

"RELEVANT" NEWS

EIC- ABBY MELLING

The Times They Are A-Changin': So What Do You Want From ACEDS Detroit In The Future

Times were certainly changing in 1964 when Bob Dylan wrote the following lyrics:

*Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'
Then you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'*

MORE GOOD NEWS IN THIS ISSUE

Board Nominations and a Holiday Party

Although not to the same extent as the 1960s, things certainly have changed a lot with respect to eDiscovery during the last 10 years after our ACEDS Detroit Chapter became affiliated with Barbri. Whether it is the continued growth of data quantity and sources, the enactment of federal and state eDiscovery court rules, the impact of international and state privacy laws, or how the pandemic has impacted how we provide eDiscovery services, a career in eDiscovery looks a lot different today than it did 10 years ago.



So that brings me to the key question that I want you to consider during the next month: what do you want from ACEDS Detroit during the next 2 years? Every 2 years all of our ACEDS Detroit Board positions are open for elections and that election process will occur during the next month. Then in January the new Board will develop goals and strategies for 2022 and 2023. However, before that meeting occurs, we will be reaching out to our members with a short survey seeking input on those goals and strategies. What services/resources (e.g. educational webinars, social networking events, newsletter, in-person symposium, access to resources from ACEDS National) have you valued and which ones don't you value very much? In addition, what new or different services/resources should we consider providing in the future. If our chapter doesn't keep swimming, we are likely to sink like a stone.

So keep an eye open for the membership survey and please take 10 minutes to complete it. Finally, please make a special effort this year to attend our Annual Holiday Party on Thursday December 9th at the Southfield Westin. You can find more details about this event inside this newsletter. Happy Holidays!!

Sincerely, Jay Yelton- Chapter President

Thank you to our 2021 Sponsors!



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ACEDS DETROIT CHAPTER HOLIDAY PARTY

Let's celebrate the end of 2021 by getting together for a
final toast!



*In lieu of a
registration fee,
we ask that you
consider bringing a
toy for donation*



Food. Prizes. Cash Bar

DECEMBER 9TH 5-8:00 PM
WESTIN SOUTHFIELD-BANQUET ROOM
~DISCOUNTED ROOMS AVAILABLE IF YOU
INTEND TO STAY~

Prize for the ugliest holiday sweater!

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Thank you to our 2020/21 Board for Serving!

Chairman of the Board/Advisor - Scott A. Petz, JD is a Member in Dickinson Wright's Troy office. Mr. Petz focuses his practice in the areas of commercial and business litigation, class and collective actions, labor litigation, consumer protection, and condemnation and land use. Mr. Petz has received a number of acknowledgements: (1) Selected for America's Top 100 Best-the-Company Litigators® for Michigan, 2019; (2) Selected for America's Top 100 High Stakes Litigators® for Michigan, 2018 and 2019; (3) Selected for Benchmark Litigation "40 & Under Hotlist," 2018 and 2019; (4) Recognized in The Best Lawyers in America®, Commercial Litigation, 2018, 2019, and 2020; (5) Selected to the Michigan Super Lawyers Rising Stars list in 2013, 2014, 2015, 2016, 2017, and 2018; (6) Selected to the Michigan Super Lawyers list in 2019; and (7) Received the Detroit Metropolitan Bar Association Barristers Section's 2013 "One to Watch" award. Mr. Petz has presented and published in the eDiscovery area. Mr. Petz received his B.A. from Kalamazoo College, cum laude, and his J.D. from The John Marshall Law School, magna cum laude.

President - Jay Yelton, III is a veteran attorney and mediator who has spent the past two decades designing and implementing plans and programs that help attorneys and organizations manage electronic documents, prepare for the discovery process associated with litigation and government investigations and develop eDiscovery strategies. Jay frequently conducts law school classes and training seminars on records management and eDiscovery and has written for and been quoted extensively by state and national publications. Jay created and serves as a leader of Warner Norcross + Judd's Data Solutions Practice Group and the firm's Discovery Center. Jay received his J.D. from Loyola University Chicago and his B.A., with honors, from Michigan State University.

