regularly involved in matters with high volumes of ESI. ⚖

Endnotes

1. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 3, Comment 3.b., p. 78, citing *Ruiz-Bueno v. Scott*, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013) (ordering answers to interrogatories about search methods and noting that, where information is shared, it changes the nature of the dispute from whether the requesting party is entitled to find out how the producing party went about retrieving information to whether that effort was reasonable).
2. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Volume 19 (2018), Principle 6, Comment 6.b., p. 118.
3. *See Miller v. Thompson-Walk*, 2019 WL 2150660, at *1 (W.D. Pa. May 17, 2019).
4. *See Jensen v. BMW of N. Am., LLC*, 328 F.R.D. 557, 566 (S.D. Cal. 2019).
5. *See Alley v. MTD Prod., Inc.*, 2018 WL 4689112, at *2 (W.D. Pa. Sept. 28, 2018) (granting protective order with respect to deposition topics regarding defendants' "systems for creating, storing, retrieving, and retaining documents" because plaintiff did not show that defendants acted in bad faith or that they unlawfully withheld documents); *see also Brand Energy & Infrastructure Servs. v. Irex Corp.*,

2018 WL 806341, at *6 (E.D. Pa. Feb. 7, 2018) (holding that discovery requests regarding the servers that defendants used to access and store digital information were impermissible).

6. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 428 (D.N.J. 2009).
7. *See, e.g.*, *id.* at 427 ("But such a conclusory allegation premised on nefarious speculation has not moved several courts, nor will it move this one, to grant burdensome discovery requests late in the game."); *Brand Energy*, 2018 WL 806341, at *6 (holding discovery requests regarding the servers that the defendants used to access and store digital information were impermissible, reasoning that "[f]ederal courts will not compel a party to disclose its discovery process as a result of the opponent's mere suspicion that the party's process has not produced adequate documents." (citations omitted)).
8. *Winfield v. City of New York*, 2018 WL 840085, at *3 (S.D.N.Y. Feb. 12, 2018); *see also Korbel v. Extendicare Health Servs., Inc.*, 2015 WL 13651194, at *15 (D. Minn. Jan. 22, 2015) (noting that meta-discovery is only warranted when there is a "colorable factual basis" for such discovery).
9. *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, 2014 WL 1494517, at *2, *4 (D.N.J. Apr. 16, 2014) (denying the defendant's request for an IT deposition to discover whether the plaintiff was "using the appropriate search tools for ESI discovery," reasoning the defendant "failed to make the requisite showing that [the plaintiff's] production has been materially deficient").
10. *Vieste, LLC v. Hill Redwood Dev.*, 2011 WL 2198257, at *1 (N.D. Cal. June 6, 2011).
11. *See, e.g.*, *Major Tours, Inc. v. Colorel*, 2009 WL 2413631, at *2-*3 (D.N.J. Aug. 4, 2009) ("Although in general hold letters are privileged, the prevailing view, which the Court adopts, is that when spoliation occurs the letters are discoverable."); *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2020 WL 1321522, at *8 (N.D. Fla. Mar. 20, 2020) ("[L]itigation hold notices are discoverable only if there is a preliminary showing of spoliation."); *Nekich v. Wis. Cent. Ltd.*, 2017 WL 11454634, at *5 (D. Minn. Sept. 12, 2017) (holding that litigation hold letters are protected from disclosure under the attorney-client privilege, yet may be discovered if the requesting party presents evidence of spoliation); *Radiation Oncology Servs. of Cent. New York, P.C. v. Our Lady of Lourdes Mem'l Hosp., Inc.*, 69 Misc. 3d 209, 126 N.Y.S.3d 873 (N.Y. Sup. Ct. 2020) (while litigation holds are generally privileged, preliminary showing of spoliation of evidence may compel production of party's litigation hold).
12. *See Major Tours, Inc.*, 2009 WL 2413631, at *2-*3 (finding a "preliminary showing of spoliation of evidence" and, therefore, granting the motion to compel the production of litigation hold letters); *see also Keir v. Unumprovident Corp.*, 2003 WL 21997747 at *6 (S.D.N.Y. Aug. 22, 2003) (allowing detailed analysis of emails pertaining to defendant's preservation efforts after finding that electronic records which had been ordered preserved had been erased).
13. *In re Caesars Ent. Operating Co., Inc.*, 2018 WL 2431636, at *11 (Bankr. N.D. Ill. May 29, 2018) ("Even if there has been no spoliation,… 'discovery of document retention and disposition policies' is proper and 'is not contingent upon a claim of spoliation or proof of discovery abuses.'" (quoting *Burd v. Ford Motor Co.*, 2015 WL 4137915, at *9 (S.D. W. Va. July 8, 2015))); *Sharma v. BMW of N. Am., LLC*, 2016 WL 1019668, at *4 (N.D. Cal. Mar. 15, 2016) (determining that document retention policies were discoverable without requiring proof of spoliation because "[k]nowledge of [the defendant's] document retention policies will allow plaintiffs to assess the company's document production, determine whether any relevant documents are lacking, and evaluate whether additional discovery is necessary in this case").
14. *See, e.g.*, *Cunningham v. Standard Fire Ins. Co.*, 2008 WL 2668301, at *5 (D. Colo. July 1, 2008) (holding that the "storage, preservation and backup of emails" was not relevant to whether defendants breached plaintiff's insurance policy or acted in bad faith in adjusting his claim); *Fish v. Air & Liquid Sys. Corp.*, 2017 WL 697663, at *15 (D. Md. Feb. 21, 2017) (rejecting plaintiffs' request for discovery of defendant's document retention policies over an 85-year period where plaintiffs failed to explain why the request was relevant and proportional).

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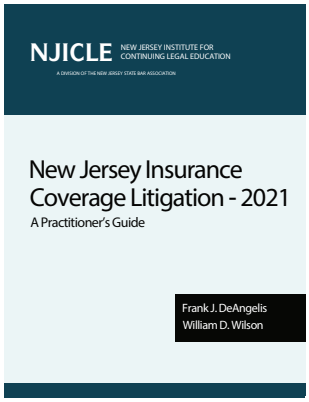

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E-Discovery and Social Media

Current Standards and Guidelines for Discoverability, Preservation, Collection, and Production in the Ever-Changing World of Social Media ESI

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By J.T. Triantos

Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance.

–Barry Albin, Associate Justice, New Jersey Supreme Court, Sept. 21, 2021.[1]

Social media has become increasingly popular among attorneys, clients, and the general public. In fact, social media has taken over as the primary means of communication for many. In 2008, only 21% of adults in the United States used some form of social media.[2] Now, in 2021, that number has skyrocketed to at least 72%.[3]

Facebook, LinkedIn, Twitter, Instagram, Snapchat, TikTok…. The list of social media platforms goes on and on, and it continues to grow. Social media is accessible via computers, cell phones, tablets, and other electronic devices. Chances are good that parties to a litigation (individuals and business entities alike) are using at least one, if not multiple, social media platforms on a daily basis to communicate with others, express their opinions, post pictures and videos, and otherwise interact in the digital world.

Background on Social Media ESI

Social media platforms generally incorporate several forms of communication and media functions. For example, Facebook, a social networking platform, allows users to post public statuses, updates, and comments, share photographs and videos, and send private messages, among other forms of interaction. Instagram, a photo-sharing application, while focused more on its photograph features, also allows users to upload and share photographs and videos, post statuses, updates, and comments, and send private messages. Twitter, too, allows the uploading and sharing of photographs and videos, posting of statuses, updates and comments, and sending of private messages. Many social media platforms also offer semi-private posting and messaging through group pages and forums.

Despite some differences, a common characteristic of all social media platforms is the sharing and transmitting of data and information. The data and information transmitted and contained on these social media platforms is relatively permanent, easily accessible, and a potential game-changer in litigation. In many cases, attorneys who understand social media can immeasurably help their clients resolve disputes. Yet, despite the massive amount of information transmitted daily on and contained within various social media platforms and its potential significant impact in litigation, social media ESI has only just begun to emerge as a focal point of discovery and many attorneys are only now getting up-to-speed with the ever-changing social media technology and its emerging place in discovery.

Given its prevalence in today's society and its emerging place in discovery, it is advisable for attorneys and their litigation support teams to understand the ins and outs of and best practices for preserving, collecting, producing, and requesting social media ESI.

Despite some differences, a common characteristic of all social media platforms is the sharing and transmitting of data and information. The data and information transmitted and contained on these social media platforms is relatively permanent, easily accessible, and a potential game-changer in litigation. In many cases, attorneys who understand social media can immeasurably help their clients resolve disputes.

Discoverability

As an initial matter, you may be asking, are the data and information transmitted and contained on personal and/or private social media platforms even discoverable? The courts have made clear that the resounding answer to this question is "yes"—social media ESI is discoverable.[4] Traditionally, courts in the United States have favored broad discovery in civil litigation.[5] Parties in litigation are entitled to discover all relevant, non-privileged information.[6] Data and information transmitted or contained on social media platforms is subject to the same discoverability standards as other forms of discovery.[7] In effect, social media ESI is treated no differently than any other discovery requests in terms of discoverability.

