

Selected eDiscovery and ESI Case Law from 2023-24

Philip J. Favro, ed.

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CLOUDS

DeMartino v. Empire Holdings and Investments, LLC, No. 22-CV-14301, 2024 WL 712456 (S.D. Fla. Jan. 26, 2024), *report and recommendation adopted sub nom.*, 2024 WL 707252 (S.D. Fla. Feb. 21, 2024). In this pregnancy discrimination case, the court declined to issue sanctions against defendant Juan Carlos Marrero for failing to preserve text messages relevant to plaintiff's claims. While Marrero had taken screenshots to preserve text messages he exchanged with plaintiff, Marrero neglected to preserve text messages with nonparties about plaintiff. The court concluded that Marrero was under a duty to preserve those messages, they were lost, and Marrero had failed to take reasonable steps to preserve them. In particular, the court criticized Marrero for declining to pay a small fee for additional cloud storage, which would have allowed him to preserve the relevant messages at issue. The court observed that "as to iCloud storage, Marrero could likely have preserved his ESI simply by purchasing more storage when prompted to do so in early 2023 . . . The Court finds, under the circumstances of this case, that Marrero acted unreasonably by failing to pay the nominal fee required to preserve his ESI." In doing so, the court indicated that its holding on this issue was limited to the facts of the instant litigation and that it "should not be interpreted to mean that all parties in all cases violate their Rule 37(e) obligations by failing to purchase additional iCloud storage." Nevertheless, the court determined that plaintiff had not met her burden of establishing a lack of replacement evidence. Plaintiff could have sought discovery of the missing text messages from nonparties who exchanged messages with Marrero regarding plaintiff. In addition, the court opined that plaintiff could have subpoenaed Marrero's mobile phone service provider (Verizon) to obtain either the messages or (if Verizon objected given the restrictions imposed by the Stored Communications Act) details including date, time, and recipient information regarding particular text messages. Since plaintiff had not taken these or other steps to obtain the lost text messages, the court could not conclude "that the ESI was not 'restorable or recoverable through additional discovery.'" *See* discussion under **Sanctions—Rule 37(e)**.

Taylor Made Express v. Kidd, No. 21 C 2903, 2024 WL 197231 (N.D. Ill. Jan. 18, 2024). In this action involving trade secret misappropriation claims, the court found that defendant Brandy Kidd (Kidd) violated a temporary restraining order by deleting files from her Dropbox account that were relevant to plaintiff's trade secrets claims. In deleting the Dropbox files, Kidd maintained that she did so negligently and did not realize that she would eliminate the records from cloud storage by removing them from a computer she was preparing for a new employee to use. While characterizing her violation of the temporary restraining order as a "serious error," the court agreed that Kidd's conduct was a "result of negligence rather than an intention to deprive [plaintiff] of those files." *See* discussion under **Sanctions—Rule 37(e)**.

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-CV-6890, 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023). *See* discussion under **Discovery Process** and **Litigation Holds and Preservation**.

COOPERATION

United States ex rel. Gill v. CVS Health Corp., No. 18 C 6494 (N.D. Ill. Feb. 15, 2024), ECF No. 280. In this False Claims Act litigation, the court rebuked the parties for their "excessive vexatiousness" on discovery issues and admonished them that it would consider drastic measures to address their conduct if it continued. While opining that the "possibilities for bending counsel toward the arc of reasonableness are endless," court highlighted several possible options on which it might draw to help "the parties . . . take it down a few notches, become more reasonable, and recalibrate their positions."

One option included vacating an order the court previously issued that extended discovery motion practice, which would result in the denial of discovery motions plaintiff and defendants had respectively filed. The court stated it might instead consider either reducing the number of witnesses to be called at trial or the amount of trial time for a particular party corresponding to the number of hours the court was forced to spend “dealing with excessive squabbling.” Finally, the court suggested that it might order the parties to read excerpts from a novel authored by the famous author Charles Dickens.

CRIMINAL LAW

United States v. Medina, No. 21-CR-62-JJM-PAS, 2024 WL 246614 (D.R.I. Jan. 23, 2024). *See* discussion under **Privacy**.

United States v. Lazar, No. 1:20-CR-78, 2023 WL 7221337 (E.D. Tex. Nov. 1, 2023). In this criminal matter in which defendants were indicted on a variety of drug charges, defendant Marius Lazar argued that the government’s form of production of relevant text messages from the ephemeral messaging application Wickr was inadequate under Rule 16 of the Federal Rules of Criminal Procedure (“FRCRP”). The government had produced to Lazar “‘approximately 254 separate videos of someone filming a cell phone while scrolling through it showing what appears to be text messages’ and ‘approximately 277 photographs of what appears to be text messages on a cell phone.’” The government had produced the relevant text messages in this manner—using one phone to take a video recording and capture images of the text messages in question—due to the ephemeral features inherent in the Wickr application that eliminated any trace of the messages within six days or, in some instances, “mere seconds.” Moreover, the government asserted that it could not obtain the messages directly from Wickr “because Wickr messages are not saved on Wickr servers beyond 6 days, the messages are encrypted, and Wickr utilizes thousands of servers worldwide.” Despite such explanations, defendant argued that the government’s production format violated FRCRP 16. In response, the court held that FRCRP 16 did not specify a particular form of production and noted that case law did not limit the government to producing the relevant text messages just from the Wickr application. Given the limitations the Wickr application posed, the lack of any evidence suggesting the government deleted or tampered with the Wickr messages, and the court’s determination that the Wickr messages memorialized in the government’s trial exhibits were “adequate and sufficiently usable,” the court rejected defendant’s motion. *See* discussion of *United States v. Lazar*, No. 1:20-CR-78, 2023 WL 7286236 (E.D. Tex. Nov. 2, 2023)) under **ESI Evidence**.

United States v. Buyer, No. 22 CR. 397 (RMB), 2023 WL 6805821 (S.D.N.Y. Oct. 16, 2023). *See* discussion under **ESI Evidence**.

DISCOVERY PROCESS

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-CV-6890, 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023). The court in this antitrust matter authorized “discovery on discovery” to allow defendants to ascertain when plaintiff reasonably anticipated litigation. In particular, the court ordered plaintiff to produce to defendants the retention letter memorializing its engagement of outside counsel in January 2020. The court also ordered the production of communications between plaintiff and its counsel between December 2019 and April 2020, along with plaintiff’s information retention policies that were in effect during that five-month period. While plaintiff would be permitted to redact privileged information from its engagement letter and its communications with counsel, the court would not

allow “the scope of representation, if laid out in the engagement letter, [to be redacted] unless it otherwise reflects legal advice.” See discussion under **Information Governance** and **Litigation Holds and Preservation**.

Adamson v. Pierce Cnty., No. 3:21-CV-05592-TMC, 2023 WL 7280742 (W.D. Wash. Nov. 3, 2023). In this civil rights litigation, defendants sought a motion for protective order to withstand compliance with a Rule 30(b)(6) deposition plaintiffs noticed on a variety of topics, including four topics that sought “discovery on discovery” regarding defendants’ production of relevant text messages. Defendants argued that the subpoena was overly broad and that plaintiffs already had information related to defendants’ text messages production. The court found that certain information plaintiffs requested was “impermissibly broad meta-discovery,” including plaintiffs’ topics that sought testimony on defendant Pierce County’s (“County”) “search for records responsive to discovery requests” and “[d]efendants’ responses to certain interrogatories and RFPs.” While granting defendants’ motion for protective order on those topics, the court found that certain “discovery on discovery” testimony should be permitted because plaintiffs had shown a “gap” in defendants’ text message production. Citing case law that referenced the *Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process*, the court observed that “discovery on discovery” is disfavored and, to be both relevant and proportional to the needs of the case, a party seeking it ‘must show a specific deficiency in the other party’s production.’” The court ultimately permitted plaintiffs to elicit certain testimony from the County about (among other things) its “retention and preservation of text messages,” whether employees could delete text messages from County-issued devices and what restrictions may have impacted their ability to do so; and the nature and extent of any metadata regarding deleted text messages.

LifeScan, Inc. v. Smith, No. 17-cv-5552 (CCC)(JSA), 2023 WL 7089662 (D.N.J. Oct. 11, 2023). In this commercial fraud litigation, defendant Zions Bank sought discovery of relevant communications and other information from custodian employees beyond those plaintiff had initially searched to identify responsive information. To warrant such discovery, the court-appointed special master observed that Zions would have to overcome the presumption established by extant district case law that plaintiff, as the responding party, is best situated to identify custodians with responsive information. To carry this “noticeably heavy burden” and establish that plaintiff’s “custodial choices” were “deficient or lacking,” Zions would have to show that plaintiff withheld relevant ESI or otherwise failed to conduct a reasonable search for relevant information. In addition, Zions would need to demonstrate that the additional ESI it sought was “unique,” i.e., sufficiently distinct from the information plaintiff already produced in discovery. The special master ultimately concluded that Zions met its burden by demonstrating that a “newly produced” PowerPoint presentation reflected the existence of additional custodians with knowledge of the issues in the litigation and who appeared to possess relevant ESI different from plaintiff’s existing production. Accordingly, the special master ordered plaintiff to identify and produce relevant information from eight additional custodians. See discussion under **Sedona Conference Publications**.

ESI Evidence

United States v. Lazar, No. 1:20-CR-78, 2023 WL 7286236 (E.D. Tex. Nov. 2, 2023)). The court conditionally overruled defendant’s objections to the admission at trial of certain exhibits memorializing Wickr text message exchanges between defendant and an undercover government agent. In this separate evidentiary ruling, the court found that defendant had not substantiated (among other things) its authentication objection in the face of evidence from the government that the exhibits

would be authenticated by the undercover agent. The court likewise rejected defendant’s unsupported original documents rule objection, particularly where the government averred that the exhibits were admissible duplicates pursuant to Federal Rule of Evidence (“FRE”) 1003; the exhibits accurately depicted the “messages exactly as they appeared on the screen in the Wickr application.” The government alternatively asserted that the exhibits were admissible under FRE 1004 because the original Wickr messages were “lost or destroyed” by the programmed operation of the Wickr application “and not by the proponent acting in bad faith.” *See* discussion of *United States v. Lazar*, No. 1:20-CR-78, 2023 WL 7221337 (E.D. Tex. Nov. 1, 2023) under **Criminal Law**.

United States v. Buyer, No. 22 CR. 397 (RMB), 2023 WL 6805821 (S.D.N.Y. Oct. 16, 2023). In this insider trading criminal action in which the jury convicted defendant Stephen Buyer, a former member of the U.S. House of Representatives, on four counts of securities fraud, Buyer filed motions both challenging his conviction and seeking bail while his appeal is pending. In connection with his motions, Buyer argued that the government did not properly authenticate a Cellebrite report of a nonparty’s phone that memorialized phone calls and text messages reflecting evidence of criminal activity. The Cellebrite Report confirmed that Buyer sent a “desperate message” (“I need to see you. Please, I will catch the next flight. I was interviewed and told them I bought . . .”) to a contact over Signal (which eliminated the message after five minutes) after being apprised that FINRA was investigating the over \$600,000 Buyer spent on Navigant stock based on material nonpublic information. The court denied both motions and held that the government properly authenticated the Cellebrite Report. In so doing, the court noted that the sufficiency standard for authentication under Federal Rule of Evidence 901(a) is a low bar—whether “a reasonable juror could find in favor of authenticity”—that can be satisfied by circumstantial evidence. The evidence the government offered that met this standard included testimony from a digital forensics examiner confirming that “the date and IMEI serial number in the [Cellebrite] Report were identical to the date and IMEI serial number in a corresponding form that was used to document the extraction [of data from] [the contact’s] phone.”

