2017-2018 E-Discovery Update

Xavier Rodriguez, United States District Judge, Western District of Texas

I. Introduction

This paper summarizes key federal and state cases and developments that have occurred in the e-Discovery arena since January 2017.

II. Preservation Orders

Courts generally disfavor the issuance of preservation orders and instead rely upon the litigant's obligations to preserve relevant ESI and tangible items.[1] However, where there is a danger of destruction absent a court order, courts are more prone to issue such an order. There is a split in the case law as to what the proper standard is for the issuance of a protective order. Some courts have applied a temporary injunction standard – the movant must show irreparable injury and likelihood of success on the merits. Others have applied a two-prong test that requires the party seeking a preservation order to demonstrate that the data is necessary, and that it is not unduly burdensome for the party to preserve it.[2]

III. Scope of Discovery

The Federal Rules permit discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.[3] FED. R. CIV. P. 26(b)(1). But discovery is not boundless. Discovery must be limited if:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

---

[1] "The extremely broad discovery permitted by the Federal Rules depends on the parties' voluntary participation. The system functions because, in the vast majority of cases, we can rely on each side to preserve evidence and to disclose relevant information when asked (and sometimes even before then) without being forced to proceed at the point of a court order." Klipsch Grp., Inc. v. ePRO E-Commerce Ltd., 880 F.3d 620, 631 (2d Cir. 2018).

[2] See Toussie v. Allstate Ins. Co., No. 15CV5235ARRCLP, 2018 WL 2766140, at *7 (E.D.N.Y. June 8, 2018) ("The Court has carefully considered the cases cited by the parties and agrees with other courts that have rejected the preliminary injunction standard in the context of orders to preserve relevant evidence for use in discovery and at trial. Unlike a preliminary injunction, a preservation order has little to do with the substantive merits of any claim or defense; instead, such an order enforces the parties' pre-existing, independent obligations to preserve relevant evidence for use in discovery and at trial, thereby ensuring the integrity and fairness of the adjudicative process. Consistent with that purpose, the Court agrees that a version of the balancing test is the appropriate standard by which to determine whether to continue the preservation order. Thus, the Court will consider: 1) the danger of destruction absent a court order, 2) whether any irreparable harm is likely to result to the party seeking preservation in the absence of an order, and 3) the burden of preserving the evidence."). See also OOO Brunswick Rail Mgmt. v. Sultanov, No. 5:17-CV-00017-EJD, 2017 WL 67119, at *1 (N.D. Cal. Jan. 6, 2017) (same factors applied).

[3] FED. R. CIV. P. 26(b)(1).

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).[4]

IV. Proportionality

Since the concept was emphasized in the 2015 Federal Rule amendments, the term is oftentimes used as an objection to discovery requests. Courts try to rely upon counsels' good-faith cooperation, and then otherwise do their best to strike a fair balance.[5]

V. Ephemeral/disappearing messaging apps

Parties have an obligation to preserve relevant, non-privileged data. What happens when a party or its employees use ephemeral messaging apps, like Wickr, Telegram, and Snapchat? Typically, these apps send encrypted messages that instantly destroy themselves, but some of these apps allow the user to determine how long the messages exist before the app deletes them.

In *Waymo LLC v. Uber Techs., Inc.*[6], the court found that Uber sought to minimize its "paper trail" by using ephemeral communications and the court issued various jury instructions to address the failure to preserve the text messages and other discovery misconduct.

VI. Litigation Hold Letters – are they entitled to attorney-client privilege protection?

A good practice is to issue written "litigation hold" letters or memoranda (sometimes referred to as "document retention notices") to key players to ensure that relevant documents are preserved. Most courts have concluded that if prepared by counsel and directed to the client, they are protected by the attorney-client privilege. However, opposing counsel are generally entitled to inquire in depositions "into the facts as to what the employees receiving the document retention notices have done in response; i.e., what efforts they have undertaken to collect and preserve applicable information."[7]

It is generally not a best practice to allow individual employees the ability to determine which documents are relevant. This practice is fraught with potential problems, such as under-preservation, over-preservation, and intentional or negligent deletion of data.

[4] See e.g. Trainer v. Cont'l Carbonic Prod., Inc., No. 16-CV-4335 (DSD/SER), 2018 WL 3014124, at *2 (D. Minn. June 15, 2018).
[5] Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017).
[6] Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018).
[7] Shenwick v. Twitter, Inc., No. 16-CV-05314-JST (SK), 2018 WL 833085, at *4 (N.D. Cal. Feb. 7, 2018).

Nevertheless, some courts have rejected the argument that it was per se inadequate to allow individual employees the ability to determine which documents were relevant, given that the employees in question were given detailed instructions as to what type of documents to retain. *See New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. 1:12-CV-00526 MV/GBW, 2017 WL 3535293, at *3 (D.N.M. Aug. 16, 2017); *see also Mirmina v. Genpact LLC*, No. 3:16CV00614(AWT), 2017 WL 3189027, at *2 (D. Conn. July 27, 2017) (counsel coordinated and supervised the individual custodian's search for ESI).

VII. Possession, Custody or Control

PCC is the subject of some debate as of late. Specifically, how to define "control."

In the federal courts, there are two chief tests that are applied – the "practical ability" test, that is does the producing party have the practical ability to secure the documents requested and the "legal right" test, that is does the producing party have the legal right to procure a document from another person or entity on demand. As of late several courts have been blurring these two tests. Some federal courts in the Fifth Circuit have stated: "Rule 34's definition of possession, custody, or control, includes more than actual possession or control of [documents]; it also contemplates a party's legal right or practical ability to obtain [documents] from a [non-party] to the action."[8] In applying ~~kthe~~the "legal right" test, the Seventh Circuit has concluded that a defendant employer had control over Salesforce data in a wage and hour case.[9]

VIII. Form of Production

Applying the Tex. R. Civ. P. 192.4 proportionality factors to a request for production that specified a "native" format for production, the Texas Supreme Court in *In re State Farm Lloyds* remanded the case to the trial court to assess whether any enhanced burden or expense associated with a requested form is justified when weighed against the proportional needs of the case.[10] State Farm argued that its static form was adequate, and it produced the requested documents as they were kept in the ordinary course of business.

[8] See, e.g., Duarte v. St. Paul Fire & Marine Ins. Co., No. EP-14-CV-305-KC, 2015 WL 7709433, at *5 (W.D. Tex. Sept. 25, 2015). But see Lifesize, Inc. v. Chimene, No. A-16-CV-1109-RP-ML, 2017 WL 2999426, at *2 (W.D. Tex. June 2, 2017) ("Lifesize has not shown that as an employee Chimene has authority over Logitech such that he is able to command release of certain documents."). The Fifth Circuit to date has not provided recent specific guidance as to whether the "legal right" test must be established or whether "practical ability" suffices. In 2016 the Sedona Conference circulated a paper discussing this issue and proposed actual possession or legal right was the correct analysis.

[9] Williams v. Angie's List, Inc., No. 116CV00878WTLMJD, 2017 WL 1318419, at *1 (S.D. Ind. Apr. 10, 2017).

[10] In re State Farm Lloyds, 520 S.W.3d 595, 607 (Tex. 2017).

The plaintiffs sought some of the static form data (primarily photographs and related data) in their native format to capture what they believed was relevant metadata.

At least one federal court has disagreed with the arguments advanced in *In re State Farm Lloyds.* In *Morgan Hill Concerned Parents Ass'n v. California Dep't of Educ.*, No. 2:11-CV-3471 KJM AC, 2017 WL 445722, at *1 (E.D. Cal. Feb. 2, 2017), plaintiffs moved to compel CDE to produce emails in "native" format with all metadata attached. CDE did not initially file any objection in its response. CDE argued that "[a] requesting party cannot demand production in one format versus another just because one would allegedly ease a party's review process." The Court rejected that argument stating: "This argument runs directly contrary to the governing Rules, which expressly state just the opposite: the requester 'may specify the form or forms in which electronically stored information is to be produced.'" *Id.* at *2 (quoting FED. R. CIV. P. 34(b)(1)(C)). The Rule does not limit this authorization to any specific set of circumstances, nor does it say that specifying the format is not available to "ease" the review process. Indeed, CDE's dismissive rejection of "ease" of review as a valid reason for specifying the format is difficult to understand, since ease of review is precisely why the requesting party would specify the format, and it is the very reason the requester is permitted to do so." *Morgan Hill*, 2017 WL 445722, at *4. CDE also argued that it would be burdensome to require it to "reproduce" ESI in native format. The court rejected "this argument because this is a problem of CDE's own making. CDE created the problem it now complains about by engaging in an ESI production in a format of *its* choosing - the 'load file format' - rather than the native format, with all metadata attached, as plaintiffs had requested." *Id.* at *7 (emphasis in original).

