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**PROGRAM MATERIALS**  
**Program #2994**  
**September 10, 2019**

## **Being Competent When Litigating with Electronically Stored Information (ESI)**

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**CELESQ PRESENTATION:  
BEING COMPETENT WHEN LITIGATING  
WITH ELECTRONICALLY STORED  
INFORMATION (ESI)**

**SEPTEMBER 10, 2019  
Noon – 1:00 PM**

# PRESENTER

Ronald J. Hedges, J.D., is a Senior Counsel with Dentons US LLP. He served as a United States Magistrate Judge in the District of New Jersey from 1986 to 2017. Mr. Hedges is a frequent writer and speaker on various topics related to electronic information and is the principal author of *Managing Discovery of Electronic Information: A Pocket Guide for Judges, Third Edition* (Federal Judicial Center: 2017). His full biography is available at <https://www.dentons.com/en/ronald-hedges>.

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- The information in these slides and in this presentation is not legal advice and should not be considered legal advice.
- This presentation represents only the personal view of the presenter and does not reflect the views of his firm.
- This presentation is offered for informational and educational uses only.

# TOPICS

- The meaning of “competence” under the Model Rules of Professional Competence
- Engaging in meaningful cooperation with adversary counsel
- Undertaking reasonable search and production of ESI
- Protecting privileged communications and confidential information

# COMPETENCE

- The California State Bar Standing Committee on Professional Responsibility and Conduct states in Formal Opinion No. 2015-193 (June 30, 2015) that attorneys should have technical competence and skill – either by themselves, co-counsel, or expert consultants.
- The opinion is available at [https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20\(06-30-15\)%20-%20FINAL.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf)

# COMPETENCE

The “facts:”

- Client is in litigation against Chief Competitor.
- Opposing counsel suggests joint search of client’s network using opposing counsel’s chose vendor.
- Opposing counsel offers clawback which court approves.

# COMPETENCE

- Attorney prepares keywords for searches and accepts keywords proposed by opposing counsel.
- Client's CEO tells attorney there is no ESI that has not been produced in hard copy.
- Attorney relies on Client's IT to understand searches so allows vendor to have unsupervised access.

# COMPETENCE

- Attorney does not review search results (assuming results same as hard copies).
- Attorney receives letter from opposing counsel accusing Client of destroying evidence.
- Attorney cannot open data and retains forensic expert who determines ESI routinely destroyed following Client's retention policy.
- Chief Competitor receives privileged and proprietary information.

# COMPETENCE

Attorney's ethical duties in managing discovery of ESI:

- “initially assess e-discovery needs and issues, if any;
- implement/cause to implement appropriate ESI preservation procedures;
- analyze and understand a client's ESI systems and storage;

# COMPETENCE

- advise the client on available options for collection and preservation of ESI;
- identify custodians of potentially relevant ESI;
- engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;

# COMPETENCE

- perform data searches;
- collect responsive ESI in a manner that preserves the integrity of that ESI; and
- produce responsive non-privileged ESI in a recognized and appropriate manner.”

(footnotes omitted)

# COOPERATION

## Committee Note to Amended Rule 1:

“Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure.”

# COOPERATION

- Rule 26(f) requires the parties to cooperate in preparing the discovery plan.
- Rule 26(c)(1) requires a party, when moving for a protective order, to certify that “the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.”
- Rule 37(a)(1) requires a party, when moving to compel disclosure or discovery, to make the same certification.

# COOPERATION

Should a Rule 26(f) meet-and-confer be attended by people who don't trust each other discussing issues they don't understand?

A.J. Tadler, K.F. Brady, & K.S. Jenson, *The Sedona Conference "Jumpstart Outline": Questions to Ask Your Client & Your Adversary to Prepare for Preservation, Rule 26 Obligations, Court Conferences & Requests for Production* (Mar. 2016),  
[https://thesedonaconference.org/publication/Jumpstart Outline](https://thesedonaconference.org/publication/Jumpstart_Outline)

# COOPERATION

- “Two-way communication” required to satisfy the duty to confer. *Easley v. Lennar Corp.*, 2012 WL 2244206 (D. Nev. June 15, 2012).
- Courts can require parties to confer outside the context of specific rules. See, e.g., *In re Facebook PPD Ad. Litig.*, 2011 WL 1324516 (N.D. Ca. Apr. 6, 2011).
- The duty to confer does not impose an obligation on a party “to continue negotiations that seemingly have no end.” *Fleischer v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290 (S.D.N.Y. 2012).

