MANAGING ELECTRONIC DISCOVERY IN ARBITRATION

A.J. Krouse
Frilot L.L.C.
(504) 599-8016
akrouse@frilot.com
Key Points to Managing Electronic Discovery in Arbitration

1) Carefully review the ADR Clause of the Arbitration Agreement as it relates to discovery

2) Be Familiar with the Procedural history of your case before the Scheduling Conference

3) Ask whether this case will require extensive electronic discovery
Key Points to Managing Electronic Discovery in Arbitration (continued)

6) Schedule frequent status conferences to determine if there are any electronic discovery issues

7) Control costs and fees by limiting eDiscovery

8) Increase your competence as an arbitrator by attending more eDiscovery CLE’s

6) Be familiar with the 2015 Amendments to the Federal Rules of Civil Procedure
EDISCOVERY IN TRANSITION
Key Participants

THEN...
IT Litigation Support

NOW...
Lead attorney or corporate counsel as subject matter experts
**End Goals**

**THEN...**
- Include every document in existence
- Be ready for trial with the underlying assumption that every potentially responsive document must be tagged

**NOW...**
- Provide sufficient evidence to tell the story
- Prepare for settlement negotiations
- Focus on using information already known by case experts to evaluate results of *Early Case Assessment (ECA)* and to separate potentially meaningful content from junk
Workflow

THEN...
Linear review practices follow a methodical path. Typical example:

• Gather data from custodians and repositories
• Process data out of house
• Run search terms on the data set to assemble a review set
• Review document set (review attorneys)
• Review Documents deemed importation (lead attorneys or case experts)

NOW...
There are a fewer steps with effective Early Case Assessment (ECA), and attorneys get case insights and knowledge earlier:

• Gather data from custodians and repositories
• Process data in-house
• View ECA analytics to get the story in the data (lead attorneys and case experts)
• Organize data intelligently for a fast review.
• Review smaller document set (review attorneys)
Risk Management

THEN...

• When e-discovery is outsourced, some believe the responsibility for storage, spoliation and retrieval belongs with the vendor (no so!)

NOW...

• When Early Case Assessment is done in-house, the organization has greater control and can better manage risk, reduce e-discovery costs and integrate with information management and governance effort
Tools

THEN...
• Technologist-friendly: Tech team or search experts run keyword searches

NOW...
• Litigator-friendly: New tools are intuitive for attorneys and non-tech types who get in early and gain quick insight
Time and Cost of Review

THEN...

• Longer and more expensive
• More documents, more eyes, more hours

NOW...

• As much as 90 percent shorter
• Analytics help reduce the set of documents requiring human review
What is Electronically Stored Information (ESI)?

- Definitions of key ESI terms
- How to communicate with third party ESI consultants
- Not just on parties’ computers, also BYOD (Bring Your Own Device) which includes employees’ cell phone, tablets, home computers, and laptops
- Social Media ESI expands the scope
- Metadata adds a layer of complexity
- Sedona Conference is an excellent reference for ESI
How does discovery differ between arbitrations and court cases?

- Parties can control by agreement how much or how little of eDiscovery will be allowed
Time for the Arbitrator to be in Charge of ESI!

• Consider issuing an order at the appointment of the arbitrator
• Discuss ESI at the Preliminary Hearing
• Ensure Parties Preserve ESI
• Manage ESI Consistent With Arbitration Goals
• Arbitrator rulings on ESI discovery disputes
• Allocation of Costs
The Preliminary Conference

Proportionality: limit e-discovery where cost burden is significant and outweighs potential benefits.

Arbitrator should consider:

• Burden/expense of the proposed discovery vs. likely benefit;
• Needs of the case;
• Amount in controversy;
• Parties’ resources;
• Importance of the issues at stake in the action; and
• Importance of the discovery in resolving the issues.
Ethics and E-Discovery

The ethical duty to be technically competent in processing electronic discovery is rooted in various rules of the ABA Model Rules of Professional Conduct:

- **Rule 1.1. Competence**: How can a lawyer who doesn’t understand ESI represent a client in litigation when the predominant form of evidence is electronic?

- **Rule 1.3. Diligence**: A threshold level of diligence would be to make an effort to understand how the principal sources of discovery can be processed.

