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February 21 - 22, 2019

eDiscovery, Evidence and Litigation Positions in Employment Matters



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Agenda

- Brief Intro to eDiscovery
- eDiscovery Challenges in Employment Litigation
- Proportionality, Cost-Shifting, Cooperation and Preservation in the employment context
- Unique Considerations by Matter Type
- Bring Your Own Device Considerations
- Litigation Support Tools and TAR
- Trends and Predictions
- Q&A



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CASE IN POINT

THE E-DISCOVERY CLE

by Tom Fishburne

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eDiscovery Rules in a Nutshell

FRCP Rules 1, 16, 26, 33, 34, 37 & 45

- Collaboration/cooperation
- Scope of Search and Production
 - ESI subject to discovery
 - “Proportionality Rule”
- Production & Data Sampling
 - Form of production
- Inadvertent disclosure of privileged ESI
- Sanctions for Spoliation



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- *Rule 1. Scope and Purpose*
 - Extends to parties the obligation to construe rules to achieve the just, speedy and inexpensive resolution of actions.
- *Rule 16. Pretrial Conferences; Scheduling; Management*
 - Scheduling orders may address preservation obligation and Fed. Evid. 502 Agreements
- *Rule 26. Duty to Disclose; General Provisions Governing Discovery*
 - Permits discovery of ESI relevant to party's claim or defense
 - Proportional to the needs of the case
 - Two-tiered framework of discoverable data
 - Accessible vs. Not reasonably accessible
- *Rule 33. Interrogatories to Parties*



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- *Rule 34. Producing Documents, ESI and Tangible Things*
- *Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions*
 - Grants courts the authority to sanction parties for the failure to preserve ESI
 - Resolves circuit split concerning the severity of sanctions
 - Only governs the spoliation of ESI; does not restrict court's "inherent authority"
 - Does not preempt stand alone tort claims for negligent/intentional spoliation under state grounds
- *Rule 45. Subpoena*
 - Mimics 26(b)(2)(B), 34(b)(2)(E) and 26(b)(5)(B)
 - Accessibility Tier
 - Form/Methodology of Production
 - Claims of Privilege



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eDiscovery Challenges in Employment Litigation

- Costs/burdens relative to value of claim
 - Universe of discoverable material increased exponentially in the workplace
 - Increased relevance of ESI in fact intensive employment disputes (e.g. discrimination, harassment, retaliation, wage & hour)
 - Incentivized early settlements regardless of merit? – e.g. Title VII 300k limit
- Asymmetrical/data imbalance
 - Employer typically maintains possession, custody and control of majority of discoverable ESI
 - Reduced incentive on employee's part to cooperate?
 - Employees typically have limited discoverable ESI
 - Generally spend less time and resources responding to RFPs



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eDiscovery Challenges in Employment Litigation

- Confidentiality of E-mails: Employer's E-mail System vs. Web based email
 - Courts split on waiver issue
 - *Scott v. Beth Israel Medical Ctr.*, 17 Misc.3d 934, 937-938 (Sup. Ct. N.Y. Co. 2007)(use of employer's email system deemed waiver of privilege)
 - *Steingart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010)(upholding expectation of privacy/confidentiality over web-based emails regardless of company policy advising otherwise)
 - *Kreuze v. VCA Animal Hospital, Inc.*, No. PJM-17-1169, 2018 WL 1898248 (D. Md. Apr. 20, 2018) (plaintiff's use of her work e-mail account to send attorney-client communications not waiver of the attorney-client privilege)
 - Subject to applicable rules of professional conduct



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eDiscovery Challenges in Employment Litigation

- Social Networking Communications
 - Actionable vs. Protected
 - Policies restricting employee comments about work conditions; terms and conditions of employment
 - Following Employees
 - Using Social Media in the Vetting Process
 - Responding to complaints made through social media
- Differing guidelines on Preservation/Disposition of employee documents and data