IX. Objections to Discovery Requests

The court in *Harper v. City of Dallas, Texas*, No. 3:14-CV-2647-M, 2017 WL 3674830, at *4 (N.D. Tex. Aug. 25, 2017) provides an excellent primer for litigants on how to seek discovery and object to discovery requests in federal court. In sum, only seek discovery that is relevant, non-privileged, and proportional. If a producing party has failed to produce discovery or production has been incomplete, a requesting party should first attempt to confer with opposing counsel before filing a motion to compel under Rule 37(a). The party resisting discovery must show specifically how *each* discovery request is not relevant or otherwise objectionable. A party resisting discovery must show how the requested discovery is overly broad, unduly burdensome, or oppressive by submitting affidavits or

offering evidence revealing the nature of the burden.[11] Boilerplate objections are no longer permissible.[12]

Further, a party seeking to resist discovery on proportionality grounds bears the burden of showing that any discovery request that is relevant to any party's claim or defense fails the proportionality calculation mandated by Rule 26(b).[13] Yet a court may decline to compel, and at its option or on motion may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden, including forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.

In an attempted class action case wherein Quicken was alleged to have made calls to individuals who had posted their phone numbers on the national "do not call registry", the plaintiffs sought all documents "of any type received by Defendant or any third party from a proposed class member requesting that Defendant not contact that consumer or customer." Although the relevant statute contained a four-year limitations period, plaintiffs refused to limit their request. Quicken objected to the request on relevance grounds and burden, asserting that such a production could necessitate reviewing over three million emails and the expenditure of millions of dollars. Without any reference to Rule 26, but apparently deciding the matter on a "burden disproportional to the needs of this action" the district court vacated the magistrate judge order requiring production. Quicken Loans, Inc., No. 8:16-CV-2605-T-23CPT, 2018 WL 1072052, at *1 (M.D. Fla. Feb. 27, 2018).

In Physicians All. Corp. v. WellCare Health Ins. of Arizona, Inc., No. CV 16-203-SDD-RLB, 2018 WL 1704108, at *2 (M.D. La. Feb. 27, 2018), the plaintiff requested "WellCare to produce all data from the backup tapes for the years 2003-2004 and 2011 at WellCare's expense or, in the alternative, an order permitting TPAC's expert to conduct a physical examination of WellCare's backup tapes for the years 2003-2004 and 2011." The

[11] See Robroy Industries-Texas, LLC v. Thomas & Betts Corp., 2017 WL 319064 (E.D. Tex. Jan. 23, 2017) (A party opposing discovery on the basis that it imposes an undue burden must make an evidentiary showing, otherwise the objection is merely conclusory.); Union Commercial Servs. Ltd. v. FCA Int'l Operations LLC, No. 16-CV-10925, 2018 WL 558760, at *3 (E.D. Mich. Jan. 25, 2018) ("[P]laintiff's primary argument for why it should not be required to produce the invoices is that its filing system contains '70 to 80' boxes of invoices, in hard copy, sorted by year, that will take as long as six months to search by hand. But, plaintiff cannot use its 'unwieldy record keeping system' to shield it from discovery."); Mann v. City of Chicago, No. 13 CV 4531, 2017 WL 3970592, at *5 (N.D. Ill. Sept. 8, 2017) (rejecting City's burden argument regarding "the time and expense of searching the email boxes of nine (9) additional custodians" because the City did not offer any specifics or even a rough estimate about the burden.

[12] "Boilerplate or generalized objections are tantamount to no objection at all and will not be considered." Wesley Corp. v. Zoom T.V. Prod., LLC, No. 17-10021, 2018 WL 372700, at *4 (E.D. Mich. Jan. 11, 2018); Halleen v. Belk, Inc., No. 4:16-CV-55, 2018 WL 3735579, at *3 (E.D. Tex. Aug. 6, 2018) ("Concerning Defendant's responses which use "subject to" or boilerplate language, the Court finds that Defendant, as a result of using such language, waived each of its objections."); Lopez v. Don Herring Ltd., No. 3:16-CV-2663-B, 2018 WL 3641688, at *21 (N.D. Tex. Aug. 1, 2018) (same).

[13] Samsung Electronics America Inc. v. Chung, 325 F.R.D. 578 (N.D. Tex. March 7, 2017).

defendant filed numerous objections, including that "the discovery sought is not proportional to the needs of the case on the basis that the data is likely to be cumulative of prior productions, carries little relevance, and is not reasonably accessible and may not be recoverable at all." Applying the proportionality factors in Rule 26(b)(1) and Rule 26(c) (wherein the court stated the "party seeking a protective order has the burden to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements"), the court found that the discovery requests were proportional, the defendant's initial estimates of costs were substantially lowered (from $211,500 to $13,000), the data was not duplicative, and the amount in controversy was large (in excess of $20 million).[14]

X. Requests for Forensic Imaging

Because a full forensic image (and production of such an image) oftentimes result in the disclosure of non-relevant data, many courts are reluctant to require a full forensic image and production citing also privacy and proportionality concerns.[15] Rather, many courts have approved some procedure or protocol to allow for keyword searches or other means to protect against the disclosure of privileged or irrelevant information, in lieu of a full forensic examination and production.[16] In cases involving allegations of theft of trade secrets, some courts are more open to allowing imaging, but again with conditions.[17]

XI. What is the proper role of the Court in disputes about how discovery is to be conducted?

A debate has surfaced as to what is the role of the court in settling discovery disputes that arise prior to the showing of any production deficiency. Federal Rule of Civil P. 1 states: ["the 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." Federal Rule of Civil P. 26(f) requires the parties to meet and confer and discuss any issues about preserving discoverable information and develop a proposed discovery plan. Federal Rule of Civil P. 16(a) provides that the court may order the parties to attend a pretrial conference to: (1) expedite disposition of the action; (2)

[14] But see Rembrandt Diagnostics, LP v. Innovacon, Inc., No. 316CV0698CABNLS, 2017 WL 4391707, at *6 (S.D. Cal. Oct. 3, 2017) ("emails sought are disproportionate, and any information Rembrandt seeks from these custodians could be obtained in deposition.").

[15] See e.g. Henson v. Turn, Inc., No. 15-CV-01497-JSW (LB), 2018 WL 5281629, at *5 (N.D. Cal. Oct. 22, 2018); First Am. Bankcard, Inc. v. Smart Bus. Tech., Inc., No. CV 15-638, 2017 WL 2267149, at *4 (E.D. La. May 24, 2017).

[16] Brand Servs., LLC v. Irex Corp., No. CV 15-5712, 2017 WL 67517, at *2 (E.D. La. Jan. 6, 2017). For an example of a protocol authorizing a full forensic imaging under certain conditions see Cleaver-Brooks Sales & Serv., Inc. v. Efird, No. 4:17-CV-2887, 2017 WL 9535080, at *4 (S.D. Tex. Oct. 6, 2017).

[17] Realpage, Inc. v. Enter. Risk Control, LLC, No. 4:16-CV-00737, 2017 WL 1180420, at *2 (E.D. Tex. Mar. 30, 2017).

establish early and continuing control so that the case will not be protracted because of lack of management; and (3) discourage wasteful pretrial activities. In his 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts stated that these amended rules of civil procedure "emphasize the crucial role of federal judges in engaging in early and effective case management." He further implored that "Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation."

Courts and litigants are split on what these amended rules mean in the "real world." Should judges proactively require that parties be completely transparent in how they plan to undertake their discovery obligations? Should judges proactively dictate what search terms must be applied to searches or require that certain eDiscovery platform software be used? Some courts have declined undertaking these activities stating that although the rules assume parties will cooperate in discovery, and the "meet and confer" conference mandated under Rule 26(f) is not a perfunctory exercise, nothing in Rule 26(g) (verification of completeness) "obligates counsel to disclose the manner in which documents are collected, reviewed and produced in response to a discovery request."[18]

XII. Allegations of Incomplete Production

The federal courts have not yet provided a clear standard to apply to cases where a requesting party alleges that the producing party has made an incomplete production.[19] The Texas Supreme Court has recently ventured into this arena. In *In re Shipman*, 540 S.W.3d 562 (Tex. 2018), Shipman had given conflicting answers in his deposition testimony. At one point he stated he searched his files and he didn't have any responsive documents. At other times when asked about certain financial documents he stated: "I'll have to look and see," "I don't know if our records go back that far," and "I don't know if I've still got it." In his deposition testimony he also admitted deleting files from a computer, but he later clarified that he meant deletion from the "old" computer. The Texas

[18] Entrata, Inc. v. Yardi Systems, Inc., No. 2:15-CV-00102, 2018 WL 5470454, at *6 (D. Utah Oct. 29, 2018).