The United States federal courts and numerous state courts have recognized that social media ESI is discoverable if it is relevant to any party's claim or defense and proportional to the needs of the case.[8] The courts have reasoned that discovery is defined significantly more by the nature of the claims and defenses presented than the forms or platforms that may contain the data and information.[9]

Thus, the scope of discovery of social media ESI is generally treated no differently than other categories of data and information and the relevant inquiry is whether the social media ESI sought is relevant to any party's claim or defense and proportional to the needs of the case.[10] In line with the proportionality standards, and as applied to requests for other forms of discovery, the courts have often rejected efforts to obtain "any and all" social media ESI.[11] Conversely, the courts have often granted

efforts to secure social media ESI when the requests are limited and targeted to obtain data and information relevant to the case.[12]

Social media ESI has the potential to be discoverable in litigation in numerous ways, depending on the particular facts and circumstances involved in the litigation. Social media ESI may evidence communications or other postings relevant to the facts involved in the litigation. Social media ESI may also reflect evidence relevant to a party's claim for damages, quality of life, physical or mental state, geographic location, and/or identity. Social media ESI has taken on particular importance in litigation involving employment discrimination, personal injury, and workers' compensation.

Privacy Rights

But, what about privacy rights? Attorneys have often objected to requests for social media ESI on the basis of privacy, particularly when private social media accounts, private messaging, and/or private group pages and forums are at play. These arguments have almost unanimously been rejected by the courts as the courts have generally recognized that privacy concerns are more germane to the question of proportionality.[13] As a general rule, privacy concerns are not a *per se* bar to discovery of relevant information, irrespective of the type of discovery sought.

Courts rejecting privacy arguments have commented that an individual's expectation and intent that their communications and other postings on social media be maintained as private is not a legitimate basis for shielding such communications and other postings from discovery in litigation.[14] In other words, regardless of whether an individual has a reasonable expectation of privacy in social media communications and other postings, a party may not use those privacy expectations as a shield against the discovery of relevant information. Thus, courts have generally treated private social media posts and messages as no different than emails. By sharing the information with others, even a limited group, the individual has no reasonable expectation of privacy as to the information.

Additionally, privacy concerns are separate and distinct from legal privileges, such as the attorney-client privilege or work product doctrine, which are, when appropriately asserted, viable objections to the discovery of relevant information.[15]

Preservation

Actual and anticipated parties to litigation have a common-law duty to preserve evidence, including ESI, when the party has notice that the evidence is relevant to the litigation or when the party should have known that the evidence may be relevant to future litigation.[16] Data and information transmitted or contained on social media platforms is subject to the same duty to preserve as other forms of ESI.[17] Moreover, parties are generally considered to have possession, custody, or control over the content on their social media accounts, as well as the communications and other postings they have transmitted on social media.[18]

Thus, when litigation is anticipated or filed, it is important for attorneys to inform their clients to preserve all relevant evidence, including all relevant evidence transmitted or contained on social media platforms. It is likewise important for attorneys to include social media ESI in their litigation hold notices. Attorneys should inquire about and understand the different social media platforms that their clients have used and the various forms of data and information that may have been transmitted and contained on such social media platforms.

Since the data and information contained on social media platforms can easily be deleted, altered, or destroyed, it is particularly important to take these necessary steps as soon as the duty to preserve is triggered to ensure that the relevant social media ESI is identified and sufficiently preserved. Documenting such preservation processes is helpful both internally and in case any preservation steps are later called into question during the litigation.

Failure to preserve relevant social media ESI could potentially result in sanctions against the client, as well as the attorney.[19] Several cases in the past few years involving social media ESI have turned on whether the data was improperly preserved and/or purposefully destroyed. Such conduct has also resulted in attorneys being sanctioned or disbarred in the most egregious of circumstances.

Collection and Production

Following the preservation of data and information transmitted or contained on social media platforms, if requested or otherwise required as part of the party's disclosure obligations, such data and information must be collected, searched, and produced in an acceptable form.[20] If a case is expected to involve at least some form of social media ESI, the attorneys for the parties should meet and confer at an early stage of the litigation to establish ground rules and guidelines for the preservation, collection, and production of such social media ESI. This could go a long way toward avoiding unnecessary and costly discovery disputes later in the litigation.

With social media ESI, collection and production in an acceptable format can be complex and problematic. All of the social media platforms are different, which makes it a challenge to collect and produce social media ESI in an acceptable format. Further, while screenshots (usually PDF files) of the relevant social media communications and other

postings may work in some cases, other cases may require the services of a third-party vendor to assist in the collection of the relevant social media content and its associated metadata. Creating screenshots of the relevant social media ESI is a relatively easy means for capturing the relevant data and information, but may result in an incomplete data capture, with limited metadata. Screenshots will also be of limited assistance if the social media ESI involves video files or other interactive data often transmitted or contained on social media platforms.

Retaining a third-party vendor, while the pricier option, will generally capture the entirety of the social media ESI, with all of its associated metadata, including video files and other interactive data. A third-party vendor may also be able to assist in retrieving relevant portions of the social media ESI through search terms. Many third-party vendors have developed technology to allow social media ESI to be collected in a manner that preserves the content and captures the associated metadata. A third-party vendor may also be necessary to load the social media ESI onto a data review platform. If the social media ESI is likely to be collected and produced by more than one party to the litigation, one potential option is to engage a neutral third-party vendor to assist all parties with collecting and producing social media ESI in the litigation.

Several social media platforms, such as Facebook, LinkedIn, and Twitter, also offer data extract functions. These data extract functions allow the user to download all of the existing data and information from a particular social media account directly to the requesting party's desktop or email via a ZIP file. Each social media platform offering these data extract functions maintain procedures for carrying out the downloads, including the information required to be submitted prior to allowing such downloads to be processed.

Failure to preserve relevant social media ESI could potentially result in sanctions against the client, as well as the attorney. Several cases in the past few years involving social media ESI have turned on whether the data was improperly preserved and/or purposefully destroyed. Such conduct has also resulted in attorneys being sanctioned or disbarred in the most egregious of circumstances.

While this approach is relatively easy, economical, and should capture much of the associated metadata, the data extract functions of the various social media platforms that offer it are frequently revised and several of those data extract functions limit the amount of data that is able to be downloaded.

Determining the specific means by which to collect and produce social media ESI will depend on the needs of the case, proportionality considerations, and the capabilities and desires of the parties requesting and producing the social media ESI. In cases involving a limited amount of social media ESI or where interactive review of the social media ESI is not important, screenshots may be preferred. On the other hand, in cases involving a large amount of social media ESI or where interactive review of the social media ESI is important, the services of a third-party vendor or the use of data extract functions may be necessary.

As to metadata, with cases involving large amounts of social media ESI, the metadata associated with such content may be particularly helpful in searching, reviewing, and indexing such discovery. Capturing the associated metadata, or as much of the metadata as possible, can assist in establishing the chain of custody and authentication of the social media ESI. By way of example, social media files may contain metadata identifying each file's item type, parent item, thread, date, recipients, author, comments, views, likes, linked media, and related information.

Other Considerations—Obtaining Relevant Social Media ESI

Attorneys representing clients in litigation should, where relevant to any party's claim or defense and proportional to the needs of the case, request social media ESI from the opposing party and/or other relevant individuals and entities. Such discovery requests should bear in mind the numerous social media platforms, their various functions and applications, the format and means of production, and the need for metadata associated with such social media ESI. Requests for social media ESI should also be sufficiently limited and targeted so as to withstand any objections or other challenges to the relevancy or proportionality of the data and information sought. As with other discovery, such requests should not be designed to harass or embarrass a party, nor should such requests by used for the purpose of increasing litigation costs.

Further, while data and information transmitted or contained on social media platforms is subject to the same discovery standards as other forms or means of discovery, attorneys should use caution when attempting to obtain such information outside of formal dis-

covery requests to opposing counsel or via subpoenas to avoid running afoul of any ethics rules. For example, New Jersey Rule of Professional Conduct 4.2 (Communication with Person Represented by Counsel) provides, in relevant part, that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter…."[21]

While viewing a party's publicly-available social media platforms is generally recognized as ethical, attorneys should avoid communicating with, contacting, or even "friending" or "following" a represented party to access such party's social media information.[22] Additionally, even if the individual is not represented by an attorney, an attorney's interaction with that individual via social media may still violate certain ethics rules, unless the attorney fully discloses the nature and purpose of the social media interaction.[23] When in doubt, the more prudent route is always to utilize the formal discovery process to obtain social media ESI.

