REDGRAVE LLP
INFORMATION MATTERS

# The 4 P's of eDiscovery: Proportionality, Privilege, Preservation & Privacy

# Program Overview

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- Examine Each "**P**"
  - State of the Law
  - FAQs
  - Resources

- Focus is on another "**P**" – **P**ractical

- Approach is **P**arty-neutral: Looking at law as it applies to requesting and responding parties; plaintiffs and defendants

# Proportionality



The starting point is RELEVANCE

(b) Discovery Scope and Limits.

(1) Scope in General.

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

…

For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

# Proportionality



- The scope of Fed. R. Civ. P. 26(b)(1) is limited by, among other things, the balancing test set forth in Rule 26(b)(2)(C), which provides that the court may limit discovery if:

> **…the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.**

- Parties and courts should keep in mind that this Rule is a direct extension of Rule 1, which focuses all of the Civil Rules on the "just, speedy, and inexpensive" determination of all matters.

# Proportionality



- Fed. R. Civ. P. 26(b)(2)(B) Specific Limitations on Electronically Stored Information.

  A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

- Fed. R. Civ. P. 26(f)(3) Discovery Plan.

  A discovery plan must state the parties' views and proposals on:

  (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

  (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

  (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

  (D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;

  (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

  (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

# Proportionality



- Test is mostly "Micro," not Macro

- Seventh Circuit Principle 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

# Proportionality



*Tamburo v. Dworkin*, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010)

Citing the Sedona Conference on Proportionality and stating:

"'Rule 26(b)(2)(C)(iii) provide courts significant flexibility . . . to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources' . . . . Accordingly, to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action, the Court orders a phased discovery schedule. . . . During the initial phase, the parties shall serve only written discovery on the named parties. Nonparty discovery shall be postponed until phase two, after the parties have exhausted seeking the requested information from one another. . . .

# Proportionality



*Tamburo v. Dworkin*, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010)

Continuing:

"'. . . [T]he parties should focus their efforts on completing their Rule 26(a) [initial disclosures] before proceeding to other discovery requests. Second, the parties should identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims. Third, the parties should prioritize their efforts on discovery that is less expensive and burdensome."

# Proportionality



*Thermal Design v. Guardian Building Products,* 2011 WL 1527025, at *1 (E.D. Wis. April 20, 2011)

Pursuant to the parties' Agreement for Electronic Discovery, Defendants already produced more than 1.46 million pages (91 GB) of ESI. This production was the result of four months spent analyzing and collecting information, then another three months processing the data for production, at a total cost of almost $600,000. Even after receiving all of this information, Plaintiff claimed that it is entitled to more ESI specifically requesting that the Defendants search all archived email accounts and shared network drives without narrowing the scope by custodian. Defendants demonstrated that the ESI was not reasonably accessible as it would have taken several months and an additional $1.9 million to meet the request. The court held that Plaintiffs did not meet the burden to demonstrate that continued discovery was appropriate:

# Proportionality



*Thermal Design v. Guardian Building Products,* 2011 WL 1527025, at *1 (E.D. Wis. April 20, 2011)

"Even if the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence, Thermal Design doesn't explain why the extensive amount of information it seeks is of such importance that it justifies imposing an extreme burden on the Guardian Defendants. Fed.R.Civ.P. 26(b)(2)(C)(iii) (factors include "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues"). Courts should not countenance fishing expeditions simply because the party resisting discovery can afford to comply."

# Proportionality



Break It Down & Factors
You Should Consider:

- Relevance of proposed discovery. This is a fundamental gate-keeping question.
- Is the discovery sought from a party or a non-party?
- Does the discovery sought relate to a key player?
- Does the discovery relate to a key time period?
- Does the discovery relate to the core issues in the case?
- Does the discovery relate to a unique source of information?
- What are the burdens and costs involved?
- Is the information from a source that is not reasonably accessible?
- What is the amount in controversy?
- What is the relative importance of issues at stake in the case?
- What are the relative resources of the parties?

# Proportionality



- How do you apply "proportionality" to a matter?
- Do separate rules for e-discovery apply to non-party subpoena recipients, and what analysis applies to cost shifting for document subpoenas to non-parties requesting emails off back-up tapes and archives?
- How do Courts balance the financial burden of extensive eDiscovery against the likelihood of relevant evidence?
- When/can the requesting party bear the costs?
- Do the Courts look at what is reasonable in terms of discovery costs vs. the amount in controversy?
- Are the Courts serious about enforcing proportionality or is it just a theoretical nicety?

# Proportionality



- How can the costs of eDiscovery be managed in small/mid-sized cases?
- How do you make the case of proportionality to the Court?
- How does the concept of proportionality apply to preservation decisions?
- Is there any legal authority that puts a number to proportionality (i.e. where the amount in controversy is $X, discovery costs should be $Y)?
- What are some ways to convince courts to reduce the scope of discovery because the costs do not justify the likely benefit?