[19] Most courts have concluded that subjective belief that production has been incomplete will not suffice. "A party seeking discovery on discovery ("meta discovery") must show a specific deficiency in the other party's production." Brewer v. BNSF Ry. Co., No. CV-14-65-GF-BMM-JTJ, 2018 WL 882812, at *2 (D. Mont. Feb. 14, 2018). In World Trade Centers Ass'n, Inc. v. Port Auth. of New York & New Jersey, the Port Authority argued that "ESI was lost or destroyed during the migration of WTCA's ESI from the EpiSolve system to the mindSHIFT system in 2011. The Port Authority highlights that, during discovery, WTCA produced fewer relevant ESI documents for the years preceding the change in vendors in 2011 thus suggesting that ESI from earlier years was not preserved." The Court found that argument unpersuasive. "First, as with the paper documents, the fact that fewer documents were produced in the year before the migration was completed shows, by itself, very little. The number of documents generally rose each year at a steady rate, and nothing appears out of the ordinary…. Meanwhile, mindSHIFT's chief legal officer provided a declaration stating that there was no indication that any emails were lost in the transition…. The Port Authority has not shown that any ESI was destroyed during WTCA's system migration, much less that any relevant ESI was destroyed during the system migration." World Trade Centers Ass'n, Inc. v. Port Auth. of New York & New Jersey, No. 15CIV7411LTSRWL, 2018 WL 1989616, at *11–12.

Supreme Court concluded that Shipman's belated production of the backup files, although inconsistent with his earlier testimony, indicated an effort to comply with his discovery obligations. "And the discovery process is best served by rules that encourage parties to produce documents belatedly discovered in good faith. They should not face the perverse incentive to conceal such information lest they be forced to hand over the underlying electronic devices for forensic examination." Regarding the adequacy of the initial searches, the Court concluded that Shipman was "competent at some level to operate a computer and create and negotiate computer files" and that Shelton offered no evidence that Shipman was incapable of searching for computer files, "or that an exhaustive search for backup files has not now been conducted, either by Shipman or his son." "Shipman's affidavit testimony that he has produced all responsive documents is his ultimate answer on what documents are in his possession. His inability to remember off the cuff what documents he possesses, even when combined with any skepticism surrounding late production of the 'backup' folder, creates only more skepticism, not evidence of default under *Weekley*." So what evidence is necessary to show that a party has not complied with his discovery obligations? The *Shipman* Court stated that it was not suggesting "that a requesting party can never establish a discovery-obligation default under *Weekley* by offering evidence of a producing party's technical ineptitude." Nor did the Court "discount trial-court discretion in determining when that line is crossed." But the Court concluded that the "burden imposed by *Weekley* is high." So according to the *Shipman* Court, evidence that some discovery production was late and that some deposition answers were equivocal only amounts to mere suspicion that more unrecovered data exists. A party must be "pressed" at his deposition concerning the producing party's computer skills, the specific steps taken to search his computer, and the adequacy of the search. All this because "forensic examination of electronic devices is 'particularly intrusive and should be generally discouraged.'"

XIII. Perfection in discovery is not required

Gone are the days when a party can insist that every single potentially responsive document (no matter how cumulative or burdensome to obtain) should be produced.[20] Where a plaintiff has failed to establish that the searches conducted so far were unreasonable, and the producing party has made reasonable efforts to identify appropriate custodians and responsive documents, plaintiffs' request "to email everyone in every Citco entity to ask whether anyone employed by any Citco entity has knowledge relevant to this litigation, and thereafter require the Citco Defendants to conduct additional electronic and hard copy searches for documents" is simply unreasonable.[21] "[T]here is no obligation on the part of

[20] Lopez v. United States, No. 15-CV-180-JAH(WVG), 2017 WL 1062581, at *3 (S.D. Cal. Mar. 21, 2017) ("As an initial matter, contrary to Plaintiff's strenuous assertion, there is no 'absolute right' to any particular piece of discovery." Denying reinspection of facility based on proportionality factors.).

[21] Firefighters' Ret. Sys. v. Citco Grp. Ltd., No. CV 13-373-SDD-EWD, 2018 WL 276941, at *6 (M.D. La. Jan. 3, 2018).

a responding party to examine every scrap of paper in its potentially voluminous files, and [i]n an era where vast amounts of electronic information is available for review, ... [c]ourts cannot and do not expect that any party can meet a standard of perfection."[22] Likewise, in *Motorola Sols., Inc. v. Hytera Commc'ns Corp*.[23], the court acknowledged that parties were "entitled to a reasonable opportunity to investigate the relevant facts—and no more. Motorola has already had that reasonable opportunity and far more. What was intended to be a month-long process of discovery on a very limited issue has turned into a protracted affair in which Motorola has received 700,000 documents—nearly 3 million pages—over a period of eight months. Yet, apparently for Motorola, it's not enough. It now wants a forensic inspection of several computers in China—and it warns that that is only the 'beginning.' What should have been limited discovery on a 'straightforward [issue has] spiral[ed] out of control.' The time has come to say: 'enough is enough.'"

XIV. Requests for Social Media content

Litigants routinely seek social media in discovery and courts grapple with the proper scope of material, if any, that should be produced. In *Hinostroza v. Denny's Inc*.[24], the plaintiff allegedly had a slip and fall in the restaurant (apparently sometime after 2016). She previously was involved in a car wreck in 2015. Denny's sought social media for the five-year period prior to the slip and fall. The Court concluded: "Such information from social media is relevant to claims of emotional distress because social media activity, to an extent, is reflective of an individual's contemporaneous emotions and mental state. Additionally, social media discovery is 'directly relevant to ... allegations of a serious physical injury...' and loss of enjoyment of life." Since the plaintiff alleged severe injuries, as well as "physical impairment, mental anguish, and loss of enjoyment of life," the court found that social media information and communications were relevant and, thus, discoverable under Fed. R. Civ. P. 26(b). As to the period of time requested, the court stated: "One moment of happiness illustrated by social media, however, does not undermine a party's claims. Therefore, social media discovery must allow the requesting party a sufficient sample size from which a potential pattern of content could reveal an emotional or mental state or physical capability that undermines a party's claim." Accordingly, the court granted defendant's motion and ordered plaintiff to identify all social media platforms with which she has an account and allow her counsel to review private, direct, and public postings, communications, and messages, as well as photographs which she has posted, and in which she is tagged, referenced, or appears, for the five-year time period.

It should be noted, however, that many courts have become sensitive to privacy issues and have applied proportionality factors to requests for social media content. *See Gordon v.*

[22] Id.
[23] Motorola Sols., Inc. v. Hytera Commc'ns Corp., 314 F. Supp. 3d 931, 940–41 (N.D. Ill. 2018).
[24] Hinostroza v. Denny's Inc., No. 217CV02561RFBNJK, 2018 WL 3212014, at *6 (D. Nev. June 29, 2018).

T.G.R. Logistics, Inc., 2017 WL 1947537 (D. Wyo. May 10, 2017) (Court denied access to entire Facebook account, citing proportionality, and denied access to postings prior to the tractor trailer collision, but required production of all post-accident postings regarding significant emotional turmoil, mental disability, or emotional distress and level of physical activity.).

XV. Cost Shifting

There is a presumption that the responding party must bear the expense of complying with discovery requests.[25] However, pursuant to Fed. R. Civ. P. 26(c), a district court may issue an order protecting the responding party from undue burden or expense by conditioning discovery on the requesting party's payment of the costs of discovery. Such an order may be granted only on the motion of the responding party and "for good cause shown." FED. R. CIV. P. 26(c). Further, "the responding party has the burden of proof on a motion for cost-shifting." In *Estate of Shaw v. Marcus*[26], the court ordered the plaintiff to pay for seventy percent of forensic examination costs (primarily due to discovery misconduct). But the court noted that as "a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted. Thus, Plaintiff's seventy-percent share only includes costs for restoration and searching, and not, as the Shaw Family requests, any expenses incurred in the course of review."

Counsel should carefully understand the implications of any discovery protocols they enter into. In *Bailey v. Brookdale Univ. Hosp. Med. Ctr.*, No. CV162195ADSAKT, 2017 WL 2616957, at *1 (E.D.N.Y. June 16, 2017), the parties submitted an ESI Agreement, which the court accepted. Afterwards, plaintiff's counsel discovered that in this employment discrimination case he had inadvertently agreed to require his client to bear the costs of certain email recovery costs and sought relief from the earlier agreed-upon order. The court refused to void the earlier agreement but did alter the cost-sharing arrangement to require defendants to bear 40% of the costs.

---

[25] See, e.g., Hawa v. Coatesville Area Sch. Dist., No. CV 15-4828, 2017 WL 1021026, at *1 (E.D. Pa. Mar. 16, 2017) (denying cost-shifting motion); Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 11 (D.D.C. 2017) ("Defendants' proposed discovery does not impose an undue burden or expense that warrants a reallocation of expenses."); Equal Employment Opportunity Comm'n v. FedEx Ground Package Sys., Inc., No. 2:15-CV-256, 2018 WL 1441426, at *3 (W.D. Pa. Mar. 21, 2018) (denying cost shifting.) ("The Court does not accept the argument that because the starting pool of documents is that large, and the anticipated relevant results are comparatively smaller (although still well into the tens of thousands), an opposing party should not be able to access via discovery any discoverable ESI documents. Many organizations, and indeed even some individuals, choose to store really large amounts of data electronically, presumably because they have concluded that doing so furthers their important day-to-day interests and, on balance, is the best/most efficient method for compiling and storing that information. The reality of "e-discovery" is that parties are left with the tasks of examining and then as applicable producing their electronic information so compiled and stored when called upon in litigation. But the fact that these repositories create complex mechanisms to store huge amounts of information cannot be used in and of itself as a shield to avoid discovery requests otherwise permitted under the Federal Rules of Civil Procedure.").