- **Rule 1.5. Fees**: The obligation to refrain from double-billing implies a duty to take reasonable steps to identify duplicative work.

- **Rule 3.2. Expediting Litigation**: The courts should not have to tolerate the delays caused by inefficient or unknowledgeable attorneys.

- **Rule 3.3. Candor toward the Tribunal**: Estimates of how much effort and time are required to process electronic records ought to be based on reasonably competent processing.

- **Rule 4.1. Truthfulness in Statements to Others**: Same as above.
Any discussion of ESI must start with an understanding of the more important terms that are commonly used in connection with that subject.
Please sign up for a copy of The Sedona Conference Glossary eDiscovery & Digital Information Management 4th Ed-July 2014
(https://thesedonaconference.org//publication/The%2520Sedona%2520Conference%2520Glossary)
Electronic Discovery Reference Model (EDRM)

Information Governance

Identification

Collection

Preservation

Processing

Review

Analysis

Production

Presentation

Volume

Relevance
Terminology

**Intimate Devices** — these are the personal smartphones and similar devices that people tend to always keep with them. Some organizations now permit people to bring their own device to work, and some require that employees and consultants use only company devices for company business.
Electronically Stored Information OR ESI
What is Electronically Stored Information – ESI?

HUGE AMOUNT OF DATA THAT COULD POTENTIALLY BE PRODUCED BY YOUR COMPANY:

- Executable Files
- Document Files
- Spreadsheet Files
- Database Files
- Graphics Files
- Partial Files
- Deleted Files
- Damages Files
- Recycle Bin Files
- File Slack
- E-mail Messages
- E-mail Archived Files
- E-mail Attachments
- Text Files
- Operating System Files
- System Files
- Application Files
- Driver Files
- OLE Sub items
- Voice Operated Internet Protocol (VOIP)
- Voice Mail
- KFF Alert Files
- Voice Operated Internet Protocol (VOIP)
- Internet History Files
- Internet Favorites Files
- Instant Messages (IM)
- Free Space text
- (photos, drawings)
- Files with Bad Extensions
- Unallocated Space

There are approximately 180,000 files on an average 40GB hard drive.
Some Distinctive Features of ESI

Information is dispersed and stored in a number of medial and locations:

• Desktop computers
• Network servers
• Backup and archival media
• Laptop computers
• Handheld devices
• Removable media
• Relational databases
Some Distinctive Features of ESI

Information may have no paper equivalent:
- Metadata
- Embedded data
- Deleted data

Information is dynamic and may be altered or destroyed without the operator’s knowledge or conscious effort:
- Turning on a computer can alter data
- Routine overwriting can destroy data
- Routine computer processes can delete, alter, or destroy data
Some Distinctive Features of ESI

Information may be unintelligible if separated from the system that created it:

• Legacy data can remain after the technology to retrieve it becomes obsolete
Terminology

**Metadata** – these are data that provide information about other data, that is, they tell the history of a document, including changes to it and accesses (connections or inquiries) to or about it. Counsel often find that the number of times a document has been changed or accessed is as informative as the text of the document. As a result, eDiscovery requests frequently will seek production of both the document and the related metadata.
Metadata

Title  Subject
Author  Keywords
Comments  Templates
Last author  Revision
Application name  Last print date
Creation date  Last save time
Total editing time  Number of pages
Number of words  Number of characters
Security  Category
<table>
<thead>
<tr>
<th>Metadata</th>
<th>Manager</th>
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<td>Number of multimedia clips</td>
</tr>
<tr>
<td>Number of hidden slides</td>
<td>Number of characters with spaces</td>
</tr>
</tbody>
</table>
Terminology

**Native Format** — this is the format in which the material was originally created and stored. The native format may not be readily readable and understood by others who have not used and been exposed to that type of format. For example, an accounting report produced in a company's legacy software format might be unreadable on a computer that does not have access to that software. In that circumstance, the party requesting discovery will be at a disadvantage in not being readily able to sort and otherwise manipulate the data in order to analyze the stored information, which might contain, for example, the producing party's damage calculations.