Conclusion

The issues discussed herein are only some of the many considerations presented by social media ESI, and these standards and guidelines are not applicable to every jurisdiction. As social media continues to evolve and the number and types of social media platforms continues to multiply, new challenges and issues relating to the preservation, collection, searching, review, and production of social media ESI will inevitably arise. Social media ESI will continue to play a significant role in pre-trial discovery in a wide variety of cases. Attorneys should therefore stay informed and knowledgeable about advances in social media to effectively represent their clients and to help their clients resolve disputes. ⚖

Endnotes

1. *Matter of Robertelli*, No. 084373, 2021 WL 4270216, at *4 (N.J. Sept. 21, 2021).
2. *Social Media Fact Sheet*, Pew Research Center (2021), available at pewresearch.org/internet/fact-sheet/social-media/
3. *Id.*
4. *See, e.g.*, *Ogden v. All-State Career Sch.*, 299 F.R.D. 446 (W.D. Pa. 2014); *Gordon v. T.G.R. Logistics, Inc.*, 321 F.R.D. 401 (D. Wyo. 2017); *Matter of the Complaint of Paradise Family, LLC*, No. 8:20-CV-2056-TPB-AAS, 2021 WL 2186459 (M.D. Fla. May 28, 2021).
5. *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975); *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300 (5th Cir. 1973); *Bowman v. Gen. Motors Corp.*, 64 F.R.D. 62 (E.D. Pa. 1974).
6. *Id.*
7. *Ogden*, 299 F.R.D. 446; *Gordon*, 321 F.R.D. 401; *Giacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112 (E.D.N.Y. 2013).
8. *Allen v. PPE Casino Resorts Maryland, LLC*, No. 1:20-CV-03269-CCB, 2021 WL 2434404 (D. Md. June 14, 2021); *Paradise Family*, 2021 WL 2186459; *see also* Fed. R. Civ. P. 26(b)(1).
9. *Allen*, 2021 WL 2434404.
10. Fed. R. Civ. P. 26(b)(1).
11. *Ogden*, 299 F.R.D. 446; *Rodriguez-Ruiz v. Microsoft Operations Puerto Rico, L.L.C.*, No. CV 18-1806 (PG), 2020 WL 1675708 (D.P.R. Mar. 5, 2020).
12. *Id.*
13. *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010); *Tompkins v. Detroit Metro. Airport*, 278 F.R.D. 387 (E.D. Mich. 2012); *Gondola v. USMD PPM, LLC*, 223 F. Supp. 3d 575 (N.D. Tex. 2016); *Georgel v. Preece*, No. 0:13-CV-57-DLB, 2014 WL 12647776 (E.D. Ky. Feb. 28, 2014); *Paradise Family*, 2021 WL 2186459; *Rodriguez-Ruiz*, 2020 WL 1675708.
14. *Id.*
15. Fed. R. Civ. P. 26(b)(1).
16. *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423 (2d Cir. 2001); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010); *Bistrian v. Levi*, 448 F. Supp. 3d 454 (E.D. Pa. 2020).
17. *Manning v. Safelite Fulfillment, Inc.*, No. CV 17-2824 (RMB/MJS), 2021 WL 3557582 (D.N.J. Apr. 29, 2021).
18. *Arteria Prop. Pty Ltd. v. Universal Funding V.T.O., Inc.*, No. CIV.A. 05 4896 (PGS), 2008 WL 4513696 (D.N.J. Oct. 1, 2008).
19. Fed. R. Civ. P. 37(e); ABA Model Rule 3.4; *see also Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013); *Katiroll Co. v. Kati Roll & Platters, Inc.*, No. CIV.A. 10-3620 GEB, 2011 WL 3583408 (D.N.J. Aug. 3, 2011).
20. Fed. R. Civ. P. 34(b)(2)(E).
21. *See also* ABA Model Rule 4.2.
22. *See, e.g.*, *Robertelli*, 2021 WL 4270216, at *4.
23. *See, e.g.*, ABA Model Rules 4.3 and 8.4(c).

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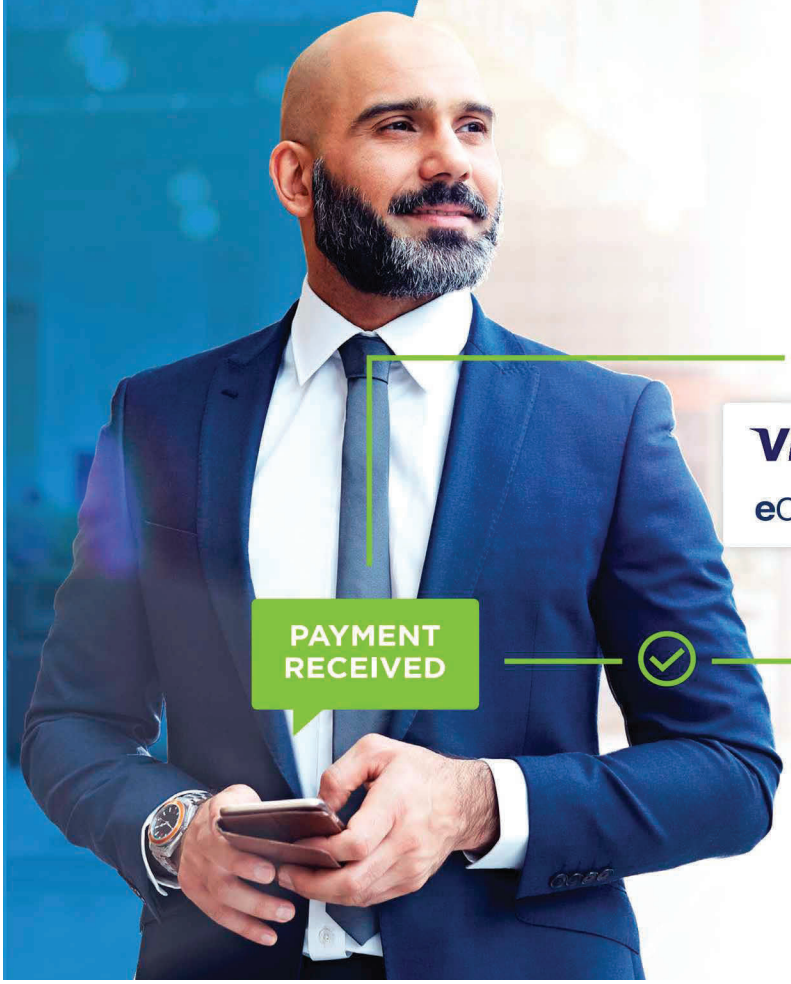

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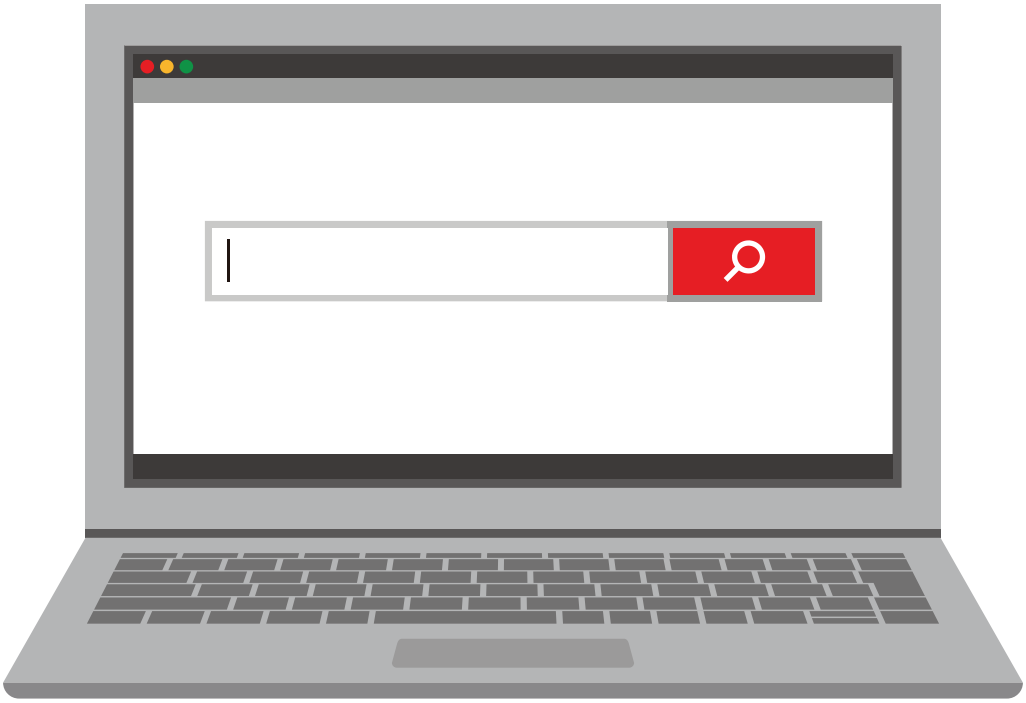

Abiding by Strict Search Terms During Discovery Can Have Consequences

by Bled Aliu and Hon. Ronald J. Hedges

The proliferation of electronic information has created many questions regarding the discovery process. Attorneys are required under Federal Rule of Civil Procedure 26(f) to confer to discuss, among other things, preservation of electronically stored information (ESI) and to prepare a plan for submission to a judge. During this conference, attorneys may develop and share suggested search terms for ESI that they believe are relevant to their claims or defenses in a civil action. A fundamental question is what an attorney's obligations are, if any, during a Rule 26(f) conference, when the attorney is aware that the suggested search terms by the opposing party are insufficient and will not produce the ESI sought. Should the attorney stay quiet? Should the attorney produce the desired ESI even though a strict application of the suggested search terms would otherwise not produce the documents? If the latter, is that attorney breaching legal and ethical duties owed to the client or the court?

The answers to these questions are not readily apparent. However, an attorney should disclose the insufficiency of an opposing party's search terms. Failure to do so may have consequences for the civil action, as well as the attorney's career.