Secretary - Abby Melling has 18 years of experience supporting corporate legal departments and law firms. She worked for 10 years at the legal services subsidiary of Wolters Kluwer, CT Corporation, as an account executive managing the largest fortune accounts in the US and supporting their corporate transactional, compliance, governance and litigation needs. Following that, she ran her own corporate legal consulting company, Consulting by M&A, LLC, specializing in entity life cycle management, corporate compliance, service of process and litigation services acting as a liaison between the companies, firms and the government. Currently, Abby is a Director at Conduent Legal, Analytics and Compliance (formerly Xerox Litigation) supporting the eDiscovery needs of law firms and corporations focused in managed review and eDiscovery technology. She previously served on the board of the Association of Litigation Support Professionals and the Society of Corporate Secretaries and Governance Professionals as well as actively supporting ACEDS and the State Bar of Michigan. She has a Bachelor's Degree from The University of Tennessee with a concentration in Business Marketing.

Treasurer - Tom Isaacs has extensive experience representing a diverse lineup of businesses in litigation, including in product liability, personal injury, contractual, antitrust, regulatory, corporate governance and business tort matters. Tom has been responsible for all phases of such cases, including pre-litigation claim assessment, development and execution of case strategy, written discovery, depositions, motion practice, expert witness retention and preparation, settlement negotiations and overall case management. Tom currently serves as National Discovery Counsel for a major automotive manufacturer in state and federal courts throughout the United States. His eDiscovery experience is very well-rounded, covering everything from document production, collection and review, as well as litigation holds and clawback agreements. He is well-versed with federal and state eDiscovery rules and requirements, and has recently published two articles on eDiscovery topics involving predictive coding and adverse influencing. He also gave a presentation on recent eDiscovery case law and current trends at the State Bar of Michigan Annual Day of Education. Professionally, Michigan Super Lawyers selected Tom as a Rising Star in 2013, 2014, 2015 and 2016. He was also appointed an Oakland County Public Administrator by Michigan Attorney General Bill Schuette in 2013.

Education - Cindy MacBean, MBA, CEDS, CIPP/US is Litigation Support Manager at Honigman LLP. Cindy is a highly experienced Litigation Support professional who has recommended technology solutions to support discovery workflow to provide innovative, appropriate and cost effective solutions in law firms, their clients and corporate legal staff. Cindy has utilized her business education and diverse experience to demonstrate excellence in solving problems, mitigating risk, providing tactical direction, overseeing operations, planning strategic initiatives, implementing solutions and supporting legal teams with utmost commitment to customer service. Her experience spans law firms, corporate legal departments and the Department of Justice, Civil Division. In addition to her MBA in Technology Management, she maintains certifications in eDiscovery (CEDS), Information Governance (IGP) and US/Europe Privacy (CIPP/US, CIPP/E).

Vice President - Phillip Shane counsels clients involved in litigation and government investigations, especially on issues associated with the identification, preservation, collection, review, and production of electronically-stored information (ESI). His diverse experience includes product liability and class action cases, regulatory investigations, high-profile financial fraud, patent infringement suits, contract disputes, labor and employment actions, legal malpractice/unauthorized practice cases, antitrust litigation and pre-merger antitrust investigations. Phil received his B.A. from Western Michigan University and his J.D. from Michigan State University College of Law.

Membership - Alma Sobo, JD is an Associate in Dickinson Wright's Troy office. Alma litigates a range of complex matters in state and federal courts, and focuses her practice in the areas of commercial and business litigation, class actions, and municipal law. Alma has represented clients through all phases of litigation, including pre-litigation dispute resolution, complex civil discovery practice, mediation, trials, appeals, and enforcement of judgment. Alma was selected to the Michigan Super Lawyers Rising Stars list in 2019. Alma received her B.A. from the University of Michigan and her J.D. from Wayne State University Law School, and is fluent in Bosnian, Croatian, and Spanish.