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Proportionality

- Can be basis to challenge overly broad/burdensome discovery
 - *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016)
- Showing of nature and quantity of undue burden required by employers
 - Rule 26 (b)(1)
 - *Fish v. Kobach*, 2016 WL 893787, at *1 (D. Kan. March 8, 2016)
 - *Zoobuh, Inc. v. Better Broadcasting, LLC*, 2017 WL 1476135, at *4-5 (D. Utah Apr. 24, 2017)
- Stronger argument for compelling production where employer sole source of information:
 - *Albritton v. CVS Caremark Corp.*, 2016 WL 3580790, at *4 (W.D. Ky. June 28, 2016)
- Can also be basis to limit employer's ability to seek discovery?
 - *Williams v. U.S. Environmental Services LLC*, 2016 WL 684607, at*3 (M.D. La. Feb. 18, 2016)



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Cost Shifting

- Remains the exception, not the rule
 - Court authority added to Rule 26(c)(1)(B) as part of 2015 amendments
- Allows courts to protect parties from undue burden or expense
 - As per *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003), many courts only deem it available whenever ESI is considered “inaccessible”
- Seven factor test developed by *Zubulake I*, continues to be applied by courts following the 2015 amendments
- No discussion about whether amendments affect applicability of 7 factor test
 - *Bailey v. Brookdale Univ. Hosp. Med. Ctr.*, 2017 WL 2616957 (E.D.N.Y. June 16, 2017)



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Duty to “Cooperate”

- Embedded within legislative intent of Rule 1 as amended on 2015
 - Not expressly incorporated so as not to create a new or independent source of sanctions; basis for discovery motions
- Intended purpose of good faith cooperative exchange about the existence and accessibility of ESI
 - Transparency encourages parties to work together towards resolution



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Duty to “Cooperate”

- Courts increasingly overseeing and enforcing parties’ cooperation responsibilities
 - Aside from Fed. R. Civ. P. 1 2015 amendments, the Federal Rules of Civil Procedure imply cooperation
 - Fed. R. Civ. P. 16 – Pretrial Conferences
 - Fed. R. Civ. P. 26(a)(1) – Initial Disclosures
 - Fed. R. Civ. P. 26(b)(2)(C) – Discovery Scope and Limits
 - Fed. R. Civ. P. 26(f) – Meet and Confer
 - Fed. R. Civ. P. 26(g) – Signing Disclosures and Discovery Requests
 - Historically had not been used enough to promote cooperation?
 - Hon. David J. Waxse, *Cooperation: What is It and Why Do It?* 18 Rich. J.L. & Tech. 8 (2012)



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Duty to “Cooperate”

- Increasing need/obligation to treat the meet and confer process seriously
 - Failure to do so can damage interests and credibility in subsequent discovery disputes
 - See, e.g., *Bailey v. Brookdale Univ. Hosp. Med. Ctr.*, 2017 U.S. Dist. LEXIS 93093, at *14–17 (E.D.N.Y. June 16, 2017) (refusing to allow plaintiff’s attorney in employment litigation to rescind discovery agreement despite substantial cost of eDiscovery inadvertently agreed to)



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Preservation in General

- Preservation starts with data governance
 - Outside employment counsel uniquely situated to advise
 - Develop policies and procedures related to communications (email, chat, social media) data management, retention
 - Map/understand systems that are repeatedly needed for litigation
- Duty arises once a party reasonably anticipates litigation
 - 2015 amendments chose not to expressly address when duty to preserve is triggered
- Preservation/litigation hold process in place
 - Content of litigation hold notice (e.g. nature of litigation, criteria for determining info. to be preserved, steps to be taken. etc.)