[26] Estate of Shaw v. Marcus, No. 14CIV3849NSRJCM, 2017 WL 825317, at *6 (S.D.N.Y. Mar. 1, 2017).

XVI. Technology Assisted Review ("TAR") software/predictive coding

The use of predictive coding software continues to be accepted by courts as an acceptable, cost-effective and reliable means for conducting discovery. However, the degree of transparency required by the producing party as to its predictive coding process has not been settled.[27] Some orders regarding search methodology and TAR are quite detailed and complex.[28] But sometimes things just don't go as expected. For example, in an MDL case, United produced 3.5 million documents, including numerous nonresponsive documents, when its TAR process failed.[29]

XVII. Fed. R. Evid. 502

Because attorney's fees associated with privilege review prior to production to avoid the inadvertent production of privileged documents was too costly, Fed. R. Evid. 502 was enacted. It states, in part:

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

---

[27] See Winfield v. City of New York, No. 15CV05236LTSKHP, 2017 WL 5664852, at *10 (S.D.N.Y. Nov. 27, 2017) ("While the Court disagrees with Plaintiffs' assertions that the TAR process as a whole is defective, it nevertheless finds that Plaintiffs have presented sufficient evidence to justify their request for sample sets of non-privileged documents from the documents pulled from the 50 custodians. In particular, this Court agrees that the sample sets will increase transparency, a request that is not unreasonable in light of the volume of documents collected from the custodians, the low responsiveness rate of documents pulled for review by the TAR software, and the examples that Plaintiffs have presented, which suggest there may have been some human error in categorization that may have led to gaps in the City's production."). See also City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489 (N.D. Ill. 2018); FCA US LLC v. Cummins, Inc., No. 16-12883, 2017 WL 2806896, at *1 (E.D. Mich. Mar. 28, 2017) (Resolving a dispute over an ESI protocol, the court concluded that applying TAR to the universe of electronic material before any keyword search is satisfactory.).

[28] See In re Broiler Chicken Antitrust Litig., No. 1:16-CV-08637, 2018 WL 1146371, at *1 (N.D. Ill. Jan. 3, 2018).

[29] In re Domestic Airline Travel Antitrust Litig., No. MC 15-1404 (CKK), 2018 WL 4441507, at *5 (D.D.C. Sept. 13, 2018).

(2) is not a waiver under the law of the state where the disclosure occurred.

(d) Controlling Effect of a Court Order. 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.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Many commentators have referred to 502(d) as a "get out of jail card" since a party that inadvertently produces attorney-client of work-product material may avoid waiver, without having to establish all the elements set forth in 502(b). Despite its intent to reduce the costs of litigation, anecdotal evidence suggests the provision for a court order is seldom requested by any party.[30]

For a recent discussion of Rule 502, *see Winfield v. City of New York*, No. 15CV05236LTSKHP, 2018 WL 2148435, at *9 (S.D.N.Y. May 10, 2018); *see also Fairholme Funds, Inc. v. United States*, No. 13-465C, 2017 WL 4768385, at *1 (Fed. Cl. Oct. 4, 2017) (court ordered a "quick peek" review because document production was going slow and piecemeal over defendant's objection); *Irth Sols., LLC v. Windstream*

[30] A sample Order that incorporates Rule 502(d), written by former U.S. Magistrate Judge Andrew Peck, follows:
1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

Commc'ns LLC, No. 2:16-CV-219, 2017 WL 3276021, at *1 (S.D. Ohio Aug. 2, 2017) (example of what can go wrong by merely entering into an agreement with opposing counsel rather than obtaining a court order pursuant to Rule 502(d)); In re Testosterone Replacement Therapy Prod. Liab. Litig., 301 F. Supp. 3d 917, 928 (N.D. Ill. 2018) (court determined that the parties intended for their protective order to override Rule 502(b)).

XVIII. Sanctions for loss or destruction of data

Federal Rule of Civil Procedure 37(e) addresses when sanctions are appropriate for the loss of electronically stored information (ESI)[31] that should have been preserved.[32] According to the Advisory Committee Note, this rule "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Nevertheless, some federal courts have continued to issue sanctions exercising the court's inherent authority.[33] These courts recognize that a court must exercise its inherent powers "with restraint and discretion," but may look to its inherent power "to fill in the interstices" not covered by the Rules or a statute.[34]

---

[31] Rule 37(e) applies to the loss of ESI, courts continue to use circuit common law when the loss of paper documents occur. See World Trade Centers Ass'n, Inc. v. Port Auth. of New York & New Jersey, No. 15CIV7411LTSRWL, 2018 WL 1989616, at *7 (S.D.N.Y. Apr. 2, 2018), report and recommendation adopted sub nom. World Trade Centers Ass'n v. Port Auth. of New York & New Jersey, No. 15 CV 7411-LTS-RWL, 2018 WL 1989556 (S.D.N.Y. Apr. 25, 2018).

[32] Fed. R. Civ. P. 37(e) Failure to Preserve Electronically Stored Information. If electronically stored information 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:
(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

[33] See e.g. Ottoson v. SMBC Leasing & Fin., Inc., 268 F. Supp. 3d 570, 580 (S.D.N.Y. 2017) ("In addition [to Rule 37(e)], the court may impose discovery sanctions pursuant to 'its inherent power to manage its own affairs.'"); Davis v. Hinds Cty., Mississippi, No. 3:16-CV-674-DPJ-FKB, 2018 WL 4656304, at *5 (S.D. Miss. Sept. 27, 2018) ("Court has the authority to sanction a party for misrepresentations and for discovery misconduct…."); Hsueh v. New York State Dep't of Financial Services, 2017 WL 1194706 (S.D. N. Y. Mar. 31, 2017) (Plaintiff deleted recording she made with HR representative.). The Supreme Court has not definitely settled whether Rule 37(e) precludes sanctions issued under inherent authority, but the Court has stated that any measures imposed under the court's inherent authority must be compensatory rather than punitive in nature. "In other words, the fee award may go no further than to redress the wronged party 'for losses sustained'; it may not impose an additional amount as punishment for the sanctioned party's misbehavior." Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186, 197 L. Ed. 2d 585 (2017). In Quantlab Techs. Ltd. (BVI) v. Godlevsky, 317 F. Supp. 3d 943, 947 (S.D. Tex. 2018), the court granted attorney's fees in excess of $3 million because the defendants failed "to conduct themselves with any measure of honesty, responsibility, or good faith." See also Klipsch Grp., Inc. v. ePRO E-Commerce Ltd., 880 F.3d 620, 632 (2d Cir. 2018) (affirming sanctions and amount of award even though the actual amount in controversy was small).

[34] Johnson v. Ford Motor Co., No. CV 3:13-6529, 2017 WL 6614101, at *2 (S.D.W. Va. Dec. 27, 2017), reconsideration denied in part, No. CV 3:13-6529, 2018 WL 1512376 (S.D.W. Va. Mar. 26, 2018) (Ford ordered to pay almost $500,000 in fees and expert costs).

Many courts are issuing orders that fail to cite to Rule 37 or analyze the case under pre-2015 cases.[35]

Some courts have considered Rule 37 but recognized that because of a unique fact pattern the rule could not be applied and accordingly issued sanctions under the court's inherent authority. For example, in *United States ex rel. Scutellaro v. Capitol Supply, Inc.*, the defendant had obligations to maintain various documents pursuant to government regulations. Although the documents were not required to be kept because there was no anticipated litigation at the time, Rule 37 did not apply. Nevertheless, the court gave an adverse jury instruction because there was "no question that the spoliated COO information would constitute direct proof or disproof of the falsity of claims made to the government."[36] Other courts have simply addressed the issue of sanctions without any reference to Rule 37.[37] The Third and Ninth Circuits have expressly cautioned judges to apply Rule 37.[38] Inasmuch as Rule 37(e) only applies to ESI, courts deciding the question of loss of non-ESI have relied upon the court's inherent authority.[39]

1. **ESI that should have been preserved**

   "A court must first determine when the duty to preserve evidence was triggered, and what evidence should have been preserved. 'The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.' Proper analysis of the question of what evidence must be preserved 'requires the Court to determine reasonableness under the circumstances.'"[40] An argument that defendants should have

[35] See e.g. Satterfield v. Chipotle Mexican Grill, Inc., No. 15 C 10308, 2017 WL 1283461, at *1 (N.D. Ill. Apr. 6, 2017); Nunes v. Rushton, No. 214CV00627JNPDBP, 2018 WL 2208301, at *1 (D. Utah May 14, 2018) (permissive adverse jury instruction sanction assessed against defendant for deletion of one of her Google accounts while litigation was pending).

[36] No. CV 10-1094 (BAH), 2017 WL 1422364, at *11 (D.D.C. Apr. 19, 2017).