Native Format \textit{(continued)} — Parties who are asked to produce data generally will prefer to do so in native format. The requesting party will press for the data to be provided in a format more convenient for them to use. Advanced software capabilities now permit the manipulation of a number of unrelated databases contained in a variety of native formats such that they may be provided in a common form, such as Excel or Word, albeit at a cost.
Terminology

**Predictive Coding** — this is the term for the most current and sophisticated form of search-and-retrieval technique. Predictive coding is designed to reduce the number of individually searched documents in the universe of potential documents by using artificial intelligence software to train the computer to refine the search algorithms and, thus, narrow the search terms to those that produce the most useful results without requiring human review of each document. As in all statistical searching, the key is to agree on a statistical methodology that is truly reliable and not just “garbage in garbage out.” Predictive coding was one of the topics at the 2013 Sedona Conference.
Terminology

• **De-duplication**: Removing duplicate records from a database, especially when two or more databases have been merged to form a single larger list.

• **deNISTing**: Removing the operating system files, program files and other non-user created data. The NIST (National Institute of Standards and Technology) list contains more than 40 million known files and using this list to filter custodian hard drives files can be effective because these files are usually irrelevant to a case, but often make up a sizable portion of a collected set of electronically stored information (ESI).
Lessons Learned from Predictive Coding


- U.S. Magistrate Judge Andrew J. Peck for the U.S. District Court for the Southern District of New York endorsed the use of predictive coding to locate electronically stored information in a document-intensive, employment discrimination case involving 3 million emails.

- This is the first case to date that endorses a protocol for the use of predictive coding to locate documents relevant to litigation in ESI.
Lessons Learned from Predictive Coding

Benefits:

– it is cost-effective
– can cut review time down to a few weeks
– reduces the number of documents that need to be manually reviewed, which results in a significant reduction of e-discovery costs

• In document-intensive cases, the costs can add up to millions of dollars and take many months to complete. Even more troubling, keyword searches can leave up to 80 percent of relevant ESI undiscovered.
Lessons Learned from Predictive Coding

• Predictive coding uses mathematical formulas that are derived from document coding choices made by experts, who are usually senior attorneys working on the case.

• The expert codes random sets of documents taken from the corpus of e-discovery and specifies the relevancy of the documents.

• The computer learns how the lawyer codes the documents and develops a formula for "relevancy."

• The formula is then applied to the entire document collection to locate all relevant documents in the case.
Lessons Learned from Predictive Coding

• Several factors motivated the court to endorse the use of predictive coding.

• In addition to the agreement between the parties, the court highlighted:
  – the 3 million documents to be reviewed
  – the superiority of computer-assisted review to the "available alternatives
  – " the need for cost-effectiveness and proportionality under Rule 26(b)(2)(c)
  – the transparent process proposed by the defendant, MSL
Lessons Learned from Predictive Coding

• The court also noted that while predictive coding technology can locate ESI much faster and at a fraction of the cost compared to traditional technologies, the technology is not a case of "machine replacing humans."

• Predictive coding involves the interaction of man and machine.

• Even with the favorable studies showing the effectiveness of predictive coding, other courts might be hesitant to endorse the technology until the results are quality control verified.

• Parties and courts must be able to see where there is "a clear drop-off from highly relevant to marginally relevant to not likely to be relevant documents"
Lessons Learned from Predictive Coding

• Counsel should not believe that the use of predictive coding is a license to put the e-discovery portion of their case on autopilot.

• Senior counsel need to be intimately involved with developing the seed sets so the technology is applied appropriately.

• Highly competent counsel should be involved to screen the documents for attorney-client privilege.

• It has not yet been shown that predictive coding technology has advanced to the point of detecting privileged documents in the absence of attorney oversight.
Legal Hold Process

Key Elements of a Sound Legal Hold Process:

– Issue timely, written legal hold directives
– Ensure custodians understand what’s required and how to comply
– Follow up
– Provide for periodic updates and reminders
– Account for employee mobility and turnover
– Consider third-party custodians
– Thoroughly document actions and the bases for decisions
– Develop procedures, recordkeeping and training materials that leverage past preservation efforts
– Legal hold is a process, not simply a document
Legal Hold Process

Know That Spoliation Occurs Even When You Do Your Best

— In her Pension Committee opinion, Judge Scheindlin observed:

• “Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party.”