ESI PROTOCOLS

P&B Franchise, LLC v. Dawson, No. CV-23-00784-PHX-SMB, 2024 WL 326956 (D. Ariz. Jan. 29, 2024). *See* discussion under **Forensics**.

ETHICS

Hedgeye Risk Mgmt., LLC v. Dale, No. 21-CV-3687 (ALC) (RWL), 2023 WL 4760581 (S.D.N.Y. July 26, 2023). *See* discussion under **Reasonable Inquiry** and **Sanctions—Other FRCP Provisions**.

FEDERAL RULE OF EVIDENCE 502

The Lubrizol Corp. v. International Business Machines Corp., No. 1:21-CV-00870-CAB, 2024 WL 941686 (N.D. Ohio Feb. 8, 2024). In this breach of commercial contract litigation involving allegations of spoliation by defendant IBM, the court denied IBM’s motion for entry of a Federal Rule of Evidence 502(d) non-waiver order. IBM had sought a non-waiver order to “produce certain documents and information regarding its document preservation and litigation holds without waiving the privilege over any related materials and without exposing itself to the risk of subject matter waiver.” That IBM sought a Rule 502(d) order that would enable it “to intentionally produce documents in connection with a spoliation dispute” led to disagreements with plaintiff Lubrizol and, ultimately, motion practice. Lubrizol argued that the court lacked authority to enter a Rule 502(d) order under these circumstances,

i.e., “to intentionally, rather than inadvertently, disclose privileged information without constituting a subject matter waiver of all other documents and communications on the same topic.” In response, the court expressed uncertainty regarding whether it had authority to enter a non-waiver order under these circumstances. While The Sedona Conference had endorsed this approach in its *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95 (2015), the court found that several courts had disagreed with this course of action. Irrespective of this issue, the court rejected IBM’s proposed non-waiver order given its concerns that IBM could use the order “to disclose documents that support its spoliation position while continuing to withhold other, less favorable, documents.” According to the court, several cases indicated that a non-waiver order with an intentional disclosure provision could allow a disclosing party “to use the rule as a means to produce documents favorable to its position while holding back harmful materials.” The court also observed that IBM had decided to only waive privilege over certain issues and not “regarding the broader question of whether it reasonably anticipated litigation at the time that the alleged spoliation occurred.” IBM’s stance led the court to believe that the parties would “continue to litigate privilege issues regarding whether IBM reasonably anticipated litigation, while also disputing whether a particular document relates to the implementation of a litigation hold or instead relates to broader anticipation of litigation issues.” Because “the scope of IBM’s proposed Rule 502(d) [order] does not eliminate the risk of selective disclosure and that it is not likely to meaningfully narrow the disputes between the parties,” the court denied IBM’s motion to enter its proposed non-waiver order.

Adams v. Medtronic, Inc., No. 4:19-CV-870-SDJ-KPJ, 2024 WL 265860 (E.D. Tex. Jan. 23, 2024). In this product liability lawsuit, defendants argued that they should be able to claw back an inadvertently produced report prepared by the U.S. Food and Drug Administration (“FDA”) under the non-waiver order the court entered pursuant to Federal Rule of Evidence 502(d). Defendants maintained that they should be able to claw back the FDA report because it was not relevant to the claims or defenses at issue in the litigation. In addition, defendants asserted that the report was attorney work product. In particular, defendants contended that the report, if not clawed back, would reveal their lawyers’ “fact gathering process during the course of discovery.” The court rejected all of these arguments. On the issue of relevance, the court reasoned that the non-waiver order did not provide the parties with a right to claw back irrelevant or nonresponsive information. Instead, clawback rights under the non-waiver order were limited to documents that were privileged. Moreover, the court took the additional step of determining that the report at issue *was* relevant to plaintiff’s claims. Next, the court held that the report was not the work product of defendants’ lawyers. The court observed that the FDA—not defendants’ counsel—prepared the report and it did not reflect counsel’s “mental impressions or legal theories.” It also found that the report did not “reveal the selection process used by Defendants’ counsel, and . . . was produced as part of the general discovery process in this case.” Because the report was not work product, the court determined that defendants could not claw back the document pursuant to the non-waiver order. *See* discussion under **Sedona Conference Publications**.

FORENSICS

Pe&B Franchise, LLC v. Dawson, No. CV-23-00784-PHX-SMB, 2024 WL 326956 (D. Ariz. Jan. 29, 2024). In this litigation involving alleged violations of the Federal Computer Fraud and Abuse Act and the Electronic Communications Privacy Act, plaintiff sought an order requiring defendant to preserve and make available for forensic imaging his computer devices and systems. In particular, plaintiff’s request sought preservation and imaging of defendant’s “documents, computer files, hard drive data, electronic mail messages, cloud storage systems, [his] personal e-mails, text messages, and related records store[d] on [his] computer devices and systems, including remote and cloud storage

systems, and any other evidence relevant to the facts and circumstances alleged in Plaintiffs' Complaint." In response, defendant maintained that such relief was "extraordinary" and unwarranted, particularly since the parties had not yet met or conferred regarding discovery issues relating to ESI. The court agreed with defendant, noting that a request for forensic imaging was an extraordinary remedy. Then, citing *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008), the court held that plaintiff's request was both overly broad and lacked any support "as to why all of that information should be preserved for imaging and collection." The court next found that plaintiff's requested remedy was inappropriate since the parties had not even conferred over the quality and nature of ESI discovery issues as required under Rule 26(f). Observing that the "Rule 26(f) Proposed Case Management Plan" previously filed in this matter did not include a protocol for addressing ESI, the court ordered the parties "to meet and confer in accordance with Fed. R. Civ. P. 26 and Fed. R. Civ. P. 34 to propose a protocol for the ESI implicated" by plaintiff's motion.

Goldstein v. Denner, ---A.3d---, 2024 WL 303638 (Del. Ch. Jan. 26, 2024). See discussion under **Text Messages & Ephemeral Messages**.

United States v. Buyer, No. 22 CR. 397 (RMB), 2023 WL 6805821 (S.D.N.Y. Oct. 16, 2023). See discussion under **ESI Evidence**.

INFORMATION GOVERNANCE

Nagy v. Outback Steakhouse, No. 19-18277(MAS)(DEA), 2024 WL 712156 (D.N.J. Feb. 21, 2024). In connection with the court's issuance of Rule 37(e)(2) sanctions against defendant for failing to preserve relevant video footage of plaintiff's fall in its restaurant, the court found that defendant failed to provide its store manager with any objective guidance to follow in the form of policies or practices regarding the preservation of relevant video footage. This was apparent from both the store manager's testimony ("restaurant managers are 'not really given a time frame' as to how much surveillance video to preserve") and defendant's express representations in motion practice ("Defendant does not have a specific video retention policy regarding accidents; instead, the manager on duty is tasked with preserving relevant surveillance video."). The court was astonished at defendant's position, observing that it was "unclear" how defendant could "reasonably expect to fulfil its duty to preserve evidence by leaving the responsibility of that preservation in the hands of restaurant manager who is given absolutely no guidance as to [defendant's] preservation duties." The court concluded defendant's lack of a formal process regarding the retention of relevant footage was evidence of its failure to take reasonable steps to preserve and a pertinent factor in determining that defendant sought to deprive plaintiff of the footage at issue. This was particularly the case where defendant had other policies in place in the event of a slip and fall, e.g., store managers were "required to call a 'hotline' to report the incident and answer a series of questions." See discussion under **Sanctions—Rule 37(e)**.

Gonzalez v. Target Corp., No. CV 22-9089 JAK (PVCx), 2024 WL 589147 (C.D. Cal. Jan. 23, 2024), *report and recommendation adopted*, 2024 WL 580544 (C.D. Cal. Feb. 13, 2024). See discussion under **Sanctions—Rule 37(e)**.

Bemesderfer v. United Parcel Serv., Inc., No. 6:22-CV-270-PGB-EJK, 2023 WL 8004428 (M.D. Fla. Nov. 17, 2023). In connection with its denial of defendant UPS's motion for summary judgment on plaintiff's disparate treatment claims, the court criticized UPS for attempting to use its shoddy record-keeping practices to demonstrate the lack of a triable issue of material fact. UPS argued that summary judgment was appropriate because plaintiff failed to present evidence of signed "bid sheets" that

would have reflected particular job openings for which he applied at UPS. The court, however, chided UPS for failing to maintain records of signed “bid sheets” and acknowledged plaintiff’s “presence of mind” in taking pictures of particular UPS bid sheets from certain years (though he did not have pictures reflecting bid sheets for every year at issue): “Having failed to enact basic document retention policies, UPS now seeks to capitalize on its lax recordkeeping. UPS cannot satisfy its burden of proving the absence of a material fact by failing to keep records. To find otherwise would be absurd and motivates document destruction as a defense tactic.”

LITIGATION HOLDS AND PRESERVATION

Chandler v. Radial, Inc., No. 1:22-cv-02442-JMS-TAB, 2024 WL 168610, (S.D. Ind. Jan. 16, 2024). The court declined plaintiffs’ request for discovery relief arising from defendant’s deletion of plaintiff’s email account and that of another former employee (Cortés). The court found that defendant deleted the email accounts pursuant to its “30-day deletion policy” and that defendant did so “well before” its duty to preserve that information arose.

Goodale v. Elavon, Inc., No. 23-5013, 2023 WL 9111441 (6th Cir. Dec. 12, 2023). In this appeal by plaintiff of multiple adverse rulings regarding her Age Discrimination in Employment Act claims, the U.S. Court of Appeals for the Sixth Circuit affirmed both the district court’s order of summary judgment and its denial of plaintiff’s motion for spoliation sanctions against defendant. Regarding the sanctions motion, plaintiff had argued to the district court that defendant wrongfully eliminated relevant emails and other ESI. In denying her motion, the court determined that the defendant’s duty to preserve the ESI in question did not arise until after defendant eliminated that information pursuant to its “90-day retention policy.” The appellate court agreed and also reasoned that an “ethics hotline” call that plaintiff placed before the information was destroyed did not trigger a duty to preserve because “it did not contain any mention of potential age discrimination or litigation.” Nor did the duty to preserve attach due to the presence of an undated company document referencing the termination of certain employees over the age of 40 and the basis for the terminations had nothing to do with their ages.

Wegman v. United States Specialty Sports Ass’n, Inc., No. 6:23-CV-1637-RBD-RMN, 2023 WL 8599972 (M.D. Fla. Dec. 12, 2023). In this discovery dispute between defendant The United States Specialty Sports Association, Inc. (“USSSA”) and defendant Donald DeDonatis III, the court ordered DeDonatis to return three electronic devices to USSSA. It was undisputed that the devices at issue belonged to USSSA. In addition, USSSA conceded that it had a preservation obligation relating to the ESI found on the devices, and that it intended to create forensic images of the devices “so it can comply with its preservation obligations.” The court readily agreed with USSSA’s position, finding that DeDonatis’s failure to return the devices prevented USSSA from satisfying its preservation duties and that “DeDonatis could bet dollars to donuts that he has no choice but to turn over three electronic devices in his possession.” In addition, the court opined that USSSA was entitled to the devices considering both DeDonatis’s role as USSSA’s chief executive officer and, citing *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & the Process*, 20 SEDONA CONF. J. 341 (2019), that his knowledge would be imputed to USSSA under basic agency principles: “Given that he is now on administrative leave and his relationship with USSSA has soured, the devices contain evidence that the organization needs to determine what DeDonatis knows, when he learned about it, what he did about it, and who was involved.”

