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E-Discovery Update

E-DISCOVERY ESSENTIALS

Judge Xavier Rodriguez
David Kessler

April 20, 2021

Duty to Preserve

- **Williams v. UnitedHealth Grp., No. 2:18-cv-2096, 2020 WL 528604 (D. Kan. Feb. 3, 2020).**
  - Should c party be required to preserve relevant instant messages when the duty to preserve has been triggered?
  - Although not at issue in this case, should a party be required to preserve relevant portions of collaborative platforms (Teams, Slack)?
  - At the preservation stage, is it appropriate to address proportionality factors? What factors should a party consider in deciding not to preserve data? What documentation should be done in memorializing this decision? When a party intentionally decides not to preserve data citing proportionality, and a court later disagrees, is the decision a de facto intent to spoliate or does some other intent apply – we didn't mean to spoliate evidence for any nefarious reason?

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Duty to Preserve

- **King v. Catholic Health Initiatives, No. 8:18CV326, 2019 WL 6699705, at *5 (D. Neb. Dec. 9, 2019).**
  - Takeaways: When the duty to preserve is triggered is fact intensive.
  - New sources of ESI – Voicemails and instant messaging
  - Cell Phones & Possession, Custody or Control

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ESI Protocols

- **In re Valsartan, Losartan, & Irbesartan Prods Liab. Litig., No. 19-2875 (RBK/JS), 2020 WL 7054284 (D.N.J. Dec. 2, 2020).**
  - Should parties agree to ESI Protocol Orders?

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Self-Collection by the client

- ***DR Distribs., LLC v. 21 Century Smoking, Inc.*, No. 12-CV-50324, 2021 WL 185082 (N.D. Ill. Jan. 19, 2021) (trademark and defamation case).**
  - When is it appropriate/inappropriate for a client to conduct data/ESI collection on its own?
  - What level of oversight should inside or outside counsel provide?
  - What does Fed. R. Civ. P. 26(g) mean?
  - If self-collection is conducted by the client, should the client sign the responses to initial disclosures and/or responses to requests for production?

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Fed. R. Civ. P. 26(g)

- **(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:**
  - (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
  - (B) with respect to a discovery request, response, or objection, it is:
    - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
    - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
    - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

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Title search: E-Discovery Update

Also available as part of the eCourse
2021 e-Discovery Essentials eConference

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"Current Issues in E-Discovery"