

eDiscovery

Federal Rules, Recent Rulings & Strategy



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Changes to the FRCP



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Changes to the Model Rules

- Effective December 1, 2015
- Rule 1.1 – Duty of Competence
 - “including the benefits and risks associated with relevant technology”
- Rule 26(b)(1) – Parties may obtain ESI that is nonprivileged, relevant and proportional to the needs of the case considering (Proportionality Factors):
 - The importance of the issues at stake
 - The amount in controversy
 - Relative access to relevant information
 - Parties’ resources
 - The importance of discovery in resolving the issues
 - Burden outweighing benefit

Changes to the Model Rules – Cont'd

- Rule 37(e) – Failure to Preserve
 - ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery
 - The Court can:
 - Upon finding of prejudice, may order measures no greater than necessary to cure the prejudice; or
 - Upon finding intent to deprive, may:
 - Presume the lost information was unfavorable to the party;
 - Instruct the jury that it may or must presume the information was unfavorable; or
 - Dismiss the action or enter default judgment

Avoid the Sanctions!!!

- [*Gilead Sciences v. Merck & Co. \(N.D. Cal. Jan. 26, 2016\)*](#)
 - *Patent infringement case where counsel requested additional information, but the court said that the request was not proportional. 26(b)(1).*
 - [*NuVasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM\(RBB\) \(S.D. Cal. July 22, 2015\)/NuVasive, Inc. v. Madsen Med., Inc.\(S.D. Cal. Jan. 21, 2016\)*](#)
 - *Plaintiff did not retain any text messages from the four main custodians (adverse inference). Revisited after the new rules...the judge decided not to apply the adverse inference because there was no intent. 37(e).*
 - [*CAT3 v. Black Lineage \(S.D.N.Y. Jan. 12, 2016\)*](#)
 - *Trademark case where Plaintiff's intentionally altered email addresses. Judge said adverse inference was an option, but only precluded use of these emails and gave fees to Defendant. 37 (e).*
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California Bar – Formal Opinion No. 2015-193

Issued June 2015 by the State Bar of California Standing Committee on Professional Responsibility and Conduct

- “The ethical duty of competence requires an attorney to assess at the outset of each what electronic discovery issues might arise during litigation...”
 - “An attorney lacking the required competence for e-discovery issues has three options:
 - 1. acquire sufficient learning and skill before performance is required;
 - 2. associate with or consult technical consultants or competent counsel (Note: Don’t forget about an attorney’s duty to supervise); or
 - 3. decline the client representation.”
 - “Not every litigated case involves e-discovery. Yet, in today’s technological world, almost every litigation matter *potentially* does.”
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Formal Opinion No. 2015-193 – Cont'd

- “Attorneys handling e-discovery should be able to perform (either by themselves or in association with competent co-counsel or expert consultants) the following:
 - initially assess e-discovery needs and issues, if any;
 - implement/cause to implement appropriate ESI preservation procedures;
 - analyze and understand a client’s ESI systems and storage;
 - advise the client on available options for collection and preservation of ESI;
 - identify custodians of potentially relevant ESI;
 - engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
 - perform data searches;
 - collect responsive ESI in a manner that preserves the integrity of that ESI; and
 - produce responsive non-privileged ESI in a recognized and appropriate manner.”

Claw back Agreements – Beware of Privileged

- 502(b) – There is no waiver if:
 - The disclosure is inadvertent;
 - The holder of privilege took reasonable steps to prevent disclosure; and
 - The holder promptly took reasonable steps to rectify

- 502(d) – There is no waiver if:
 - The holder does not want there to be.
 - Note: Great tool for when you want to disclose a privileged document without waiving privilege (think DOJ investigation).

Recent E-Discovery Rulings



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Recent E-Discovery Rulings

Preservation

- *Blue Sky Travel & Tours, LLC v. Al Taylor*, 2015 WL 1451636 (4th Cir. March 31, 2015)
- *Clear-View Technologies, Inc. v. Rasnick*, 2015 WL 2251005 (N.D. Cal. May 13, 2015)
- *Best Payphones, Inc. v. City of New York*, No. 1-CV-3924 (JG) (VMS); 2016 WL 792396 (E.D.N.Y. Feb. 26, 2016)
- *Accurso v. Infra-Red Servs., Inc.*, ---F. Supp. 3d---, 2016 WL 930686 (E.D. Pa. Mar. 11, 2016)



Proportionality

- *United States ex rel. Guardiola v. Renown Health*, No. 12-cv-00295 2015 WL 5056726 (D. Nev. Aug. 25, 2015)

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Possession, Custody, or Control

- *In re Lululemon Athletica Inc.*, C.A. No. 9039, 2015 WL 1957196 (Del. Chan. Apr. 30, 2015)



Recent E-Discovery Rulings, Cont'd.