# Proportionality



- Seventh Circuit Electronic Discovery Pilot Program (Oct. 2009)
- The Sedona Conference® Commentary on Proportionality (Oct. 2010)
- The Sedona Conference® Commentary on Achieving Quality in the E-Discovery Process (May 2009)
- The Sedona Conference® Cooperation Proclamation (2008)

# Preservation



- Preservation – the duty to preserve relevant evidence for pending or reasonably anticipated litigation
- This is the battleground that gets the most attention because of the other side of the coin – spoliation
- Spoliation can lead to sanctions, such as:
  - imposition of costs
  - fines
  - adverse inference jury instructions,
  - default judgments
  - civil contempt citations
- This is an issue for both plaintiffs and defendants in the digital age of Web 2.0
- Just consider all of the "new" places you can find information for individuals and organizations…

# Preservation



Proposed New Federal Rules?

- Category 1
  - Very specific preservation guidelines
  - Basic question: should such specifics be included in a Rule?
- Category 2
  - More general preservation rule, addresses specific concerns in a more general way but still provides front-end guidance
  - Basic question: Too general to be helpful?
- Category 3
  - Sanctions only "back-end" rule
  - Basic question: Can preservation be controlled solely by regulating punishment issues without further guidance?

# Option 1

- Detailed and specific rule provisions
- Provides specific examples of data types that should be specifically included or excluded in preservation efforts
- Also discusses:
  - Format of preservation
  - Time frame for preservation of information
  - Number of key custodians whose data must be preserved
- Combines these specific directions with a Rule 37 sanctions proposal
  - Debate as to degree of bad-act required before sanctions are imposed (negligence, willful, bad faith, etc.)

# Option 2

- General proposals that do not include any specific examples
- Example: Scope of duty to preserve: "A person's whose duty to preserve discoverable information in regard to the potential claim of which the person is or should be aware."
  - Note: No specific data types or data stores listed
  - Note: Debate whether to explicitly include a proportionality standard into the rule
- Also combines with Rule 37 Sanctions proposal similar to Category 1

# Option 3

- Back-end rule provision governing sanctions determinations but not providing specific guidance regarding preservation standards
- Lists types of sanctions that may be awarded
- Suggests that sanctions only be permissible where actions were taken in "bad faith" and caused "substantial prejudice" in the litigation
- Major areas for debate
  - Would such a rule encourage motions for sanctions?
  - Is this approach acceptable to ensure uniform treatment of preservation/sanctions issues nationwide?

# Preservation



Internal Collaboration:

- **SharePoint**
- **Office Communicator**
- **Yammer**

Blogs:

- **Blogger**
- **Twitter** (Considered a "micro-blog")

Internet:

- **Corporate Websites**
- **Agent Websites**
- **Third Party Websites**

Virtual Worlds:

- **Second Life**
- **World of Warcraft**

Social Networking:

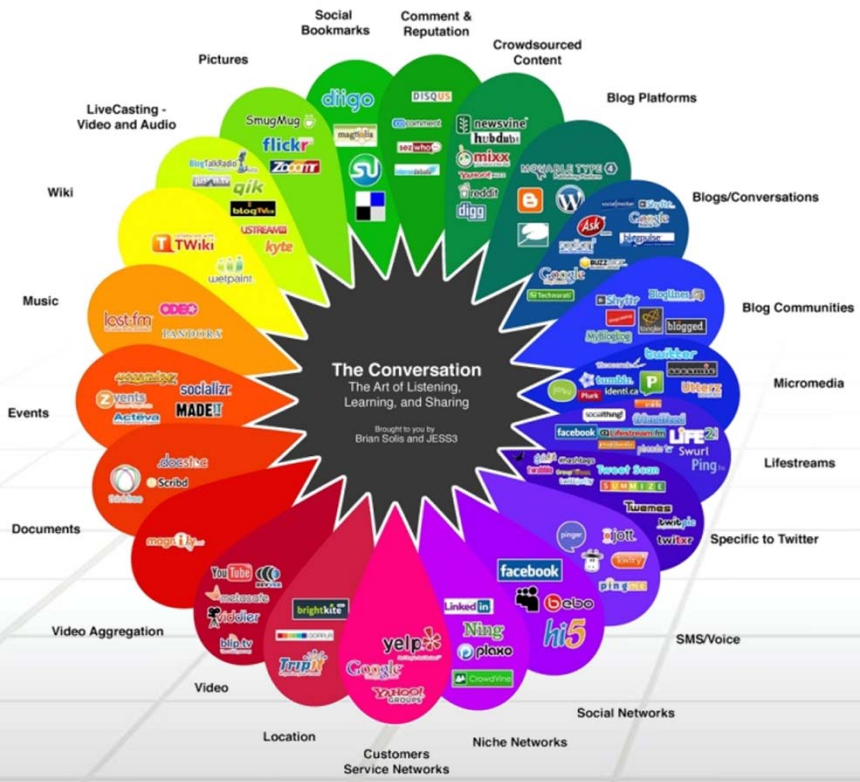
- **Facebook**
- **MySpace**
- **LinkedIn**

Peer to Peer sharing Websites:

- **You Tube**
- **Yelp**

# Preservation






Think you know Social Media?

