# GEORGE MASON AMERICAN INN OF COURT

# E-DISCOVERY: PRACTICE AND POINTERS

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**"E-discovery is still discovery. Unquestionably, at times, ESI discovery can be complex. But complex issues were not at play here. The same basic discovery principles that worked for the Flintstones still work for the Jetsons."**

**– Illinois District Judge Iain D. Johnston, *DR Distribs. v. 21 Century Smoking, No. 12 CV 50324 (N.D. Ill. Jan. 19, 2021)***

E-discovery is an unavoidable reality in the twenty-first century legal environment, and it presents one area where lawyers can provide immense value to their clients.[1] By professionally collecting, reviewing, and producing your client's electronic documents, you can ease the burden of subpoena compliance on your client by assuming the responsibility of assessing responsiveness and privilege, while also helping the client to avoid the kind of self-inflicted mistakes that can cause them headaches.

**THE OBLIGATION TO PRESERVE: WHEN DOES IT ATTACH?**

- The obligation to preserve documents attaches when a party is "on notice that specific and identifiable litigation [is] likely and that the evidence would be relevant." Virginia Code Ann. § 8.01-379.2:1. "[T]he duty to preserve arises when a party 'reasonably should know that the evidence may be relevant to anticipated litigation.'" *In re David*, 615 B.R. 785, 793 (Bankr. E.D.V.A. 2020).
- When determining whether a party to a case should have reasonably anticipated litigation, courts "must consider the totality of the circumstances, including the extent to which the party was on notice that specific and identifiable litigation was likely and that the evidence would be relevant … In the instant case, Summit destroyed the documents long before thoughts of litigation against Byron David arose. Its long-standing blanket policy of destroying guarantees was not in effect for the sole purpose of spoliating evidence for litigation … Moreover, 'spoliation is not a substantive claim or defense but a 'rule of evidence,' and thus is 'administered at the discretion of the trial court' … The Court finds that Summit's duty to preserve the guarantees did not arise at the time of the signing of the guarantees or their destruction as the bank was not on notice that specific and identifiable litigation was likely even though the evidence would be relevant." *In re David*, 615 B.R. 785, 793-794 (Bankr. E.D.V.A. 2020).

[1] Portions of today's program were researched and written by Andrew Pardue, Esq. of Holtzman Vogel.

- The applicable standard is less clear with regard to third parties. Virginia law makes no mention of any standard for third-party spoliation, but only refers to "a party or potential litigant." Virginia Code Ann. § 8.01-379.2:1. There is no case law in Virginia or from the Fourth Circuit addressing preservation of evidence requirements for third parties. However, other courts are mixed on whether the preservation duty extends to third parties:

| **Rulings that extend preservation duties to third parties:** | **Rulings that <u>do not</u> extend preservation duties to third parties:** |
|---|---|
| ○ The court explained that non-parties "do not have a duty to preserve evidence for use by others." *Quincy Mutual Insurance Co. v. W.C. Wood Co.*, 2007 WL 1829378 (Mass. Dist. Ct. June 6, 2007) | ○ "In this case, there was no statute, contract, or discovery request that would impose a clearly defined duty on [a third party] to preserve any potentially relevant evidence. . . . [Plaintiff] would like us to announce that [the third party] owed a duty to it based on the foreseeability of litigation. Considering the traditional approach to defining legal duty, we decline to do so . . . There are innumerable circumstances in which a nonparty to litigation may have evidence relevant to a case and may know of its relevance. But that knowledge, by itself, should not give rise to a duty to safeguard the evidence in anticipation of litigation." *Shamrock-Shamrock, Inc. v. Remark*, 271 So. 3d 1200, 1205–06 (Fla. App. 2019) |
| ○ Third party's spoliation "imputed" to party absent any subpoena at all where spoliator was "not a disinterested non-party" *Woods v. Scissons*, 2019 WL 3816727, at *4 (D. Ariz. Aug. 14, 2019) | |
| ○ "Third-party subpoenas" mean that "third parties will be on notice of any obligation to preserve evidence" *Garcia v. Target Corp.*, 276 F. Supp. 3d 921, 925 (D. Minn. 2016) | ○ Court rejected a "sweeping and novel theory of spoliation" that a subpoena served in different litigation could create a preservation duty to plaintiffs in other litigation. *Accord In re Delta/AirTran Baggage Fee Antitrust Litigation*, 770 F. Supp.2d 1299, 1307-08 (N.D. Ga. 2011) |
| ○ The court ordered "that all non-parties upon whom subpoenas have been served in this action are to preserve all documents and other materials responsive to such subpoenas." *Novak v. Kasaks*, 1996 WL 467534, at *2 (S.D.N.Y. Aug. 16, 1996) | ○ "[T]he entities that have the information . . . are not parties and thus have no duty to preserve absent a court order" *Bright* |
| ○ The third–party target "acknowledged a duty to preserve | |