Public Relations - Megan P. McKnight, JD, CEDS, is the founder of Tealstone Law, PLC in Royal Oak, Michigan where she concentrates her practice in the areas of eDiscovery, information governance, and commercial litigation. She started her own firm after spending 15 years in private practice working at large law firms. Ms. McKnight advises businesses and other lawyers on e-discovery issues, from developing early discovery plans and advising on implementing defensible litigation holds to triaging unexpected e-discovery issues mid-litigation. She works collaboratively with other lawyers, business agents, and technologists to develop strategies for the efficient and effective management of electronically stored information – for litigation and beyond. Ms. McKnight has experience representing businesses, financial institutions, individuals and public entities in a range of matters, including contract disputes, fraud and other misconduct, lender liability, loan defaults, bankruptcy adversary proceedings, and real estate disputes. She is admitted to practice in the state, federal and bankruptcy courts in Michigan, as well as in the state and federal courts in Illinois. Ms. McKnight received her Bachelor's degree from Kalamazoo College and her J.D. from the University of Michigan Law School.

Director at Large, Denise B. Bach, CEDS has extensive experience in Digital Forensics, eDiscovery and Cybersecurity and works with law firms, corporate counsel, litigation support managers and paralegals to bridge the gap between the legal process and technology. Denise's experience with eDiscovery projects from collection through production spans many industries including manufacturing, automotive, finance, retail, marketing, government, energy, healthcare and insurance. Her expertise involves matters related to numerous forms of government investigations including anti-trust, as well as large complex commercial litigation, theft of intellectual property and other labor and employment matters. Prior to joining held positions over the past 25 years within the legal industry at both law firms and corporations as well as at national eDiscovery service providers. Denise is a Certified eDiscovery Specialist (CEDS), is a member of The Sedona Conference and is on the Technology Committee of the Eastern District of Michigan Chapter of the Federal Bar Association.

Director at Large - Paula Haines, CEDS is a Legal Specialist focused on eDiscovery strategy and data risk at Whirlpool Corporation; a journey she began when she joined the Whirlpool Law Department in 2006. Paula has managed all aspects of eDiscovery related to litigation matters as well as government and internal investigations. She leads Whirlpool's eDiscovery team made up of selected in-house counsel and Whirlpool national counsel, along with records management and IT professionals, with the goal of identifying and reducing legal risk. These risks include both the retirement of legacy systems and the introduction of new business technologies and cloud solutions. More recently, Paula has focused on building metrics and managing eDiscovery costs, as well as developing and documenting the eDiscovery program. Paula manages the relationships with Whirlpool's outside eDiscovery vendors and outside eDiscovery counsel. She has implemented eDiscovery technologies and is involved in the day-to-day adoption of these tools. Paula holds a Bachelor of Business Administration degree from Western Michigan University, as well as the Certified eDiscovery Specialist (CEDS) designation, which she earned in 2013.

Director at Large - Karen Hassevoort, Esq. is Senior Discovery Counsel for Stryker Corporation and has been with the company since 2010. She and her team coordinate the discovery work in all litigation and government investigation matters across the company. They collaborate with Stryker's in-house and outside legal counsel and discovery support team, preferred litigation support vendor and internal business partners to carry out and/or coordinate the identification, collection, analysis, review, production and post-production management of potentially relevant documents in connection with these matters. Karen also is a principal collaborator with their Director, Information Governance, and she is a member of Stryker's Information Governance Steering Committee, helping to lead the development and implementation of records management policies, practices and procedures across the company. Prior to joining Stryker, Karen was a partner at the law firm of Miller Canfield and a leader of the firm's Discovery Center.

Angela Emmerling Shapiro is a litigation shareholder at Butzel Long in Detroit. She guides clients through complex lawsuits, governmental investigations, and other legal challenges. A significant portion of Angela's practice is focused on electronic discovery, working with large volumes of electronically stored information and navigating privacy laws that impact collection, processing, review and production of data around the globe. She also frequently negotiates technology, SAAS, and vendor contracts. Angela is CIPP/US and CEDS certified and has been repeatedly recognized as an eDiscovery and Information Technology Law "Top Lawyer" by DBusiness Magazine. Crain's Detroit Business named Angela to its inaugural class of Notable Women in Technology. Angela is a member of Butzel Long's Women's Leadership, Technology, and Pro Bono Committees. She is admitted to practice in all Michigan state and federal courts, the United States Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States of America. She graduated from Michigan State University (1994) and the Michigan State University College of Law (J.D., magna cum laude, 1998).