Implementing a legal hold is not about scooping up all of the ESI and locking it in a vault. It is about taking reasonable steps to assure the data will be there when needed.
Understanding Parties’ Computer Systems and Cost Control

• Do not agree to the scope of discovery until you have a detailed understanding of the producing parties’ computer systems and available ESI.

• Does counsel anticipate the need to notice any depositions to obtain further information about the opposing party’s computer systems or electronic records management procedures?

• In order to reduce ediscovery cost and time, focus on negotiating limitations as to the temporal scope of ediscovery.

• Can cost savings be realized using shared vendors, repositories, or neutral experts?
ESI Types and Storage Media, Devices and Locations

• Have the parties considered all different ESI types and storage media, devices and locations?
• What are the principal ESI types and storage media, devices and locations used in the litigation now, and in the past?
• What email applications are in use currently and in the relevant past?
• How will the parties’ process voicemail, instant messaging or other challenging ESI?
• How will the contents of databases be discovered and disclosed? By queries, exporting a subset of the ESI, copies of the database, or by direct access?
Key and Other Players

• Who are the key players in the case? Identify all current and former employees who were involved with the issues in the case. If former employees, what happened to their computer media and devices when they left their job?
Document Retention Policies

• Have the parties provided a general description, named the person responsible for, and exchanged copies of their clients’ documents retention policies and practices?

• Have the parties suspended all electronic document deletion and media recycling policies?
Backup, Archival, Disaster Recovery and Legacy Systems

• What are the backup practices, and what archives exist for each party’s computer systems?

• Have the responsive backup or archival tapes or other storage media been segregated and secured?

• Are there legacy and archival systems and do the parties need to recover responsive ESI generated on these outdated or dormant computer systems?

• How recent are a party’s disaster recovery storage media and how difficult is it to restore them?
Inspection of Computer System

• Is there reason (hiding data/obstructing discovery/deleting data) to request a “forensic copy” of storage media?

• Have parties agreed upon an inspection protocol to ensure protection of privileged information?

• What should be inspected – active network servers, desktop hard drives, laptops, and similar hardware?

• Does counsel anticipate the need to conduct an on-site inspection of the opposing party’s computer system?
Search Techniques and Protocol

• Will there be agreement as to the search protocol? Will there be subject matter expert/litigator interactive input allowing for supplementary search terms to be permitted? With self-selection of ESI by those involved in the case be prohibited or supervised?

• Will different combinations of search technologies and techniques be employed?

• Will there be testing of the search technology to determine if it is able to retrieve different data types?

• By what date will the parties negotiate search parameters (keyword, concept, etc.) and search strings?

• Who will search and collect the ESI from all those who have involvement with the case?

• Have the parties agreed to “certify” the search protocol and methodology used to obtain responsive ESI?
Protection of Privileged ESI

• Will the parties be entering into a nonwaiver or protective agreement for inadvertently disclosed ESI to avoid costs of intensive privilege review? Will the agreement be converted to a Court order?

• Do parties understand the search/production protocol necessary to ensure the nonwaiver of privileged ESI?

• Do regulatory prohibitions on disclosure, foreign privacy laws or export restrictions apply?
ESTABLISHING GROUND RULES FOR ESI PRODUCTION REQUESTS & THE ACTUAL PRODUCTION OF ESI
The arbitrator must guide discussions regarding the production of ESI and when necessary and appropriate, impose a framework for eDiscovery.

First Prehearing Conference

At the first prehearing conference, the arbitrator should encourage counsel, in conjunction with their clients' senior information technology personnel and outside eDiscovery consultants, to agree if they have not already done so upon:

• Preliminary search terms (relevant words, names, phrases, and topics)

• Software tools and methodology for data sampling (the retrieval and review of a small selection of ESI)

• Test runs of the preliminary search terms on sub batches of ESI to assess whether, in light of the quality of the data received, the benefits of further production justify its costs and burdens.

• The parties have also been advised that cooperation and proportionality in connection with discovery requests will be required of each of the parties.
• A party making a production will provide the other party with a list of custodians of no more than 5, after which the other party may add to the custodian list by no more than 5 additional custodians.
• Any party requesting documents in electronic format shall specify the metadata being requested, if any, and specific date ranges for the request. The responding party shall produce the documents in a pdf format.
• The parties shall share and agree upon the specific search terms to be used.
• Clawback agreements shall be in place for all parties to allow for the retrieval of inadvertently disclosed attorney-client privileged documents.
• If the cost of collection of any of the electronically stored data presents an unreasonable cost for the producing party because the data is not readily accessible and the parties cannot reach an agreement on the handling of the cost, the Tribunal will decide if cost sharing or cost shifting is appropriate.