# Preservation



Preservation/Spoliation as the "Issue of the Past 2 Years"

- *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).*
  - Judge Shira Scheindlin, author of the *Zubulake* decisions, again addressed preservation and production issues in this case
  - Conduct ranging from merely negligent (failing to collect documents from persons not directly involved in the matters at issue) to "grossly negligent" (failing to collect information from key players and failing to preserve backup tapes) resulted in sanctions
  - Decision reiterates that there is not one set of discovery guidelines that must be followed for every case – discovery requirements are fact-dependent
  - Certain procedures should be a starting point for most cases, but specific processes depend on what is needed in each case
  - Parties and counsel must err on the side of preservation until they know where information is likely to be found
  - Adverse inference instruction issued

# Preservation



- *Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598 (S.D. Tex. 2010)*
  - Focus on proportionality
  - Like *Pension Committee*, notes that discovery obligations are fact-specific
  - Deals primarily with intentional destruction, rather than negligent loss of information
  - Addresses differing circuit laws, and notes that in some circuits, negligence alone can be the basis for adverse inference sanctions while not in most
  - Adverse inference instruction

# Preservation



Preservation/Spoliation as the "Issue of the Past 2 Years"

- *Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497 (D. Md. 2010)*
  - Provides tour de force analysis of circuit differences
  - Recommended jail time for contemptuous behavior
  - District court adopted in large part

- *Orbit One Communications, Inc. v. Numerex Corp., 271 F.R.D. 429* (S.D.N.Y. 2010)
  - Written legal hold not always required
  - Proportionality may not be realistic in preservation
  - No sanctions without proof of prejudice

# Analysis of Seventh Circuit Sanctions Law from *Victor Stanley II*

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| | | Culpability and prejudice requirements | | | | | |
|---|---|---|---|---|---|---|---|
| Scope of Duty to Preserve | Can conduct be culpable per se without consideration of reasonableness? | for sanctions in general | for dispositive sanctions | for adverse inference instruction | for a rebuttable presumption of relevance | What constitutes prejudice | Culpability and corresponding jury instructions |
| Duty to preserve potentially relevant evidence party has control over. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010). | No: Breach is failure to act reasonably under the circumstances. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *6-7 (N.D. Ill. May 25, 2010).<br><br>"The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court's consideration, but it is not per se evidence of sanctionable conduct." Haynes v. Dart, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010). | Willfulness, bad faith, or fault. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (stating that fault is based on the reasonableness of the party's conduct).<br><br>Bad faith. BP Amoco Chemical Co. v. Flint Hills Resources, LLC, No. 05 C 5, 2010 WL 1131660, at *24 (N.D. Ill. Mar. 25, 2010). | Willfulness, bad faith, or fault. In re Kmart Corp., 371 B.R. 823, 840 (Bankr. N.D. Ill. 2007) (noting that fault, while based on reasonableness, is more than a "'slight error in judgment'") (citation omitted) | Bad faith. Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008). | Unintentional conduct is insufficient for presumption of relevance. In re Kmart Corp., 371 B.R. 823, 853-54 (Bankr. N.D. Ill. 2007). | When spoliation substantially denies a party the ability to support or defend the claim. Krumwiede v. Brighton Assocs., L.L.C., No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006).<br><br>When spoliation substantially denies a party the ability to support or defend the claim OR delays production of evidence. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *8-9 (N.D. Ill. May 25, 2010). | Grossly negligent conduct; jury instruction to inform the jury of the defendant's duty and breach thereof. Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010). |

# Preservation (Sanctions)



*E360 Insight, Inc. v. The Spamhaus Project*, --- F.3d ----, 2011 WL 3966150 (7th Cir. September 02, 2011)

"With this track record, no reasonable person could conclude that the district court's sanctions were too severe. *See Johnson, 192 F.3d at 661; see also Johnson v. J.B. Hunt Transport, Inc.*, 280 F.3d 1125, 1132 (7th Cir.2002) (affirming imposition of harsh sanctions in similar circumstances). The stricken witnesses and new damage calculation were disclosed to Spamhaus inexcusably late, and they were provided under circumstances that seriously call e360's good faith into doubt. The district court could have simply dismissed the case as a sanction for the failure to comply with orders and its bad faith misuse of the discovery process. *See Maynard*, 332 F.3d at 467. Instead, the court generously allowed e360 a chance to prove its damages using the information it had disclosed in a timely manner. In so doing, the district court imposed a punishment that was not excessive, *see Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir.1993) (requiring that sanctions "be proportionate to the circumstances surrounding the failure[s] to comply with discovery"), and at the same time avoided the serious prejudice that Spamhaus would have suffered if it had been forced to conduct additional discovery to address e360's late disclosure of so much new information. The district court exercised its discretion with considerable restraint. We affirm the sanction in its entirety.