Look out for an email with the
nominees for 2022/23!



SUMMARIES OF RECENT eDISCOVERY CASES

BY: Ken Treece and Jay Yelton

Motion to Compel Granted When Data Production Evidenced Inconsistencies

Axis Ins. Co. v. American Specialty Ins. & Risk Servs., Inc., 2021 WL 2910814 (N.D. Ind. July 12, 2021)

Plaintiff Axis sued American Specialty for breach of contract on an Excess Liability insurance policy covering the Tampa Bay Buccaneers. The team's placekicker, Lawrence Tynes, suffered a career-ending injury that exhausted the limits of the team's worker's compensation policy and the Excess Liability policy. Plaintiff contended that defendant, its underwriter, improperly exceeded its contractual authority and could not bind plaintiff to the Excess Liability policy.

During discovery, plaintiff engaged in good faith discussions with defendant regarding what plaintiff perceived to be deficiencies in defendant's document productions. After several attempts by defendant to cure the deficiencies, plaintiff filed a motion to compel. Plaintiff alleged that defendant had failed to conduct a reasonable search for responsive emails, that defendant's production did not maintain family relationships between emails and attachments and that some attachments appeared to be missing, that defendant did not produce requested metadata, and that some metadata appeared to be altered.

In response, defendant contended that it had produced all responsive documents, and in any event, plaintiff had access to all of defendant's documents based on the contractual relationship between the parties, that any missing attachments were simply .gif files from logos or signature blocks or other non-substantive attachments, that the parties had no agreement concerning production of specific metadata fields, and that any metadata alteration occurred when employees forwarded emails and altered subject lines. The court rejected each of defendant's arguments, and ordered defendant to conduct a reasonable search for responsive emails and provide an affidavit detailing its efforts, including an explanation regarding altered metadata.

The court found that regardless of plaintiff's access, it was entitled to request documents from defendant in litigation. Moreover, defendant's in-house counsel had demanded that plaintiff desist from seeking access to defendant's documents since discovery was on-going. Defendant was not entitled to have it both ways. The court also found that defendant's production made it difficult for plaintiff to match up email family members, and that email families should be produced together. As for metadata, the court found that, while co-operation regarding discovery is encouraged, Rule 34 allowed plaintiff to request specified metadata fields and the absence of an agreed upon ESI protocol did not excuse defendant from complying with plaintiff's requests. Finally, the court found that the metadata produced by defendant raised questions that defendant would need to address in its affidavit. The court also awarded attorney fees to plaintiff finding that defendant's objections to plaintiff's discovery requests were not substantially justified.

Motion to Re-Produce Documents with Metadata Denied as Waived

Cody v. City of St. Louis, 2021 WL 2454215 (E.D. Mo. June 16, 2021)

Plaintiff filed a Section 1983 class action against defendant alleging dangerous, unsanitary and inhumane conditions inside defendant's medium security institution during 2017. Discovery commenced under an agreement that ESI would be produced as "PDF files, paper photocopies, or screen prints. Should the need to produce other [ESI] arise, the parties will confer in an effort to facilitate production in a mutually agreeable format." Both parties abided by the agreement. There were discussions regarding amendments to the ESI protocol, but the parties were never able to reach an agreement.

In September 2020, the case was stayed. In February 2021, the parties motion to lift the stay was granted. At this time, plaintiff, represented by new counsel, moved to compel defendant to reproduce PDF files in native format with accompanying metadata. Defendant objected stating that both sides had produced documents pursuant to their agreement and that plaintiff had not specified a format for production in its discovery requests or at any other time during the litigation. Defendant also noted that it had produced certain documents, such as Excel files, video and audio files, in native format. Plaintiff responded that the PDF production included thousands of documents for which it could not identify time, date, author, or recipient."