Doe LS 340 v. Uber Technologies, Inc., --- F.Supp.3d ---, 2024 WL 107929 (N.D. Cal. 2024). In this multidistrict litigation (“MDL”) arising from instances of sexual misconduct by drivers for defendant’s car service, the court provided various rulings on the nature and scope of ESI preservation. First, the court ordered defendant to disclose “basic information concerning its litigation holds” to plaintiffs. Plaintiffs had argued that defendant had withheld information that is subject to disclosure, including “names, job titles, and dates of employment of the recipients of the hold notices, the dates of issue, and what litigation or claim the holds relate to.” In response, defendant asserted that the information plaintiffs were seeking was “‘plainly privileged’ because it concerns matters contained within the litigation holds themselves.” The court rejected defendant’s arguments, holding that “‘basic details surrounding the litigation hold’ are not protected by the attorney-client privilege and the work product doctrine.” While plaintiffs were forbidden from obtaining information that defendant’s lawyers communicated to its employees, the court found that plaintiffs were entitled to learn whether the litigation holds defendant issued pertained to the instant MDL. Second, the court held that defendant must provide to plaintiffs “information about the ESI sources it has preserved, specifically, what sources of ESI it preserved, when each source was preserved, when each ESI source was used, what each source was used for, and the general types of information housed or contained in each source.” Citing Comment 5.c from *The Sedona Principles, Third Edition*, the court opined that “parties should discuss and consider non-custodial as well as custodial sources of relevant ESI.” In its final ruling, the court declined to adopt plaintiffs’ requested relief that would have required defendant to suspend its “automatic deletion of records company-wide.” Relying on *The Sedona Principles, Third Edition*, the court observed that “litigants are not generally required to preserve all electronic records, and the principles of proportionality guide the scope of a party’s duty to preserve potentially relevant evidence.” The court found that principle applicable here given that defendant had “already suspended automatic deletion of emails and electronic data for thousands of employee custodians,” and plaintiffs had not sufficiently supported their assertion that suspending all automated deletion functionality would prevent the deletion of relevant information going forward. *See* discussion under **Sedona Conference Publications**.

Nagy v. Outback Steakhouse, No. 19-18277(MAS)(DEA), 2024 WL 712156 (D.N.J. Feb. 21, 2024). *See* discussion under **Information Governance** and **Sanctions—Rule 37(e)**.

Gonzalez v. Target Corp., No. CV 22-9089 JAK (PVCx), 2024 WL 589147 (C.D. Cal. Jan. 23, 2024), *report and recommendation adopted*, 2024 WL 580544 (C.D. Cal. Feb. 13, 2024). *See* discussion under **Sanctions—Rule 37(e)**.

Herbert v. Lynch, 7:22-CV-6303 (NSR) (VR), 2024 WL 20942 (S.D.N.Y. Jan. 2, 2024). *See* discussion under **Sedona Conference Publications**.

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-CV-6890, 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023). The court in this antitrust matter authorized “discovery on discovery” to allow defendants to ascertain when plaintiff reasonably anticipated litigation. Among other things, the court ordered plaintiff to produce the letter memorializing its engagement of outside counsel in January 2020 and communications between plaintiff and its counsel between December 2019 and April 2020. In its motion to compel, defendants argued that they were entitled to this information given that plaintiff eliminated ESI from four of its former employees when it may have had a duty to preserve it. In response, plaintiff asserted that it deleted its former employees’ ESI within three months of their respective departures from the enterprise (August 2018, October 2019, and December 2019) pursuant to its information retention policy and practices. Plaintiff alternatively contended that its former

employees' data was discarded in any event by April 2020 when it implemented a "new cloud-based email system"—Microsoft 365—that included only active employee email accounts. Given these facially neutral disposal determinations, plaintiff maintained that information about its retention of counsel was not pertinent to the trigger for its preservation duty. The court, however, disagreed, finding instead that defendants were entitled to explore the nature and purpose of plaintiff's retention of counsel, since this might reveal the date when plaintiff reasonably anticipated litigation. In addition, the court ordered plaintiff to produce its information retention policies that were in effect between December 2019 and April 2020. The court reasoned that such information was pertinent to understanding whether the ESI belonging to two of the former employees, who left plaintiff's employ in October and December 2019, was deleted in accordance with those policies and whether it should have existed at the time the duty to preserve attached. In connection with these decisions, the court clarified that it was not making any rulings relative to whether plaintiff's engagement of counsel was determinative on the issue of when its duty to preserve ripened. Instead, the court observed that such an event may be relevant to triggering the duty. Finally, the court rejected plaintiff's argument that its duty to preserve would only attach once litigation was imminent. Citing to the 2015 committee note to Rule 37(e) and subsequent case law, the court indicated that reasonable anticipation of litigation was the "uniform standard" under which the duty to preserve attached. *See* discussion under **Discovery Process**.

NONPARTIES

Doe 1 v. Nat'l Collegiate Athletic Ass'n, No. 1:23-cv-00542-SEB-MJD, 2024 WL 643038 (S.D. Ind. Feb. 15, 2024). *See* discussion under **Social Media**.

McBryde-O'Neal v. Polichetti, No. 23-CV-10113 (JPC) (RFT), 2024 WL 195571 (S.D.N.Y. Jan. 17, 2024). *See* discussion under **Nontraditional Sources of ESI**.

Correct Transmission LLC v. Microsoft Corp., No. 2:23-MC-0075-KKE, 2023 WL 7301240 (W.D. Wash. Nov. 6, 2023). The court in this patent infringement litigation rejected plaintiff's efforts to compel nonparty Microsoft Corporation ("Microsoft") to comply with a Rule 45 subpoena that included six document requests. While acknowledging that five of plaintiff's document requests sought relevant information from Microsoft (the court refused the sixth request after deeming it an "impermissible interrogatory"), the court found that plaintiff had not made sufficient efforts to obtain this information from defendant Juniper Networks ("defendant"). Plaintiff had served requests on defendant for comparable information, including pertinent communications between defendant and Microsoft, but defendant had yet to respond with the requested information. Plaintiff had apparently neglected to meet and confer with defendant about its failure to produce the requested documents that plaintiff was now seeking by way of subpoena. Citing both district court and appellate authority from the U.S. Court of Appeals for the Ninth Circuit, the court observed that it was "reluctant to require a non-party to provide discovery that can be produced by a party." The court additionally relied on the *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1 (2021) and observed that The Sedona Conference "recommends seeking production of documents from non-parties only after meeting and conferring with the party who either confirms it does not possess the requested documents or does not respond within a reasonable time." Given the instant circumstances in which plaintiff failed to meet and confer with defendant over its nonproduction of relevant information, the court denied plaintiff's motion to obtain that same information from Microsoft.

NONTRADITIONAL SOURCES OF ESI

Park v. Kim, 91 F.4th 610 (2d Cir. 2024). In affirming a district court’s order of dismissal of plaintiff’s claims for failure to comply with certain discovery orders, the U.S. Court of Appeals for the Second Circuit separately determined that plaintiff-appellant’s attorney violated Rule 11 by including a fake case citation in the reply brief that counsel identified using ChatGPT. The Second Circuit found that counsel violated Rule 11 by making a false statement of fact in the reply and by failing to make a reasonable inquiry (“Attorney Lee made no inquiry”) “into the validity of the arguments she presented.” The Second Circuit referred counsel to its “Grievance Panel . . . for further investigation” and ordered her to provide a copy of the court’s opinion to plaintiff.

J.G. individually & on behalf of G.G. v. New York City Dep’t of Educ., ---F. Supp. 3d---, 2024 WL 728626 (S.D.N.Y. 2024). Plaintiff in this Individuals with Disabilities Education Act matter sought to recover its attorney fees and costs in the amount of \$113,484.62 from the New York City Department of Education after prevailing at two administrative hearings. In an effort to substantiate the reasonableness of the rates that the lawyers charged plaintiff for the work they performed, counsel relied on a myriad of sources including “feedback it received from the artificial intelligence tool ‘ChatGPT-4.’” While plaintiff’s counsel argued that ChatGPT’s opinion could be a “a useful gauge of the reasonable billing rate,” the court rejected this assertion and found that such proposition “was misbegotten at the jump.” In doing so, the court cited both *Park v. Kim*, 91 F.4th 610 (2d Cir. 2024) and *Mata v. Avianca, Inc.*, --- F. Supp. 3d ---, 2023 WL 4114965 (S.D.N.Y. 2023) in which the courts respectively determined that parties had relied on fabricated case citations generated by ChatGPT. In criticizing their reliance on ChatGPT, the court reasoned that counsel took no effort to substantiate the conclusions ChatGPT reached regarding reasonable billing rates: “Cuddy Law Firm does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the Cuddy Law Firm urges for its timekeepers.” The court concluded its analysis of this issue by admonishing counsel “to excise references to ChatGPT from future fee applications.” While the court ultimately issued an award of fees and costs to plaintiff, it only did so in the total amount of \$53,050.13.

Tracey v. Fabian, No. 3:22-CV-189, 2024 WL 665926 (W.D. Pa. Feb. 16, 2024). In connection with the determination of this omnibus discovery motion, the court denied without prejudice plaintiffs’ request that defendants produce relevant video footage over a two-day period from a Ring doorbell camera . Defendants represented that they had produced all of the requested doorbell footage they had available to them and indicated that the remaining footage had been “automatically deleted” after a certain time. Defendants nonetheless committed to serving a subpoena on nonparty Ring to obtain the balance of the footage that plaintiffs requested.

Neal v. City of Bainbridge Island, No. 3:20-CV-06025-DGE, 2024 WL 308069 (W.D. Wash. Jan. 26, 2024). See discussion under **Workplace Collaboration Tools**.

United States v. Medina, No. 21-CR-62-JJM-PAS, 2024 WL 246614 (D.R.I. Jan. 23, 2024). See discussion under **Privacy**.

McBryde-O’Neal v. Polichetti, No. 23-CV-10113 (JPC) (RFT), 2024 WL 195571 (S.D.N.Y. Jan. 17, 2024). In this civil rights action, the court was asked to consider whether it should issue a document

preservation subpoena to nonparty Ring, LLC to preserve certain doorbell camera video footage before the formal commencement of discovery. The court acceded to a pro se plaintiff's request, finding good cause to issue the preservation subpoena. First, the court found that plaintiff had made a particularized request since it was limited to one hour of footage from two Ring doorbell cameras. Second, the court determined that the subpoena was necessary to prevent undue prejudice that would otherwise result from the deletion of the video footage. Plaintiff had been unsuccessful in her efforts to preserve pertinent footage of her alleged physical harassment by law enforcement officers from either her Ring device or that of her neighbor. In addition, Ring, by its own policies, would typically delete any stored camera footage within 60 days, permanently eliminating the evidence unless the subpoena were issued.

POSSESSION, CUSTODY, OR CONTROL

Loc. 3621 v. City of New York, No. 18-cv-4476 (LJL) (JW), 2023 WL 8804257 (S.D.N.Y. Dec. 20, 2023). See discussion under **Search**.