What the Rules Suggest

The rules suggest that disclosure is necessary when an attorney knows that suggested search terms will not lead to

the production of their client's relevant ESI. Discovery is a party-driven effort that requires good faith and cooperation by all parties to be effective. Rule 1 provides that the Federal Rules of Civil Procedure "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."[1] Rule 16(f) allows for sanctions to be imposed against an attorney who does not participate in good faith.[2] These requirements may create an obligation to disclose, as withholding of relevant ESI can cause undue delay and expense in a civil action and may not be good faith participation in the Rule 26(f) process.

The need to disclose is further governed by Rule 26. Rule 26(g)(1)(A) requires an attorney who is responding to a discovery request to sign off on the request to signal that after a "reasonable inquiry" the disclosure of all materials pertinent to the request is "complete and correct" to the best of the attorney's knowledge.[3] The Committee Note explains that this signature requirement is "…designed to curb discovery abuse by explicitly encouraging the imposition of sanctions."[4] If an attorney knows that the suggested search terms will not produce relevant ESI, the attorney may not have performed a reasonable inquiry in complete and correct production of the requested materials to the best of the attorney's knowledge. This could result in sanctions under Rule 26.

Rule 37(f) allows sanctions to be imposed against a party or an attorney who fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f).[5] The Committee Note states that "[i]interrogatories and requests for production should not be read or interpreted in an artificially restrictive or hypertechnical manner to avoid disclosure of information fairly covered by the discovery request, and to do so is subject to appropriate sanctions under subdivision (a)."[6] An attorney who withholds relevant ESI could experience sanctions under Rule 37.

What Ethical Standards and Persuasive Materials Suggest

The New Jersey Rules of Professional Conduct (NJRPC) also suggest that disclosure is expected. NJRPC 3.4(a) states that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act." NJRPC 3.4(d) states that a lawyer shall not "fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party."[7] NJRPC 3.3 outlines an attorney's duty of candor toward the tribunal and states that an attorney shall not knowingly "fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law."[8] NJRPC 3.4 and 3.3 combined with Rule 26's signature requirement may also support a presumption of disclosure.

The counterargument that NJRPC 1.6 (an attorney's duty of confidentiality of information) could shield an attorney from suggested search term misconduct is unfounded.[9] Unless the suggested search terms will reveal protected ESI under the work product privilege or the attorney-client privilege, nothing suggests that NJRPC 1.6 trumps the good faith requirements of the above-described rules and standards.

The Sedona Conference, a non-partisan, non-profit educational organization, has published a variety of materials to assist attorneys through the ESI discovery process. An article published in *The Sedona Conference Journal* by Jason Baron and Edward Wolfe suggests that "[p]arties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools, and protocols (including as to keywords, concepts, and other types of research parameters)."[10] Another article published in the *Journal* by William Butterfield, *et al.*, suggests "it is possible that refusing to 'aid' opposing counsel in designing an appropriate search protocol that the party holding the data knows will produce responsive documents could be tantamount to concealing relevant evidence."[11]

Read together, the NJRPC and persuasive materials further create a presumption of disclosure when an attorney is aware that suggested search terms are insufficient and will not produce readily available ESI. Analysis of case law further reinforces this presumption.

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What Case Law Suggests

Courts recommend avoiding "gotcha" games in a variety of discovery disputes.[12] Moreover, courts have encouraged cooperation between parties when creating search terms to produce relevant documents from large repositories.[13] In *Tracinda Corp v. DaimlerChrysler AG*, the court noted that the obligation for counsel to come forward with relevant documents requested during discovery is absolute.[14] Courts have made it clear that the federal rules, NJRPC, and even statutes impose limits on how the adversarial system works during the discovery process.[15] Additionally, attorneys are strongly encouraged to cooperate and communicate with opposing counsel during discovery.[16] There have been two decisions in New Jersey that are directly on point.

In *Younes v. 7-Eleven, Inc.*, a franchise owner of multiple 7-Eleven stores believed that corporate headquarters had devised a plan to illegally terminate undesirable stores. The plaintiff's stores unfortunately fell into this category. One of the main discovery disputes centered around the search terms that were used by 7-Eleven in response to the plaintiff's ESI discovery requests. 7-Eleven had a plan to strategically shut down certain stores in New Jersey, and referred to this plan in more than seven different ways. At the time of the Rule 26(f) meet and confer, the plaintiff only knew of one of the terms used for the plan, and requested that all documents which referred to "Operation Philadelphia" (one of the code words for the plan) be produced. 7-Eleven only produced documents that referred to "Operation Philadelphia," but produced no documents that referred to the same plan under the names of "Project P," "Project Philly," "Philly Project," "Project Philadelphia," "Philadelphia Project," and "Operation Take Back," among other code words.

The court found this conduct sanctionable since individuals within the 7-Eleven organization knew about all of the different code words but refused to produce all of the relevant ESI by blaming the suggested search term request by the plaintiff. What made the case especially egregious is that the attorney who signed off on the Rule 26(g) discovery production request himself likely had personal knowledge of the project and its code words. The court made clear that 7-Eleven had an independent duty to produce relevant and responsive discovery even if the plaintiff did not specifically list all of the different code words for the project. The court also noted that this conduct violated the spirit of the discovery rules and breached all tenets of good faith. The

court imposed sanctions under Rule 26(g) and Rule 37(b)(2)(C) in the forms of an admonition and ordered 7-Eleven to pay all fees and costs related to the misconduct, respectively.

Another decision that addressed the same issue is *Montana v. County of Cape May Bd. of Freeholders*.[17] The plaintiff believed that several negative employment actions were taken against him for illegitimate and illegal reasons. The plaintiff's name was "Arthur Montana." During discovery, plaintiff requested production of all ESI that referred to "Arthur Montana" and the defendant produced those documents. However, the defendant did not produce any ESI that mentioned terms such as "Art," "Art Montana," or "Montana" on the basis that those search terms were never suggested. The court found this behavior to be sanctionable since the employer knew of the different variations of Arthur's name. The court noted that a requesting party is not required to identify the exact "magic words" to obtain relevant documents and it is the duty of the defendant to produce all relevant documents, even if a plaintiff does not specifically list the precise ESI wording or spelling in suggested search terms. The court declined to enter a default judgment against the defendant, but ordered the defendant to pay fees and costs.

The federal rules, NJRPC, and precedent set in New Jersey federal courts suggest that an attorney should not knowingly avoid discovery requests by blaming insufficient suggested search terms, especially when the attorney has knowledge of the desired ESI. This kind of behavior is sanctionable and usually leads to awards of costs and fees, but can potentially result in a default judgment against a violating party.

What Needs to be Done Moving Forward

It is explicit that attorneys are expected to cooperate with each other during the discovery process and conduct diligent searches to the best of their knowledge. What is less explicit is that attorneys are expected to produce relevant ESI even when suggested search terms are not exactly on point. It is perhaps not surprising that attorneys seek the best results for their clients. However, attorneys should understand the nature of their client's ESI and what ESI falls within the scope of production.

In the 2015 Year-End Report on the Federal Judiciary, the Chief Justice emphasized the need for cooperation between attorneys during ESI discovery and to address new problems associated with vast amounts of ESI.[18] The benefits of increased cooperation and transparency between parties during ESI discovery cannot be overstated. Attorneys who follow the spirit of the federal rules and NJRPC drive down the costs and time associated with litigation. They also benefit by receiving discovery productions that they otherwise might not have ever received. There will always be disputes about suggested search terms for ESI. However, cooperation and transparency can eliminate at least some of these. ⚖

Endnotes

1. Fed. R. Civ. P. 1.
2. Fed. R. Civ. P. 16(f).
3. Fed. R. Civ. P. 26(g)(1)(A).
4. Fed. R. Civ. P. 26 Advisory Committee Note to 1980 Amendment.
5. Fed. R. Civ. P. 37(f).
6. Fed. R. Civ. P. 37 Advisory Committee Note to 1993 Amendment.
7. New Jersey Rules of Prof'l Conduct R. 3.4(a), 3.4(d).
8. New Jersey Rules of Prof'l Conduct R. 3.3.
9. John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 526 (2000).
10. Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 SEDONA CONF. J. 229, 230 (2010).
11. William P. Butterfield et al., *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 344 (2009).
12. *Inferrera v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 146007, at *4 (D.N.J. Dec. 20, 2011); *Worden v. Interbake Foods, LLC*, 2011 U.S. Dist. LEXIS 120525, at *1 (D.S.D. Oct. 18, 2011); *Georgacarakos v. Wiley*, 2011 U.S. Dist. LEXIS 26900, at *5 (D. Colo. Mar. 16, 2011); *Carr v. Spherion*, 2009 U.S. Dist. LEXIS 92765, at *7 (W.D.La. Aug. 17, 2009); *Compaq Computer Corp. v. Ergonome, Inc.*, 2000 U.S. Dist. LEXIS 22984, at *3 (S.D. Tex. Mar., 15 2000).
13. *In re Seroquel Prods. Liab. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007); *In re Direct Southwest, Inc.*, 2009 U.S. Dist. LEXIS 69142, at *3 (E.D. La. Aug. 7, 2009); *Lawson v. Love's Travel Stops & Country Stores, Inc.*, 2019 U.S. Dist. LEXIS 219687, at *11-13 (M.D.Pa. Dec. 23, 2019).
14. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 243 (3rd Cir. 2007).
15. *Mancia v. Mayflower Textile Services, Co.*, 253 F.R.D. 354, 357-58 (D. Md. 2008).
16. Id. at 356; *Lawson v. Love's Travel Stops & Country Stores, Inc.*, 2019 U.S. Dist. LEXIS 219687, at *13 (M.D.Pa. Dec. 23, 2019).
17. *Montana v. County of Cape May Board of Freeholders*, 2013 U.S. Dist. LEXIS 189464, (D.N.J. Sept. 20, 2013).
18. 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY, at 4-5 (2015).