The court denied the plaintiff's motion. The defendant had produced documents pursuant to the parties' agreement, and Rule 34 does require the production of metadata. The Bates labeled, searchable PDF format used by defendant was reasonable under Rule 34, especially where the plaintiff failed to specify the production format in its discovery requests. However, the court did direct plaintiff to provide "a limited list of particular documents that Plaintiffs believe are critical to this litigation and for which Plaintiffs are indeed unable to identify the date, author, and/or recipient." The parties would meet and confer regarding the production of metadata for these documents and regarding the production of ESI in native format with metadata going forward. The court warned plaintiff that depending on the volume and importance of documents to be reproduced, the court might require plaintiff to bear some or all of the costs of reproduction.

Motion to Compel Denied without Some Concrete Evidence of Inadequacy

Sidman v. Concord Arena Parking, LLC, 2021 WL 1940255 (E.D.N.Y. May 11, 2021)

Defendants moved to compel plaintiffs to "'use a to-be-agreed-upon set of search terms to locate and produce documents in good faith' and to permit them to conduct additional depositions based on the new documents." Defendants' motion was based on what it perceived to be a paucity of documents produced by plaintiffs in response to its discovery requests, alleging that "'it is inconceivable' that there are not more documents in the production." The court denied defendants' motion.

The court noted that the defendants had made a similar motion three years prior. At that the time the court found the motion to be unsubstantiated, but allowed the parties a chance to submit interrogatories to explore the methodologies used to identify and produce responsive documents. Defendants failed to take advantage of that opportunity. "Instead, they make the same assertions they did three years ago about document production." Without laying a predicate foundation of "some concrete evidence pointing to the existence of missing documents," defendants were not entitled to the relief requested.

Can't Use Opposing Party's Non-Compliance to Justify Own Non-Compliance

RG Abrams Insurance v. The Law Offices of C.R. Abrams, 2021 WL 4805315 (C.D. Cal. Aug. 10, 2021)

Plaintiff filed claims against defendant arising from their broken business relationship under the Computer Fraud and Abuse Act and various state law theories. Plaintiff moved to compel the defendant's supplemental responses to various discovery requests as defendant asserted various general and specific objections and failed to state under Rule 34(b)(2)(C) whether it had withheld any documents based on its objections. The court first addressed the defendant's general objections and summarily overruled them as improper under Rule 34, but the court also provided independent bases for overruling them.

As for defendant's non-compliance with Rule 34(b)(2)(C), defendant argued that plaintiff was equitably estopped from enforcing this requirement because plaintiff had also failed to comply with the rule. Defendant made the same argument regarding its failure to provide a privilege log based on its privilege objections to plaintiff's discovery requests. The court rejected defendant's equitable estoppel argument.

While the court found plaintiff's position on her motion "disturbing" given her own non-compliance, it was defendant's conduct, not plaintiff's that was before the court. Moreover, the "Federal Rules do not contain a provision 'authorizing a litigant to behave only as well as his opponent.'" Defendant had to provide supplemental responses to state whether any documents were being withheld based on its specific objections and provide a privilege log for any documents withheld on that basis.

Forensic Imaging/Inspection Denied Absent Evidence of Misconduct

Preston v. County of Macomb, 2021 WL 4820556 (E.D. Mich. Oct. 15, 2021)

Plaintiff sued defendant alleging she received "deliberately indifferent medical care related to the birth her child" while incarcerated. Plaintiff requested documents created and maintained by the defendant's jail administrator, Michelle Sanborn. Sanborn retired approximately one month after the events at issue. At some point within approximately 18 months of her retirement, defendant disposed of Sanborn's records. Pursuant to court order, defendant conducted additional searches and produced roughly 900 Sanborn documents to plaintiff.

Plaintiff moved to compel defendant to identify an IT specialist, compel that IT specialist to consult with plaintiff's IT expert regarding recovery of lost ESI and to produce the hard drive from which Sanborn's documents were deleted. The court denied plaintiff's motion in its entirety.

Plaintiff could only offer speculation regarding additional missing Sanborn documents. Lacking specifics, the court determined that forensic imaging, which is highly intrusive and might lead to the disclosure of personal, privileged, or otherwise irrelevant data, was unwarranted. The court noted that it reserved the right to impose sanctions if discovery violations committed by defendant were later unearthed.