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Employer vs. Employee Preservation Obligations

Employer considerations

- Duty may attach earlier than in other commercial litigation contexts (potential vs. reasonable anticipation)
 - Contentious termination of employment
 - *Snider v. Danfoss LLC*, 2017 U.S. Dist. LEXIS 107591, at *13 (N.D. Ill. July 12, 2017) (obligation “obvious” in light of employee threat to sue).
 - Demand letter; Agency notice of investigation or charges
 - See *Goonewardena v. State Workers Comp. Bd.*, 258 F. Supp. 3d 326, 348 (S.D.N.Y. 2017) (employee filing charge with U.S. EEOC)
 - Reductions in force
 - Internal complaints about violations of law or policies



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Employer vs. Employee Preservation Obligations

Employer considerations (cont'd)

- Number and makeup of possible custodians and others to be appraised of duty to preserve
 - E.g. HR, managers, co-workers, IT, third-party service providers, PEOs, joint employers
- Volume and types of potentially relevant data to be preserved are subject to type of claims/allegations
 - E.g. collective actions under FLSA



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Employer vs. Employee Preservation Obligations

- *Schmalz v. Village of North Riverside*, No. 13-cv-8012, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018)
 - Loss of 50 text messages led to sanctions under Rule 37(e) following employer's admission of having received a legal hold notification and not taking any steps to preserve the texts
- *Franklin v. Howard Brown Health Center*, 1:17-cv-8376 (N.D. Ill. Oct. 4, 2018)
 - Flawed legal hold process in workplace harassment and discrimination claim led to adverse inference instruction
 - Despite "instant messages" being main source of harassment, messages were not preserved



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Employer vs. Employee Preservation Obligations

Employee considerations

- Likely less familiar concerning their discovery obligations
- Depending on claims, scope may include:
 - Social media profiles; postings; status updates
 - Text messages
 - Electronic calendar entries
 - Other device data (GPS, public hotspot “check ins”, fit data)
- *Waters v. Union Pacific Railroad Co.*, No. 15-1287-EFM-KGG (D. Kan. June 21, 2016) (employee compelled to produce social media account information as well as postings from dates he missed work in conjunction with injury claims)



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Digital Footprint

- Living Social
- Twitter
- Park Mobile
- Grocery IQ
- Yelp
- AT&T
- Facebook
- Foursquare
- Google E-mail
- Loyalty Card
- Bank of America
- Items purchased
- Timing of purchase
- Amount of time in the store
- Order of purchase
- Gap between purchases
- Location of purchase
- Location of my phone
- Pictures
- Video



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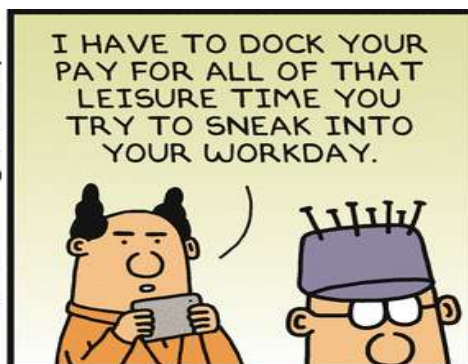
eDiscovery Considerations by Matter Type

Employment Discrimination

- Plaintiff bears burden of proof compounded by costs of accessing and reviewing relevant ESI
 - Further heightened by reliance on circumstantial evidence
- Employer's "greater access" to information deemed unfair advantage?



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eDiscovery Considerations by Matter Type

Employment Discrimination (cont'd)

- David A. Green, *The Fallacy of Liberal Discovery: Litigation Employment Discrimination Cases in the E-Discovery Age*, 44 Cap. U.L. Rev. 693 (2016)
- Should the shift to proportional discovery recast employees' burden of proof which is arguably contingent in "liberal discovery"?; employer's showing of "real reason"?
 - Evidentiary standards set forth that party bringing a claim has the burden of proof
 - Proportionality/cooperation should play crucial role in facilitating ruling on the merits
 - Employer still bears burden of paying costs of review/production of ESI



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eDiscovery Considerations by Matter Type

Wage & Hour Litigation

- Broader scope of potential evidence requires expansion of search to uncommon sources of data
- Repurposing of data so that it may be used in ways not meant to be used
- No ready source to construct amount of time/liability concerning work performed by contractors or exempt employees
 - E.g. date and time-stamp of activities/business/computer transactions tied to specific employees; network and computer logs; electronic badge swipes; GPS on service vehicles