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Facts:

- Plaintiff filed her EEOC complaint in October 2007. She alleged that she endured discrimination based on race and disability.
- Defendant's initial response was to instruct three administrators to search through their own electronic mail and save relevant messages.
- No further guidance by counsel was given with respect to preservation.
- EEOC final decision was April 2008.
- Plaintiff filed lawsuit in June 2008; amended complaint in October 2008.
- Defendant's June 2008 response was to instruct three additional people to search through their own electronic mail and save relevant messages.

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Facts:

- In October 2008, defendant began automatically saving all emails from the district's users in a searchable archive.
- In the spring of 2009, the defendant instructed all of its employees to preserve emails which might be relevant to the litigation (plaintiff's first request for production was filed in May 2009).
- Defendant fired plaintiff on November 17, 2009, allegedly for turning over confidential student records to her attorneys, the subject of a motion for a protective order before the court.
- Plaintiff next filed a retaliation claim against defendant with the EEOC on November 30, 2009.
- She filed her Second Amended Complaint on January 5, 2010, adding a claim of retaliatory discharge to her racial discrimination claims in violation of Title VII.

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The legal test:

- "To find that sanctions for spoliation are appropriate, the Court must find the following: 1) that there was a duty to preserve the specific documents and/or evidence, 2) that the duty was breached, 3) that the other party was harmed by the breach, and 4) that the breach was caused by the breaching party's willfulness, bad faith, or fault."

- "If the Court finds that sanctions are appropriate, it must determine whether the proposed sanction can ameliorate the prejudice that arose from the breach; if a lesser sanction can accomplish the same goal, the Court must award the lesser sanction."

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 1:

"First, a party has a duty to preserve evidence that it has control over and which it reasonably knows or can foresee would be material (and thus relevant) to a potential legal action. A document is potentially relevant, and thus must be preserved for discovery, if there is a possibility that the information therein is relevant to any of the claims. The existence of a duty to preserve evidence does not depend on a court order. Instead, it arises when a reasonable party would anticipate litigation."

(Footnotes omitted.)

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 2:

"Second, the duty to preserve evidence must have been breached. In the Northern District of Illinois, a party's failure to issue a litigation hold is not per se evidence that the party breached its duty to preserve evidence. Instead, reasonableness is the key to determining whether or not a party breached its duty to preserve evidence. It may be reasonable for a party to not stop or alter automatic electronic document management routines when the party is first notified of the possibility of a suit. However, parties must take positive action to preserve material evidence."

(Footnotes omitted.)

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 3:

"Third, the breach must have harmed the other party and, fourth, there must be a sufficient level of fault to warrant sanctions. Findings of willfulness, bad faith, and fault are all sufficient grounds for sanctions. However, a court may only grant an adverse inference sanction upon a showing of bad faith. Bad faith requires the intent to hide unfavorable information. This intent may be inferred if a document's destruction violates regulations (with the exception of EEOC record regulations). Fault is defined not by the party's intent, but by the reasonableness of the party's conduct. It may include gross negligence of the duty to preserve material evidence. Mere negligence is not enough for a factfinder to draw a negative inference based on document destruction."

(Footnotes omitted.)

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

Factor 4:

"The final factor to determine the appropriateness of sanctions and the appropriate level of sanctions is whether the defendant acted willfully, acted in bad faith, or is merely at fault. To find bad faith, a court must determine that the party intended to withhold unfavorable information. Bad faith may be inferred when a party disposes of documents in violation of its own policies. Gross negligence of the duty to preserve material evidence is generally held to be fault.""

(Footnotes omitted.)

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Findings:

- Defendant's attempts to preserve evidence were reckless and grossly negligent.
- Defendant did not reasonably prevent employees from destroying documents concerning this case.
- Defendant failed to adequately supervise those employees who were asked to preserve documents.
- Some relevant emails were probably lost due to this negligence.
- Tardy production of many more emails after depositions have been taken has caused her prejudice.
- Plaintiff did not demonstrate that defendant purposefully tried to destroy evidence material to her racial discrimination claim.

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Sanctions:

"The Court has broad discretion to fashion an appropriate sanction to remedy plaintiff's prejudice. That sanction should be appropriate to the harm that has been done to plaintiff. Because the Court does not find that there was a deliberate effort to conceal harmful evidence, the Court will not find (as plaintiff urges) that an adverse inference be drawn against defendant (that email it did not preserve contained discriminatory statements). Such an inference, under these facts, would be contrary to established precedent and unfair to defendant. "

(Footnotes omitted.)

# Preservation



Anatomy of a Case: *Jones v. Bremen High Sch. Dist. 228*, No. 08-C-3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010).