PRIVACY

Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024). In this Title VII matter in which the district court dismissed plaintiff's claims as a sanction under Rule 37(e) for intentionally deleting relevant text messages, plaintiff argued on appeal that the district court violated "privacy interests" and erred in ordering plaintiff and nonparty witnesses to provide their mobile phone to a forensics expert for imaging and analysis. The U.S. Court of Appeals for the Ninth Circuit disagreed and found plaintiff's argument "unpersuasive." To be sure, the Ninth Circuit reasoned, "there is a strong privacy interest in the contents of mobile phones," and those interests are generally addressed in connection with proportionality considerations under Rule 26(b)(1) (citing *Henson v. Turn, Inc.*, No. 15-cv-01497-JSW, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018)) or protective orders under Rule 26(c) (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984)). Using that framework, the Ninth Circuit determined that the district court's forensics imaging order was proportional to the needs of the case, particularly given the evidence demonstrating that plaintiff and her nonparty witnesses both exchanged and then deleted relevant messages. Moreover, while a protective order had apparently issued to safeguard plaintiff's privacy, that protective order was limited to plaintiff and did not include the nonparty witnesses. See discussion under **Sanctions—Rule 37(e)**.

United States v. Medina, No. 21-CR-62-JJM-PAS, 2024 WL 246614 (D.R.I. Jan. 23, 2024). In this matter involving the issuance of 58 warrants to law enforcement that resulted in kidnapping and drug conspiracy charges, defendants sought to suppress information the government obtained from 14 of those warrants. This included defendants' motion to suppress short-term, historical cell-site location information ("CSLI") obtained through a Tower Dump Order, which a magistrate judge issued without a search warrant. Defendants argued that they had a reasonable expectation of privacy in the information on their mobile phones and that the Tower Dump Order, which authorized the disclosure of short-term CSLI, violated that right. In response, the court observed that the warrants in this matter "offer a sobering tour of modern electronic surveillance techniques," which include "[t]ower dumps, geofences, cell-site simulators, warrants seeking real-time and historical CSLI." The court further noted that "these techniques are not only no longer new, but also are now a standard part of an investigative repertoire" for law enforcement and raise any number of privacy issues for criminal defendants and others whose data may be swept up in those investigative methods. In its order, the court found that the government needed a warrant to obtain a tower dump order because it enabled

law enforcement to acquire “subscriber information and location history for everyone in the vicinity” over a period of four hours from the five cell towers subject to the order. This included “intimate and personal” data for all user devices in the area, including “conversations being held in private homes, by people not under investigation.” Given these circumstances, the court determined that this type of “mass surveillance of an entire population” violated the Fourth Amendment. However, the court still upheld the tower dump order under the good-faith exception pursuant to *United States v. Leon*, 468 U.S. 897 (1984) given the reasonableness of the government’s conduct in connection with obtaining the order and the still unsettled nature of the law regarding whether the government should be required to obtain a warrant for short-term CSLI.

PRIVILEGE

United States ex rel. Gill v. CVS Health Corp., No. 18 C 6494, 2024 WL 406510 (N.D. Ill. Feb. 2, 2024). In this False Claims Act litigation, the court denied plaintiff’s motion to compel the production of 20,790 documents identified on defendants’ privilege log and declined to issue a blanket privilege waiver order regarding those documents. Plaintiff had argued that waiver was appropriate in this instance given defendants’ failure to timely serve a privilege log and prepare a log that complied with the requirements of Rule 26(b)(5)(A). While the court agreed that defendants’ privilege log was both tardy and incomplete, it refused to issue a blanket privilege waiver order. On the issue of timeliness, the court determined that plaintiff waited too long to seek relief regarding defendants’ problematic log. The court observed that plaintiff could have sought relief months earlier and in response to prior iterations of the log that clearly did not meet Rule 26(b)(5)(A)’s requirements. Instead, plaintiff continued to wait for defendants to perfect their log. This proved futile, as defendants’ series of logs failed in many instances to include descriptions of withheld documents, did not identify the names of lawyers who authored particular documents or were involved in privileged communications, or neglected to expressly state a privilege claim. While it would not deny with prejudice plaintiff’s motion on the issue of timeliness, the court held that “plaintiff’s failure to file its motion on time operates as a waiver of any issues he may have had with the defendants’ failure to provide their privilege log in a timely manner.” The court also ordered the parties to continue to meet and confer regarding the nature of the shortcomings in defendants’ log. Even though the log was “faulty on several levels” and many of the documents were probably not privileged, the court did not feel it was appropriate to conduct an in camera review of the 20,790 documents at issue or otherwise order other relief at that time. Instead, the court directed the parties to “carefully consider how the present dispute might ultimately and reasonably be resolved.”

Coker v. Goldberg & Assocs. P.C., No. 21-cv-1803, 2024 WL 263121 (S.D.N.Y. Jan. 24, 2024). In this Fair Labor Standards Act litigation, the magistrate judge deemed defendant’s privilege claims waived over certain WhatsApp audio recordings after determining that defendants failed to serve a timely privilege log. Plaintiff argued that sanctions should issue pursuant to Rule 37(b)(2) because defendants neither produced the audio recordings at issue, nor served a privilege log memorializing any privilege claims pursuant to Rule 26(b)(5)(A), in violation of discovery orders requiring defendants to complete all discovery by a date certain. The magistrate judge agreed, finding that defendants—which asserted the audio recordings were privileged—had not memorialized their claims on a privilege log and neglected to substantiate their claims under Rule 26(b)(5)(A) in their opposition to plaintiff’s motion. While observing that plaintiff had not suffered any prejudice given the existence of “overwhelmingly favorable” WhatsApp messages previously produced in discovery, the magistrate judge nevertheless deemed defendants’ privilege claims waived as a sanction under Rule 37(b)(2) for their noncompliance with the court’s previous discovery orders. The magistrate judge rejected further relief that plaintiff

sought, including her request for an order of default judgment, an adverse inference against defendants for their alleged discovery violations, and Rule 11 sanctions. In addition, the magistrate judge denied plaintiff's request for additional sanctions against defendants for allegedly withholding relevant WhatsApp messages. While plaintiff had shown that defendants possibly withheld those messages, that showing was insufficient to issue sanctions. Nevertheless, the magistrate judge issued a preclusion order to prevent defendants from using at trial any documents it may have withheld from plaintiff during discovery.

Linet Americas, Inc. v. Hill-Rom Holdings, Inc., No. 1:21-CV-6890, 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023). See discussion under **Discovery Process** and **Litigation Holds and Preservation**.

Doe LS 340 v. Uber Technologies, Inc., --- F.Supp.3d ---, 2024 WL 107929 (N.D. Cal. 2024). See discussion under **Litigation Holds and Preservation** and **Sedona Conference Publications**.

PROPORTIONALITY

Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024). See discussion under **Privacy** and **Sanctions—Rule 37(e)**.

REASONABLE INQUIRY

Tornabene v. City of Blackfoot, No. 4:22-CV-00180-AKB, 2024 WL 809900 (D. Idaho Feb. 27, 2024). See discussion under **Search** and **Sedona Conference Publications**.

Hedgeye Risk Mgmt., LLC v. Dale, No. 21-CV-3687 (ALC) (RWL), 2023 WL 4760581 (S.D.N.Y. July 26, 2023). The court in this Defend Trade Secrets Act litigation issued monetary sanctions against plaintiff pursuant to Rule 37(a) and Rule 37(b)(2) for failing to produce hundreds of relevant Slack and text messages from several of its executives. The court determined that this failure occurred because plaintiff's outside counsel neglected to properly supervise the process of collecting relevant information. In particular, the court found that plaintiff—and not its outside counsel—had led the investigation for relevant information. The court observed that it was inappropriate for plaintiff to lead the collection process without supervision from outside counsel considering that its in-house counsel was both a witness in the lawsuit and reported to two executives “who have a direct interest in the case.” While perhaps not “willful misconduct,” the court found that plaintiff's actions were “hardly innocent” and certainly “more than negligent.” Holding that plaintiff's counsel “failed to exercise sufficient quality control over collection by [plaintiff's] personnel, the court cited *Herman v. City of New York*, 334 F.R.D. 377, 386 (2020), which noted that “[i]t is not appropriate to take a client's self-collection of documents, assume it is complete, and not take steps to determine whether significant gaps exist.” See discussion under **Sanctions—Other FRCP Provisions**.

RULE 34 REQUESTS, RESPONSES, AND PRODUCTIONS

Mi Familia Vota v. Fontes, 344 F.R.D. 496 (D. Ariz. 2023). In this litigation over the constitutionality of an Arizona voting law designed to remove voters from the state's “permanent early voting list” under certain circumstances, nonparty the Republican Party of Arizona (“RPA”) sought to lessen its production burden regarding documents responsive to plaintiffs' subpoena. After extensive wrangling and delays over the subpoena's scope, the court ordered the RPA on July 17, 2023, to produce responsive documents that hit on particular search terms and produce them within three weeks

(August 7, 2023). After identifying 61,298 hit documents, the RPA contacted plaintiffs on August 8, 2023, and advised them that it did not have the resources to review the 61,298 documents. Beyond its undue burden and relevance objections, the RPA maintained that all of the 61,298 documents were privileged under the First Amendment and another 1,016 documents were covered by the attorney-client privilege. Shortly afterwards, the RPA notified plaintiffs that it intended to use “artificial intelligence”—or what appears to be a technology-assisted review “active Learning model”—to identify responsive documents and that, based on its preliminary analysis, RPA would likely produce approximately 5,039 documents (family complete) to plaintiffs. Plaintiffs disagreed with this approach and sought a further order directing RPA’s compliance with the July 17 order. In its opposition, the RPA argued that it should only be required to produce the 5,039 documents identified by using AI rather than being forced to review the 61,298 search term hits for responsiveness. Since RPA was requesting to change the previously ordered search methodology, the court evaluated its challenge as a motion for reconsideration. Against this standard, the court denied RPA’s request, as it failed to present any evidence or law indicating an error in its July 17 order. In particular, the court observed that RPA had neglected to work cooperatively and had instead moved the discovery goalposts by “initially refus[ing] to produce anything, then seem[ing] to agree to use keyword searches in an attempt to locate responsive documents, then retract[ing] that offer.” The court also found that RPA did not raise “its anticipated AI-assisted search process” either with plaintiffs or the court in a timely manner. Citing *Bridgestone Americas, Inc. v. Int’l Bus. Machines Corp.*, No. 3:13-1196, 2014 WL 4923014 (M.D. Tenn. July 22, 2014), the court indicated that it “would have been very open” to RPA’s use of AI had it not raised the issue so “belatedly, and without justification.” The court also criticized the lack of detail RPA disclosed regarding its AI search methodology, noting that “RPA’s counsel was able to provide essentially no details about the proposed AI search process” during oral argument. In other rulings, the court found that RPA failed to serve proper privilege logs, waived its First Amendment Privilege over documents identified on its First Amendment privilege log, and waived the attorney-client privilege over certain documents identified on its attorney-client privilege log.