• If any party has documents that are confidential, the Tribunal will issue a protective order upon the receipt of a stipulation from the parties for such an order.

• The parties' agreement regarding e-discovery will then be memorialized in an ESI case management order to be submitted in draft to the Tribunal on or before September 26, 2016. If the parties cannot come to agreement regarding all salient issues concerning e-discovery, they may raise the remaining issues to the Tribunal by motion, to be filed within 10 days of the meet and confer in accordance with the deadlines.
Other Early Stage Issues

It is important that the parties also agree at an early stage on issues concerning the format and manner of production of ESI:

• Whether the produced data should be searchable by the requesting party
• How to identify each document produced
• Whether the requesting party is able to view the metadata on the produced documents

Limit the number and type of storage devices to be searched. The bulk of relevant ESI often resides on the hard drive most frequently used by the key witnesses. Multiple copies of the same electronic document also may be found in redundant storage locations, such as laptop; tablets, Blackberries, personal digital assistants, smartphones, thumb drives, and home computers. One management tool is to eliminate some storage devices from the search.
Approaches to Consider

• Limit discovery to electronic documents that are relevant and material to issues in the case and not merely likely to lead to relevant evidence.

• Limit discovery to particular custodians of data.

• Limit discovery to the electronic documents on which each side intends to rely at the hearing.

Approaches to Consider

• Limit the number of requests or search terms.

• Limit the date range of documents that must be searched.

• Limit the number of custodians whose storage devices must be searched.

• In appropriate cases, shift all or some of the cost of furnishing ESI to the requesting party.
THE 2015 AMENDMENTS TO THE FRCP

Major changes to the Federal Rules of Civil Procedure took effect on December 1, 2015

Purpose of the Amendments

• Cooperation
• Early Case Management ("ECM")
• Proportionality
• Cost Reduction
• Preservation
Rule 1 now charges the parties and the court with “secure the just, speedy and inexpensive determination of every action and proceeding.” The change emphasizes that attorneys and parties “share the responsibility” with the court of moving cases forward in a cooperative and proportional manner.
The 2015 Amendments to the FRCP

Proportionality Defines the Scope of Discovery

• Perhaps the biggest cultural change that the 2015 amendments seek to accomplish involve the scope of discovery permitted in federal court proceedings.

• Proportionality is the concept that addresses the marginal utility of the requested discovery
  – Concept originally introduced to FRCP in 1983 as part of the definition of the scope of discovery in Rule 26(b)(1)

• Rule 1’s aspirational goal of “securing the just, speedy, and inexpensive determination of every action and proceeding” can only be achieved through proportionality
THE "TRADITIONAL" LOG: ONE DOCUMENT AT A TIME
For each document identified on the company's privilege log, state:

• the document's control numbers;
• all authors of the document;
• all addressees of the document;
• all recipients of the document or of any copies of the document, to the extent not included among the document's addressees;
• the date of the document;
• a description of the subject matter of the document;
Typical Standards for a “Traditional Log”

For each document identified on the company's privilege log, state:

• the nature or type of the privilege that the company is asserting for the document
• *(e.g., “attorney-client privilege”)*;
• the specification(s) of this Request to which the document is responsive;
• the document control number(s) of any attachments to the document, regardless of whether any privilege is being asserted for such attachment(s); and
• whether the document has been produced in redacted form.

-Dep't of Justice Model Second Request
Consideration for a Traditional Log

• Email chains
• Attachments
• Duplication
• Scanned Paper
WHAT'S THE BIG DEAL?