The Sanctions:

"However, the Court will grant plaintiff the following sanctions: 1) the jury in this case should be told that the defendant had a duty to preserve all email concerning plaintiffs' allegations beginning in November 2007, but did not do so until October 2008. Accordingly, defendant will be precluded from arguing that the absence of discriminatory statements from this period (November 2007 until October 2008) is evidence that no such statements were made; 2) defendant will be assessed the costs and fees of plaintiff's preparation of the motion for sanctions; and 3) plaintiff will be permitted to depose witnesses concerning emails produced on May 14, 2010 if it so chooses. Defendant will pay for the cost of the court reporter for those depositions."

(Footnotes omitted.)

# Preservation



- *Bryden v. Boys and Girls Club of Rockford*, 2011 WL 843907 (N.D. Ill. Mar. 8, 2011)
  - Plaintiff sought sanctions based on the Defendant's failure to preserve data (emails were admittedly lost during a third party's unacknowledged server upgrade). The Plaintiff argued that the data was destroyed willfully, however the Defendant argued that sufficient documentation has been provided, and that the remainder of what the Plaintiff sought was not relevant. While the Court established that the Defendant had a duty to preserve relevant documents, it could not perform an adequate balancing of the parties' interests due to the lack of explanation and speculative allegation and therefore dismissed the motion without prejudice.

# Preservation



- *Jacobeit v. Rich Township High School District 227*, 2011 WL 2039588 (N.D. Ill. May 25, 2011)
  - Plaintiff sought sanctions under the Federal Rules as a result of the Defendant's untimely disclosure of documents, destruction of an audiotape and failure to preserve relevant emails. The Court found that the Plaintiff was prejudiced when he was unable to question witnesses about the tardily produced emails in their depositions and therefore granted leave to re-depose three witnesses. Regarding the destruction of the audiotape and relevant emails, the Court found that a duty to preserve was breached, and although the conduct did not amount to willfulness or bad faith, it did amount to "fault" and thereby awarded reasonable costs and fees incurred by the Plaintiff in filing his motions and reply brief. The Court also denied Plaintiff's request for forensic analysis of the Defendant's computers as the estimated monetary burden "greatly outweighs the minimal likelihood that it would reveal additional relevant evidence."

# Preservation



- *Oleksy v. General Electric*, 2011 WL 3471016 (N.D. Ill. August 8, 2011)
  - Plaintiff sought to compel additional discovery including documentation related to the Defendant's document hold practices after it was discovered that a regularly-scheduled data purge of a database had deleted potentially relevant data. The Court found that the Defendant was at fault for the purge and that its culpability reflected "more than mere inadvertence or carelessness" as they were obligated to ensure the data was preserved yet a litigation hold letter had not been sent to the database manager.

# Preservation



- *SEC v. Brewer*, 2011 WL 3584800 (N.D. Ill. August 15, 2011)
  - The Court found the Defendants in contempt for failing to preserve documents as previously ordered and determined that the appropriate sanction included costs associated with the government having to bring and prosecute the motion to compel. While it was undisputed that ESI had been destroyed, the Defendants' attempted to argue that documents could be easily obtained from other sources to which the Court pointed out: the burden was on them, not the Government to comply with the agreed order.

# Preservation



## Seventh Circuit Principle 2.04 (Scope of Preservation)

(a) Every party to litigation and its counsel are responsible for taking reasonable and proportionate steps to preserve relevant and discoverable ESI within its possession, custody or control. Determining which steps are reasonable and proportionate in particular litigation is a fact specific inquiry that will vary from case to case. The parties and counsel should address preservation issues at the outset of a case, and should continue to address them as the case progresses and their understanding of the issues and the facts improves.

(b) Discovery concerning the preservation and collection efforts of another party may be appropriate but, if used unadvisedly, can also contribute to the unnecessary expense and delay and may inappropriately implicate work product and attorney-client privileged matter. Accordingly, prior to initiating such discovery a party shall confer with the party from whom the information is sought concerning: (i) the specific need for such discovery, including its relevance to issues likely to arise in the litigation; and (ii) the suitability of alternative means for obtaining the information. Nothing herein exempts deponents on merits issues from answering questions concerning the preservation and collection of their documents, ESI, and tangible things.

# Preservation



## Seventh Circuit Principle 2.04 (Scope of Preservation)

(c) The parties and counsel should come to the meet and confer conference prepared to discuss the claims and defenses in the case including specific issues, time frame, potential damages, and targeted discovery that each anticipates requesting. In addition, the parties and counsel should be prepared to discuss reasonably foreseeable preservation issues that relate directly to the information that the other party is seeking. The parties and counsel need not raise every conceivable issue that may arise concerning its preservation efforts; however, the identification of any such preservation issues should be specific.

