Restoring and Saving Electronic Data in Bankruptcy

John T. Dorsey, Moderator
Young Conaway Stargatt & Taylor, LLP; Wilmington, Del.

Alfred T. Giuliano
Giuliano, Miller & Company, LLC; West Berlin, N.J.

Hon. Paul W. Grimm
U.S. District Court (D. Md.); Baltimore

Brittany J. Nelson
Foley & Lardner LLP; Washington, D.C.

Catherine E. Youngman
Fox Rothschild LLP; Roseland, N.J.

United States District Court
Northern District of California

GUIDELINES FOR THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION

GENERAL GUIDELINES

Guideline 1.01 (Purpose)

Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using the text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay.

These Guidelines should guide the parties as they engage in electronic discovery. The purpose of these Guidelines is to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring that information subject to discovery is preserved and produced to allow for fair adjudication of the merits. At all times, the discovery of ESI should be handled by the parties consistently with Fed. R. Civ. P. 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding."

These Guidelines also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention.

Guideline 1.02 (Cooperation)

The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties' Fed. R. Civ. P. 26(f) conference.

Guideline 1.03 (Discovery Proportionality)

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) should be applied to the discovery plan and its elements, including the preservation, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider factors that include the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. To further the application of the proportionality standard, discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

ESI DISCOVERY GUIDELINES Guideline 2.01 (Preservation)

a) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.

b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

c) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve.

d) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.

e) The parties should discuss what ESI from sources that are not reasonably accessible will be preserved, but not searched, reviewed, or produced. As well as discussing ESI sources that are not reasonably accessible, the parties should consider identifying data from sources that (1) the parties believe could contain relevant information but (2) determine, under the proportionality factors, should not be preserved.

Guideline 2.02 (Rule 26(f) Meet and Confer)

At the required Rule 26(f) meet and confer conference, when a case involves electronic discovery, the topics that the parties should consider discussing include: 1) preservation; 2) systems that contain discoverable ESI; 3) search and production; 4) phasing of discovery; 5) protective orders; and 6) opportunities to reduce costs and increase efficiency. In order to be meaningful, the meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case. Some or all of the following details may be useful to discuss, especially in cases where the discovery of ESI is likely to be a significant cost or burden:

a) The sources, scope and type of ESI that has been and will be preserved --considering the needs of the case and other proportionality factors-- including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation;

b) Any difficulties related to preservation;

c) Search and production of ESI, such as any planned methods to identify discoverable ESI and filter out ESI that is not subject to discovery, or whether ESI stored in a database can be produced by querying the database and producing discoverable information in a report or an exportable electronic file;

d) The phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information and is postponed or avoided from sources less likely to contain relevant and discoverable information;

e) The potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) Order;

f) Opportunities to reduce costs and increase efficiency and speed, such as by conferring about the methods and technology used for searching ESI to help identify the relevant information and sampling methods to validate the search for relevant information, using agreements for truncated or limited privilege logs, or by sharing expenses like those related to litigation document repositories.

The Court encourages the parties to address any agreements or disagreements related to the above matters in the joint case management statement required by Civil Local Rule 16-9.

Guideline 2.03 (Cooperation and Informal Discovery Regarding ESI)

The Court strongly encourages an informal discussion about the discovery of ESI (rather than deposition) at the earliest reasonable stage of the discovery process. Counsel, or others knowledgeable about the parties' electronic systems, including how potentially relevant data is stored and retrieved, should be involved or made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.

Guideline 2.04 (Disputes Regarding ESI Issues)

Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the earliest possible opportunity, such as at the initial Case Management Conference. If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process, the Court may require additional meet and confer discussions, if appropriate.

Guideline 2.05 (E-Discovery Liaison(s))

In most cases, the meet and confer process will be aided by participation of e-discovery liaisons as defined in this Guideline. If a dispute arises that involves the technical aspects of e-discovery, each party shall designate an e-discovery liaison who will be knowledgeable about and responsible for discussing their respective ESI. An e-discovery liaison will be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in- house or outside counsel), an employee of the party, or a third party consultant, the e-discovery liaison should:

a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;

b) Be knowledgeable about the party's e-discovery efforts;

c) Be familiar with, or gain knowledge about, the party's electronic systems and capabilities in order to explain those systems and answer related questions; and

d) Be familiar with, or gain knowledge about, the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

EDUCATION GUIDELINES

Guideline 3.01 (Judicial Expectations of Counsel)

It is expected that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

a) The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;

b) The Advisory Committee Report on the 2015 Amendments to the Federal Rules of Civil Procedure, available at www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2014; and

c) These Guidelines and this Court's *Checklist for Rule 26(f) Meet and Confer Regarding ESI and Stipulated E-Discovery Order for Standard Litigation*.