## **Presenter to read NY Code**

**This code is required for all attorneys wishing to receive CLE credit in the state of NY**

**Please notate it carefully**

**The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.**

**Thank you!**

# COOPERATION

- Declining to impose certain sanctions when both parties failed to cooperate in timely fashion. *Johnson v. Ford Motor Co.*, No. 13-cv-06529 (S.D. W. Va. Sept. 11, 2015), *objections sustained in part and overruled in part* (S.D. W. Va. Nov. 5, 2015).
- “Woefully inadequate” effort to confer results in denial of motion to compel discovery. *U-Haul Co. v. Gregory J. Kamer, Ltd.*, No. 12-cv-00231 (D. Nev. Sept. 17, 2013).

# COOPERATION

Rule 29(b): “Unless the court orders otherwise, the parties may stipulate that:

Other procedures governing or limiting discovery be modified—but a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.”

*See, e.g., In re: Transpacific Passenger Air Transp. Antitrust Litig.*, No. C-07-05634 (N.D. Ca. Feb. 24, 2014) (quashing subpoena on nonparty that violated expert stipulation agreed on by parties).

# COOPERATION

“If the defendants unilaterally develop and implement a search protocol, rather than negotiate a stipulated search protocol with the plaintiffs, they run the risk that I will later deem their search strategy insufficient and require them to conduct additional searches.” *Lightsquared Inc. v. Deere & Co.*, No. 13 Civ. 8157 (S.D.N.Y. Dec. 10, 2015).

# SEARCH AND PRODUCTION

How do we search for discoverable ESI?

- Manually?
- With automated assistance?
- Which is “better” and why?

# SEARCH AND PRODUCTION

Automated search tools include:

- Keyword search
- Concept search
- Discussion threading
- Clustering
- Find similar
- Near-duplicate identification
- Technology-Assisted Review (“TAR”)