# Preservation



## Seventh Circuit Principle 2.04 (Scope of Preservation)

(d) The following categories of ESI generally are not discoverable in most cases, and if any party intends to request the preservation or production of these categories, then that intention should be discussed at the meet and confer or as soon thereafter as practicable:

(1) "deleted," "slack," "fragmented," or "unallocated" data on hard drives;

(2) random access memory (RAM) or other ephemeral data;

(3) on-line access data such as temporary internet files, history, cache, cookies, etc.;

(4) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(5) backup data that is substantially duplicative of data that is more accessible elsewhere; and

(6) other forms of ESI whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business.

# Preservation



## Seventh Circuit Principle 2.04 (Scope of Preservation)

(e) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel must meet and confer and fully explain their reasons for believing that additional efforts are, or are not, reasonable and proportionate, pursuant to Rule 26(b)(2)(C). If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

# Preservation



Fed. R. Civ. P. 26(f)(2) Conference Content; Parties' Responsibilities.

In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); **discuss any issues about preserving discoverable information**; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(Emphasis added.)

# Preservation



- How should one plan for the possibility of being subject to eDiscovery?
- How best to respond to a letter from an attorney demanding that electronic data be preserved either before or after a lawsuit is filed? What if you are a third party to the litigation?
- When should a party voluntarily disclose its preservation efforts?
- Do I have to issue a written legal hold in every case?
- Can you still permanently delete non-relevant electronic data and still have a qualitative preservation system that will not result in sanctions?

# Preservation



- What is the proper policy for management and/or deletion of email communications in the ordinary course of business?
- How can I help my client convince her in-house privacy officer that litigation preservation obligations trump data privacy considerations?
- Do counsel representing individual plaintiffs need to worry about preservation issues?
- What is the relationship between the public records act and preservation?
- Is it sufficient for the purposes of preservation to print and preserve a copy of computer-generated reports, or is it actually necessary to preserve the electronic file in order to comply with the preservation obligations?

# Preservation



- Seventh Circuit Electronic Discovery Pilot Program (Oct. 2009)
- The Sedona Conference® Commentary on Legal Holds – September, 2010
- The Sedona Conference® Commentary on Inactive Information Sources (July 2009)
- The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible (August 2008)
- The Sedona Conference® Commentary on Email Management (August 2007)

# Privilege



Elements of Attorney-Client Privilege

- A communication
- Between attorney and client
  - No third parties
  - Attorney must be acting as an attorney
  - Person or entity asserting the privilege must be the client
- In confidence
- For the purpose of obtaining or providing legal advice

# Privilege



- Attorney Work Product Doctrine Applies to:
  - Documents and tangible things
  - Prepared in anticipation of litigation or for trial
  - Prepared by or for a party or its representative (by an attorney, client or consultant, etc.)

- Qualified Immunity Only
  - May be discovered based on substantial need *and* inability to obtain information by other means without undue hardship
  - Opinion work product more protected than fact work product

# Privilege

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## How to Claim Privilege in Litigation:

- Privilege logs governed by Fed. R. Civ. P. 26(b)(5)

  (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

  (i) expressly make the claim; and

  (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

- The 1993 Advisory Committee Note that accompanied the Rule declined to identify exactly what information needed to be provided, suggesting that:

  "[d]etails concerning time, persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."

- *Muro v. Target Corp.*, 250 F.R.D. 350 (N.D. Ill. 2007)(Rule 26(b)(5)(A) does not require itemizing each item individually on the privilege log; "Rule 26(b)(5)(A) requires only that a party provide sufficient information for an opposing party to evaluate the applicability of privilege, 'without revealing information itself privileged.'")

# Privilege



Waivers:

- Unintentional Waiver
  - Inadvertent disclosure
- Intentional Waiver
  - Waiver as part of litigation strategy (*e.g.*, to prove internal processes)
  - Other conduct (*e.g.*, disclosure to third parties)
- Sanction
- Scope of Waivers
- Crime Fraud Exception
- Difference Between Jurisdictions

# Privilege



Fed. R. Evid. 502(a):

- When a disclosure is made in a federal proceeding, the waiver does not extend to undisclosed information or communications unless: (1) the waiver is intentional; (2) the disclosed and undisclosed communications relate to the same subject matter; and (3) the communications "ought in fairness" be disclosed together.
- Thus, subject matter waiver cannot result from an inadvertent production, and does not automatically result even after a voluntary production.
- "[S]ubject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver." Fed. R. Evid. 502(a) 2008 Advisory Committee Note.
- While certain jurisdictions have applied this or a similar standard, Rule 502 creates the first national standard for subject matter waiver, so long as the initial triggering disclosure occurs in a federal court.

# Privilege



Fed. R. Evid. 502(b):

- Rule 502(b) protects a party from waiving a privilege in a federal or state proceeding if privileged or protected information is disclosed inadvertently in a federal court proceeding or to a federal public office or agency, unless the disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return.
- This was the "middle ground" approach under prior case law, although some jurisdictions have taken either a more or less restrictive approach.
- The Advisory Committee Note discusses some considerations that will affect the reasonableness of a party's actions to prevent disclosure, beyond those in the text of the rule.