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Windows

Information Technology (VPN)

Operations (Dispatch)

Fleet Management (GPS)

Finance (Invoices)

Personal (Detours)

Human Resources (Time Card)

5:00 AM

5:30 AM

6:00 AM

6:30 AM

7:00 AM

7:30 AM

8:00 AM

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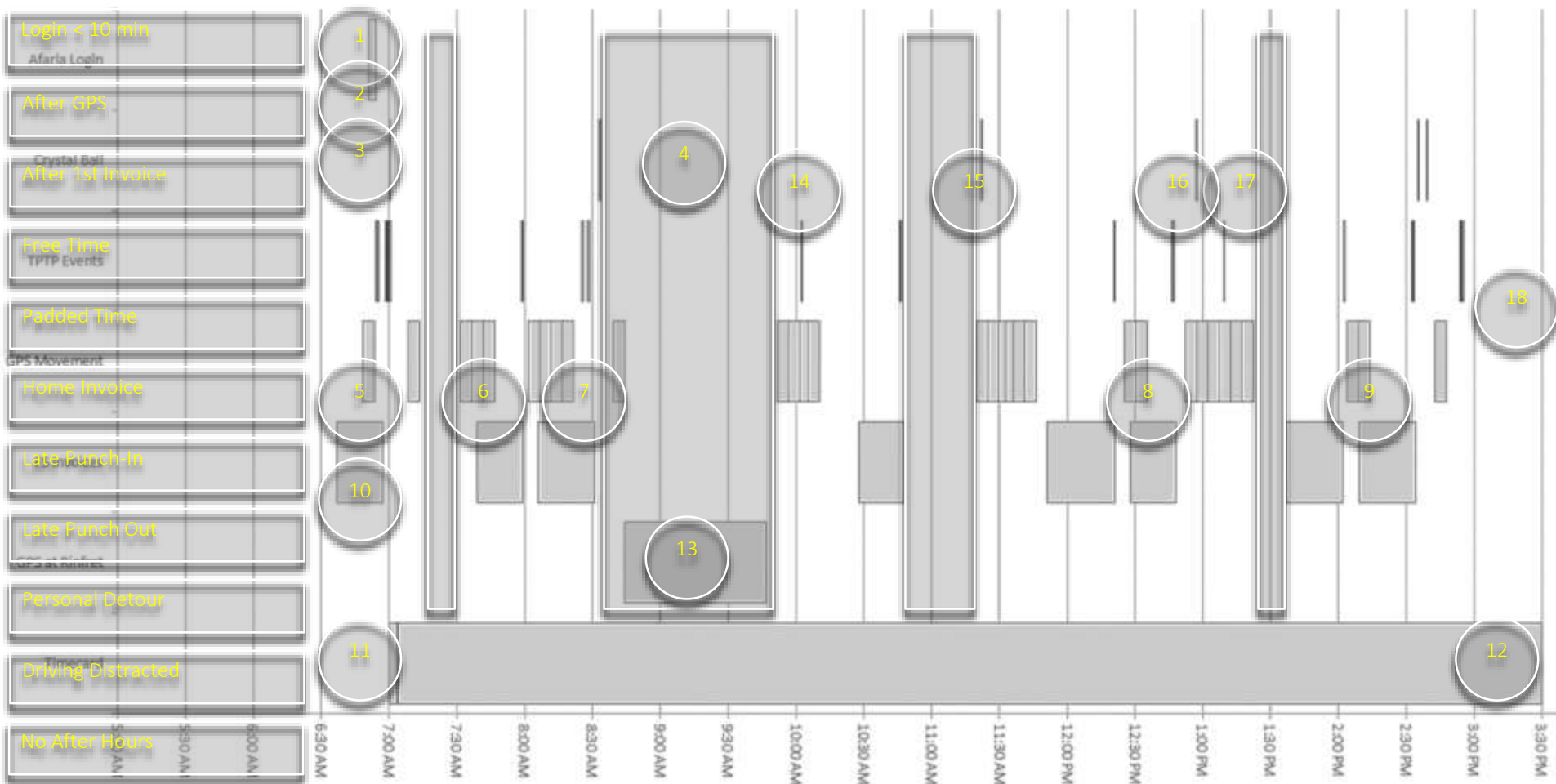
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POWERFUL INSIGHT TO CLAIMS AND DEFENSES