[37] See Bryant v. Wal-Mart Louisiana, L.L.C., 729 F. App'x 369, 370 (5th Cir. 2018) ("A district court's decision regarding sanctions for spoliation is reviewed for an abuse of discretion. 'An adverse inference based on the destruction of potential evidence is predicated on the 'bad conduct' of the defendant.' That generally requires evidence of "bad faith." The district court concluded that Wal-Mart did not act in bad faith in deleting videos because (1) none of the videos showed the relevant area where the fall occurred, and (2) Wal-Mart deleted the videos showing other parts of the store pursuant to a standardized retention policy."). In United States v. Regents of New Mexico State Univ., No. 16-CV-911-JAP-LF, 2018 WL 3719240, at *2 (D.N.M. Aug. 3, 2018), without reference to Rule 37 and apparently relying upon inherent authority the court ordered evidence preclusion as a sanction for the failure to keep certain records.

[38] See Newberry v. Cty. of San Bernardino, No. 16-55466, 2018 WL 4450831, at *2 (9th Cir. Sept. 18, 2018) ("Rule 37(e) 'therefore foreclose[d] reliance on inherent authority' to determine whether terminating sanctions were appropriate."); Clientron Corp. v. Devon IT, Inc., 894 F.3d 568, 577 (3d Cir. 2018) ("Our 'preferred' course, however, is that when 'statutory or rules-based sanctions are entirely adequate, they should be invoked, rather than the inherent power.'").

[39] See Gipson v. Mgmt. & Training Corp., No. 3:16-CV-624-DPJ-FKB, 2018 WL 736265, at *7 (S.D. Miss. Feb. 6, 2018).

[40] Ballard v. Wal-Mart Stores East, LP, No. 5:17-CV-03057, 2018 WL 4964361, at *2 (S.D.W. Va. Oct. 15, 2018); ILWU-PMA Welfare Plan Bd. of Trustees & ILWU-PMA Welfare Plan v. Connecticut Gen. Life Ins. Co., No. C

preserved certain data because they generally knew their facility had environmental problems was rejected by the trial court as satisfying the threshold that litigation was reasonably anticipated.[41] Vague telephone statements by a plaintiff who told a manager that she fell "in the front end of the store near the cash registers that afternoon," have been found not to trigger a preservation obligation, especially since the statement was insufficiently precise to alert the store to what evidence it should have preserved. Moreover, the statement neither threatened nor referenced litigation, and she never filed a formal complaint.[42]

"[T]he phrase 'should have been preserved' encompasses the concept of the duty to preserve ESI. If there were no duty to preserve the ESI, then it need not have been preserved. Moreover, this provision appears to be based on a prospective standard. Using hindsight to determine that the ESI 'should have been preserved' is far too easy. Accordingly, the better interpretation of this provision is that the determination of what ESI 'should have been preserved' is viewed at the time litigation is anticipated or ongoing, not when it is discovered that the ESI was lost. And this prospective standard is from the viewpoint of the party who controls the ESI. Finally, this provision limits the preservation to only relevant ESI."[43]

In *In re Abilify (Aripiprazole) Prod. Liab. Litig.*, the court rejected the plaintiffs' argument that the defendant should have reasonably anticipated litigation because of information disclosed in publications, other lawsuits concerning other drugs and based upon information OAPI received in adverse event reports.[44]

15-02965 WHA, 2017 WL 345988, at *1 (N.D. Cal. Jan. 24, 2017); ILWU-PMA Welfare Plan Bd. of Trustees & ILWU-PMA Welfare Plan v. Connecticut Gen. Life Ins. Co., No. C 15-02965 WHA, 2017 WL 345988, at *1 (N.D. Cal. Jan. 24, 2017) (Carewise executed a tolling agreement contemplating claims in connection with "benefits paid out under the Plan" or "breaches of contractual or other obligations owed between and among the Parties.").

[41] A.O.A. v. Rennert, No. 4:11 CV 44 CDP, 2018 WL 1251827, at *4 (E.D. Mo. Mar. 12, 2018).

[42] Washington v. Wal-Mart Louisiana LLC, No. CV 16-1403, 2018 WL 2292762, at *4 (W.D. La. May 17, 2018).

[43] Snider v. Danfoss, LLC, No. 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017), report and recommendation adopted, No. 1:15-CV-04748, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017) (finding that a duty to preserve emails existed and defendant "mechanically and blindly followed its 90-day destruction policy in the face of a clear threat of litigation.").

[44] In re Abilify (Aripiprazole) Prod. Liab. Litig., No. 3:16-MD-2734, 2018 WL 4856767, at *3 (N.D. Fla. Oct. 5, 2018) ("Certainly, nothing Plaintiffs did before these cases were filed or anything that any of Plaintiffs' respective counsel did before these cases were filed evidence that OAPI could have or should have reasonably anticipated litigation in the 2002 to 2006-time frame. Plaintiffs' counsel did not begin advertising for plaintiffs in this litigation until 2013 and did not threaten OAPI with litigation until October 2014, more than a decade after the emails were deleted. Indeed, the first lawsuit involving Abilify® was not filed until January 2016. Thus, the earliest date OAPI should have reasonably anticipated litigation is when it first learned that claims might be filed, either as early as 2013, but not later than October 2014, when OAPI was threatened with litigation.").

In a confusing opinion one court excused a plaintiff's failure to keep text messages from his cell phone (after he had expressed comments about initiating legal action), relying upon the Advisory Committee Note that courts should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts.[45]

2. Failure to take reasonable steps to preserve

In *Small v. University Medical Center*, UMC and its counsel took no steps to put a litigation hold in place until April 15, 2013, when it then sent an inadequate email providing "little or no guidance to key custodians about what the case was about and what evidence should be preserved." The litigation hold failed to notify key custodians and IT staff responsible for maintaining data of the need to preserve and prevent destruction until months after the special master was appointed. UMC and its counsel failed to conduct an adequate investigation to determine which employees were likely to have discoverable information, and where that information was stored. UMC executives and its counsel failed to instruct any UMC employees to suspend any automatic data destruction policies.[46] Similarly, in *Moody v. CSX Transportation, Inc.*, the court found that failure to access or review the data at any time during a four-year period indicated a failure to take reasonable steps.[47]

In a case where the party argued that it lost data because of a software attack, the court took the Rule 37 sanctions motion under advisement until time of trial to determine whether the party took reasonable steps to preserve the information before the cyberattack.[48]

Companies oftentimes allow (or at least tolerantly ignore) their employees' usage of private messaging systems for business purposes. Failure to maintain a software usage policy in place requiring employees to segregate personal and business accounts or to otherwise ensure that professional communications sent through personal accounts can be preserved by the company for litigation

[45] Trainer v. Cont'l Carbonic Prod., Inc., No. 16-CV-4335 (DSD/SER), 2018 WL 3014124, at *4 (D. Minn. June 15, 2018).

[46] Small v. Univ. Med. Ctr., No. 2:13-CV-0298-APG-PAL, 2018 WL 3795238, at *60–61 (D. Nev. Aug. 9, 2018). See also EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., No. 3:12-CV-00463, 2018 WL 1542040, at *22 (M.D. Tenn. Mar. 29, 2018), aff'd as modified sub nom. EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463, 2018 WL 3322305 (M.D. Tenn. May 14, 2018) (faulting counsel for failure to take an active and primary role in implementing a litigation hold); Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15CV9363 (ALC) (DF), 2018 WL 1512055, at *11 (S.D.N.Y. Mar. 12, 2018) (small business and its counsel not excused from taking reasonable steps to preserve email).

[47] 271 F. Supp. 3d 410, 426 (W.D.N.Y. 2017).

[48] W. Power, Inc. v. TransAmerican Power Prod., Inc., 316 F. Supp. 3d 979, 997 (S.D. Tex. 2018).

purposes has been found by some courts to constitute a failure to take reasonable steps.[49]

3. Cannot be restored or replaced through additional discovery

In *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, the court summarily denied plaintiffs' sanctions motion where plaintiffs themselves possessed copies of the Webpages at issue—in the form of screen captures taken.[50]

In *Steves & Sons, Inc. v. JELD-WEN, Inc*., the court placed the burden on the movant to show that the lost ESI cannot be replaced or restored. "This factor does not require that JELD–WEN pursue every possible avenue for replacing or restoring the ESI, but it must show that it made some good-faith attempt to explore its alternatives before pursuing spoliation sanctions."[51]

4. Rule 37(e)(1) prejudice

"Obviously, establishing prejudice is tricky business. All involved—the court, the party that failed to preserve, and the seeking party—are at a disadvantage because none know precisely what the lost ESI contained or showed. It is difficult for a court to determine prejudice when the ESI no longer exists and cannot be viewed. Likewise, it is difficult for the party that failed to preserve the ESI to show the absence of prejudice, again because the ESI was lost. Of course, this party is inclined to minimize the prejudice and importance of the lost ESI. And similarly, it is difficult for the party that seeks the ESI to establish prejudice because it does not know what was contained in the ESI. This party is predisposed to over emphasize the prejudice and importance of the lost ESI. The Advisory Committee Notes recognize this dilemma but offer no solutions…. To evaluate prejudice, the court must have some evidence regarding the particular nature of the missing ESI."[52]