# Privilege



Fed. R. Evid. 502(b):

- Additional factors include the number of documents to be reviewed, and the time constraints for production. Further, the presence of an established records management system before litigation may be relevant, and depending on the circumstances, the use of advanced analytical software applications and linguistic tools in screening for privilege and work product may support a finding that a party took "reasonable steps" to prevent inadvertent disclosure.
- The Note adds that the rule "does not explicitly codify" the waiver test, because "it is really a set of non-determinative guidelines that vary from case to case."

# Privilege



Fed. R. Evid. 502(c):

- Addresses the reverse of subdivisions (a) and (b) – the effect of a state court waiver on a later federal court proceeding.
- Provision holds that a disclosure made in a state proceeding does not constitute a waiver in federal court so long as the disclosure:
  - would not have been a waiver under Rule 502 if it had been made in a federal proceeding; and
  - is not a waiver of the law of the state where the disclosure occurred.
- Provision only applies to disclosures that are not the subject of a state court order concerning waiver.
- Like the earlier provisions regarding subject matter waiver and inadvertent production related to disclosure in federal court, this provision seeks to create consistency between state and federal courts.

# Privilege



Fed. R. Evid. 502(d):

- Rule 502(d) provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."
- Specifically permits a federal court to enter an order preventing disclosure of privileged or protected information from constituting a waiver in that court or in any other court. Although such an order may arise from a party agreement, the court may also issue such an order on its own.
- Under this provision, a court may incorporate party agreements into an order, including a quick peek agreement or a clawback agreement.
- On its face this provision does not require reasonable care, or any standard of care at all, to make such agreements enforceable in other jurisdictions, so long as the agreement is memorialized in an order. Indeed, the Advisory Committee Note says specifically that "the court order may provide for return of documents **irrespective of the care taken by the disclosing party**; the rule contemplates enforcement of 'clawback' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product."
  (Emphasis added.)

# Privilege



Fed. R. Evid. 502(d):

- Theoretically, under this section, the parties could agree to virtually abandon the privilege review process altogether, or agree to terms that clearly are not likely to address the relevant privilege issues. If the agreement is then blessed by the court, any disclosure made under that agreement would not be a waiver in any federal or state court, even if the disclosure would not have met the requirements for protection under the inadvertent disclosure provisions of 502(b).
- Rule 502's language on its face is silent as to whether party consent is necessary for such an order to be entered; however, the Advisory Committee Note states unequivocally that party consent is not necessary: "Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to the litigation. Party agreement should not be a condition of enforceability of a federal court's order."

# Privilege



## Fed. R. Evid. 502(e):

- Rule 502(e) acknowledges that parties in a federal proceeding may enter an agreement providing for mutual protection against waiver in that proceeding, but provides that such an agreement is only binding on the signing parties, unless the agreement is incorporated into a court order.
- This was not new law, but merely codification of common law permitting such agreements between parties -- while clarifying that such an agreement does not bind third parties without a court order.
- **Parties seeking the protection of Rule 502(d) must get their agreements entered by the court.**
- Fed. R. Evid. 502(e) 2008 Advisory Committee Note (the subdivision codifies "the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure").

# Privilege



- Given the volume of data collected and produced in litigation how do I manage the risk that privileged information may be produced?
- How do I write an effective/enforceable FRE 502 agreement and order?
- Do you ever recommend entertaining the idea of allowing the opposing side a "quick peek?" If so, in what sort of circumstances?
- Is it wise to seek, and how do you best pursue, confidentiality agreements to allow information disclosure while preserving privacy and privilege?

# Privilege



- How can I reduce the costs of attorney privilege review and the creation of privilege logs?
- Have any Courts adopted the Facciola/Redgrave approach?
- Thoughts on how to manage the costs/burdens of handling the identification of emails on privilege logs?
- What are the necessary elements for the formation of a joint defense agreement/privilege?

# Privilege



- *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework* (Federal Court Law Review, Volume 4, Issue 1 (2009) (Jonathan M. Redgrave with Hon. John M. Facciola)

- *New Federal Rule of Evidence 502: Privileges, Obligations, and Opportunities* (56 The Federal Lawyer 1, January 2009) (Jonathan Redgrave and Jennifer J. Kehoe)

# Privilege



- *Testimonial Privileges (*David Greenwald, Edward F. Malone, Robert R. Stauffer)(Thompson West, 3d ed., 2005)(update 2010)

- Federal Evidence Review http://federalevidence.com/resources502

# Privacy



- Privacy rights under US law
  - Federal laws (e.g., HIPPA)
  - State laws
- Privacy rights under foreign laws
  - EU Data Protection Directive
  - Canada
  - Mexico
- Role of U.S. courts to protect privacy interests
  - Rule 26(b)(2)(C) limitations on discovery
  - And…

# Privacy



- Rule 26(c) Protective Orders.