| | |
|---|---|
| documents . . . based on plaintiffs' subpoena." In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060 (N.D. Cal. 2006) | *Solutions for Dyslexia, Inc. v. Doe 1*, 12015 WL 5159125, at *3 (N.D. Cal. Sept. 2, 2015)<br><br>o A "non-party . . . does not have a duty to preserve information absent a court order." *Swetic Chiropractic & Rehabilitation Center, Inc. v. Foot Levelers, Inc.*, 2016 WL 1657922, at *3 (S.D. Ohio April 27, 2016)<br><br>o [I]t is not [the subpoenaed persons'] lawsuit and they should not have to pay for the costs associated with someone else's dispute. Not only is it fundamentally unfair for non-parties to bear the significant litigation costs of others, but also if this Court were to allow litigating parties . . . to impose such a burden on non-parties, then the likelihood of cooperation by non-parties in the future would be placed in jeopardy. *Guy Chemical Co. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007). |

**WHAT HAPPENS AFTER THE OBLIGATION TO PRESERVE IS ESTABLISHED?**

- Once the obligation is triggered, the attorney should generally send a document preservation notice or litigation hold letter to their client. Neither statute nor case law specify when the attorney should circulate a document preservation notice. Secondary sources recommend such notices be sent to potential litigants as soon as possible.
- Virginia case law also does not address what length of time should be considered unreasonable. Secondary sources suggest that there is not a specific number of days but rather, to be effective, document preservation notices need to be sent as soon as possible.
- The only consequence of issuing an untimely notice (or failing to issue a notice) appears to be that the party may not be placed on notice of potential litigation. There is no case law on point.

## THE LITIGATION HOLD LETTER

- Most litigation hold notices share common features.
  - The notice should describe in plain English the nature of the issues in the lawsuit and the relevant time period as derived from all pertinent pleadings so that everyone in the organization understands their obligation.
  - The notice must be comprehensible and clearly define the scope of the preservation obligation, including criteria for identifying potentially relevant ESI. It should clearly instruct employees not to delete, modify, or alter any ESI subject to the litigation hold.
  - Likely witnesses and key persons with knowledge of relevant events should be identified in the notice.
  - The notice should identify the specific types of ESI that must be preserved, including email and attachments, word processing documents, spreadsheets, PowerPoint presentations, images, databases, instant messages, etc. Because the communication will be sent to many different individuals within an organization, it must state in clear and direct language what evidence must be preserved and how the evidence is to be preserved.
  - The notice should identify the sources and storage media of relevant evidence that must be preserved. The list should be comprehensive and include all the specific locations, *e.g.*, personal workstation computers, backup media, databases, mobile devices, home computers, and data held by third parties.
  - The notice should address whether metadata, deleted, or fragmented data must be preserved.
  - Information should be provided on whether the ESI should be preserved in place or transmitted to a central repository using forensically sound methods.
  - Specific instructions concerning the ongoing operations that may alter or destroy ESI should be provided in the notice. The IT personnel should be asked whether any one-time backup of the network or individual servers has been performed prior to upgrading a computer system. These backups may not be documented in the record-retention policy and may include relevant ESI.
  - "Because metadata is fragile and subject to alteration, special care should be taken to advise employees on how to handle ESI without affecting its metadata. In particular, key ESI custodians should be notified of the precautionary measures to preserve metadata. Specific examples should be

provided as illustrations." 17 Bender's Forms of Discovery Interrogatories § 15.63 (2023); 17 Bender's Forms of Discovery Interrogatories § 15.63 (2023)

- Document preservation notices typically identify the specific types of documents to be preserved and the nature of the underlying litigation. *See In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 512 (S.D. W.Va. 2014) (explaining "Ethicon issued a document preservation notice that identified the specific litigation and listed categories of documents . . . that needed to be segregated and preserved")