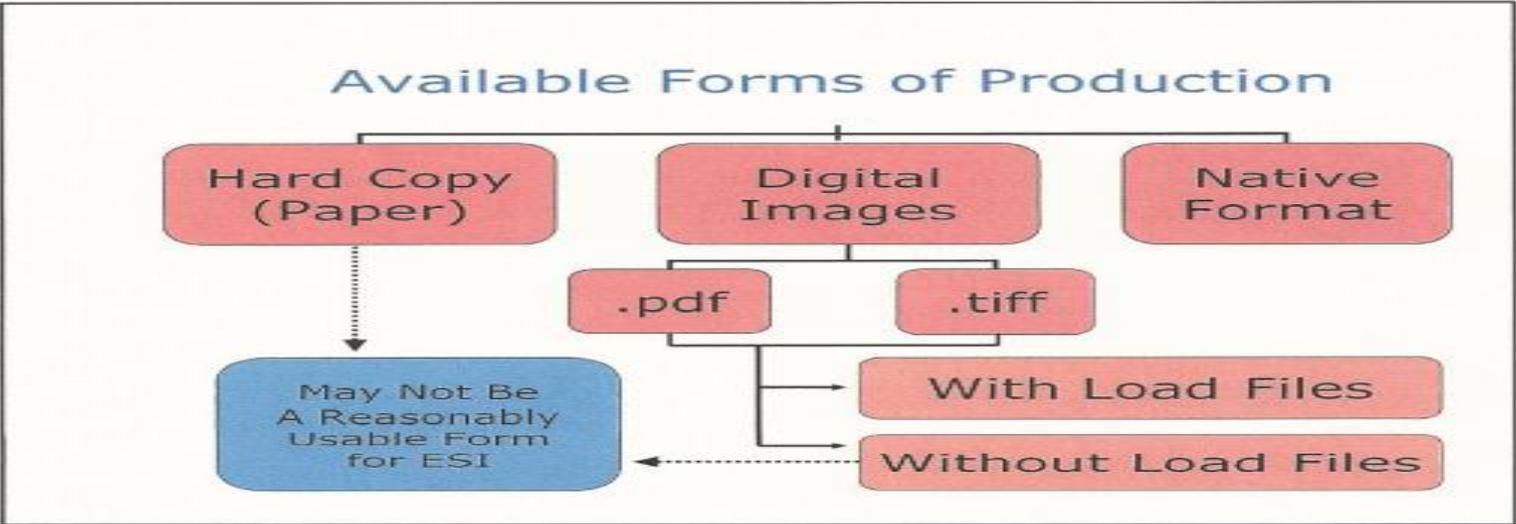
# SEARCH AND PRODUCTION

- Are search terms accurate? See *In re National Ass'n of Music Merchants, Musical Instruments and Equipment Antitrust Litig.*, 2011 WL 6372826 (S.D. Ca. Dec. 19, 2011).
- Limitation on scope of search and recognition that, under the circumstances, “ESI is neither the only nor the best and most economical discovery method for obtaining the information the government seeks,” *United States v. University of Nebraska*, No. 11-cv-3209 (D. Nebr. Aug. 25, 2014).
- “Without any showing that additional searches are likely to result in a higher rate of success, the Court will not order NMC to engage in further problem-solving.” AND NOTE that, “[a] attorney is not required to offer opposing counsel his or her own ideas about how to narrow a particular search.” *Lareau v. Northwestern Med. Ctr.*, 2019 WL 1379872 (D. Vt. Mar. 27, 2019).

# SEARCH AND PRODUCTION

- Federal rules do not require perfection and denying request to test sufficiency of adversary's search effort, *Freedman v. Weatherford Internat'l Ltd.*, No. 12-cv-2121 (S.D.N.Y. Sept. 12, 2014).
- Interpreting agreement between the parties, finding that documents not responsive to agreed-on search terms do not have to be produced, *BancPass, Inc. v. Highway Toll Admin., LLC*, 14 CV 1062-SS (W.D. Tex. July 26, 2016).
- Compelling meet-and-confer regarding search terms, *Pyle v. Selective Ins. Co. of America*, No. 16-cv-335 (W.D. Pa. Sept. 30, 2016).

# SEARCH AND PRODUCTION



**COURTESY OF MAURA R. GROSSMAN**

# SEARCH AND PRODUCTION

Rule 34(b): The request [\*\*\*] may specify the form or forms in which electronically stored information is to be produced [\*\*\*] [the responding party may lodge] an objection to the requested form for producing electronically stored information \*\*\* the [responding] party must state the form or forms it intends to use.

# SEARCH AND PRODUCTION

Rule 34(b)(2)(E):

- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
- (iii) A party need not produce the same electronically stored information in more than one form.

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

- *Hopson v. Mayor and City Council*, 232 F.R.D. 228 (D. Md. 2005).
- “Absent further Congressional action, the Rules Enabling Act does not authorize modification of state privilege law. Thus, the clawback provision in Fed. R. Civ. P. 26(b)(5)(B) and 16(b)(6), while respected in federal courts, might be deemed a common law waiver of privilege in state courts, not only for the document in question, but a broader waiver of attorney client privilege as to the subject matter involved.” *Henry v. Quicken Loans, Inc.*, 2008 WL 474127 (E.D. Mich. Feb. 15, 2008).

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

Federal Rule of Evidence 502:

- Reduce cost of privilege review.
- Provide clear guidance on waiver of privilege.
- Avoid broad waiver through inadvertent disclosure of privileged communications.
- Give effect to agreements between parties and court orders regarding privilege.

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

The Rule 502 hierarchy:

- No Agreement: Rule 502(b)
- Agreement: Rule 502 (e)
- Order: Rule 502 (d)

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

- Can “the bell be unrung?” What might be the practical consequences of “returning” an inadvertently produced document?
- *Stinson v. City of New York*, 10 Civ. 4228 (S.D.N.Y. Oct. 10, 2014):  
“Plaintiffs are directed to return all copies \*\*\*. Plaintiffs may, however, rely on any material learned prior to \*\*\* [notification of the inadvertent disclosure] in challenging Defendants’ assertion of privilege.”

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

State equivalents to Rule 502:

Arizona

Colorado

Delaware

Illinois

Indiana

Iowa

Kansas

Vermont

Virginia

Washington

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

- *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases*, 8 *Sedona Conf. J.* 141 (2007) (post-public comment version), <https://thesedonaconference.org/download-pub/478>

# PROTECTING PRIVILEGE AND CONFIDENTIAL INFORMATION

- Presumption of public access to court records and proceedings
  - Common law
  - First Amendment
- 21st century privacy concerns given the Internet
  - CM/ECF and PACER
  - *Fed. R. Civ. P. 5.2*
- Rule 26(c) protective orders available upon showing of “good cause.”
- Sealing orders available upon showing of “compelling need.”

# QUESTIONS? THANK YOU!

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