(1) In General.

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. **The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression**, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery.

If a motion for a protective order is wholly or partly denied, the court may, **on just terms**, order that any party or person provide or permit discovery.

(Emphasis added.)

# Privacy



- *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002)("[Plaintiff] had no right of privacy in the computer that [his employer] had lent him for use in the workplace. Not that there can't be a right of privacy . . . in employer-owned equipment furnished to an employee for use in his place of employment. . . . But [the employer] had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy. . . . The laptops were [the employer's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions. . . .")

- *Shefts v. Petrakis*, 2010 WL 5125739, at **8-9 (C.D. Ill. Dec. 8, 2010)(court found that plaintiff had no reasonable expectation of privacy in communications sent via Blackberry handheld device, employer email account, and Yahoo! email account because employer had policy in place regarding monitoring of such communications, stating that the Seventh Circuit has held "a party's expectation of privacy in messages sent and received on company equipment or over a company network hinge on a variety of factors, including whether or not the company has an applicable policy on point.")

- *Stengart v. Loving Care Agency, Inc.*, 973 A.2d 390, 399 (N.J. Super. Ct. App. Div. 2009)(rejecting argument that employer could access Web-based email account of employee because the employee used a company computer to access the email account)

# Privacy



- *United State v. Barrows*, 481 F.3d 1246, 1248-49 (10th Cir. 2007)(holding that employee had no reasonable expectation of privacy in personally owned computer because employee brought it to work and used it for work functions on a non-password protected file-sharing network)

- *Biby v. Bd. of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005)(holding that employee had no expectation of privacy in computer files when employer had a policy that allowed it to search files in responding to a request for discovery)

- *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996)(holding that employee loses reasonable expectation of privacy in email once employee sends email over a company email system)

- *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 655-657 (N.Y. Sup. Ct. 2010)("Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy. . . . Thus, when Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. . . . Further, Defendant's need for access to the information outweighs any privacy concerns that may be voiced by Plaintiff.")

# Privacy



- Is there any right of privacy to a person's social networking information?
- Does US discovery always trump foreign data privacy laws?
- Are private emails or texts sent on company owned devices protected or not?
- How does cloud computing affect privacy rights?
- Does a litigant lose privacy rights by virtue of being part of a law suit?

# Privacy



- International Association of Privacy Professionals (www.privacyassociation.org)
- The Sedona Conference Working Group 2 & Working Group 6
- Gucci Amer., Inc. v. Curveal Fashion, 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010)

  (Plaintiff sought to compel the production of documents and information regarding defendants' Malaysian bank accounts pursuant to a subpoena served on United Overseas Bank's New York Agency ("UOB NY"). UOB NY was not a party to the underlying action, nor was its parent company. Despite substantial evidence that production of the requested information was prohibited by Malaysian law and that violation of the law could subject a person to civil and criminal penalties, court concluded that compliance with the subpoena was warranted and ordered UOB NY to produce the information within two weeks.)

# Privacy



- AccessData Corp. v. ALSTE Tech. GMBH, 2010 WL 318477 (D. Utah Jan. 21, 2010)

  (Court granted plaintiff's motion to compel and ordered defendant (a German company) to produce responsive third-party, personal data, despite objections that such production would violate German law.)

- EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010)

  (EEOC, on behalf of two claimants, filed claims alleging sexual harassment. In the course of discovery, defendant sought production of claimants' internet social networking site profiles and other communications from claimants' Facebook and MySpace.com accounts. Court determined that certain content was relevant and ordered plaintiff to produce the relevant information, subject to the guidelines identified by the court.)

# Q&A

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- How do you deal with a party that is not sophisticated in eDiscovery issues? E.g., pro se plaintiff or attorney with no experience/understanding?
- How will the cloud affect eDiscovery and the litigation practice in general?
- Whether search for email or other ESI in handheld device memory is required for items not regularly stored in a dedicated private server – e.g. where a witness' email account is with yahoo, Gmail?
- Discovery of emails, including identification of custodians and best practices for limiting this often onerous task.
- To what extent do you find Magistrates, supervising discovery, saying "no" to a party seeking to increase the scope of electronic discovery after the initial reviews of ESI produced pursuant to…
- How are these Ps affected/modified when the discovery target is a foreign non-party? Or does the same analysis apply?

# Q&A

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- How to ensure that your opponent is producing all relevant information and not holding out one or more strings of bad emails or memos?
- What meet and confer requirements is there concerning selection of ESI search terms? What ESI search terms are typically considered overbroad or unduly burdensome?
- In a contested hearing, my opponent submitted an affidavit from a computer technologist that 2 days after email is deleted its gone forever. Neither the judge nor I believe him.
- What obligations do clients have to re-do/re-evaluate eDiscovery steps previously taken in ongoing litigation to bring them into compliance with eDiscovery obligations that post-date the litigation.