Social Media and the Cloud

- *Nucci v. Target Corp.*, No. 4D14-138, 2015 WL 71726 (Fla. App.4th Dist. Jan 7, 2015)
- *Liebeskind v. Rutgers University*, 2014 WL 7662032 (N. J. Super. Jan. 22, 2015)
- *Silva v. Dick's Sporting Goods, Inc.*, 3:14-cv-580 (WWE)(WIG), 2015 WL 1275840 (D. Conn. Mar. 19, 2015)
- *Farley v. Callais & Sons LLC*, No. 14-cv-02550, 2015 WL 4730729 (E.D. La. Aug. 10, 2015)
- *Brown Jordan Int'l, Inc. v. Carmicle*, No. 15-MC-00027, 2015 WL 6142885 (W.D. Ky. Oct. 19, 2015)

Adequacy of Search Efforts

- *New Orleans Reg'l Physician Hosp. Org., Inc. v. United States*, 122 Fed. Cl. 807 (Ct. Fed. Cl. 2015)
- *In re VERP Investment, LLC*, No. 05-15-00023-CV, 2015 WL 708207 (Tex. App. Feb. 17, 2015)
- *A.M. Castle & Co. v. Byrne*, No. H-13-2960, 2015 WL 4756928 (S.D. Tex. Aug. 12, 2015)



Recent E-Discovery Rulings, Cont'd.

Form of Production

- *In re Benecar (Olmesartan) Product Liability Litigation*, MDL 15-2606 (D.N.J. June 30, 2015)
- *United States ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225 (S.D. Cal. 2015)
- *Spilker v. Medtronic, Inc.*, No. 13-cv-00076, 2015 WL 1643258 (E.D.N.C. Apr. 13, 2015)
- *Truesdell v. Thomas*, No. 5:13-cv-552-Oc-10PRL, 2015 WL 2022991 (M.D. Fla. Apr. 30, 2015)
- *Themis Bar Review, LLC v. Kaplan, Inc.*, No. 14-cv-00208, 2015 WL 3397877 (S.D. Cal. May 26, 2015)



Third-Party Discovery

- *In re Am. Nurses Ass'n*, No. 11-CV-2836, 2015 WL 1505652 (D. Md. Mar. 31, 2015)

Recent E-Discovery Rulings, Cont'd.

Taxing/Reimbursing Discovery Costs

- *Colosi v. Jones Lang LaSalle Americas, Inc.*, 781 F.3d 293 (6th Cir. 2015)
- *Comprehensive Addiction Treatment Center, Inc. v. Leslea*, No. 11-CV-03417, 2015 WL 638198 (D. Colo. Feb. 13, 2015)
- *Balance Point Divorce Funding LLC v. Srantom*, No. 13-cv-1049 (PKC), 2015 WL 997718 (S.D.N.Y. Mar. 6, 2015)
- *Hanwha Azdel, Inc. v. C&D Zodiac, Inc.*, No. 12-CV-00023, 2015 WL 1417058 (W.D. Va. Mar. 27, 2015)
- *Bagwe v. Sedgwick Claims Mgmt. Servs., Inc.*, No. 11 CV 2450, 2015 WL 351244 (N.D. Ill. Jan. 27, 2015)
- *Assoc. Elec. & Gas Ins. Servs. v. BendTec, Inc.*, No. 14-1602(MJD/LIB), 2016 WL 740409 (D. Minn. Feb. 24, 2016)



Technology Assisted Review (TAR)



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Technology Assisted Review (T.A.R.)

- **Judicial Opinions:**

- Da Silva Moore v. Publicis Groupe & MSL Grp., 287 F.R.D. 182 (S.D.N.Y. 2012)
- Dynamo Holdings v. Commissioner of Internal Revenue, Docket Nos. 2685-11, 8393-12 (U.S. Tax Ct. Sept 17, 2014)
- Rio Tinto Plc v. Vale S.A., 14 Civ. 3042 (RMB)(AJP) (S.D.N.Y. Mar. 2, 2015)
- Bridgestone Americas Inc. v. Int'l Bus. Mach. Corp., No. 3:13-1196, 2014 U.S. Dist. LEXIS 142525 (M.D. Tenn. July 22, 2014)
- Progressive Cas. Ins. Co. v. Delaney, No. 2:11-cv-00678-LRH-PAL, 2014 U.S. Dist. LEXIS 69166 (D. Nev. May 19, 2014)
- Connecticut Gen. Life Ins. Co. v. Health Diagnostic Lab., Inc., No. 3:14-cv-01519, 2015 WL 417120 (D. Conn. Jan. 28, 2015)

Technology Assisted Review (T.A.R.)

- **Sample Workflow:**
 - Initial Random Sample
 - Seed Set
 - Iterative Training Rounds
 - Stop Training Decision
 - Final Quality Control Check
 - Proportional Final Review

Technology Assisted Review (T.A.R.)

- **A Tale Of Two Cases:**

Predictive Coding	Keyword Search
Data Set: 887,617 documents	Data Set: 2.1 million documents
Number of Docs Reviewed: 27,000	Number of Docs Reviewed: 82,000
Time to Conduct Review: 674 hours	Time to Conduct Review: 2,500 hours
Cost of First Level Review: \$28,000	Cost of First Level Review: \$150,000
Relevant Documents Found: 11,000	Relevant Documents Found: 6,700



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