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REPORTED
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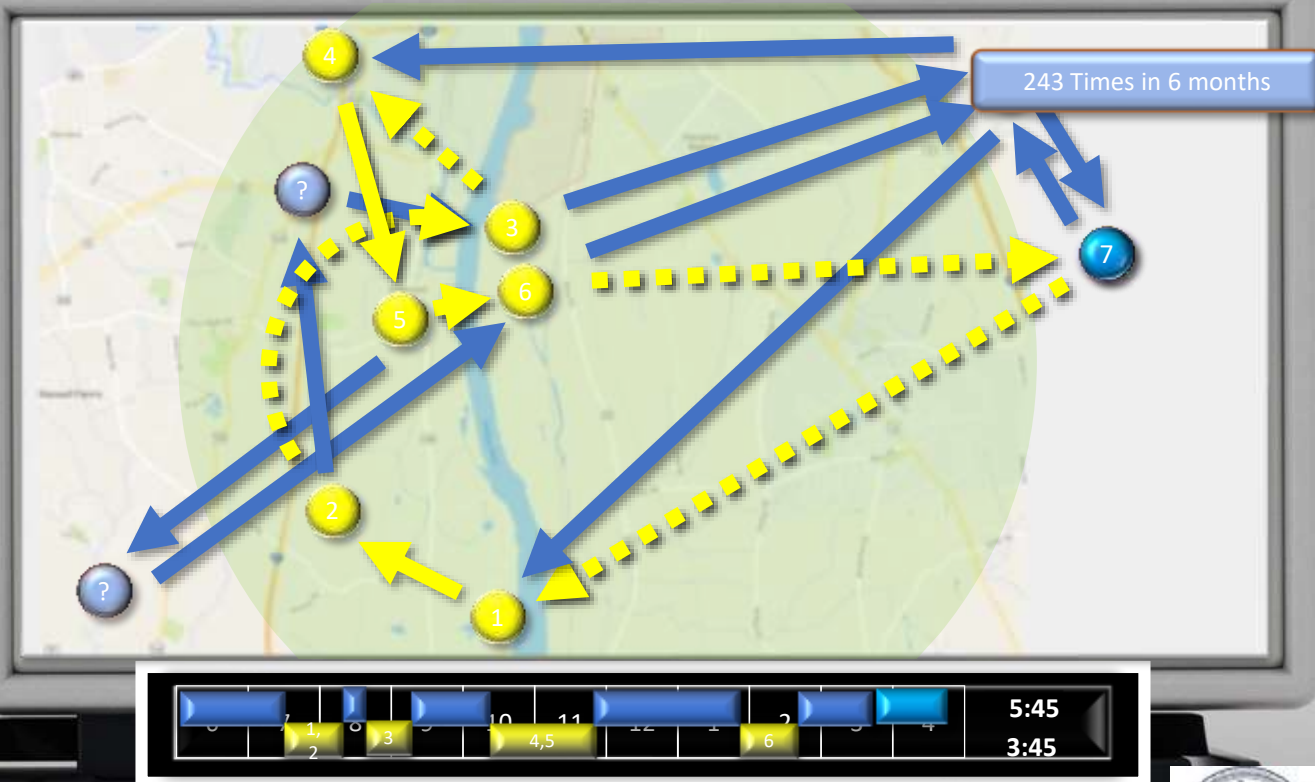


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ACTUAL
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eDiscovery Considerations by Matter Type