The Resurgence of Electronic Evidence Spoliation Sanctions

Is the Tiered Approach of FRCP 37(e) Living Up to Expectations?

By Mark S. Sidoti and Kevin H. Gilmore

In December 2015, following much discussion about the need to curtail electronically stored information (ESI) spoliation motions and inconsistent burdens of proof for the imposition of game-changing sanctions, Federal Rule of Civil Procedure 37(e) was significantly amended to establish a two-tiered approach to remedial relief and more severe spoliation penalties. In addition, the amended rule added a number of threshold requirements before any relief can be awarded, and severely limited the court's inherent authority in these circumstances. Much of the rationale for what effectively became a wholesale rewriting of Rule 37(e) was to stem the then-surging tide of spoliation sanctions motions, often based on what were arguably inconsequential losses of evidence, and to enhance and standardize the burden of proof/fault analysis when evaluating the level of scienter behind acts of alleged ESI spoliation across federal circuits. In the end, it was generally believed that the new rule would usher in an era of reduced motion practice in this area, and a more measured approach by aggrieved litigants to pressing their perceived advantage in the face of deleted, inaccessible or incomplete ESI discovery.

At the same time, it was also hoped that more of a focus on the potential for significant, often outcome-altering sanctions as newly spelled out in the rule would discourage some of the more indefensible evidence destruction that was the hallmark of the spoliation sanctions trend in the 10 years predating the amendment. Six years later, it is not clear that either of the goals has been fully realized. While an appreciable downturn in spoliation motions occurred in the years immediately following the amendment, it appears that as courts and litigants become more acclimated to the new protocols, spoliation cases are seeing a resurgence—including cases in which more serious sanctions are imposed. That said, the seminal January 2021 decision in *DR Distributors* may signal that one of the key elements of new Rule 37(e)—the restriction on serious sanctions in the absence of a clear showing of intent—may well be gaining a strong foothold in federal spoliation jurisprudence.

Rule 37(e) and Its Tiered Approach to Addressing Spoliation

Prior to the 2015 amendment, courts generally relied upon the Rules of Civil Procedure and the court's inherent authority to sanction parties for spoliation of ESI. While Rule 37(e) existed in another form prior to the 2015 amendments, it served simply as a "safe harbor" from sanctions for parties that lost ESI as the "result of the routine, good-faith operation of an electronic information system." Not many knew what this really meant, and many still do not. More to the point, the "safe harbor" provided by old Rule 37(e) was, to extend the analogy, quite shallow and scattered with rocks because loss of relevant evidence in the face of a extant preservation obligation would not be considered by any court to be a loss due to "routine good faith operation" of any computer or cloud storage system. While innocent parties, typically in the pre-preservation time frame, were potentially protected under the rule, the imposition of sanctions in many other circumstances was common. Additionally, some circuits, including, most prominently, the Second Circuit, routinely levied severe sanctions—such as adverse inferences and dismissals—against parties where the ESI was lost due to simple negligence. The application of Rule 37—and the court's use of inherent authority—resulted in the inconsistent and unpredictable imposition of sanctions within and across federal circuits. In such an uncertain landscape, parties were encouraged to seek sanctions at the slightest discovery missteps in hopes of gaining an upper hand in a litigation. Further, the unpredictability with which sanctions were levied compelled litigants, including many corporate defendants that generally bore grossly disproportionate preservation, collection and production obligations, to preserve far more ESI than was ultimately necessary to minimize the chance of being saddled with costly spoliation sanctions. The cycle was thought by many to be unworkable in the long run.

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Yet, with further time, as counsel and the courts honed their understanding of the mechanics and parameters of Rule 37(e), there seems to be a resurgence in the filing of spoliation sanctions motions under Rule 37(e). Offsetting this trend, however, is a growing recognition in federal jurisdictions, particularly the Second Circuit, that Rule 37(e)'s tiered, intent-based scheme simply does not permit the most serious sanctions in response to many acts of even blatant and prejudicial ESI spoliation.

Enter amended Rule 37(e), which was strongly lobbied for by these very corporations caught between preserving every shred of ESI at astronomical costs, and taking their chances in particularly dangerous "negligence"-based circuits. With the former Rule 37(e) failing to "address[] the serious problems resulting from the continued exponential growth in the volume of such information" and "[f]ederal circuits hav[ing] established significantly different standards for imposing sanctions," new Rule 37(e) affirmatively provided the court with authority to impose sanctions only in certain instances where ESI was not preserved.[1] To address the inconsistencies between circuits, the rule set up a scienter scheme that required the demonstration of actual *intent to deprive* the *adversary* of the evidence *in the litigation* to secure the most serious sanctions, and relegated other proven spoliation conduct to redress by remedial measures no greater than necessary to cure whatever provable prejudice had been shown. But perhaps the most radical aspect of the rule was the clear and numerous gating requirements that a party must address before even getting to the stage of remedial measures or serious sanctions. These are:

1. the information must be ESI;
2. a duty to preserve ESI must have been triggered;
3. the ESI must be lost or destroyed;
4. the ESI must have been lost or destroyed as a result of the party's failure to take reasonable steps to preserve it; and
5. the ESI cannot be obtained through any other source.

If the party claiming spoliation can meet these threshold requirements, the court must then also find that the requesting party was actually prejudiced. Further, if prejudice is found and intent to deprive is not established, Rule 37(e)(1) limits the curative, remedial measures that the court is authorized to impose to those "no greater than necessary to cure the prejudice." These can include fee and cost awards, restrictions on the use of certain evidence at trial, and jury instructions (or judicial presumptions) that do not rise to the level of mandatory or permissive adverse inferences. Finally, the most serious sanctions, including the latter and outright dismissal of claims or suppression of defenses, are only attainable under the new rule if the moving party can demonstrate the spoliating party's intent to deprive its adversary of the use of the spoliated ESI in the litigation; *i.e.* the case at bar, not generally or as to another matter. In this regard, the Committee Notes to new Rule 37(e) emphasize that the rule is intended to "foreclose": (1) serious sanctions where a party acted negligently (even grossly negligently) in preserving relevant ESI, and (2) the court's reliance on its inherent sanctioning authority in cases that can be addressed by the rule.

Upon enactment of this clearer framework governing the path to ESI-related sanctions, motions and resulting opinions decreased significantly, with one study finding a 35% reduction in such cases from 2014 to 2018.[2] Yet, with further time, as counsel and the courts honed their understanding of the mechanics and parameters of Rule 37(e), there seems to be a resurgence in the filing of spoliation sanctions motions under Rule 37(e). Offsetting this trend, however, is a growing recognition in federal jurisdictions, particularly the Second Circuit, that Rule 37(e)'s tiered, intent-based scheme simply does not permit the most serious sanctions in response to many acts of even blatant and prejudicial ESI spoliation.[3]

DR Distributors: Its Lessons and Aftereffects

DR Distributors v. 21 Century Smoking, Inc., et al., a case out of the Northern District of Illinois, has clearly influenced this trend.[4] In January 2021, *DR Distributors* sent a stark reminder to all attorneys that compliance with e-discovery obligations is not simply "best practices," but requirements set forth by the Federal Rules of Civil Procedure, and failure to abide by these obligations under the rules may result in serious sanctions against both parties and their

attorneys. Through the opinion, District Court Judge Iain D. Johnston provided a 125-page treatise on e-discovery and spoliation, tracing the history of ESI spoliation over the past 20 years, and ultimately imposing sanctions against the defendants and defendants' former counsel for a myriad of discovery failures, ranging from the failure to issue a litigation hold and the spoliation of relevant evidence. This seminal decision—perhaps the most thorough judicial treatment of ESI spoliation law to date—has quickly become required reading for everyone from law students to seasoned practitioners who want to understand these important issues.

DR Distributors stemmed from alleged trademark infringement claims under the Lanham Act for confusingly similar marks by businesses in the electronic cigarette market. Initially filed in 2012, the litigation was marred with e-discovery issues from the start as defendants' counsel undertook little effort to comply with their e-discovery obligations. In late 2012, the principal of defendant 21 Century Smoking—Brent Duke—met with counsel to prepare initial disclosures wherein Duke explained that he used two cloud-based email accounts (Yahoo! and GoDaddy) and also used the Yahoo! chat feature for business purposes. At this time, defendants' counsel claimed to have orally instructed Duke to preserve all relevant emails and chat messages; however, at no time did counsel issue a written litigation hold, provide detailed instructions as to precisely what ESI to preserve, nor instruct Duke to disable the automatic deletion function for the email and chat accounts. As such, defense counsel allowed Duke to self-collect what he considered relevant ESI with little to no supervision. Further, based on defendants' representations and their own failure to investigate further, defendants' counsel operated under the belief that all relevant emails and chats were retrievable from defendants' business servers despite the fact that most emails and chats were web-based and stored only on the cloud.