**RESPONDING TO SUBPOENAS: WHAT TO AVOID**

- General objections that fail to tie each objection to a specific request in the subpoena have been deemed insufficient by most courts.
  - *Carter v. Pickering*, 191 Va. 801, 62 S.E.2d 856 (1951): A general objection is insufficient to establish error if the evidence is received; an objection is too general which comprises the mere statement, "I object to that."
  - *Jackson v. Chesapeake & O. Ry. Co.*, 179 Va. 642, 20 S.E.2d 489 (1942): Burden is on counsel to specify the question for the court to decide, so that the court may make a proper ruling and the opponent revise his or her proof as necessary to satisfy the ruling.
  - *Shifflett v. Commonwealth*, 212 Va. 741, 187 S.E.2d 174 (1972): Where objection is made at trial on one ground, properly overruled, an objection on appeal on some other ground will not be considered.
- Boilerplate objections that copy and paste generic language have also been deemed insufficient.
  - *Parker v. Commonwealth*, 14 Va. App. 592, 421 S.E.2d 450 (1992): merely stating an objection to the "irregularity of the jury" fails to indicate what action the defendant wants the trial court to take and prevents consideration of the error as a basis for reversal.
  - *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 74 S.E.2d 165 (1953): When a motion is made to exclude a mass of evidence, some of which is proper and some not, the objection must specify the improper evidence.
- If a lawyer is not careful in drafting their objections, they can even waive a privilege that is not clearly and specifically claimed.
  - *Perry v. Commonwealth*, 58 Va. App. 655, 712 S.E.2d 765 (2011): A timely objection in a criminal case to the hearsay nature of testimony concerning an excited utterance by a witness who does not testify is not sufficient to raise an objection to the violation of confrontation clause rights of the defendant by admitting this evidence, as these are separate objections. Where this objection is

made for the first time in a motion to strike the evidence are not the proper vehicle to raise challenges, to the admission of evidence already admitted.

- *Saunders v. Commonwealth*, 211 Va. 399, 177 S.E.2d 637 (1970): A party may have a right to object but lose that right by failure to make timely objections. Or the party may lose the right to object if he or she has previously opened the door by introducing evidence of a similarly improper character, since, as a general rule, a party may not challenge evidence when that party has already introduced evidence of the same nature.
- *Spence v. Repass*, 94 Va. 716, 27 S.E 583 (1897): Objections to the competency of a witness are waived unless specifically stated in a timely fashion in the trial court.
- *King v. Commonwealth*, 264 Va. 576, 570 S.E.2d 863 (2002): Where a defendant in a criminal case notes objection to a ruling by the trial court, failure to note objection to an instruction implementing this ruling is not a waiver of the objection.

**OBJECTIONS: WHEN AND HOW TO RAISE**

- The granting or denying of a request under Rule 34 is a matter within the trial court's discretion and will be reversed only if the action taken was improvident and affected substantial rights. *Guilford National Bank of Greensboro v. Southern Ry. Co.*, 297 F.2d at 926
    - **Timing**: a specified date of production that does not give the party sufficient time to review and produce documents is a legitimate ground for objection.
        - *First Charter v. Middle Atlantic*, 218 Va. 304, 308-09, 237 S.E.2d 145, 147-148 (1977): A trial court's decision to admit evidence that is not timely disclosed, rather than to impose the sanction of excluding it, will not be reversed unless the court's action amounts to an abuse of discretion.
        - *Rappold v. Indiana Lumbermens Mut. Ins. Co.*, 431 S.E.2d 302, (Va. 1993): No abuse of discretion by the trial court found when the court admitted evidence that was requested 15 days before trial.
        - *Tanger v. de Tanger*, 1997 WL 374812, Ct. of App. Va. 1997: Even if a party thinks the opposing party responded to the discovery requests insufficiently, if the party has the opportunity to conduct and access a substantial amount of discovery generated by prior proceedings in the matter, relief should not be granted.
        - *Walsh v. Bennett*, 530 S.E.2d 904, 907 (Va. 2000): Trial court abused its discretion in depriving a party of time, cutting a deadline 2 days short, in which to comply with the court's order to "adequately depose" a witness.