Investigations

- No obligation to review voluminous amounts of content; just get to the answer.
- Forensic investigation can uncover user activity on and across devices (e.g., theft of trade secrets)
- Powerful analytic tools use artificial intelligence to hone in on “hot documents”



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BYOD and eDiscovery

- Greater Risks in BYOD environments?
 - Mobility Device Management
 - Mobile Application Management
- Employers' eDiscovery obligations are more limited when personal devices are not used for work-related purposes
 - Discouragement for the design/implementation of BYOD policies?
- BYOD devices should form part of early preservation assessment
 - *Small v. University Medical Center of South Nevada*, 2018 WL 3795238, at *63 (D. Nev. Aug. 9, 2018)(sanctioning employer for failure to address BYOD devices as part of litigation hold)



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Discovery – Paradigm Shift

- Traditional approaches to searching for evidence no longer practical and/or financially feasible
- Challenge of identifying and producing responsive ESI on time, within budget, without waiving privilege
- Complying with certification requirement
 - That “to the best of [his/her] knowledge, formed after a reasonable inquiry...” the response is “complete and correct”
 - Fed. R. Civ. P. 26(g)(1)(A)
 - 31 L.P.R.A. Ap. V, R. 9.1/Vellon v. Squibb Mfg., Inc., 117 D.P.R. 838, n.17 (1986)



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Discovery – Paradigm Shift

Search and Retrieval Challenges

- Synonymy
 - Variety of ways to say same thing
- Polysemy
 - Different meanings in contexts
- Jargon and acronyms
 - Employer's own use of words and/or expressions
- Confirmation bias
 - Searching for information that proves party's theory; rather than evidence that tests whether party is correct
 - Focus should be directed towards information that tests theories
- Challenge in "identifying" right words
 - Difficulty in isolating all relevant references



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Litigation Support Tools

- Ensure proper identification and preservation of ESI
- Facilitate search, review and production
- Generally involves partnering with an electronic discovery vendor/consultant to assist in the identification, collection, processing, analysis of data



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Litigation Support Tools

Intended functions to assist attorneys in organizing and reviewing ESI:

- Processing
 - Extraction and conversion of data from files
 - Deduplication
- Document repository
- Search and retrieval
- Document control
- Classification
- Indexing
- Sorting
- Bates Stamping
- Redaction
- In-court presentation functions
- Compare modules



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Litigation Support Tools

Technology Assisted Review (“TAR”)

- Method of document review where attorneys’ review decisions are submitted to a computer algorithm that finds conceptually similar documents to ultimately predict relevance and other determinations.
- Acknowledged as a permissible form of document review
 - *Da Silva Moore v. Publicis Groupe & MSL Grp.*, 287 F.R.D. 182, 192 (S.D.N.Y. 2012)
- Proven to be more accurate/cost effective than exhaustive manual review
- Inconsistent ruling as to amount of disclosure required prior to warranting its use



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Litigation Support Tools

Technology Assisted Review (“TAR”)

- Open-ended controversy concerning the requesting party’s evaluation of the adequacy of production
 - Courts lack judicial authority to order production of irrelevant documents withheld from “seed set”
 - Does two-way effectiveness of TAR depend on parties’ transparency/forego privacy concerns?
- Whether parties may be compelled to use one technology over another also remains a disputed issue
 - *In re Bridgepoint Education Inc., Securities Litigation*, 2014 WL 3867495 (S.D. Cal. 2014)
 - *Hyles v. New York City*, 2016 WL 4077114 (S.D.N.Y. 2016)



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2019 Trends and Predictions

- Gradual modification of eDiscovery practices to incorporate personal data privacy protection
 - Meanwhile... increased acceptance that “personal” data may be relevant to commercial disputes
- Increased threat of data breaches of ESI platforms
 - Continued threat to law firms housing client data
- Increased acceptance and adoption of data analytics tools and Technology Assisted Review (“TAR”)
- Increased role of corporate data other than communications



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