ASSESSING THE BURDEN OF TRADITIONAL PRIVILEGE LOGS
Cost of Privilege Logging

• Can add tens of thousands of dollars to review cost
• Time consuming/diverts resources
• Questionable value
Thoughts on Privilege Logging

• A “harrowing burden" -Report of The Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association (June 23, 2012)


• “Unnecessary overkill" -Ralph Losey
Privilege Issues Associated With In-House Counsel Communications

- Communications involving in-house counsel are increasingly scrutinized
- In-house counsel wears two hats: legal and business
- Common perception among company employees that all communications with in-house counsel are protected by the privilege
- Broad dissemination of privileged communications within a company can result in a waiver
Privilege “Clawback” ≠ Non-Waiver!

Rule 26(b)(5)(B): Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it . . . After being notified, a party must promptly return, sequester, or destroy the specified information... until the claim is resolved...
Four Main Provisions of F.R.E. 502

1. No privilege waiver for inadvertent disclosure in federal court or agency proceedings unless disclosing party was negligent in producing the information or failed to take reasonable steps seeking its return.

2. No waiver for other documents dealing on the same subject matter unless “fairness requires”.

3. No waiver if the court enters an order that disclosure of the information does not constitute a waiver.

4. Parties can enter into confidentiality agreements for mutual protection against waiver in that proceeding.
(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.
Federal Rule of Evidence 502(e) & (f)

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

(f) Controlling Effect of This Rule. ...This rule applies to state proceedings and to federal ... proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.
“Failing to propose a Rule 502(d) court order in a big document case probably is legal malpractice.”
Consequences of Inadequate Privilege Log

1) Permit the party another chance to submit a more detailed log;

2) Deem the inadequate log a waiver of the privilege;

3) In camera inspection of the withheld documents; or

4) In camera inspection of a select sample of the withheld documents
The 2015 Amendments to the FRCP

Proportionality’s Factors and Considerations

• Rule 26(b)(1) sets forth a series of factors that a court and parties should consider in making a proportionality determination:
  – Importance of the issues at stake in litigation
  – Importance of the requested discovery in resolving those issues
  – Amount in controversy
  – Parties’ relative access to relevant information
  – Parties’ respective resources
  – Whether the burden or expense of the proposed discovery outweighs its likely benefits

• There is no hierarchy of importance among Rule 26’s proportionality factors; all must be considered
"Proportionality"
Balance the scale of discovery to the scope of the specific needs to reduce or limit related costs
Practical Decisions When Making a Proportionality Objection

• When making a proportionality objection, counsel should endeavor to provide the court with much factual information as possible that supports his or her objection

• The 2015 Committee not for Rule 26 warns that parties cannot refuse to produce discovery by making a boilerplate proportionality objection
The 2015 Amendments to the FRCP

Practical Decisions When Making a Proportionality Objection

• The 2015 amendment to Rule 1 suggests that the hardball discovery tactics of yesteryear no longer have any place when it comes to e-discovery

• The 2015 Note to Rule 1 takes the position that effective advocacy depends on the “cooperative and proportional use of procedure.”
The 2015 Amendments to the FRCP

Concepts Removed from Rule 26’s Scope of Discovery

• The former provision that allowed broader “subject matter” discovery based upon a showing of “good cause” was deleted in the 2015 amendment to Rule 26

• The phrase “reasonably calculated to lead to the discovery of admissible evidence” was deleted from the text of Rule 26
The 2015 Amendments to the FRCP

Concepts Removed from Rule 26’s Scope of Discovery

• In its place, a provision was added explaining that information need not to be admissible to be discoverable

• The reference to discovery involving existence, description, nature, custody, condition, and location of documents or persons with knowledge of discoverable matters was also deleted in an effort to shorten Rule 26
The 2015 Amendments to the FRCP

New Spoliation Framework Under Rule 37(e)

• Rule 37(e) was completely rewritten in an attempt to address the problem of excessive preservation obligation and to develop a national, uniform standard for sanctions involving eDiscovery
• The new rule replaces the 2006 version
• Rule 37(e) only applies to the loss of ESI
• Does not apply to the loss of paper records or tangible evidence
PROTECTING YOUR CLIENT'S PRIVILEGE: THE LAW OF PRIVILEGE LOGS

Averitt, Jessica, Duffy, Robert, Emory, Tara S.
F.R.C.P 26(b)(5)(A)

- (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
  - (i) expressly make the claim; and
  - (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.
Don’t Waive your Client’s Privilege

• Inadequate privilege logging has consequences
• Must be sufficiently detailed
• Must be done in a “timely and proper” manner