- *Woodbury v. Courtney*, 391 S.E.2d 293, 295 (Va. 1990): Five months is more than sufficient time for a litigant to identify expert witnesses.
- *Mikhaylov v. Sales*, 784 S.E.2d 286, 292 (Va. 2016): Disclosure of "Primary experts on or before 90 days before trial" and rebuttal experts "no later than 45 days before trial," as well as all information discoverable is reasonable.

- **Overbreadth**: parties may also properly object to requests that would require the production of an unreasonable number of documents, or the review of documents from an unreasonable number of custodians.
  - *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 260 (1999): "every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant."
  - *Ragland v. Commonwealth*, 16 Va. App. 913, 918 (1993): "Evidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in the case."
  - *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.*: 6 factors when determining proportionality the court should weigh: 1) the importance of the issues at stake in the action; 2) the amount in controversy; 3) the parties' relative access to relevant information; 4) the parties' resources; 5) the importance of the discovery in resolving the issues; and 6) whether the burden or expense of the proposed discovery outweighs its likely benefit.
  - *Brink's Company v. Chubb European Group Limited*, 2021 WL 5083335, page 13: 10,695 commercial crime policy files needed to be searched, a task requiring an estimated 1782.5 to 32,085 hours, at a cost ranging from $225,000 to $2 million. Attorney review of the files is a factor, and the files could not be disclosed without attorney review due to protection of the clients. Court found that this was too excessive.

## TECHNICAL ASPECTS OF E-DISCOVERY

E-Discovery combines legal and technical disciplines to facilitate the identification, preservation, collection, review, production(exchange) evidence/information in electronic format.

It is important to clarify nomenclature in order to find a common language between legal and tech. This seems simple, but it's important that everyone is having the same conversation. Some common terms:

- ESI - Electronically Stored Information
- Family vs. Conversation
- Custodian vs. Entity - What is a custodian?
- Client Evidence vs. Client Files
- Production vs. data dump

## BASIC PARAMETERS FOR COLLECTION

- Parameters used for collections
  - Custodian
  - Date Range
  - Keywords
  - Apps
  - Shared Document Locations
  - Proprietary Databases
- Parameters used for searches - saved searches and search term reports in all of their iterations
- Parameters used to determine Responsiveness
  - Review Stages
    - keep documents organized
    - prevent duplicate work
    - provide parameters for rolling productions
    - can be configured to move documents through the workflow automatically to prevent lag time
- Parameters used to identify production documents
  - Responsiveness
  - Entirety of documents provided
  - Specific keyword, domain, search terms hits

## IDENTIFICATION & PRESERVATION

- Onboarding/Strategy Call
  - Data sources based on subpoena – what are we required to collect? Are there legal holds already in place?
  - Identification Strategy - narrow with date ranges, keywords, custodians before collection? – Does the subpoena allow for this or must we collect and then use terms to narrow down to the scope and cull what we don't need? This can start with higher hosting charges, but can remove the need to go back and collect again.
  - Identify challenges and details that could impact your approach
    - proprietary databases
    - former employees
    - data retention policies
    - legal holds
    - changes in technology - migration of data
  - Preliminary Data Mapping - types of files and where they are stored, who has access (proprietary databases?)
- Custodian Interviews
  - Where are they storing their data? What do they have access to? What do they use on a daily basis that is relevant to this matter?
    - Mapped Drives
    - External Hard Drives

        - OneDrive
        - Local Machine
        - Personal Cell Phone
        - Company Owned Cell Phone
    - What other apps/forms of communication were used?
        - Teams, SLACK, etc
    - Social Media
        - Facebook, Twitter, LinkedIn, Instagram, TikTok, YouTube
- Systems Information - Scoping call with "IT" – getting access to the identified data
    - Email Platform - Admin Access
    - Laptops
    - Desktops
    - Servers - who had access - ownership
    - Types of Phones – BYOD? – Bring Your Own Device
        - Are employees allowed to use their personal devices for professional purposes?
        - Is this monitored/governed/secured by your organization?
        - Are there BYOD agreements in place allowing you to access their personal phones?
- Collections Strategy – based on the answers to the questions above and the access capabilities
    - Prioritize by high profile custodians, locations of data, access to data, deadlines for specific data or custodians
    - Collect easiest data quickly, then move on to more difficult and complicated collections?

**COLLECTIONS**

Once the universe of potentially responsive data has been identified, the collection strategy agreed upon, and necessary access granted, forensically sound, defensible collections can begin.