Some parties have attempted to argue that the loss of emails could not be prejudicial because "there are other means to obtain the contents of the conversations from the defendants, including prior oral discovery and potential

[49] Klipsch Grp., Inc. v. ePRO E-Commerce Ltd., 880 F.3d 620, 629 (2d Cir. 2018).
[50] No. 16-CV-7634 (JMF), 2017 WL 4334138, at *1 (S.D.N.Y. Sept. 28, 2017).
[51] No. 3:16-CV-545, 2018 WL 2023128, at *9 (E.D. Va. May 1, 2018).
[52] Snider v. Danfoss, LLC, 2017 WL 2973464, at *5 (concluding that no prejudice existed because "emails not only to and from the human resources department were preserved and produced, but also that Danfoss preserved and has produced to the Court all of Rick White's emails to and from Ms. Blood and Plaintiff during the relevant time period . . .. As to Plaintiff's deleted emails, Plaintiff is obviously a party to the suit and has first-hand knowledge of the substance of emails she sent or received . . .. [I]f the case goes to trial, she can testify as to any emails at that time, assuming the testimony is admissible. Accordingly, no prejudice exists as to Plaintiff's emails.").

trial testimony."[53] At least one court has rejected such arguments by stating: "A party has the right to prosecute its case in the way it deems fit based on all available relevant evidence. The content of text messages cannot be replaced simply by eliciting testimony from the Defendants, and by having Plaintiff accept that testimony rather than relying on the actual messages to use as they deem fit. Without the lost text messages, Plaintiff is deprived of the opportunity to know 'the precise nature and frequency' of those private communications, which occurred during a critical time period."[54] Likewise, in *Kische USA LLC v. Simsek*, the court stated: "where emails and documents are missing entirely due to a party's failure to preserve and their relevance cannot be directly ascertained, a party can hardly assert any presumption of irrelevance to the destroyed documents. Rather, the party that fails to preserve evidence 'bear[s] the consequence of [the] uncertainty' as to the relevance of the documents and the resulting prejudice."[55]

It is oftentimes difficult to ascertain prejudice when a party does not fully understand what has been lost. In a section 1983 case where the plaintiff lost video that resided on his cell phone, the defendants argued that the lost video "was the best evidence of the presence and location of [Rochester's] gun, as well as critical events that led to plaintiffs' arrest." The court disagreed, stating: "But that assertion is pure speculation; Defendants do not actually know what (if anything) was filmed by Simon, let alone whether it would have been helpful to their case. Even assuming arguendo that the video did capture the location of Rochester's gun, it would be largely irrelevant to the question of whether Defendants had probable cause to arrest Plaintiffs."[56] Likewise, in *Alston v. City of Darien*, the Eleventh Circuit affirmed the trial court's grant of summary judgment in an excessive force case because the plaintiff failed to show that he was prejudiced by the absence of dash cam vide. Alston argued that the video "would speak for itself and would either exonerate appellee Brown or show the extent of his unlawful behavior. Alston's concession that the video might exonerate Brown fails to demonstrate the necessary prejudice. Moreover, Alston testified about what happened on the scene of the arrest and during his transport to the jail."[57]

[53] Schmalz v. Vill. of N. Riverside, No. 13 C 8012, 2018 WL 1704109, at *4 (N.D. Ill. Mar. 23, 2018).
[54] Id.
[55] No. C16-0168JLR, 2018 WL 620493, at *5 (W.D. Wash. Jan. 29, 2018).
[56] Simon v. City of New York, No. 14-CV-8391 (JMF), 2017 WL 57860, at *7 (S.D.N.Y. Jan. 5, 2017) (citing Goldrich v. City of Jersey City, No. 15-885, 2018 WL 4492931, at *10 (D. N.J. July 25, 2018)).
[57] Alston v. City of Darien, No. 17-15692, 2018 WL 4492422, at *6 (11th Cir. Sept. 19, 2018).

At least two courts have stated: "[P]rejudice exists where documents that are relevant to a claim are unavailable and the moving party has come forward with a plausible, good faith suggestion as to what the evidence might have been."[58] The 2015 Advisory Committee Notes to Rule 37(e) explain that "[a]n evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation."

Some courts have concluded that requiring too much from a requesting party to establish prejudice is unfair.[59]

5. Rule 37(e)(1) curative measures no greater than necessary

In a case where it appears the court issued sanctions under Rule 26(e)(1), the court rejected a special master's recommendation for granting a default judgment in favor of the plaintiffs because of defendant's willful, bad faith conduct. The court instead assessed costs and attorney's fees and stated that it would include an adverse inference jury instruction.[60] One party successfully argued that if a permissive adverse jury instruction would be issued to the jury, that she be allowed to testify in front of the jury why she had discarded certain files.[61] Some courts have ordered that the negligent party be prevented from introducing certain evidence at trial.[62]

Some parties have objected that a court failed to issue strong enough curative factors when discovery obligations were not met. In *Barbera v. Pearson Educ.*, the court found that the employer had negligently destroyed emails, but only ordered that Pearson could not contest Barbera's recollection of the emails. Further, the magistrate judge held that any prejudice could be cured by requiring

[58] Sinclair v. Cambria Cty., No. 3:17-CV-149, 2018 WL 4689111, at *2 (W.D. Pa. Sept. 28, 2018).

[59] Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 430 (W.D.N.Y. 2017) ("[E]vent recorder data would have conclusively determined whether the horn or bell on Train Q627 were sounded prior to movement. That critical and irreplaceable data was within defendants' complete control to review and produce, but they failed to take simple, reasonable steps to preserve it. Moody has identified testimonial evidence (her own and that of her friend Tiffany Johnson) that the bell and/or horn were not sounded prior to train movement. Under these circumstances, it is plausible that the data from the event recorder would have supported Moody's case. Accordingly, prejudice has been established.").

[60] Small v. Univ. Med. Ctr., No. 2:13-CV-0298-APG-PAL, 2018 WL 3795238, at *71 (D. Nev. Aug. 9, 2018) ("the court has found UMC failed to comply with its legal duty to preserve discoverable information, failed to comply with its discovery obligations, and failed to comply with a number of the court's orders. The instruction will provide that these failures resulted in the loss or destruction of some ESI relevant to the parties' claims and defenses and responsive to plaintiffs' discovery requests, and that the jury may consider these findings with all other evidence in the case for whatever value it deems appropriate.").

[61] Cordoba v. Pulido, No. C 12-4857 (PR), 2018 WL 500185, at *3 (N.D. Cal. Jan. 21, 2018) ("[P]ermitting Defendant to explain her reasons for destroying the Kelley file is appropriate to assist the jury in its determination of whether it should infer that the file contained information unfavorable to Defendant.").

[62] Leidig v. Buzzfeed, Inc., No. 16CIV542VMGWG, 2017 WL 6512353, at *13 (S.D.N.Y. Dec. 19, 2017); Hugler v. Sw. Fuel Mgmt., Inc., No. 16CV4547FMOAGRX, 2017 WL 8941163, at *12 (C.D. Cal. May 2, 2017).

certain stipulations of fact—concerning the contents of the email exchange—be taken as true. The court of appeals affirmed.[63] Likewise, in *ML Healthcare Servs., LLC v. Publix Super Markets, Inc.*, the Eleventh Circuit found the district court did not abuse its discretion by concluding that defendant's failure to retain more video did not constitute bad faith or demonstrate an intent to deprive plaintiff of evidence necessary to her case. "Defendant immediately saved the most relevant portion of the video—the hour during which Plaintiff's fall occurred, which covered the entire time Plaintiff was in the store—before any request for preservation or notice of litigation was provided."[64]

6. Are attorney's fees recoverable as a sanction?

"Notably absent from Rule 37(e) is the mention of attorneys' fees as a sanction, either for having to file the motion or for the failure to preserve the ESI. And the Advisory Committee Notes are shockingly silent on the issue as well. In fact, the minutes of the Advisory Committee meetings reflect that those in attendance recognized this absence, but simply chose not to do anything about it."[65] Notwithstanding the absence of language, many courts continue to award attorney's fees and costs associated with the discovery failure.[66]

7. Rule 37(e)(2) intent to deprive

A plaintiff must present evidence that the defendant destroyed the ESI with an intent to deprive the plaintiff of this ESI.[67] An individual's spoliation may be

[63] Barbera v. Pearson Educ., Inc., No. 18-1085, 2018 WL 4939772, at *5 (7th Cir. Oct. 12, 2018).

[64] 881 F.3d 1293, 1308 (11th Cir. 2018) ("Likewise, the district court did not abuse its discretion by denying Plaintiff's alternative sanctions request, which was to preclude Defendant's witnesses from testifying that the location of Plaintiff's fall had been cleaned or inspected hours prior to the accident…. In both its initial ruling and its oral ruling upon reconsideration, the district court held that Plaintiff had not been prejudiced by Defendant's failure to provide additional video evidence. Specifically, the court found that any additional benefit from the undisclosed video was 'purely speculation and conjecture,' and that the resolution of the videos was not clear enough to see any liquids on the floor, even if the videos were available. The court thus concluded that 'having additional videotape to look at would accomplish nothing but consume more of everybody's time in this case.' There is no basis for finding that the district court abused its discretion in reaching this conclusion.").