To make matters worse, defendants' counsel failed to attempt to rectify these e-discovery missteps until three years after the close of discovery and not until plaintiff raised the issue that defendants were withholding communications relevant to the litigation. At that point, defendants produced over 15,000 pages of Yahoo! emails after having its ESI vendor—for the first time—search the web-based application's cloud storage. The defendants, however, were unable to recover potentially relevant GoDaddy! emails due to the failure to disable the automatic deletion function and Yahoo! chat communications that were permanently deleted due to the feature's discontinuance in 2015.

As a result of these e-discovery failures, and following numerous evidentiary hearings, Judge Johnston issued a meticulously detailed opinion tracing the history of ESI preservation obligations and spoliation sanctions and the years-long chain of discovery missteps by defendants, while driving home the clear responsibility of both counsel and their clients to ensure that relevant evidence is identified, properly preserved and timely produced. Applying Rule 37(e), the court imposed numerous remedial measures under section (e)(2), including evidence and issue preclusion and jury instructions related to defendants' failure to preserve the Yahoo! chats and GoDaddy emails, and even required the former defense counsel responsible for the spoliation to attend eight hours of Continuing Legal Education on ESI and certify that they have read the applicable federal rules. In the end, however, one of the most enduring lessons of *DR Distributors* is that even the most grossly negligent and pervasive discovery conduct may not be sufficient to satisfy the intent to deprive element of section (e)(2). Despite opining that "there is certainly enough evidence for a reasonable person to conclude that defendants intentionally destroyed the Yahoo! chats," Judge Johnston ultimately left the determination of intent to deprive (and thus the availability of even more serious sanctions) to the jury, explaining that reasonable persons might find otherwise under the same set of facts.

Ultimately, *DR Distributors* is more than simply a textbook treatment of e-discovery and spoliation of evidence. It is a clarion call to practitioners and litigants that the ground rules governing the preservation of ESI have been clear for far too long for conduct like this to occur or be tolerated by the courts. And this decision may be supporting other courts' refusal to abide such conduct by litigants and counsel in this area, even if actual intent remains an open issue.

For example, four months after *DR Distributors*, the Southern District of New York in *Bursztein v. Best Buy Stores, L.P.*, addressed a case involving an alleged escalator trip and fall where the plaintiff requested surveillance footage, maintenance logs and safety manuals in discovery.[5] The defendant claimed it did not possess most, if any, of the requested ESI. It also denied the existence of any surveillance footage, despite repeated discovery requests, and contrary to testimony by the defendant's Rule 30(b)(6) witness. In light of the evidence presented, the court determined that the footage did, in fact, exist at some point in time, but had since been lost or destroyed.

In determining the appropriate response to the plaintiff's spoliation motion, the court found all of the gating requirements of Rule 37(e) satisfied. Citing *DR Distributors* in its analysis of defendant's duty to preserve ESI, the court focused on the clear notice provided to defendant prior to the spoliation that the tapes and training materials were relevant evidence. Of course, such

external notification of the obligation to preserve evidence is not required by law where a party should have an independent awareness of the evidence's relevance. However, as in *DR Distributors*, the *Bursztein* court was unwilling to move beyond the remedial measures permitted by section (e)(2) because it was not persuaded by clear and convincing evidence that the spoliation was undertaken with the requisite intent to deprive plaintiff of the evidence in that litigation. Instead, given the prejudice to plaintiff by the loss of the footage, the court imposed curative measures under Rule 37(e)(1) in the form of an order allowing plaintiff to present evidence at trial regarding the existence of the surveillance footage and defendant's failure to preserve it.

In June 2021, the Southern District addressed this issue again in *Fed. Trade Comm'n v. Vyera Pharm., LLC*.[6] There, plaintiffs sought sanctions under Rule 37(e)(2) in light of defendant Martin Shkreli's failure to preserve relevant communications on two cell phones—a company-issued phone that Shkreli allegedly used to communicate about issues relevant to the case and a contraband phone he used while incarcerated that was implicitly used to shield case-related communications, including WhatsApp messages, from future discovery. With respect to the company phone, the court acknowledged that the phone was factory reset (*i.e.*, "wiped") after the preservation obligation was triggered, but that it was backed up to the cloud before that occurred, and suggested that any relevant communications might still be accessible from that backup. Because the FTC failed to fully address this, or otherwise demonstrate that relevant messages were even sent over that phone, the court concluded that the threshold requirements of Rule 37 were not met and no remedial measures or sanctions were appropriate. As to the illegal burner phone, the court expressly found that Shkreli used that device to engage in highly relevant communications, and was aware that the messages should have been preserved. Interestingly, despite characterizing the burner phone conduct as "intentional spoliation and warrant[ing] sanctions," the court exercised its discretion to order only relatively inconsequential evidentiary preclusion under section (e)(1), and bypassed the serious sanctions reserved for intentional spoliation under section (e)(2).[7]

In August 2021, another Southern District of New York court in *Stanbro v. Westchester County Health Care Corp., et al.*, applied the Rule 37(e) analysis to ultimately find clear and consequential spoliation, but rejected the application of serious sanctions under Rule 37(e)(2).[8] Like *Best Buy*, *Stanbro* also involved a defendant's failure to preserve a videotape, which captured the plaintiff's transfer from a correctional facility to a hospital during a medical emergency. The plaintiff, an inmate, suffered paralysis sometime after being forcibly restrained by correctional officers during a medical procedure in which he became combative. After the prison received a complaint for excessive force immediately following the incident, the plaintiff was transferred to a hospital. In the course of that transfer, a correctional officer recorded the plaintiff on a video camera and then burned the footage onto a DVD. The DVD was not preserved according to the prison's protocol and, ultimately, was lost prior to the plaintiff initiating the litigation.

Citing *DR Distributors* and other longer-standing precedent, the court methodically analyzed whether the threshold elements of Rule 37(e) were satisfied, and ultimately found that they were. It found that the videotape qualified as ESI (as had the court in *DR Distributors*), that at least some of the defendants had a duty to preserve the tape, that reasonable steps to preserve it were not taken and that the evidence could not be replaced. After determining that the plaintiff was clearly prejudiced in certain of his claims by the unavailability of the video (which, the evidence suggested, supported his claim that he was paralyzed at the time), the court turned to the issue of whether section (e)(1) remedial measures or (e)(2) serious sanctions should apply. Finding "no direct or circumstantial evidence that [the tape was lost or destroyed with] the requisite intent to warrant an adverse-inference instruction," it declined to impose a section (e)(2) sanction. Instead, pursuant to section (e)(1), the court ordered that the plaintiff would be permitted to present evidence concerning the loss of the tape, and its likely relevance, at trial.

This trend in the Southern District of New York is noteworthy, given that jurisdiction's well-known reputation under the previous version of Rule 37(e) for liberally applying serious sanctions like adverse inferences even for purely negligent acts of spoliation. But it is not unique to that district. The District of New Jersey, among others, has signaled a similar understanding of the limitations of the amended rule. For example, in *Manning v. Safelite Fulfillment, Inc.*,[9] the Magistrate Judge considering the defendants' spoliation motion meticulously applied the Rule 37(e) scheme. Ultimately, with regard to certain spoliated emails, the court declined to impose sanctions based on the availability of some from other sources and the defendants' failure to identify the substance of others. Regarding certain deleted Facebook messages, the court found prejudicial spoliation, but declined to grant the defendant's request for an adverse inference under Rule 37(e)(2) because the timing of the admitted spoliation (which often informs courts regarding section (e)(2) intent element) did not suggest the requisite intent to deprive. Alternatively, citing section (e)(1), the Magistrate Judge ordered the

curative measure of allowing the defendant to present the jury with evidence of the plaintiff's deletion of the messages, and permit its consideration of that evidence, with the other evidence, to "evaluate credibility and inform their determinations." Interestingly, on the defendant's appeal, the District Court[10] affirmed much of the Magistrate Judge's findings, but took a more measured approach to the section (e)(2) adverse inference request by reserving that determination for the jury, an available option suggested by the Advisory Committee notes to Rule 37(e) and used by other courts where intent to deprive presents a close question.[11]

Revamped Rule 37(e) has had six years now to take hold, both in the practice of litigation and in its application by the courts. Whether its initial and intended effect of reducing sanctions motions and penalties has been realized remains to be seen, though it appears doubtful that acts of spoliation of ever-increasing types and volumes of ESI will abate in the short term. However, another of its intended effects—standardization of the scienter element required for the most serious, game-changing sanctions across federal jurisdictions—does appear to be taking root, perhaps sparked (or at least nurtured) by Judge Johnston's careful and exceedingly thorough analysis in *DR Distributors*. Indeed, the Second Circuit and its district courts, known before the 2015 rule change to be the most liberal in applying serious sanctions like adverse inferences for even purely negligent acts of spoliation, have signaled a clear understanding that amended Rule 37(e) requires a more measured analysis of a party's misconduct and the intent that may or may not underlie it. While all of the salutary effects contemplated by the amended rule have yet to fully manifest, some, like this intent requirement for serious sanctions, are becoming evident thanks to the time and effort some courts have given to evaluating these issues in faithful accordance with Rule 37's mandates. ⚖