- Options
    - Collection from within the platform
        - Exchange Security and Compliance Tool
        - Google TakeOut
        - Google Vault
        - Other tools used by the client to monitor and maintain resources
        - As a last resort – self-collection by the custodian using 7zip – but self-collection is NOT RECOMMENDED!
    - Professional Forensics Collection
        - Acquire in-house forensics tool and certified forensic examiner
        - Outsource to forensics company
        - Forensics services provided by your eDiscovery platform provider
- Every aspect of collection must be documented to preserve a paper trail.
    - Custodian
    - Time/Date
    - Media Collected

- Make/Model/SN
- Path
- Tool Used
- Output Format/Location
- CoC if transferred – this can be separate for external media being transferred or on the collections form for storage
- Signature of Collections personnel

**SEARCH**

Working with your client, you will need to identify key custodians, keywords, date ranges, domains, and email addresses in order to prioritize searches and narrow the scope and number of documents that need to be reviewed. Create the database and choose the Time Zone that the documents should be processed in. E-discovery platforms will normalize all documents into the same Time Zone for consistency across metadata fields.

Considerations: combining these criteria can narrow the scope considerably, but you don't want to exclude important data by being too specific up front. It is always best to start broad and then continue to narrow to find what you need.

1. Know what metadata is being automatically searched and what fields need to be specified – the fields in blue are automatically searched using keywords, the other fields need to be specified in search syntax to be included:
    i. Document Text
    ii. Subject Line
    iii. Custodian
    iv. To/From/CC/BCC
    v. Domains
    vi. Filename
2. Keywords - have a second set of eyes review and edit based on goals
3. Date Ranges
4. Search Syntax - under-inclusive/over inclusive –
    a. know your language/syntax – different platforms use different indexes and operators (see NOTE below)
        i. OR – documents that contain either word, in any order, in any part of the document – Pear OR Apple – all documents with either of these words
        ii. AND (&) – documents that contain both of the criteria on either side of the AND
            1. Pear AND Apple – only documents that contain *both* words anywhere in the document
        iii. NOT (%) – contains the first set of criteria, but not the second set
            1. Pear NOT Apple – all documents that contain the word pear but not the word apple

5. Root Extenders vs. Wild Cards – know your syntax – in this example, Westlaw and Lexis-style, (**NOTE**: some platforms use these operators differently where * is the root expander and ! is the single character wildcard)
    a. Truncation search or root expander; can be used at the beginning of a term, end of a term, or both.
        i. contract! — Documents that contain any term starting with contract - contract, contracts, contractual, contracting, or contracted
        ii. !contract — Documents that contain any term ending with contract - subcontract, noncontractual
        iii. !kill! – Documents that contain any letters before and after the word – skills, skillet, painkiller
    b. Wildcard search for single character
        i. contract* — Searches for words that have one, but only one, character after contract, such as contracts, but *NOT* contracted, contractual, or contract
6. Use of parenthesis and proximity searches –
    a. Parenthesis provide priority and help to organize your terms - (trust OR breach) AND (obligation OR contract) - documents that have either of the words in BOTH sets of parenthesis
    b. Proximity searches help to narrow down the results by asking tha the words be a certain number of words apart. (Trust / 2 breach) AND (obligation /2 contract) will search for each set of words in proximity to each other first and then result in documents that have both sets of terms within the documents. If the document contains the word trust within 2 words of breach, but not obligation within 2 words of contract, the document will not be in your results
7. Quotes around Acronyms and short words - ADA – will result in everything with the ada in the word – adapt, gradation, readable, radar, etc – "ADA" will only result in these letters when they appear independently.
8. Not using common words as keywords - Ned Stark as a keyword or domain in documents collected from Ned Stark – unique keywords will help to narrow your results.
9. Facebook, Twitter, LinkedIn, etc as keywords when these are used in signatures – these will result in false positives.

**REVIEW THE COLLECTION**

Managed Review –
Considerations – On-shore review is usually more expensive. Off-shore review is cheaper per document, but you should consider whether there is a risk in sensitive documents being reviewed by attorneys outside of the US.