United States v. Anthem, Inc., No. 20-CV-2593 (ALC) (KHP), 2024 WL 1116276 (S.D.N.Y. Mar. 13, 2024). The discovery dispute in this False Claims Act (“FCA”) litigation involved “copycat” or “clone” discovery in which a requesting party seeks discovery of information from a responding party who has already produced the requested information in another lawsuit. In this action, defendant Anthem sought (among other things) relevant documents from 40 custodians regarding various issues relating to the government’s contracting process for, payments to, and audits regarding Medicare Advantage Organizations (“MAO”). The information Anthem requested was part of a larger set of documents from 187 custodians that the government produced in an FCA lawsuit against a different MAO, United Healthcare. Anthem argued that the production of the requested documents should be turnkey given that the government had previously produced the information and that relevance should not be an issue given the overlap between the two FCA lawsuits. The government disagreed, arguing that many of the requested documents were irrelevant and protected from discovery under the deliberative process privilege. In response, the court observed that “copycat” or “clone” discovery requests like Anthem’s are typically overly broad and entail court intervention to either “considerably scale back the information that a producing party must produce from another litigation or deny it entirely on the ground that a party must do its own work.” The court also noted that Rule 34 mandates that document requests “describe with reasonable particularity each item or category of items requested.” In addition, the court cited the *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447 (2018), for the proposition that document requests should be tailored “to minimize objections and facilitate substantive responses.” Against the backdrop of these standards, the court ultimately adopted a “middle approach” consistent with its understanding of the

aims of Rule 1 and Rule 26(b)(1) and directed the government to identify responsive information subject to several date and substantive restrictions to safeguard against the production of irrelevant or privileged information.

Equal Employment Opportunity Commission v. Wal-Mart Stores East, LP, No. 5:22-CV-252-FL, 2024 WL 923195, (E.D.N.C. Mar. 4, 2024). In this employment discrimination case, the court issued discovery relief on multiple items for plaintiff. First, the court ordered defendant Walmart to produce documents in response to certain of plaintiff's document requests that sought information related to email accounts used by former Walmart employees that had been deleted. The employees whose accounts were deleted worked in the same facility as the former employee who claimed she was subject to "unlawful employment discrimination." The court indicated that Walmart should produce any documents from the deleted email accounts that it had managed to recover after a particular time period. Second, the court authorized plaintiff to serve additional discovery (10 document requests, 10 interrogatories, and 10 requests for admission) if Walmart was unable to produce responsive documents as ordered.

Gaudet & Co., Inc. v. ACE Fire Underwriters Ins. Co., No. CV 21-372-JB-MU, 2024 WL 457134 (S.D. Ala. Feb. 6, 2024). In this insurance coverage dispute that includes a claim for bad faith, plaintiff sought (among other things) an order compelling defendants to produce in unredacted format several documents that they previously produced with extensive relevance and confidentiality redactions. In response to plaintiff's motion, defendants asserted that their redactions were appropriate considering that they did not want to disclose details regarding "other insureds or confidential business, privileged, technical information relating to Defendants' insurance operations." In connection with reaching its determination on the disputed issues, the court stated several general propositions that were based on extant district authority (*WNE Cap. Holdings Corp. v. Rockwell Automation, Inc.*, No. CV 09-0733-WS-C, 2011 WL 13254691 (S.D. Ala. Aug. 4, 2011)). First, the court observed that the general rule in discovery is that the responding party should produce documents without redactions for relevance or confidentiality. The court next reasoned that a protective order could reduce harm arising from the production of irrelevant or confidential information. The court further noted that in camera reviews were not appropriate for materials redacted on the basis of relevance or confidentiality. Finally, the court explained that instances where redactions were appropriate typically involved few documents whose redacted content "was readily apparent." Applying those standards to the instant dispute, the court found the redactions were improper and ordered defendants to produce the documents at issue in unredacted format. After performing an in camera review of the redacted content, the court determined that it had not seen "any redacted information that would constitute confidential, proprietary business information." In any event, any such information, along with "information on other insureds or the handling of other claims," could be produced subject to the existing protective order. The court also found that the number of documents redacted were extensive and their redacted content not readily apparent. Defendants did not aid their cause by making inconsistent redactions of certain content—"there are many instances of inconsistent redactions among duplicative documents/email chains. The inconsistent nature of these redactions undermines Defendants' position that these redactions are necessary"—and by previously producing highly relevant documents with redactions that were later withdrawn.

Eagle View Technologies, Inc. v. Nearmap US, Inc., No. 2:21-CV-00283, 2024 WL 694724 (D. Utah Feb. 20, 2024). See discussion under **Workplace Collaboration Tools**.

Miller v. Legacy Bank, No. CIV-20-946-D, 2023 WL 7410627 (W.D. Okla. Nov. 8, 2023). The court held that the defendant, Legacy Bank, fulfilled its obligations under the Federal Rules of Civil Procedure regarding document production. It rejected the plaintiff's argument that documents should have been provided via Dropbox instead of a flash drive, stating that the form of produced information is separate from how it's delivered or stored. Additionally, the court found that Legacy Bank properly produced documents as they are kept in the usual course of business, which is permissible under Rule 34. Consequently, the plaintiff's motion to compel Legacy Bank to produce documents in a different format was denied.

United States v. Lazar, No. 1:20-CR-78, 2023 WL 7221337 (E.D. Tex. Nov. 1, 2023). *See* discussion under **Criminal Law**.

SANCTIONS—OTHER FRCP PROVISIONS

Roadbuilders Mach. & Supply Co. v. Sandvik Mining & Constr. USA, LLC, No. 2:22-CV-2331-HLT-TJJ, 2024 WL 68366 (D. Kan. Jan. 5, 2024), *reconsideration denied*, 2024 WL 757154 (D. Kan. Feb. 23, 2024). *See* discussion under **Workplace Collaboration Tools**.

Coker v. Goldberg & Assocs. P.C., No. 21-cv-1803, 2024 WL 263121 (S.D.N.Y. Jan. 24, 2024). *See* discussion under **Privilege**.

Hedgeye Risk Mgmt., LLC v. Dale, No. 21-CV-3687 (ALC) (RWL), 2023 WL 4760581 (S.D.N.Y. July 26, 2023). In this trade secret misappropriation action, the court imposed monetary sanctions against plaintiff pursuant to Rule 37(a) and Rule 37(b)(2) for failing to produce hundreds of relevant communications from several of its executives. Despite representing various times to the court and defendants that it had conducted a reasonable inquiry and identified all relevant, responsive communications, plaintiff nonetheless produced relevant text and Slack messages from its executives after a nonparty's production "revealed the existence of text messages that had not been produced by [plaintiff]." The court concluded that plaintiff previously overlooked the existence of the relevant communications by failing to have outside counsel properly supervise the process of collecting relevant information. As a result, the court found that monetary sanctions were appropriate under Rule 37(a) pursuant to defendants' motion to compel. The court also determined that monetary sanctions were proper under Rule 37(b)(2) because plaintiff had failed to comply with previous orders directing that it produce the responsive Slack and text messages that defendants previously requested. *See* discussion under **Reasonable Inquiry**.

SANCTIONS—RULE 37(e)

Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024). In this Title VII action in which the district court dismissed plaintiff's claims under Rule 37(e)(2), plaintiff argued on appeal that the district court both abused its discretion by ordering dismissal as a sanction and erred by finding that she intentionally destroyed relevant text messages. In particular, plaintiff asserted that the deletion of relevant text messages did not merit dismissal "because her conduct was neither willful nor prejudicial" to defendant. In addition, plaintiff maintained that lesser sanctions could have ameliorated the harm caused by her spoliation. In connection with its consideration of plaintiff's appeal, the U.S. Court of Appeals for the Ninth Circuit observed that it would evaluate the district court's issuance of discovery sanctions under an abuse-of-discretion standard while reviewing the underlying factual findings for

clear error. Against those standards, the Ninth Circuit rejected both of plaintiff's arguments. The Ninth Circuit first discussed the issue of intent under Rule 37(e)(2), citing both *Skanska USA Civ. Se. Inc. v. Bagelheads, Inc.*, 75 F.4th 1290 (11th Cir. 2023) and the 2015 committee note to Rule 37(e) to define intent as "the willful destruction of evidence with the purpose of avoiding its discovery by an adverse party." The Ninth Circuit then affirmed the district court's finding of intent, concluding that circumstantial evidence of plaintiff intentionally deleting her own text messages, and conspiring with nonparty witnesses to do the same, substantiated this finding. That evidence included (among other things) plaintiff's disobedience of the court's forensic imaging order and her selective preservation of certain text messages. Finally on this issue, the Ninth Circuit determined that the district court did not have to make an express finding of prejudice because it was inferred pursuant to Rule 37(e)(2) once the district court made its finding of intent. The Ninth Circuit next affirmed the nature of the sanction, holding that the order of dismissal was not clearly erroneous given the "repeated violations of court orders" by plaintiff and her counsel, even after the district court had issued monetary sanctions against them. *See* discussion under **Privacy**.

Traverse Therapy Servs., PLLC v. Sadler-Bridges Wellness Grp., PLLC, No. C23-1239 MJP, 2024 WL 896168 (W.D. Wash. Mar. 1, 2024). *See* discussion under **Text Messages & Ephemeral Messages** and **Workplace Collaboration Tools**.

Boshea v. Compass Marketing, Inc., No. CV ELH-21-00309, 2024 WL 811468 (D. Md. Feb. 27, 2024). The court denied defendant's motion for spoliation sanctions against plaintiff, finding that defendant had not satisfied Rule 37(e)(2)'s intent-to-deprive requirement. The court reviewed the "scienter" element from Rule 37(e)(2) and—relying both on *Fowler v. Tenth Planet, Inc.*, 673 F. Supp. 3d 763 (D. Md. 2023) and the committee note corresponding to Rule 37(e)'s 2015 amendments—determined that defendant as the moving party needed to show that plaintiff had deleted the relevant emails at issue with either "willful or intentional conduct." Citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010), the court defined willfulness as being "intentional, purposeful, or deliberate conduct." The court next discussed *Victor Stanley* and drew a contrast between that case and the instant litigation. The court observed that defendants in *Victor Stanley* "deleted thousands of files" and, among other things, "ran programs to ensure their permanent loss immediately following preservation requests and orders." In contrast, the court in *Boshea* held that defendant had failed to proffer evidence suggesting plaintiff deleted certain emails to deprive defendant of their use in the litigation. The court also noted that the lost emails did not prejudice defendant since they apparently could be obtained from other sources. Finally, the court concluded the emails "appear[ed] tangential to the matters at issue in this case, and cumulative."

Nagy v. Outback Steakhouse, No. 19-18277(MAS)(DEA), 2024 WL 712156 (D.N.J. Feb. 21, 2024). In this personal injury lawsuit, the court issued a permissive adverse inference instruction under Rule 37(e)(2) against defendant for failing to preserve relevant video footage that plaintiff asserted would have shown the precarious conditions on defendant's restaurant floor that allegedly caused her to slip and fall. Within 24 hours after plaintiff's fall, defendant's store manager preserved 27 total minutes of video footage, which included approximately 5 minutes before plaintiff's fall and 22 minutes afterwards. However, by the time plaintiff served a preservation demand letter on defendant—12 days after her fall—the balance of the footage from the day of plaintiff's accident had already been overwritten. Pursuant to the automated operation of defendant's video surveillance system, video was overwritten after seven days. Given these circumstances, defendant argued that the loss of any additional footage was due to negligence and not bad faith. The court disagreed, finding that

defendant's conduct met the Rule's intent-to-deprive standard. As an initial matter, the court determined that defendant's duty to preserve relevant footage arose at the time of plaintiff's accident. The court observed that defendant was a sophisticated litigant that frequently handled similar lawsuits. Moreover, defendant's conduct suggested it reasonably anticipated litigation given that it claimed that certain information the store manager provided to defendant's claims administrator the day after the incident was "privileged because it was prepared in anticipation of litigation." The court next found that additional footage preceding the accident was clearly relevant to the issue of whether a hazardous condition existed of which defendant should have been aware. As the court reasoned, "it is hard to imagine evidence that would be more pertinent to [plaintiff's] claims in this case." After concluding that defendant failed to take reasonable steps to preserve the additional footage and that witness testimony could not adequately replace the lost video footage, the court concluded by holding that the circumstantial evidence evinced defendant's intent to deprive plaintiff of the footage in question. The court reached this conclusion based on: (1) defendant's selective preservation of certain footage at the direction of an experienced claims administrator; (2) defendant subjectively preserved the footage (5 minutes before the accident and 22 minutes afterwards) rather than using a more objective standard (30 minutes before and after); and (3) defendant failed to provide its store manager with any objective guidance to follow in the form of policies or practices regarding the preservation of relevant video footage. *See* discussion under **Information Governance**.