[65] Snider v. Danfoss, LLC, 2017 WL 2973464, at *5.

[66] See Sinclair v. Cambria Cty., No. 3:17-CV-149, 2018 WL 4689111, at *3 (W.D. Pa. Sept. 28, 2018); Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15CV9363 (ALC) (DF), 2018 WL 1512055, at *17 (S.D.N.Y. Mar. 12, 2018).

[67] Snider v. Danfoss, 2017 WL 2973464, at *8 ("Plaintiff has presented no evidence that Danfoss destroyed the emails with the intent to deprive Plaintiff of this ESI. Instead, what little evidence presented on the issue of intent indicates that Danfoss acted with a pure heart but empty head."); Jackson v. Haynes & Haynes, 2017 WL 3173302 (N.D. Ala. July 26, 2017) (ESI on smartphone not retained by plaintiff. Court found negligence and irresponsible not sufficient to establish intent to deprive.); Archer v. York City Sch. Dist., 710 F. App'x 94, 101 (3d Cir. 2017) ("[N]o evidence to show that the District intentionally deleted the account of the assistant superintendent to destroy evidence, or that the email account would have contained any relevant evidence at all. Given that test scores are the linchpin of the Defendants' defense, and there is no argument that the assistant superintendent would have had any involvement in the statistical results produced by a state-wide, state-administered academic test, the spoliation argument is particularly weak."); Organik Kimya, San ve Tic. A.S. v. Int'l Trade Comm'n, 848 F. 3d 994 (Fed. Cir.

imputed to a defendant where that person is acting within the scope of his employment.[68] In cases where intent to deprive has been established, the typical sanction has been to give the jury a permissive adverse inference instruction.[69] One court also ordered that the spoliator's external hard drive be subject to a forensic examination as a sanction.[70] Intentional use of wiping tools evidences an intent to deprive.[71] Otherwise, courts continue to struggle with whether circumstantial evidence may allow an inference of intent to deprive.[72] The Eighth Circuit has

---

2017) (Plaintiffs intentionally began overwriting their laptops to delete relevant files days before an investigation. Rule 37(e) applied not only to penalize, but to deter others who may be tempted to engage in similar misconduct.).

[68] RealPage, Inc. v. Enter. Risk Control, LLC, No. 4:16-CV-00737, 2017 WL 3313729, at *12 (E.D. Tex. Aug. 3, 2017).

[69] See GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS, 2017 WL 4417810, at *4 (D. Del. Oct. 5, 2017) ("Despite the direction from Plantronics to preserve documents, after receiving the hold notices, Mr. Don Houston – who was then the Senior Vice President of U.S. Commercial Sales for Plantronics – deleted certain emails and, on three occasions, directed others to delete certain emails."); E.E.O.C. v. GMRI, Inc., No. 15-20561-CIV, 2017 WL 5068372, at *31 (S.D. Fla. Nov. 1, 2017); TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo, No. CV 15-2121 (BJM), 2017 WL 1155743, at *3 (D.P.R. Mar. 27, 2017); Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2018 WL 646701, at *23 (N.D. Cal. Jan. 30, 2018) ("First, the Court itself will inform the jury that, despite the expedited discovery and provisional relief orders, Uber failed to timely disclose the destruction of the five discs and repeatedly supplemented both its communications log and accounting after the ordered deadlines. The Court will instruct the jury that it may, but need not, draw any adverse inference from these facts, and will further explain that the nature of any adverse inference likewise remains up to the jury…. Second, as explained above, evidence of Uber's litigation misconduct or corporate culture may be relevant and admissible insofar as it reasonably bears on the merits of this case. This includes evidence and argument that Waymo has been unable to find stronger proof of its claims due to Uber's obstruction tactics. But such evidence will not be allowed to consume the trial to the point that it becomes a distraction from the merits or turns into a public exercise in character assassination. Again, the point is to maintain a fair balance between allowing Waymo to reasonably explain any weaknesses in its case on the one hand and preventing Waymo from sidestepping its burden of proof by inflaming the jury against Uber on the other."); Goldrich v. City of Jersey City, No. CV15885SDWLDW, 2018 WL 4489674, at *2 (D.N.J. Sept. 19, 2018); Edelson v. Cheung, 2017 WL 150241 (D. N.J. Jan. 12, 2017) (Court awarded adverse jury instruction against the defendant for deleting emails from his computer. Defendant had opened a second email account, which he did not disclose for the purpose of evading discovery, and then deleted key emails when the account was discovered.); GoPro, Inc. v. 360Heros, Inc., No. 16-CV-01944-SI, 2018 WL 1569727, at *3 (N.D. Cal. Mar. 30, 2018) (defendant deliberately altered Skype conversation and denied that the native form of the conversation existed; Court awarded an adverse inference instruction at trial and reimbursement to GoPro of the costs incurred in retaining expert that demonstrated metadata had been altered). In Lexpath Techs. Holdings, Inc. v. Welch, No. 17-2604, 2018 WL 3620479, at *4 (3d Cir. July 30, 2018), the trial court initially signaled that it was going to include a permissive adverse jury instruction, but after hearing the trial evidence changed its position. The trial court did, however, allow the plaintiff to present evidence concerning the defendant's spoliation to the jury. The appellate court affirmed the trial court concluding it had discretion to revisit prior rulings upon hearing the evidence at trial.

[70] TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo, No. CV 15-2121 (BJM), 2017 WL 1155743, at *3 (D.P.R. Mar. 27, 2017).

[71] In re Correra, 589 B.R. 76, 136 (Bankr. N.D. Tex. 2018). But see HCC Ins. Holdings, Inc. v. Flowers, 2017 WL 393732 (N.D. Ga. Jan. 30, 2017) (No evidence of actual prejudice shown even though defendant ran several computer cleaning programs on his laptop after a court ordered production.).

[72] Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) "([E]ven accepting as credible defendants' explanation for the loss of the event recorder data, this Court still concludes that defendants' actions presented sufficient circumstantial evidence from which to infer that they intended to deprive Moody of the relevant data."). See Ottoson v. SMBC Leasing & Fin., Inc., 2017 WL 2992726, *9 (S.D.N.Y. 2017) (Intentional failure to take steps necessary to preserve relevant evidence "satisfies the requisite level of intent required by Federal Rule of Civil Procedure 37(e). Here, even if Lewandowski's initial error in uploading the event recorder data to the Vault is excused, defendants' repeated failure over a period of years to confirm that the data had been properly preserved

suggested that circumstantial evidence can establish an intent to deprive and that a "smoking gun" is not required, but nevertheless more is required than negligent conduct.[73] Some courts have required that an intent finding be based on clear and convincing evidence.[74] Other courts, including those in the Fifth Circuit, have suggested that "bad faith" must be established.[75]

---

despite its ongoing and affirmative Rule 11 and Rule 26 obligations, particularly before discarding Lewandowski's laptop, is so stunningly derelict as to evince intentionality."); Goldrich v. City of Jersey City, No. CV15885SDWLDW, 2018 WL 4489674, at *2 (D.N.J. Sept. 19, 2018) (circumstantial evidence of bad faith and intent; "Contrary to Plaintiff's representations that he had transferred evidence from the laptop to two USB devices, [the forensic expert] determined that these drives had never interfaced with the [l]aptop and that none of the files on the USB drives were ever located on the [l]aptop. Moreover, despite Plaintiff's assertions that the laptop had been infected with a virus, [the forensic expert] testified that there was never a virus on the laptop. Plaintiff has not presented anything to rebut the evidence before this Court."); Alabama Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 746 (N.D. Ala. 2017), motion to certify appeal denied, No. 2:11-CV-03577-RDP, 2017 WL 4572484 (N.D. Ala. Apr. 3, 2017) ("[T]here is no direct evidence of an intent to deprive Pemco of Blake's ESI in this litigation. But there certainly is sufficient circumstantial evidence for the court to conclude that Boeing's agents acted with an intent to delete (or destroy) ESI on Blake's computer in order to hide from Pemco what Blake possessed at a time when Boeing should have anticipated litigation related to the terminated MOA and/or for a jury to infer that Boeing wished to conceal what information was on Blake's computer. As discussed above, Boeing anticipated (or, at a minimum should have anticipated) litigation with Pemco, and the parties had agreed to a manner of handling Pemco-related ESI. In furtherance of that agreement, Boeing instituted a Firewall Plan calling for Pemco-related ESI to be removed from Boeing employees' computers and sent to the legal department. Blake's Pemco-related ESI was intentionally destroyed by an affirmative act which has not been credibly explained. Smith and Holden knew how to comply with the Firewall Plan (and they did so with their own information), but failed to do so with Blake's. No credible explanation has been given as to why they departed from the Firewall Plan's protocols and intentionally deleted Blake's information."); BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., No. 15 C 10340, 2018 WL 1616725, at *11 (N.D. Ill. Apr. 4, 2018) ("Here, there is no 'direct' evidence of intent—at least in the sense the term is most often used. But there almost never is, and, in any event, direct evidence is not needed. Circumstantial evidence will suffice."); Basra v. Ecklund Logistics, Inc., 2017 WL 1207482 (D. Neb. Mar. 31, 2017) (Accident logs and reports were destroyed. Court found that recordkeeping was less than meticulous but did not meet intent to suppress the truth. Rule 37 not mentioned specifically.).