- Linear Review - this can still be cyclical if new documents are added, keywords are updated, new custodians are identified, etc
    - 1L Review – first pass of documents identified – can be Responsiveness and/or Privilege
        - Training of reviewers

        - QC of documents – a random quality control set should be reviewed by experts each day after large sets of data have been reviewed to ensure decisions are correct
            - If large turnover rate (decisions by reviewers are incorrect and identified in QC) – further trainings and live Q&A sessions with attorneys will be necessary
    - 2L Review – random sampling of documents to ensure decisions are in line with instructions, or documents tagged Responsive can be automatically filtered into this stage in real time for further review. You can forgo this step if careful QC has been conducted throughout the 1L stage
    - Privilege Review - preliminary tagging can be completed during the 1L stage if preferred. Documents can be filtered into a separate privilege review stage in real time as they are identified for final review, redactions, or domain, email address and unique keyword searches can be used to identify privileged documents. Use of the AMLAW list in the domain filter can be applied to speed up the search as well

**PRODUCTION TO OPPOSING COUNSEL**

Once all documents have been collected from the client's system and reviewed by attorneys for responsiveness and any applicable privileges, you are finally prepared to produce the narrowed universe of responsive documents to opposing counsel.

Considerations - Deadlines - Rolling production deadlines and expectations, or one comprehensive production

- ESI Protocols - agreed upon, DOJ, SEC, etc
    - Format of production images (B&W TIFF, PDFs, B&W TIFF & Color JPEGs)
    - Metadata fields required
    - Treatment of document types –
        - natives for Excels, unless redacted
        - natives for excessively large files, unless redacted
        - natives for audio, video, CAD, database files, etc
    - Treatment of Confidential documents
    - Other protocols required (submission index, naming conventions, custom manual metadata fields)
    - Delivery methods accepted – SFTP, External Drive, email attachment (not recommended)
- Parameters to determine production set
    - Responsive families – family complete productions are always recommended to avoid issues and questions about "missing" attachments referenced in emails
    - Privileged documents
        - Withhold full families
        - Produce and withhold and slipsheet privileged attachments, etc.
        - Produced with redactions
- Workflow
    1. Use agreed upon parameters to identify Production Set

2. Provide production specifications and conflicts
    a. Specifications
        i. Number of documents with families
        ii. Confidentiality - Confidential, Attorneys' Eyes Only, FOIA, etc
        iii. Bates prefix or beginning Bates if rolling productions
        iv. Order of the documents – usually keeping the custodian documents together and producing in family date order, but a specific ordering of documents can be achieved by creating a reference ID and producing in this order
        v. Metadata fields included
        vi. Redacted Documents
        vii. Treatment of any privileged documents in families
        viii. Any extra documents that need to be provided as natives, unless redacted
        ix. Image format
    b. Conflicts – examples may include
        i. Inconsistent tagging – Responsive and Non-Responsive or Need Further Review on same document
        ii. Family Incomplete tagging – Responsiveness – usually produce full families
        iii. Family Incomplete tagging – Privilege – use determination of treatment of privilege documents listed above
        iv. Tagged for Redaction, but no redaction on documents
3. Once conflicts are resolved, provide pre-production summary for the client's approval. These will include all specifications above and document any updates or changes that have been made
4. Once the client has approved, run production.
    a. Complete quality assurance review
        i. Compare dat file with production natives, text files
        ii. Compare opt file with production images
        iii. Confirm redactions on images AND in text files
        iv. Confirm Confidentiality stamping
        v. Confirm withhold and slipsheeted documents are withheld and verbiage is correct on slipsheets, text files should only contain the slipsheet verbiage.
5. Provide production summary that includes delivery specifications
    a. Number of documents
    b. Volume Number
    c. Bates Range
    d. Size of Zip File
    e. Encryption information
6. Encrypt and deliver via secure file transfer

## SPOLIATION: WHEN THE CLIENT FAILS TO PROPERLY PRESERVE

- "If spoliation has occurred, then a court may impose a variety of sanctions, ranging from dismissal or judgment by default, preclusion of evidence, imposition of an adverse inference, or assessment of attorney's fees and costs." *Goodman v. Praxair Services, Inc.*, 632 F. Supp. 2d 494, 505 (D. Md. 2009) (citing *In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 191 (S.D.N.Y. 2007)).
- "A party may be sanctioned for spoliation where the party had a duty to preserve material evidence and willfully engaged in conduct that resulted in the loss or destruction of such evidence at a time when the party knew—or should have known—that the destroyed evidence was or could be relevant in litigation." *Quetel Corp. v. Hisham Abbas*, 819 Fed. Appx. 154, 156 (4th Cir. 2020).