DeMartino v. Empire Holdings and Investments, LLC, No. 22-CV-14301, 2024 WL 712456 (S.D. Fla. Jan. 26, 2024), *report and recommendation adopted sub nom.*, 2024 WL 707252 (S.D. Fla. Feb. 21, 2024). Sarabeth DeMartino, who worked as the general manager of a gym in Vero Beach, Florida, was terminated from her position. She alleged pregnancy discrimination. Plaintiff sought sanctions against her former supervisor, defendant Marrero, for failing to preserve certain text messages from his personal cell phone. The court held an evidentiary hearing and found no sanctions warranted. The lost text messages were not assumed to be unfavorable to Marrero. Marrero, as Empire's regional business manager, sometimes used his personal cell phone for business purposes by sending text messages to Empire employees, including plaintiff. *See* discussion under **Clouds**.

AC Bluebonnet, LP v. Suther Feeds, Inc., No. 8:22-CV-40, 2024 WL 940501 (D. Neb. Feb. 16, 2024). *See* discussion under **Text Messages & Ephemeral Messages**.

Gonzalez v. Target Corp., No. CV 22-9089 JAK (PVCx), 2024 WL 589147 (C.D. Cal. Jan. 23, 2024), *report and recommendation adopted*, 2024 WL 580544 (C.D. Cal. Feb. 13, 2024). Pursuant to its inherent authority, the court in this personal injury litigation imposed spoliation sanctions on defendant Target for failing to preserve more than five minutes of video footage from its surveillance cameras relating to plaintiff's slip and fall. The court found that Target's own internal policy—its "policy was to capture and store video footage for 30 minutes before and 30 minutes after any incident from all cameras"—imposed a duty to preserve relevant video footage. Moreover, the court reasoned that Target should have preserved relevant video footage based on its analysis of the video footage, which showed both plaintiff's fall and the difficulty he experienced walking afterwards. Finally, the court determined that Target had the culpable state of mind required to issue severe sanctions given the "conscious disregard" of its obligation to preserve additional relevant footage. The court issued the following "adverse jury instruction," indicating that it could still be subject to modification depending on further pretrial proceedings:

Target failed to prevent the destruction of potentially relevant video footage that Mr. Gonzalez could have used in this case. This is known as the “spoliation of evidence.” Evidence is relevant if it would have clarified a fact at issue in the trial and would have been introduced into evidence. In this case, the destroyed video footage may have been favorable to Mr. Gonzalez. Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not determinative in reaching your verdict.

You may also consider whether Target intentionally, as opposed to unintentionally, failed to prevent the destruction of the video footage. If you decide that Target did so intentionally, you are permitted to decide that the footage would have been unfavorable to Target and favorable to Mr. Gonzalez.

Carroll v. Trump, No. 20-CV-7311 (LAK), 2024 WL 475140 (S.D.N.Y. Feb. 7, 2024). In this defamation action against former U.S. President Donald Trump, defendant moved multiple times for a mistrial based on plaintiff’s admitted destruction of text messages regarding alleged death threats made against plaintiff. Defendant argued that a mistrial was the appropriate remedy for plaintiff’s testimony regarding her deletion of text messages; short of a mistrial, defendant maintained that the court should strike plaintiff’s testimony and issue an adverse inference instruction to the jury. The court rejected defendant’s requested relief and denied his motions. The court first found that plaintiff had not deleted the text messages at issue before her duty to preserve attached since they were eliminated before plaintiff considered suing defendant. However, even assuming plaintiff had destroyed relevant messages after a duty to preserve arose, the court indicated that defendant had not established a lack of replacement evidence for the lost ESI: “Mr. Trump has offered no evidence that he ever even attempted to recover any of these messages through discovery or otherwise. In fact, he does not even argue that the messages in question have been permanently lost and are now unrecoverable. This failure alone was sufficient basis to deny the alternative relief he sought.” The court additionally held that defendant failed to show that he had been prejudiced by plaintiff’s loss of the text messages. Not only had defendant neglected to demonstrate that the “loss of any such ESI would have supported his defense . . . it is at least equally likely that deletion of such messages benefitted Mr. Trump by removing from the jury’s consideration a significant number of violent threats made against [plaintiff] in the wake of Mr. Trump’s statements. With fewer examples to show, [plaintiff’s] case for damages was weakened, and Mr. Trump benefitted as a result.” Finally, the court concluded that defendant had not shown any intent by plaintiff to deprive him of the messages at issue since “her testimony evidenced her intent to comply with her preservation obligations to the extent she was aware of them, not an intent to harm or deprive defendant in any way.”

Taylor Made Express v. Kidd, No. 21 C 2903, 2024 WL 197231 (N.D. Ill. Jan. 18, 2024). In this action involving trade secret misappropriation claims, the court addressed plaintiff’s motion for Rule 37(e) sanctions for spoliation of Dropbox data. The court found that defendant Brandy Kidd (Kidd) deleted files from her Dropbox account that were relevant to plaintiff’s trade secrets claims after a temporary restraining order was issued. In reaching its decision, the court determined that Rule 37(e)’s preconditions had been met since the deleted files were ESI, subject to a duty to preserve, lost due to Kidd’s failure to take reasonable steps to preserve them, and not restorable or replaceable. In addition, the court found that the metadata relating to certain Sylectus reports (an industry software system) was lost due to the deletion. In doing so, the court rejected Kidd’s assertion that Rule 37(e) did not apply to the lost metadata. Relying on *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at

*4 & n.10 (N.D. Ill. July 12, 2017), *report and recommendation adopted*, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017), the court reasoned that lost metadata could be more critical to the movant than the underlying files and that, in this instance, the deleted metadata could have shown “when Kidd copied and accessed the Sylectus reports.” Next, the court concluded that severe sanctions under Rule 37(e)(2) were not warranted since defendant had acted negligently, not intentionally. However, the court determined that the spoliation prejudiced plaintiff, as it hindered its ability to fully develop its trade secrets claims and to prove Kidd’s misappropriation. The court held that plaintiff should be awarded its costs and expenses incurred in uncovering and addressing the spoliation. Citing to *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016), the court reasoned that such an award would ameliorate the “economic prejudice” plaintiff incurred “and also serves as a deterrent to future spoliation.” *See* discussion under **Clouds**.

Herbert v. Lynch, 7:22-CV-6303 (NSR) (VR), 2024 WL 20942 (S.D.N.Y. Jan. 2, 2024). *See* discussion under **Sedona Conference Publications**.

Premier Prod., Inc. v. Orion Cap. LLC, No. 21 CV 1094, 2023 WL 6907958 (N.D. Ill. Sept. 22, 2023). In this breach of commercial contract action, the magistrate judge issued a report and recommendation to the district court, recommending that it deny plaintiff’s motion for Rule 37(e) sanctions against defendant despite evidence suggesting that defendant’s chief executive officer deleted relevant messages shared with nonparty witnesses on WhatsApp. The magistrate judge determined that plaintiff had satisfied the prefatory elements under Rule 37(e) for the issuance of sanctions, finding that the CEO deleted his WhatsApp account three weeks after the duty to preserve; that it was “likely” that relevant messages from the CEO’s WhatsApp account were deleted; that defendant failed to take reasonable steps to preserve the messages; and that no evidence could reasonably replace the lost messages. Nevertheless, the magistrate judge found that plaintiff had not offered evidence showing that the CEO deleted his WhatsApp account with the requisite intent to merit the issuance of severe sanctions under Rule 37(e)(2). Citing *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) and *In re Local TV Advertising Antitrust Litig.*, MDL No. 2867, 2023 WL 5607997, at *6 (N.D. Ill. Aug. 30, 2023), the magistrate judge indicated that bad faith is the standard in the U.S. Court of Appeals for the Seventh Circuit for the issuance of severe sanctions for the destruction of relevant ESI. While it was apparent that the messages were deleted intentionally, the magistrate judge determined that plaintiff failed to show that the CEO did so “to hide messages that would have helped its case or harmed [plaintiff’s].” In addition, the magistrate judge recommended that curative measures not issue pursuant to Rule 37(e)(1) since plaintiff did not seek such relief and, in any event, given the lack of prejudice to plaintiff arising from the deletion of the messages. The magistrate judge pointed to unrefuted evidence confirming that the CEO typically corresponded with nonparty witnesses by iMessage (and not WhatsApp) regarding the parties’ business transactions at issue in the litigation, defendant had made a large production of relevant iMessage texts, and plaintiff considered this production “‘incredibly salient and’ ‘key evidence of a similar nature to what was likely in WhatsApp.’” Finally, the magistrate judge recommended that the court deny plaintiff’s Rule 37(e) motion as being untimely. The magistrate judge concluded that plaintiff should have brought the motion months earlier and before the completion of nearly all fact discovery, particularly since plaintiff sought to obtain through the instant motion additional nonparty discovery that the court previously rejected as being untimely. The court subsequently overruled plaintiff’s objections to the report, adopting—as modified—the magistrate judge’s recommendation that plaintiff’s motion be denied on the sole ground that plaintiff’s requested relief was untimely. However, the court also expressed concern regarding the deletion of the WhatsApp account and suggested that evidence may yet exist evincing

bad faith. Accordingly, the court indicated that it would allow plaintiff “to seek an appropriate curative instruction *in limine*” closer to any trial in this matter. *See* discussion under **Sedona Conference Publications**.

SEARCH

Tornabene v. City of Blackfoot, No. 4:22-CV-00180-AKB, 2024 WL 809900 (D. Idaho Feb. 27, 2024). The parties in this wrongful termination case filed cross-motions for discovery relief and sanctions, with plaintiff’s motion seeking the production of undisclosed documents from defendants. At the outset of discovery, the parties entered into a “Discovery Plan” and agreed to run “narrowly tailored” search terms to identify responsive information among defendants’ emails and text messages. After running plaintiff’s initial set of search terms, defendants advised plaintiff that the search terms were overly broad since they yielded “54,000 email chains.” Plaintiff subsequently narrowed her search terms, which defendants declined to run against the universe of potentially responsive documents. In her motion to compel, plaintiff requested an order compelling defendants to run her narrower set of search terms and produce responsive documents. In response, defendants maintained that plaintiff’s search terms were overly broad and disproportionate. Asserting that they “fully responded to all discovery requests and produced all relevant documents,” defendants sought a protective order to withstand any further discovery from plaintiff. While agreeing that plaintiff’s initial search terms were overly broad, the court held that defendants’ search efforts were not sufficient under the circumstances. The court reasoned that defendants had an independent obligation to identify responsive information and that their search—conducted by the city clerk on Microsoft Outlook without any supervision from counsel and limited to two custodians’ email accounts—was clearly inadequate: “Defendants’ self-search conducted without oversight by legal counsel, technical support, or a forensic expert, at the very least, raises questions regarding the accuracy and completeness of their document collection.” In addition, the court observed that the city clerk failed search for responsive ESI from other custodians that the parties jointly identified in their Discovery Plan and neglected to search for any responsive text messages. To remedy this situation, the court ordered the parties to further meet and confer regarding appropriate search terms and to consider proportionality guidelines in connection with the nature and extent of plaintiff’s email discovery. Regarding the remaining relief the parties sought, the court (among other things) denied their respective motions for sanctions. *See* discussion under **Sedona Conference Publications**.