Endnotes

1. Fed. R. Civ. P. 37 Advisory Committee Notes.
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3. Victoria Hudgins, *Why an Amended Rule 37(e) Hasn't Slowed 'Hail Mary' E-Discovery Sanction Motions*, | Legaltech News, March 26, 2021, available at law.com/legaltechnews/2021/03/26/why-an-amended-rule-37e-hasnt-slowed-hail-mary-e-discovery-sanction-motions/.
4. *DR Distributors, LLC v. 21 Century Smoking, Inc.,* 513 F. Supp. 3d 839 (N.D. Ill. 2021).
5. *Bursztein v. Best Buy Stores, L.P.*, No. 20-cv-00076 (KHP), 2021 WL 1961645 (S.D.N.Y. May 17, 2021).
6. *Fed. Trade Comm'n v. Vyera Pharm., LLC*, 20-cv-00706 (DLC), 2021 WL 2201382 (S.D.N.Y. June 1, 2021).
7. Shkreli was precluded at trial "from introducing any argument or evidence contrary to the presumption that he communicated with [his co-defendants] about company business from prison[.]"
8. *Chad Stanbro v. Westchester County Health Care Corp., et al.*, No. 19-cv-10857 (KMK/JCM), 2021 WL 3863396 (S.D.N.Y. Aug. 27, 2021).
9. *Manning v. Safelite Fulfillment, Inc.*, CV 17-2824 (RMB/MJS), 2021 WL 3557582, at *1 (D.N.J. Apr. 29, 2021), report and recommendation adopted in part, 17-2824 (RMB/MJS), 2021 WL 3542808 (D.N.J. Aug. 11, 2021).
10. *Manning v. Safelite Fulfillment, Inc.*, 17-2824 (RMB/MJS), 2021 WL 3542808 (D.N.J. Aug. 11, 2021).
11. *See, e.g., Sosa v. Carnival Corp.*, 18-20957-CIV, 2018 WL 6335178 (S.D. Fla. Dec. 4, 2018); *see also, e.g. NuVasive, Inc. v. Kormanis*, 1:18CV282, 2019 WL 1171486 (M.D.N.C. Mar. 13, 2019), report and recommendation adopted in part, 1:18-CV-282, 2019 WL 1418145 (M.D.N.C. Mar. 29, 2019).

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Avoiding a Plan for Failure

Lessons From Recent Products Liability E-discovery Decisions

By Jonathan Donath

In many ways, discovery in a products liability case presents a host of challenges that differentiate this type of litigation from many others. This notion is only amplified in the evolving context of electronic discovery. Products liability litigation often involves large-scale consolidation, such as multi-district litigation (MDL) on the federal level, and multi-county litigation in the Superior Court of New Jersey. The sheer breadth of discovery in litigation involving thousands of plaintiffs presents its own unique challenges, including how to best evaluate, manage and produce electronically stored information (ESI).

The volume of documentation and information that may be sought in discovery implicates a host of issues. Such cases can involve hundreds of thousands of emails and communications, historical documents, internal documents, and many other

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To be sure, the scope of issues, obstacles, and risks associated with electronic discovery in the products liability context can be daunting. Moreover, like technology's effect on our day-to-day lives, how New Jersey courts deal with ESI issues in products cases is evolving in real time as well. Several New Jersey courts have issued decisions in the past year that provide guidance regarding the handling of such issues in products cases.

types of ESI. Likewise, such cases involve documents relating to the development of the product, regulatory documents, governmental applications, and ESI that may implicate trade secrets and other issues of confidentiality. Defendants in product liability litigation are often institutional entities that have either corporate relationships with or outright locations in other countries or the product at issue may be distributed internationally, thus potentially implicating international issues as well.

To be sure, the scope of issues, obstacles, and risks associated with electronic discovery in the products liability context can be daunting. Moreover, like technology's effect on our day-to-day lives, how New Jersey courts deal with ESI issues in products cases is evolving in real time as well. Several New Jersey courts have issued decisions in the past year that provide guidance regarding the handling of such issues in products cases.

Breadth of Information

The sheer breadth of material possibly subject to discovery in products litigation demands creativity and forethought in structuring how to preserve, collect, search, review, designate and produce such massive amounts of information. By way of example, just this past July, the Honorable Joel Schneider, acting as Special Master, was tasked with reviewing documents for confidentiality in the *Johnson & Johnson* talc MDL.[1] Judge Schneider reviewed emails by and between counsel, email attachments, patent communications, public relations documents, and several other categories of documents.[2] This case further illustrates the endless classifications of ESI that must be sifted through when responding to discovery in products liability litigation.

Indeed, an institutional defendant in a products liability action may be requested to produce millions of pages of documents. The task of identifying and producing this information becomes even more laborious when one considers that the subset of documents and information produced, voluminous as it may be, will likely be only a small percentage of the documents and information available from the company defendant overall. This means that processes must be in place to handle the scope of review, identification, and selection required to appropriately respond to discovery requests in such litigation.

Products attorneys have turned more and more to technology as a means to address these issues. One such method is technology-assisted review (TAR), which has been defined as "[a] process for prioritizing or coding a collection of documents using a computerized system that harnesses human judgments of one or more subject matter expert(s) on a smaller set of documents and then extrapolates those judgments to the remaining document collection."[3] The purpose of employing TAR is to permit counsel to review a large volume of documents and information while, hopefully, minimizing (as much as possible) the cost to the parties. The use of TAR has become so commonplace in products litigation that provisions for TAR are now routinely found in ESI protocols entered on dockets nationwide. Reference to another much-discussed matter presided over by Judge Schneider, this time serving as Magistrate Judge in the *In re Valsartan, Losartan, & Irbesartan* MDL, illustrates how TAR can be used in such litigation, as well as some of the potential risks involved.

The relevant dispute in that matter centered on a defendant's use of "a continuous multi-modal learning (CMML)" in connection with its review.[4] The defendant described CMML as a "machine-learning technology that enables a computer to prioritize relevant documents based on limited human input."[5] Essentially, the defendant intended to use CMML to identify documents for review and, potentially, to identify groups of documents that, if identified by the CMML as "unlikely" to be responsive, would not be reviewed.[6] Plaintiffs objected on the basis that manual search terms had already been agreed upon and because plaintiffs had not been afforded the opportunity to weigh in on the layered review approach which, they contended, ran counter to the ESI protocol already in place.[7] Conversely, the defendant attempted to focus the court on the effectiveness of its methodology as opposed to its procedural compliance with the protocol.[8] Additionally, the defendant argued that forcing it to conduct a manual review at that point would be tremendously inefficient.[9]

The court agreed with the plaintiffs and determined that defendant failed to comply with the protocol.[10] The court largely disregarded the question of whether the defendant's methodology was effective.[11] Instead, the court chiefly focused on its view that the defendant had not fully complied with the meet and confer requirements in the protocol as to the review methodology.[12] As a result, the court attempted to fashion an equitable resolution that involved defendant conducting a TAR review of the potentially non-responsive documents (as opposed to a manual review) but foreclosed the defendant from utilizing the CMML platform as proposed by defendant.[13]

The obvious takeaway is that if a party seeks to utilize a layered approach to its review, the party should confirm that its approach is memorialized ahead of time in the protocol or other agreement with its adversary. More broadly, Magistrate Schneider's decision in *Valsartan* confirms that planning and working with your adversary are paramount. As noted by the court, "[e]lectronic discovery requires cooperation between

opposing counsel and transparency in all aspects of preservation and production of ESI…Technology-assisted review requires, an unprecedented degree of transparency and cooperation among counsel in the review and production of electronically stored information responsive to discovery requests."[14]

Confidentiality and Privilege

In addition to responsiveness and relevance, another focus of ESI review in products liability cases is confidentiality. While disputes regarding confidentiality of ESI are certainly not unique to products liability litigation, the context of products cases can affect the scope of such disputes. For example, electronic communications between a range of personnel from multiple departments of an institutional entity about a product can implicate a variety of privilege issues once discovery commences in litigation surrounding that product. Indeed, the sheer breadth of documents and information in some products cases only compounds the potential confidentiality issues involved as compared to other cases, sometimes exponentially.

In the *Johnson & Johnson* MDL, plaintiffs challenged J&J's confidentiality designations as to approximately 1,300 documents.[15] In presiding over that dispute, the court reviewed a number of documents, many of them electronic communications to, from, or copied to inside or outside counsel. The court made it plain that such a confidentiality analysis cannot be limited to which personnel were copied on the communication or even the superficial nature of the communication itself. For example, simply because an electronic communication was copied to an attorney does not render the document privileged. On the other hand, simply because a communication is not copied to an attorney does not render it discoverable. Likewise, just because a document might be sent to or from an outside consultant does not automatically render the document discoverable. As noted by the court, "there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice."[16] In the present day, when legal advice is often interwoven with discussions of business issues, a court faced with such discovery disputes must analyze such electronic communications to determine whether the predominant reason for the communication was to seek or provide legal advice.[17] Likewise, the court will separately analyze both the email and any attachments, as "[m]erely attaching something to a privileged document will not, by itself, make the attachment privileged."[18]

While disputes regarding confidentiality of ESI are certainly not unique to products liability litigation, the context of products cases can affect the scope of such disputes. For example, electronic communications between a range of personnel from multiple departments of an institutional entity about a product can implicate a variety of privilege issues once discovery commences in litigation surrounding that product. Indeed, the sheer breadth of documents and information in some products cases only compounds the potential confidentiality issues involved as compared to other cases, sometimes exponentially.