## CLAIMING PRIVILEGES

- In order to properly claim a privilege over a document or parts of documents that a party declines to produce, the party must generally produce a privilege log that explains the specific privilege claim and the basis for that claim for *each* document in the production.
- Failure to produce a privilege log can result in a waiver of the privilege. *See Creasy v. Medical Assocs.*, 98 Va. Cir. 332, 332 (Va. Cir. Ct. 2018) (explaining, "MRH failed to properly disclose the documents it claims as privileged and has failed to meet the standards required in its privilege log. For these and other reasons set forth on the record on April 16, 2018, as well as the memorandums filed herein by Plaintiff, I find that the Defendant, MRH has waived any privilege it may have...")
- Courts may also award attorneys' fees for related motions to compel. *See Creasy v. Medical Assocs.*, 98 Va. Cir. 332, 332 (Va. Cir. Ct. 2018) (explaining, "I will entertain a motion for attorney fees and expenses by Plaintiff.")

What constitutes a sufficient privilege log?

- Virginia Supreme Court Rule 4:1(b)(6)
    - **Claims of Privilege or Protection of Trial Preparation Materials.**
    - (i) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party must make the claim expressly and must describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.
- *Hawkins v. Norfolk S. Ry. Co.*, 71 Va. Cir. 285, 287 (Va. Cir. Ct. 2006).
    - "Initially, Liberty [Insurance] indicated that it was claiming privilege of adjuster's log, but it did not disclose why the log was considered work product, which is not enough to satisfy the disclosure requirements of Rule 4:1(b)(6). However, in its

memorandum submitted to the Court, Liberty gave clear notice to the Court and Defendant why the adjuster's log was being claimed as work product: it contained investigative results and comments, conversations, claim of property damage and personal injury, and notations of Liberty's strategy of defending against claims and asserting Plaintiff's claim against Defendant."

- The Court found this second notice was sufficient for the privilege log.
    - *See also Jeong v. George Mason Univ.*, Va. App. LEXIS 797, 17 (Va. Ct. App. 2023).

What are the punishments for improper privilege assertions?

- *Chevalier-Seawell v. Mangum*, 90 Va. Cir. 420, 427 (Va. Cir. Ct. 2015).
    - Party asked for sanctions because the defendant falsely asserted privilege and the court determined the material was not privileged. Court reserved the right to rule on the motion for sanctions.
    - "In summary, the Court grants Plaintiff's motion to compel and orders that the documents enumerated above be produced to Plaintiff within two weeks. The Court orders that the remaining documents listed on the Privilege Log be produced to the Court for an *in camera* review within two weeks. The Court reserves ruling on Plaintiff's Motion for Sanctions."
- Va. Code § 8.01-271.1 provides that:
    - "Every pleading, written motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name . . . .
    - The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
- "The statute further provides that if this rule is violated, the court "shall impose" an appropriate sanction upon the attorney, a represented party, "or both," and that such sanctions may include reasonable attorney's fees. Code § 8.01-271.1. *N. Va. Real Estate, Inc. v. Martins*, 283 Va. 86, 105 (Va. 2012).

**MISCELLANEA AND RECENT DEVELOPMENTS IN E-DISCOVERY**

- Settlements with the CFTC, DOJ and FTC during COVID – traders have been using other forms of communications
    - Look at the duty to preserve starting before the thought of litigation has occurred
    - DOJ Whatsapp settlement

- Other interesting topics....
  - The duty to preserve documents following receipt of a litigation hold notice does not include a duty to preserve backup tapes. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.,* those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the ligation hold." Thompson v. United States HUD, 219 F.R.D. 93, 100
  - Recent major court decisions regarding ESI from across the country, available at https://www.reuters.com/legal/legalindustry/e-discovery-trends-2022-2022-12-16/

## BIOGRAPHIES OF PANEL MEMBERS

### Jonathan P. Lienhard, Holtzman Vogel Baran Torchinsky Josefiak PLLC

Jonathan Lienhard is a partner with Holtzman Vogel and focuses his practice in the areas of commercial litigation, civil litigation, and white-collar criminal defense.
Jonathan began his career as a Navy JAG Corps prosecutor in Norfolk, Virginia, and served as a Special Assistant U.S. Attorney in the Eastern District of Virginia. For over 26 years he has tried cases before juries and judges in federal court, state court, and military courts-martial.
Jonathan has also argued cases before the Virginia Supreme Court, while briefing numerous cases before U.S. Circuit Courts of Appeal and filing briefs at the Supreme Court of the United States.