Doe 1 v. Nat’l Collegiate Athletic Ass’n, No. 1:23-cv-00542-SEB-MJD, 2024 WL 643038 (S.D. Ind. Feb. 15, 2024). *See* discussion under **Social Media**.

Loc. 3621 v. City of New York, No. 18-cv-4476 (LJL) (JW), 2023 WL 8804257 (S.D.N.Y. Dec. 20, 2023). In this civil rights action, plaintiffs sought production of certain demographics data from the City of New York (“City”) and other defendants, arguing that such information was relevant to their disparate treatment and disparate impact claims. In response, the court issued multiple production orders and even sanctioned the City (\$148,971.73 in attorney fees and \$10,807.38 in costs) in March 2022 for failing to turn over the requested demographics data. In the instant discovery order, the court handled several outstanding discovery issues, among which was a further dispute over the demographics data. The court again ordered defendant to produce the information, indicating with some frustration that “after years of acrimony, dozens of conferences, and hundreds of thousands of dollars in sanctions, enough is enough. The demographic data must be turned over for this case to move forward.” Defendants argued that they could not comply with the production orders because certain of the defendants (NYCAPS and Department of Citywide Administrative Services) did not maintain or have

access to particular demographics data. The court rejected these assertions and found that the City had possession, custody, or control over the demographics data given the relationship between the City and its various departments: “Whether the data is at NYCAPS, DCAS, the FDNY, or any other City department or agency, the information is within the ‘possession, custody, or control’ of the City of New York.” The court also found that certain demographics data that the City had previously produced was not accurate since more than a third of that information did not identify the race of the listed individuals, which was “a key issue in this case.” Relying on Rule 34, case law, and the March 2011 (public comment) version of *The Sedona Conference Database Principles*, the court ordered the City to produce “verifiably accurate” information and in a reasonably usable production format.

Paieri v. W. Conf. of Teamsters Pension Tr., No. 2:23-CV-00922-LK, 2023 WL 8717173 (W.D. Wash. Dec. 18, 2023). See **Sedona Conference Publications**.

Garner v. Amazon.com, Inc., No. C21-0750RSL, 2023 WL 6038011 (W.D. Wash. Sept. 15, 2023). In this action in which plaintiffs claim that Amazon’s popular Alexa product unlawfully recorded voice communications without users’ consent, the court ordered Amazon to redo its document production in order to capture relevant internal communications and other documents that were excluded from Amazon’s prior document productions. By way of background, the court first ordered Amazon to run 38 search queries that plaintiffs had proposed against 36 Amazon custodians. After doing so, Amazon identified a grand total of 2,036,172 documents. To facilitate its responsiveness review of the 2,036,172 documents, Amazon implemented a technology-assisted review (“TAR”) workflow. Amazon subsequently identified 2,564 responsive documents among the over 1.8 million documents that it reviewed using TAR. Amazon thereafter conducted elusion testing on the unreviewed 224,924 documents and failed to identify any responsive materials during its review of the null set sample (1,527 documents). In its May 19, 2023, order (2023 WL 3568055), the court acknowledged that plaintiffs might have “valid” concerns regarding the low number of responsive documents that Amazon identified among the set of 2,036,172 (less than .13%). Nevertheless, the court refused to impugn Amazon’s TAR process as the source of those concerns, finding that it was defensible given the elusion testing results. In its September 15, 2023, order, though, the court revisited plaintiffs’ concerns regarding Amazon’s low production volume and determined that Amazon used an unreasonably limited definition of relevance in connection with its review of the 2,036,172 documents. The court reached this conclusion after Amazon divulged that it did not search for internal communications or documents regarding (among other things) the development of its Alexa product, which was inappropriate given that such information was clearly within the ambit of plaintiffs’ claims. To remedy this problem, the court gave Amazon the option of either: (1) producing to plaintiffs within seven days the entire set of 2,036,172 documents, which plaintiffs could then review; or (2) redoing its review of the 2,036,172 documents based on the court’s broader determination of relevance and producing all newly designated relevant documents within 35 days.

Chaverra v. U.S. Immigr. & Customs Enft., No. CV 18-289 (JEB), 2023 WL 6291642 (D.D.C. July 31, 2023). In the context of a Freedom of Information Act (“FOIA”) dispute, the court approved the sampling method that U.S. Immigration and Customs Enforcement proposed to evaluate its FOIA exemption claims. In its decision, the court affirmed the general notion that parties may use random sampling as a method for “achieving a representative sample.” Citing *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 15 SEDONA CONF. J. 265 (2014), the court also observed that a “fundamental statistical reality” regarding sampling includes the expectation that an appropriate random sample will “be representative of the population from which it comes.”

SEDONA CONFERENCE PUBLICATIONS

Doe LS 340 v. Uber Technologies, Inc., --- F.Supp.3d ---, 2024 WL 107929 (N.D. Cal. 2024). In this multidistrict litigation arising from instances of sexual misconduct by drivers for defendant's car service, the court relied on *The Sedona Principles, Third Edition* to describe the scope of preservation for relevant ESI and certain steps preserving parties might take to discharge their duty to preserve such information. *See* discussion under **Litigation Holds and Preservation**.

United States v. Anthem, Inc., No. 20-CV-2593 (ALC) (KHP), 2024 WL 1116276 (S.D.N.Y. Mar. 13, 2024). *See* discussion under **Rule 34 Requests, Responses, and Productions**.

Tornabene v. City of Blackfoot, No. 4:22-CV-00180-AKB, 2024 WL 809900 (D. Idaho Feb. 27, 2024). In connection with the parties' dispute over search terms in this wrongful termination case, the court cited *The Sedona Principles, Third Edition* for the proposition that custodians may self-collect relevant information in certain instances. The court eventually found that the self-collection efforts of defendants' custodians were insufficient and ordered the parties to further meet and confer regarding appropriate search terms. *See* discussion under **Search**.

The Lubrizol Corp. v. International Business Machines Corp., No. 1:21-CV-00870-CAB, 2024 WL 941686 (N.D. Ohio Feb. 8, 2024). *See* discussion under **Federal Rule of Evidence 502**.

Goldstein v. Denner, ---A.3d---, 2024 WL 303638 (Del. Ch. Jan. 26, 2024). In this securities litigation in which the court imposed spoliation sanctions against defendants for failing to preserve relevant text messages from three key custodians, the court cited *The Sedona Conference Commentary on Legal Holds, Second Edition: The Trigger & The Process*, 20 SEDONA CONF. J. 341 (2019), to support the proposition that the duty to preserve attaches when a reasonable party under the same circumstances would have reasonably anticipated litigation. The court also cited *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* and *The Sedona Conference Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations*, 19 SEDONA CONF. J. 495, 528 (2018). *See* discussion under **Text Messages & Ephemeral Messages**.

Adams v. Medtronic, Inc., No. 4:19-CV-870-SDJ-KPJ, 2024 WL 265860 (E.D. Tex. Jan. 23, 2024). In this product liability lawsuit, the court cited *The Sedona Principles, Third Edition* multiple times regarding the nature and scope of non-waiver orders entered pursuant to Federal Rule of Evidence 502(b). *See* discussion under **Federal Rule of Evidence 502**.

Herbert v. Lynch, 7:22-CV-6303 (NSR) (VR), 2024 WL 20942 (S.D.N.Y. Jan. 2, 2024). In this civil rights action against county incarceration officials and officers, the court concluded that defendants were under no duty to preserve relevant video footage where they were served with plaintiff's civil rights complaint after the footage at issue was overwritten pursuant to the county's 30-day automated deletion policy. In denying plaintiff's motion for Rule 37(e) sanctions, the court cited *The Sedona Principles, Third Edition* and observed that plaintiffs in similar matters could apprise defendants of their duty to preserve relevant information by sending a pre-filing preservation demand notice delineating particular relevant information to be retained.

Loc. 3621 v. City of New York, No. 18-cv-4476 (LJL) (JW), 2023 WL 8804257 (S.D.N.Y. Dec. 20, 2023). *See* discussion under **Search**.

Paieri v. W. Conf. of Teamsters Pension Tr., No. 2:23-CV-00922-LK, 2023 WL 8717173 (W.D. Wash. Dec. 18, 2023). In this putative class action matter in which the court denied defendant’s motion to stay discovery pending determination of its motion to dismiss, the court rejected defendants’ argument that discovery would be too costly or otherwise unduly burdensome. The court reasoned that defendants’ approach to discovery failed to address whether their alleged “burdens could be lessened by technology-assisted review and/or other discovery tools geared towards eliminating or reducing the need for manual review,” citing both the *TAR Case Law Primer, Second Edition*, 24 SEDONA CONF. J. 1 (2023) and *The Sedona Principles, Third Edition*.

Wegman v. United States Specialty Sports Ass’n, Inc., No. 6:23-CV-1637-RBD-RMN, 2023 WL 8599972 (M.D. Fla. Dec. 12, 2023). See discussion under **Litigation Holds and Preservation**.

Correct Transmission LLC v. Microsoft Corp., No. 2:23-MC-0075-KKE, 2023 WL 7301240 (W.D. Wash. Nov. 6, 2023). See discussion under **Nonparties**.

Adamson v. Pierce Cnty., No. 3:21-CV-05592-TMC, 2023 WL 7280742 (W.D. Wash. Nov. 3, 2023). See discussion under **Discovery Process**.

LifeScan, Inc. v. Smith, No. 17-cv-5552 (CCC)(JSA), 2023 WL 7089662 (D.N.J. Oct. 11, 2023). In this commercial fraud litigation, defendant Zions Bank sought discovery of relevant communications and other information from custodian employees beyond those plaintiff had initially searched to identify responsive information. In connection with his analysis of the discovery dispute, the court-appointed special master cited extant district case law that relied on Sedona Principle 6 from *The Sedona Principles, Second Edition* and observed that Zions would have to satisfy a “noticeably heavy burden” to show that the responding party’s “custodial choices” were “deficient or lacking.” The special master ultimately concluded that Zions met that burden and ordered plaintiff to identify and produce relevant information from eight additional custodians. See discussion under **Discovery Process**.

Premier Prod., Inc. v. Orion Cap. LLC, No. 21 CV 1094, 2023 WL 6907958 (N.D. Ill. Sept. 22, 2023). In this breach of commercial contract action, the court referenced *The Sedona Conference Commentary on Ephemeral Messaging* in connection with its analysis of whether plaintiff established that defendant’s chief executive officer deleted relevant messages exchanged with nonparty witnesses on WhatsApp with an intent to deprive after a duty to preserve attached. In finding that plaintiff failed to meet that benchmark, the court found that plaintiff had not shown that the deleted messages at issue were still retained during the three-week interval after the duty to preserve attached and defendant’s CEO deleted the messages. Citing the *Commentary on Ephemeral Messaging*, the court observed that plaintiff apparently failed to question the CEO during his deposition regarding whether he had previously enabled the “ephemeral messaging setting available through WhatsApp to automatically delete messages after a certain amount of time.” Because it neglected to explore this area in deposition, plaintiff was unable to demonstrate “whether . . . any relevant text messages even remained in [the CEO’s] account or had been deleted pursuant to an auto-delete setting.” See discussion under **Sanctions—Rule 37(e)**.