Intentional Deletion of Data Warrants Case Terminating Sanction

Prudential Defense Solutions, Inc. v. Graham, 2021 WL 4810498 (E.D. Mich. Oct. 15, 2021)

Plaintiff filed suit against defendants arising out of defendant Graham's alleged breach of his non-compete agreement by attempting to create a competing private security company with co-defendants Sheahan and Charnot. Prior to litigation being filed, defendants recognized that plaintiff would terminate Graham if it discovered his efforts to create a competing company. Defendants took measures to try to conceal Graham's involvement in the competing enterprise. Nevertheless, plaintiff did learn of Graham's actions and terminated him.

While still employed, plaintiff issued Graham an iPhone for business purposes. Shortly before his termination, Graham wiped all of the iPhone data on both his iPhone and associated iCloud storage account. Graham claimed he kept a lot of personal information on his phone that he didn't want shared, but admitted to saving some text messages in case they need to be used as evidence in a legal action he contemplated filing against plaintiff.

After suit was filed, the court issued a preliminary injunction against defendants ordering them to stop solicitation of plaintiff's clients and employees. As part of the injunctive relief, the court also ordered defendants to return plaintiff's proprietary information and preserve and produce all electronic devices used to retain or view plaintiff's proprietary information. Defendants were later held in contempt for violating the injunction. Specifically, after the injunction issued, Graham claimed he lost his new iPhone and to be safe, wiped his iCloud storage account. The remaining defendants also suffered various calamities that resulted in the data from their personal electronic devices being irretrievably lost. Plaintiff moved for case terminating sanctions against defendants under Rules 37(b) and 37(e).

As to Defendant Graham, the court found that case terminating sanctions under Rule 37(e) could be awarded because Graham had intentionally deleted data while litigation was foreseeable and with full recognition of the data's importance to such litigation, and once again while under a court injunction to preserve his data. The court found that the remaining defendants acted recklessly, but not intentionally, with respect to the loss of their data. Therefore, the court found that lesser sanctions under Rule 37(e)(1) could be awarded.

The court also considered the defendants' actions under Rule 37(b) for violating the court's injunction and associated discovery orders. "Given defendants' persistent disobedience with the court's orders and their failure to meaningfully cooperate with plaintiff, the court is inclined to impose case dispositive sanctions against defendants." Despite its inclination to enter case dispositive sanctions, the court provided the defendants with one last opportunity to influence its final disposition of plaintiff's sanctions motion. The court directed the defendants to show cause why it should not sanction them under Rule 37(b) or 37 (e), taking "care to address the propriety of an entry of default judgment."

Adverse Inference Jury Instruction Warranted for Deletion of Video

Musse v. King County, 2021 WL 4709875 (W.D. Wash. Oct. 8, 2021)

In litigation arising from a prisoner's rights case, plaintiff moved for spoliation sanctions for defendant's failure to preserve video footage of an altercation between plaintiff and another prisoner resulting in injuries to plaintiff. Defendant's camera system admittedly would have caught the altercation on two separate cameras from start to finish.

Defendant's record retention policy provided for the destruction of video footage on a rolling 60-day basis. But, an event resulting in injury to staff or an inmate required relevant footage to be exported to an archive file. Despite defendant's acknowledgement that the video footage would have been helpful and should have been retained, the video footage was inexplicably lost.

In its consideration of plaintiff's motion, the court found that defendant had a duty to preserve the video footage. The court rejected defendant's argument that its duty to preserve did not attach unless it had "specific knowledge of the particular type of future litigation." It is enough that some type of litigation could be foreseen from the incident giving rise to the suit. In fact, the defendant was still engaged in criminal litigation against the other inmate for his part in the altercation after plaintiff filed his notice of tort claim. Under these circumstances, defendant was obligated to preserve the video footage.

The court also rejected defendant's argument that it could not be sanctioned for deleting electronic evidence under its retention policy. The court found that the video footage was not deleted pursuant to the policy, but in spite of the policy, which required video footage from an incident resulting in injury to an inmate to be archived.