Jonathan holds an AV rating from Martindale-Hubbell, has been recognized as a "top lawyer" in Northern Virginia Magazine, and is admitted to practice in Virginia, Maryland, the District of Columbia, and before the Supreme Court of the United States. After being raised in northern Virginia, he attended the University of Notre Dame, where he earned his B.A. and his J.D. A former President of the Fauquier County Bar Association, Jonathan is Secretary of the Virginia State Bar Litigation Section Board of Governors. He also serves on the Executive Committee of American Legion, Post 72, in Warrenton, and is Master Member of the George Mason chapter of the American Inn of Court. Jonathan resides in Warrenton, Virginia, with his wife and three children.

### Paul Hayden, United States Department of Justice

Paul Hayden serves as a Trial Attorney in the Foreign Corrupt Practices Act (FCPA) Unit of the Fraud Section of the U.S. Department of Justice's Criminal Division. He joined the FCPA Unit in 2017. Paul focuses on the investigation and prosecution of corporations and individuals related to FCPA violations, money laundering, securities, tax evasion, and other complex economic crimes. He works with every major U.S. Attorneys' Office, federal law enforcement agency, as well as in coordination with other government agencies, including the U.S. Securities and Exchange Commission, FinCEN and the Office of Foreign Asset Control, and numerous foreign law enforcement and regulatory agencies.
During his time in the FCPA Unit, Paul has been involved in, among other cases, the corporate resolutions of Fresenius Medical Care and Stericycle. Paul has also prosecuted numerous individuals in connection with international schemes, including obtaining the trial conviction of a former Hong Kong official working for a Chinese Energy conglomerate involved in bribing the former President of the United Nations General Assembly and the Presidents of two African Nations and the trial conviction of the former Treasurer of Venezuela in a complex money laundering and bribery case.

Prior to joining the FCPA Unit, Paul worked in the U.S. Department of Justice's National Security Division and as an Associate Deputy General Counsel at the U.S. Department of Defense. Paul is an U.S. Army combat veteran. He graduated from George Mason University School of Law in 2007.

**John Cycon, Holtzman Vogel Baran Torchinsky Josefiak PLLC**

John Cycon is a Partner at Holtzman Vogel where he focuses his practice on governmental and internal investigations. John's experience spans five continents, and he has successfully resolved inquiries from various U.S. and foreign regulators. He also advises clients on remediation and enhancing compliance programs, as well as defending them in corresponding civil suits. Prior to joining the firm, John was an attorney at a large firm in New York City and the District of Columbia, where he represented companies, boards of directors, and individuals in various high stakes enforcement and litigation matters. During that time, his experience with complex financial transactions and multifaceted investigations helped clients successfully resolve cases with the Department of Justice, Securities and Exchange Commission, Financial Industry Regulatory Authority, and Commodity Futures Trading Commission, as well as civil lawsuits in state and federal courts. Before law school, John was a New York City Teaching Fellow, where he taught special education students in a high needs school.

John is admitted to the New York Bar, The Florida Bar, U.S. Court of Appeals, First and Second Circuit, Eastern and Southern Districts of New York

John attended the University of Iowa College of Law, and earned his J.D. and the University of Notre Dame, and earned his B.A.

**Celeste McDowell, Holtzman Vogel Baran Torchinsky Josefiak PLLC**

Celeste McDowell is Holtzman Vogel's Director of Litigation Support. She was brought into the firm in 2023 to strengthen the eDiscovery team, and to facilitate the development and implementation of eDiscovery policies, procedures, and best practices.

Celeste has over 15 years of eDiscovery experience guiding high-profile clients involved in complex, global and high-profile litigation, arbitration, and investigations through the entirety of the EDRM life cycle providing expert recommendations, forensically sound and defensible data collections, and complex data analysis.

Celeste holds a degree in Digital Forensics, is GIAC Certified as a Forensic Examiner (GCFE), and is fully certified in our DISCO platform, with certifications in Project Management, Data Management, Search and Review, and Review Management.