Chaverra v. U.S. Immigr. & Customs Enft., No. CV 18-289 (JEB), 2023 WL 6291642 (D.D.C. July 31, 2023). See discussion under **Search**.

SOCIAL MEDIA

Doe 1 v. Nat'l Collegiate Athletic Ass'n, No. 1:23-cv-00542-SEB-MJD, 2024 WL 643038 (S.D. Ind. Feb. 15, 2024). Defendant NCAA served document requests in this putative class action on the 14 named plaintiffs, seeking social media posts and direct messages reflecting relevant information regarding their various tort claims alleging “rampant sexualized harassment and misconduct” by an NCAA member school. In response, plaintiffs agreed to disclose “their entire social media feeds in the format in which Plaintiffs obtained them using the export feature found on each social media site.” Nevertheless, plaintiffs objected to producing direct or “private messages” exchanged on social media sites, arguing that such discovery would be disproportionate and unduly burdensome. Plaintiffs argued that they should not have to manually review each private message and that they should only be obligated to disclose messages that hit on particular search terms. The court rejected these arguments and overruled plaintiffs’ objections, finding that: (1) the messages were relevant to plaintiffs’ emotional distress claims; (2) plaintiffs did not substantiate their undue burden assertions with time and cost estimates; and (3) search terms were an ineffective method for identifying relevant messages given plaintiffs’ use of certain nomenclature (e.g., slang), along with emojis and GIFs. The court ordered plaintiffs to produce all of their social media messages. In addition, the court issued provisions to safeguard the privacy of nonparties by (among other things) directing that the messages be designated confidential under the protective order, the names and other identifying information be redacted from messages, and that messages used in court filings should be filed under seal.

TEXT MESSAGES & EPHEMERAL MESSAGES

Jones v. Riot Hosp. Grp. LLC, 95 F.4th 730 (9th Cir. 2024). *See* discussion under **Privacy and Sanctions—Rule 37(e)**.

Traverse Therapy Servs., PLLC v. Sadler-Bridges Wellness Grp., PLLC, No. C23-1239 MJP, 2024 WL 896168 (W.D. Wash. Mar. 1, 2024). In this Defend Trade Secrets Act litigation involving competing counseling and therapy services providers, the court rejected plaintiff’s motion for spoliation sanctions against defendant arising from defendants’ alleged failure to preserve relevant messages from its Simple Practice messaging platform. Plaintiff failed to establish that any of the Simple Practice messages at issue were actually relevant to its claims. In addition, plaintiff had not adduced evidence showing that the messages could even be preserved. After discussing certain deposition testimony from one of defendants’ principals (Sadler)—“messages are not saved because the program is ‘HIPAA compliant, and . . . once the session is over, the link is done’ and the chat is not saved”—the court observed that Sadler “professed no knowledge as to whether this feature could be disabled to allow messages to be saved, and Plaintiff provides no evidence it could be.” The court also refused to issue sanctions against defendants for allegedly failing to preserve certain text messages. Plaintiff asserted that Sadler had activated an automated deletion feature that allowed her to eliminate relevant text messages. The court rejected this assertion, finding that the evidence confirmed that Sadler had disabled the automated deletion feature once she became aware that it was active. During her deposition, Sadler indicated that she “just found out [her] phone is set up to delete [her] messages automatically after a certain period of time” and that she was likewise unaware of when the phone “auto-deleted” text messages. Significantly, the court did not mention whether Sadler had been asked if she had activated the automated deletion feature and, if so, when she had done so. Because there was “no evidence that Sadler used the auto-delete feature to knowingly delete text messages,” plaintiff

accordingly failed to establish that defendants’ “failure to retain the messages was willful or done with a culpable state of mind.” *See* discussion under **Workplace Collaboration Tools**.

AC Bluebonnet, LP v. Suther Feeds, Inc., No. 8:22-CV-40, 2024 WL 940501 (D. Neb. Feb. 16, 2024). The court refused to issue spoliation sanctions against defendant Suther Feeds (“Suther”) for failing to preserve (among other things) text messages in this breach of contract and misappropriation of trade secrets litigation. While it was undisputed that Suther neglected to preserve messages from one of its employees (Perry), the court found that Suther’s omission did not satisfy Rule 37(e)(2)’s intent to deprive requirement. Plaintiff argued that Suther’s intent could be gleaned from its failure to advise Perry to disable the automated deletion feature that eliminated messages from his phone after one year and thereby preserve relevant ESI. The court disagreed, finding that the “most the evidence supports is that the automatic deletion of Perry’s messages was an unfortunate oversight, not an intentional act.” The court also denied plaintiff’s request for attorney’s fees in connection with bringing its motion. *See* discussion under **Text Messages & Ephemeral Messages**.

Doe 1 v. Nat’l Collegiate Athletic Ass’n, No. 1:23-cv-00542-SEB-MJD, 2024 WL 643038 (S.D. Ind. Feb. 15, 2024). *See* discussion under **Social Media**.

Goldstein v. Denner, ---A.3d---, 2024 WL 303638 (Del. Ch. Jan. 26, 2024). The court imposed spoliation sanctions against defendants for failing to preserve relevant text messages from three key custodians in this securities litigation. In its comprehensive opinion reviewing both federal and Delaware state law regarding ESI preservation, along with defendants’ preservation failures, the court found that defendants were “reckless” in failing to disable the 30-day automated deletion feature on a particular custodian’s (Garafolo) phone that allowed relevant messages to evade preservation. The court also determined that defendants should have taken forensic images of custodian phones and that the failure to do so in this matter was also evidence of recklessness. Regarding the importance of obtaining relevant evidence from electronic devices, the court observed the following: “In a world where people primarily communicate using personal devices, it will almost always be necessary to image or backup data from phones.” In addition, regarding the issue of replacement evidence, the court noted that subsequent deposition testimony generally could not serve as adequate replacement evidence for lost ESI, and that it would not suffice in this instance. The court issued various sanctions against defendants including, among other things, a requirement that defendants meet a higher burden of proof at trial, i.e., “[r]ather than rebutting the presumptions or proving issues by a preponderance of the evidence, the defendants will have to adduce clear and convincing evidence.” The court subsequently denied defendants’ application for interlocutory appeal to the Delaware Supreme Court (*Goldstein v. Denner*, No. 2020-1061-JTL, 2024 WL 776033 (Del. Ch. Feb. 26, 2024)) in which it reviewed many of the same issues addressed in its spoliation order. *See* discussion under **Sedona Conference Publications**.

Coker v. Goldberg & Assocs. P.C., No. 21-cv-1803, 2024 WL 263121 (S.D.N.Y. Jan. 24, 2024). *See* discussion under **Privilege**.

United States v. Buyer, No. 22 CR. 397 (RMB), 2023 WL 6805821 (S.D.N.Y. Oct. 16, 2023). *See* discussion under **ESI Evidence**.

United States v. Lazar, No. 1:20-CR-78, 2023 WL 7221337 (E.D. Tex. Nov. 1, 2023). *See* discussion under **Criminal Law**.

Premier Prod., Inc. v. Orion Cap. LLC, No. 21 CV 1094, 2023 WL 6907958 (N.D. Ill. Sept. 22, 2023). *See* discussion under **Sanctions—Rule 37(e)** and **Sedona Conference Publications**.

Hedgeye Risk Mgmt., LLC v. Dale, No. 21-CV-3687 (ALC) (RWL), 2023 WL 4760581 (S.D.N.Y. July 26, 2023). *See* discussion under **Reasonable Inquiry** and **Sanctions—Other FRCP Provisions**.

WORKPLACE COLLABORATION TOOLS

Traverse Therapy Servs., PLLC v. Sadler-Bridges Wellness Grp., PLLC, No. C23-1239 MJP, 2024 WL 896168 (W.D. Wash. Mar. 1, 2024). In this Defend Trade Secrets Act litigation involving competing counseling and therapy services providers, the court rejected plaintiff's motion for spoliation sanctions against defendants arising from defendants' alleged failure to preserve relevant messages from its Slack messaging platform. Plaintiff failed to establish that any of the Slack messages at issue were actually relevant to its claims. In addition, the evidence suggested that defendant had stopped using Slack before its duty to preserve attached in the litigation: "Plaintiff fails to point to any evidence that Defendants used Slack after the lawsuit was filed and the document preservation letter was sent." *See* discussion under **Text Messages & Ephemeral Messages**.

Eagle View Technologies, Inc. v. Nearmap US, Inc., No. 2:21-CV-00283, 2024 WL 694724 (D. Utah Feb. 20, 2024). The court in this trade secret litigation denied defendant's motion to compel plaintiff Eagle View Technologies ("Eagle View") to produce all documents from its "competitiveintel" Slack channel. The court found that defendant's motion was facially overly broad because the document requests it served sought discovery of information relating to the "Accused Products" and were not directly tied to the claims or defenses at issue in the litigation. Moreover, the court held that defendant had failed to establish the relevance of any information in the "competitiveintel" Slack channel and dismissed the notion that discovery should be permitted simply because Eagle View obtained discovery from defendant's "fishing" Slack channel. The court observed that Eagle View obtained the requested discovery after identifying an email that established the presence of relevant ESI in defendant's Slack channel. In contrast, defendant presented no such evidence or other corroborating information that would suggest the presence of relevant information in Eagle View's Slack channel.

Neal v. City of Bainbridge Island, No. 3:20-CV-06025-DGE, 2024 WL 308069 (W.D. Wash. Jan. 26, 2024). In connection with its order of summary judgment dismissing plaintiff's Washington State Public Records Act claim, the court discussed retention features associated with Zoom. In particular, the court—based on declaration testimony from one of defendant's employees—concluded that certain videos from defendant's Zoom account no longer existed because they had been moved to the "Trash folder," and Zoom "automatically deletes files from the Trash folder after 30 days."

Roadbuilders Mach. & Supply Co. v. Sandvik Mining & Constr. USA, LLC, No. 2:22-CV-2331-HLT-TJJ, 2024 WL 68366 (D. Kan. Jan. 5, 2024), *reconsideration denied*, 2024 WL 757154 (D. Kan. Feb. 23, 2024). Defendant's belated compliance with a discovery order in this breach of contract litigation culminated in the court awarding plaintiff attorney's fees and costs in the amount of \$29,015. Nevertheless, the court denied the more severe relief that plaintiff sought under Rule 37(b)(2)(A) since defendant did comply with the order and produced the information subject to the court order. That included emails belonging to a former employee (Winslow) that defendant deleted from its Microsoft 365 platform pursuant to its email retention policy. Defendant was able to recover the Winslow emails because they were only "soft-deleted" and not permanently eliminated. According to defendant, "emails are 'soft-

deleted’ once a user’s license has been revoked. Microsoft 365 retains the ‘soft-deleted’ mailbox and all its contents until the deleted mailbox retention period expires, which is 30 days.”

Hedgeye Risk Mgmt., LLC v. Dale, No. 21-CV-3687 (ALC) (RWL), 2023 WL 4760581 (S.D.N.Y. July 26, 2023). *See* discussion under **Reasonable Inquiry** and **Sanctions—Other FRCP Provisions**.