Finding that the defendant's failure to preserve the video evidence amounted to an "intent to deprive," the court awarded sanctions under Rule 37(e)(2). "A permissive adverse inference instruction is sufficient to cure this prejudice. That would 'deny the wrongdoer the fruits of its misconduct yet not interfere with that party's right to produce other relevant evidence.'"

Subpoena Requesting Any and All Records Quashed as Overbroad

G.D. & R.D. obo G.D. v. Utica Community Schools, 2021 WL 4621847 (E.D. Mich. Oct. 7, 2021)

After favorable rulings on behalf of a disabled student from an Administrative Law Judge concerning defendant's compliance with the Individuals with Disabilities Education Act, the student's parents brought claims against the defendant school district to recover attorney fees. Defendant in turn brought claims to reverse the ALJ's rulings and to recover attorney fees from plaintiffs. During discovery, defendant subpoenaed the student's grandmother for a "copy of any and all documents, personal notes, emails, correspondence and/or other writings related to" the administrative proceedings between her, the student's parents and/or their counsel.

Plaintiffs' counsel moved to quash the subpoena because the subpoena was overly broad and because it requested communications protected by the attorney-client privilege.

Defendant responded that plaintiffs' counsel did not have standing to challenge the subpoena. If he did have standing, the subpoena was not overbroad because it requested materials that bore on the issues, and the requests were "reasonably calculated" to provide information regarding witness credibility. As for the privilege issue, defendant argued that communications with the student's grandmother present destroyed attorney-client privilege as she was a third party to the proceedings.

The court disagreed with defendant and quashed the subpoena. First, the court found that plaintiffs' counsel had standing to challenge the subpoena to the grandmother. "A party who can show a personal interest or a claim of privilege has standing to object to a subpoena served on a third party." Next, as to the over breadth objection, the court found that the request for "any and all records" constituted a "long condemned omnibus discovery request," especially troublesome when directed to a non-party as Rule 45 directs an issuing party to "take reasonable steps to avoid imposing an undue burden or expense" on a non-party. The court also noted that defendant relied on a discovery standard "that has been obsolete for almost six years" and that proportionality was the standard that governed the reasonableness of the subpoena. Finally, the court found that the communications involving the student's grandmother did not destroy privilege. The grandmother had testified extensively at the administrative proceeding, both as a fact and expert witness. "She was a member of the student's litigation team, and her participation in communication with [plaintiff's counsel] and the student's parents did not destroy the attorney-client privilege."



Determining What Constitutes “Intent to Deprive” Under FRCP 37(e)

Sines v. Kessler, 2021 WL 4943742 (W.D. Va. Oct. 10, 2021) –

This case concerns a lawsuit arising from the “Unite the Right” rallies in Charlottesville, Virginia. One of the organizers represented himself and took minimal efforts to preserve his ESI, much of which ended up being lost. In deciding whether to allow an adverse inference, the court’s opinion provided helpful guidance regarding what constitutes an “intent to deprive,” under Rule 37(e). The court stated:

The Rule’s plain text makes clear that it is the party’s “fail[ure] to take reasonable steps to preserve” ESI, Fed. R. Civ. P. 37(e), with the intent to deprive another party from using it in litigation that supports a logical inference that the “lost information was unfavorable to the party who lost it,” Fed. R. Civ. P. 37(e)(2). See, e.g., Ungar v. City of N.Y., 329 F.R.D. 8, 13 (E.D.N.Y. 2018) (“Whether the spoliator affirmatively destroys the data, or passively allows it to be lost, is irrelevant; it is the spoliator’s state of mind that logically supports the adverse inference.”). Thus, a party’s “conscious dereliction of a known duty to preserve electronic data—whether passive or active—is both necessary and sufficient to find that the party acted with the intent to deprive another party of the information’s use under Rule 37(e)(2).” Capricorn Mgmt. Sys., 2019 WL 5694256, at *11 (internal quotation marks omitted); see Moody v. CSX Transp., Inc., 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) (“[D]efendants’ repeated failure over a period of years to confirm that the data had been properly preserved despite its ongoing and affirmative ... obligations, particularly before discarding [key employee’s] laptop, is so stunningly derelict as to evince intentionality.”).



Wishing you all a
Happy and Healthy End
of 2021 and New
Years!!



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