[73] Auer v. City of Minot, 896 F.3d 854, 858 (8th Cir. 2018) ("Auer did not present sufficient evidence of this serious and specific sort of culpability. She supported her request with allegations that incriminating voicemails, emails, and other electronic communications were lost because the city failed to properly search some computers, tablets, and phones; waited too long to search others; and generally failed to take basic steps necessary to find and preserve files that could be relevant to her case. Still, her allegations would at most prove negligence in the city's handling of electronic information, not the sort of intentional, bad-faith misconduct required to grant an adverse presumption.").

[74] Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15CV9363 (ALC) (DF), 2018 WL 1512055, at *8 (S.D.N.Y. Mar. 12, 2018).

[75] See e.g. Eaton-Stephens v. Grapevine Colleyville Indep. Sch. Dist., 715 F. App'x 351, 354 (5th Cir. 2017)(note this case did not interpret Rule 37, but nevertheless may be informative)("Eaton-Stephens also argues she should have received a spoliation inference [assisting her opposition to defendant's motion for summary judgment] because her computer's contents were erased, and that, because the School District's policy and rules required retention of the contents for several years, the only conclusion was that the action was taken in bad faith. Our cases indicate a violation of a rule or regulation pertaining to document retention is not per se bad faith and Eaton-Stephens cites no authority in support of such a per se bad faith rule. We decline to adopt a per se rule here. As such, Eaton-Stephens has not met her burden to show bad faith where the only evidence she put forth in support of her claim of bad faith was the alleged violation of School District policy and rules."; Alston v. Park Pleasant, Inc., 679 F. App'x 169, 173 (3d Cir. 2017); Rife v. Oklahoma Dep't of Pub. Safety, 854 F.3d 637, 654 (10th Cir.), cert. denied sub nom. Dale v. Rife, 138 S. Ct. 364, 199 L. Ed. 2d 273 (2017), and cert. denied sub nom. Jefferson v. Rife, 138 S. Ct. 364, 199 L. Ed. 2d 264 (2017); Washington v. Wal-Mart Louisiana LLC, No. CV 16-1403, 2018 WL 2292762, at *5 (W.D. La. May 17, 2018); Wright v. Nat'l Interstate Ins. Co., No. CV 16-16214, 2017 WL 4011206, at *2 (E.D. La. Sept. 12, 2017).

Many courts are still looking to establish prejudice before deciding whether intent to deprive was met.[76] As indicated in the 2015 Advisory Committee Notes, this approach is incorrect: "Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position."

One case has concluded that although the party destroyed documents intentionally, the destruction was not done in bad faith. The spoliator argued that he destroyed the documents to prevent an overseas competitor from obtaining his purported trade secrets. Simone v. VSL Pharm., Inc., No. CV TDC-15-1356, 2018 WL 1365848, at *4 (D. Md. Mar. 16, 2018).[77] This case raises but did not address a unique kink in Rule 37(e). The rule provides that "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation" may the court impose Rule 37(e)(2) sanctions. The Court in Simone decided the case without reference to Rule 37 and awarded only reasonable costs and attorney's fees associated with De Simone's spoliation.

XIX. Sanctions for refusal to comply with a court order – Federal

Trying to argue that the opposing party was not prejudiced by one's failure to comply with a court order requiring documents to be produced is generally not successful.[78] In addition, serving untimely and deficient responses to discovery requests and taking indefensible positions that are not substantially justified has resulted in sanctions.[79]

---

[76] See e.g. Zamora v. Stellar Mgmt. Grp., Inc., No. 3:16-05028-CV-RK, 2017 WL 1362688, at *2 (W.D. Mo. Apr. 11, 2017).

[77] See also Mueller v. Swift, No. 15-CV-1974-WJM-KLM, 2017 WL 3058027, at *6 (D. Colo. July 19, 2017) (concluding no intent to deprive even though "Plaintiff had numerous opportunities to take easy steps to prevent this ultimate loss of evidence, but failed to do so." "He made the decision— inexplicably, in the Court's view—to alter the original evidence and to present his lawyer with only "clips" hand-picked from the underlying evidence. This reflects that he obviously intended to make use of portions of the recording to advance his own claims. Plaintiff nevertheless failed to take any number of rather obvious steps to assure that this evidence was not lost. While the spill of liquid on his laptop may not have been Plaintiff's fault, it was an entirely foreseeable risk. Indeed, the same thing had happened to Plaintiff's previous laptop not long before. Plaintiff could and should have made sure that some means of backing up the files relevant to litigation was in place, but this was not done." Court declined to give an adverse jury instruction but would allow the defendants to cross examine plaintiff in front of the jury regarding the spoliation.).

[78] See A.O.A. v. Rennert, No. 4:11 CV 44 CDP, 2018 WL 1251827, at *3 (E.D. Mo. Mar. 12, 2018).

[79] See Hernandez v. City of Houston, No. 4:16-CV-3577, 2018 WL 4140684, at *6 (S.D. Tex. Aug. 30, 2018) (court issued adverse inference for misrepresentations made regarding discovery efforts, failing to comply with discovery

Worse yet is spoliation of evidence on multiple occasions despite explicit orders from the ALJ to preserve the evidence. This conduct led to issuance of default judgment sanctions pursuant to Rule 37(b).[80]

XX. Cross Border Discovery

Effective May 28, 2018, the European Union began its enforcement of the General Data Protection Regulation (GDPR). This Regulation standardizes data protection law across all 28 EU countries and imposes strict new rules on controlling and processing personally identifiable information (PII). The GDPR applies to all organizations holding and processing EU resident's personal data, regardless of geographic location. According to the EU, the Regulation applies to organizations outside the EU, if the organization offers goods or services to, or monitors the behavior of EU residents. Although there is a tiered approach to fines for noncompliance, fines can be as high as 4% of a company's total global revenue.

The GDPR may result in litigants arguing that they are unable to produce data in US courts because such production may run afoul of the GDPR. Some of these issues have arisen prior to May 2018, because several countries have privacy laws and "blocking statutes" that seek to limit discovery. *See Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*[81] for a discussion of blocking statutes, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and the Supreme Court's guidance in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*.[82] *See also Corel Software, LLC v. Microsoft Corp.*, No. 215CV00528JNPPMW, 2018 WL 4855268, at *2 (D. Utah Oct. 5, 2018) (rejecting GDPR concerns without any significant discussion and merely stating that the discovery request was proportional under Fed. R. Civ. P. 26). Some commentators suggest that litigants faced with requirements to produce data considered private under foreign law attempt to take steps to prevent the dissemination of the data if the data is required to be produced in an American court. For a discussion of those concerns versus the desire to keep American courts public and disfavoring sealing information, see Knight Capital Partners Corp. v. Henkel Ag & Co., KGaA, 290 F. Supp. 3d 681, 692 (E.D. Mich. 2017).

XXI. 28 U.S.C. § 1920 – recoverable costs

orders and spoliating evidence); Davis v. Elec. Arts Inc., No. 10-CV-03328-RS (DMR), 2018 WL 1609289, at *7 (N.D. Cal. Apr. 3, 2018).

[80] Organik Kimya, San. v. Tic. A.S., 848 F.3d 994, 1003 (Fed. Cir. 2017).

[81] Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS, 303 F. Supp. 3d 1004 (D. Ariz. 2018).

[82] 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987).

Fed. R. Civ. P. 54(d)(1) provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." 28 U.S.C. § 1920[83] sets forth the expenses that may be taxed as costs. Courts are divided regarding what e-discovery charges are recoverable under Section 1920(4). In *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis, Co., L.P.A.*, No. 1:17 CV 817, 2018 WL 5259268 (N.D. Ohio Oct. 22, 2018), the court allowed as costs expenses for loading and exporting data into an e-Discovery vendor platform as "copying." It further stated that "data conversion, audio transcription, and export of data, all suggest a replication of data that would fit the broader definition of electronic "copying." Most recently in Gonzales v. Pan Am. Labs., L.L.C., No. 3:14-CV-2787-L, 2018 WL 2321896, at *5 (N.D. Tex. May 4, 2018), report and recommendation adopted, No. 3:14-CV-2787-L, 2018 WL 2317749 (N.D. Tex. May 22, 2018), the court rejected costs associated with gathering and hosting data in a platform because "the United States Supreme Court has underscored the 'narrow scope of taxable costs' and has emphasized that 'taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920.'" (citing Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560, 573 (2012)).

[83] 28 U.S.C. § 1920 sets forth the expenses that may be taxed as costs:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under 1923 of this title;
(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.