The lesson is that planning for confidentiality disputes in products liability litigation starts well before litigation is initiated. Company employees should be trained, with counsel involvement, on what types of communications may end up being privileged. Likewise, counsel should routinely be involved in higher-level communications in the event litigation becomes reasonably anticipated.

The onset of litigation presents a whole new set of issues. One of the most important for clients is the confidentiality designation. There is an inherent push and pull relationship when making these decisions. Attorneys must weigh the danger and harm to their clients should certain documents and information be disclosed in discovery without protection. Clients can suffer real commercial harm in a variety of ways if information that might otherwise be kept confidential as a trade secret is disclosed. On the other hand, over-designation of materials as confidential can result in litigation penalties and increased costs.

Earlier this year, again in the context of the *Valsartan* MDL, Judge Schneider reviewed several sets of ESI (mostly emails) that were designated as "confidential" by a defendant. As a preliminary matter, the court found that the defendant had failed to satisfy the process for confidentiality designation outlined in the protocol.[19] Specifically, although the defendant complied with the protocol's requirements to state the

bases for any objections to production and to meet and confer with plaintiffs thereafter, the court found the defendant failed to satisfy the protocol's requirement that the objecting party bring any such dispute regarding the designations to the court's attention.[20] As a result, the court found that the confidentiality designations were waived.[21] Moving forward, parties must be careful to adhere to procedural requirements of any agreed-upon or court-entered ESI protocol, especially as relates to confidentiality designations. If a party fails to do so, a procedural violation can result in very significant consequences, such as an outright waiver of the designation.

The court went on to review the documents from a substantive perspective as well. As is often the case, the defendant supported its confidentiality designations with client affidavits. However, the court was careful to note that it "…is not required to give credence to (defendant)'s conclusory self-serving affidavit that is inconsistent with the Court's independent review of (defendant)'s documents."[22] In other words, when designating ESI as "confidential," counsel should be able to support such designations with proofs beyond client affidavits and certifications alone. Instead, additional proofs showing that the communication/document in question contains, for example, "proprietary, trade secret and/or highly confidential information," and that the party would be "significantly harmed" by the release of the communications will very likely be required to uphold the designations.[23] In this matter, the court concluded that the communications at issue were "routine business communications" and were, therefore, discoverable without being designated as "confidential."[24]

International Issues

Products liability litigation can involve institutional clients that do business overseas or have a parent or subsidiaries that are incorporated and/or have their principal place of business in foreign nations. This implicates a variety of issues relating to ESI. ESI sought in discovery might be housed in foreign nations. The product at issue may have been developed overseas, implicating foreign regulatory processes (and, by extension, discovery of the materials related to those regulatory processes). Likewise, when a United States court faces a discovery dispute in a products liability matter in which the material sought was created by or is owned or housed by a foreign entity, the dispute may implicate international laws.

Product liability claims are often borne out of product recalls, voluntary or otherwise. If the product at issue was distributed overseas, documents related to a foreign recall may be requested in discovery in a case venued in New Jersey. For example, in *Valsartan*, one aspect of the ESI dispute was over a series of emails relating to a recall in Finland.[25] Specifically, a customer instituted a recall of Valsartan in Finland.[26] While the defendant claimed that these emails should be shielded from discovery as trade secrets, the court ultimately concluded that these were "routine business communications" and should be produced.[27]

Recently, the District Court for the District of New Jersey was faced with a different issue: how to evaluate a claim that ESI should not be produced based on the laws of a foreign nation. In *In re Valsartan,* a defendant sought to withhold a selection of documents, including electronic communications, based on its contention that disclosure would violate the laws of the People's Republic of China.[28] In his Aug. 12, 2021, decision, the Honorable Thomas I. Vanaskie, (Ret.) serving as Special Master noted that, customarily, a party seeking to rely on foreign law to prevent production of discoverable information "has the burden of showing such law bars production" and put the defendant to its proofs.[29]

Judge Vanaskie noted the following factors that are to be considered in the analysis: (1) the importance of the documents requested; (2) the specificity of the request; (3) whether the information originated in the United States; (4) alternative means of securing the information; (5) the extent to which noncompliance/noncompliance would undermine important interests of the United States or the foreign state; (6) hardship that enforcement would impose upon the foreign entity; and (7) the good faith of the party opposing discovery.[30] Ultimately, after reviewing the electronic communications and other documents at issue through this lens, the court ordered production of all of the documents at issue, except three, which were created by a Chinese governmental agency.[31] In ordering production of some, but not all of the documents in dispute, the court noted that the defendant demonstrated good faith throughout the discovery process and had only sought to redact or withhold a very small percentage of documents as compared to the several hundred thousand it produced.[32] If nothing else, this suggests that it is advisable to proceed judiciously in seeking to redact or withhold documents in discovery, as doing so may establish some credibility with the court.

Conclusion

These are only a few of the myriad of electronic discovery issues that have been reviewed in recent New Jersey products cases. New Jersey counsel in products liability actions must be cognizant of the dangers inherent in navigating the sea of electronic discovery. The lesson New Jersey practitioners can learn from these decisions is that the earlier the preparation begins for electronic discovery, the better. Before litigation is even anticipated, counsel should be involved in training company employees early and often regarding their use of electronically stored infor-

mation and electronic communications. Once litigation is anticipated, counsel should begin weighing decisions related to confidentiality, as well as the best means for reviewing potentially hundreds of thousands (in some cases, millions) of documents and other ESI in terms of both cost and substance. Once litigation commences, counsel must take great care in crafting and agreeing to an ESI protocol that they and their clients can live with on multiple levels. Once the protocol is agreed to and/or entered by the court, counsel must follow the protocol as even a procedural misstep can have substantive impact in the litigation and on their clients. Finally, the extent to which ESI (or the custodian of such ESI) is located in a foreign nation or implicates foreign laws should be considered. Many New Jersey attorneys have long been taking these issues into account earlier and earlier. Nevertheless, the overarching lesson to be gleaned from these cases is that it is never too early to consider such issues in products litigation. ⚖

Endnotes

1. *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices, & Prods. Liab. Litig.,* No. 2738 (FLW) (LHG), 2021 U.S. Dist. LEXIS 138589 (D.N.J. July 26, 2021).
2. *Ibid.*
3. Maura R. Grossman and Gordon V. Cormack, *"The Grossman-Cormack Glossary of Technology Assisted Review,"* 7 Fed. Courts L. Rev. 1 (2013); https://www.americanbar.org/groups/litigation/committees/professional-liability/practice/2020/ethical-obligations-in-technology-assisted-review/
4. *In re Valsartan*, 337 F.R.D.610, 614 (D.N.J. 2020).
5. *Id.*
6. *Ibid.*
7. *Id.* at 616-617.
8. *Id.*
9. *Id.*
10. *Id.* at 617-618.
11. *Id.* at 620.
12. *Id* .at 621.
13. *Id.* at 624-625.
14. *Id.* at 618, 612.
15. *In re Johnson & Johnson* 2021 U.S. Dist. LEXIS 138589 at *1160.
16. *In re Johnson & Johnson*, 2021 U.S. Dist. LEXIS 138589, at *1160-61; *quoting In re Copper Market Antitrust Litig.,* 200 F.R.D. 213, 219 (S.D.N.Y. 2001).
17. *In re Johnson & Johnson,* U.S. Dist. LEXIS 138589 at *1145, 1150.
18. *Id.* at *1163; *quoting Leonen v. Johns-Manville,* 135 F.R.D. 94, 98, 99 (D.N.J. 1990).
19. *In re Valsartan N-Nitrosodimethylamine (NDMA),* 512 F. Supp. 3d 546, 553 (D.N.J. 2021).
20. *Id.* at 551-552.
21. *Id.* at 552.
22. *Id.* at 553-554.
23. *Id.* at 554.
24. *Id.*
25. *Id.* at 553.
26. *Id.*
27. *Id.* at 554.
28. *In re Valsartan,* No. MDL No. 19-2875(RBK/KW), 2021 U.S. Dist. LEXIS 159783, at *114 (D.N.J. Aug. 12, 2021).
29. *Id.; quoting Schindler Elevator Corp. v. Otis Elevator Co.,* 657 F. Supp. 2d 525, 532 (D.N.J. 2009) (*quoting United States v. Vetco, Inc.,* 691 F.2d 1281, 1288 (9th Cir.)).
30. *In re Valsartan,* 2021 U.S. Dist. LEXIS 159783, at 123-124; *citing Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1475 (9th Cir. 1992).
31. *In re Valsartan,* 2021 U.S. Dist. LEXIS 159783 at 130-131.
32. *Id.*

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