United States District Court
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER REGARDING ELECTRONICALLY STORED INFORMATION

In cases where the discovery of electronically stored information ("ESI") is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

I. Preservation

- ❒ The ranges of creation or receipt dates for any ESI to be preserved.
- ❒ The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- ❒ The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, is not discoverable and should not be preserved.
- ❒ Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- ❒ The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., "HR head," "scientist," "marketing manager," etc.).
- ❒ The number of custodians for whom ESI will be preserved.
- ❒ The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- ❒ Any disputes related to scope or manner of preservation.

II. Liaison

- ❒ The identity of each party's e-discovery liaison.

III. Informal Discovery About Location and Types of Systems

- ❒ Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- ❒ Description of systems in which potentially discoverable information is stored.
- ❒ Location of systems in which potentially discoverable information is stored.
- ❒ How potentially discoverable information is stored.
- ❒ How discoverable information can be collected from systems and media in which it is stored.

IV. Proportionality and Costs

- ❒ The amount and nature of the claims being made by either party.
- ❒ The nature and scope of burdens associated with the proposed preservation and discovery of ESI.
- ❒ The likely benefit of the proposed discovery.
- ❒ Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.

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- ❒ Limits on the scope of preservation or other cost-saving measures.
- ❒ Whether there is relevant ESI that will not be preserved pursuant to Fed. R. Civ. P. 26(b)(1), requiring discovery to be proportionate to the needs of the case.

V. Search

- ❒ The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- ❒ The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

VI. Phasing

- ❒ Whether it is appropriate to conduct discovery of ESI in phases.
- ❒ Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- ❒ Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- ❒ Custodians (by name or role) most likely to have discoverable information and whose ESI
- ❒ will be included in the first phases of document discovery.
- ❒ Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- ❒ The time period during which discoverable information was most likely to have been created or received.

VII. Production

- ❒ The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- ❒ The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- ❒ The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- ❒ The production format(s) that ensure(s) that any inherent searchablility of ESI is not degraded when produced.

VIII. Privilege

- ❒ How any production of privileged or work product protected information will be handled.
- ❒ Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- ❒ Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

Rule 303 and Other Evidentiary Issues

The Honorable Paul W. Grimm
United States District Judge
United States District Court for the District of Maryland
Southern Division

Federal Rule of Evidence 502: "Attorney-Client Privilege and Work Product; Limitations on Waiver"

The Rule applies only to…

- The attorney-client privilege and work product doctrine
  - It has no effect on any other kind of evidentiary privilege
- Certain kinds of waiver: **Actual disclosure** of information
- Disclosures made in a "federal proceeding" or to a "federal agency"
  - Thus, the rule reaches disclosures made during civil and criminal proceedings in federal court, during administrative proceedings, and to federal administrative agencies during investigative proceedings.

Distinguishing Attorney-Client Privilege and Work Product Doctrine

Attorney-Client Privilege:	Work Product Doctrine:
Protects: Confidential communications between attorney and client made for the purpose of obtaining legal advice.	Protects: Attorney's work and mental processes regarding a client's case. ***Distinguish: Opinion v. Fact Work Product***
Waiver: Occurs when attorney or client acts in a way that is inconsistent with continued maintenance of the privilege. The privilege is held by the client, who may waive it expressly or impliedly.	Waiver: Occurs when the protected information is disclosed in a manner that is inconsistent with preserving its secrecy from the opposing party.
Inadvertent Disclosure: Although now tempered by Rule 502, waiver may occur through inadvertent disclosure.	Inadvertent Disclosure: Inadvertent disclosure does not appear to waive work product protection.

Advisory Committee's Note: Rule 502

Addresses the Rule's two major purposes:

1. Resolve confusion about the effect of certain communications protected by the attorney-client privilege or work product doctrine, specifically those involving **inadvertent disclosure** and **subject matter waiver**.
2. Respond to the complaint that the **costs** of protecting against waiver are prohibitive, as counsel fear that any disclosure (no matter how innocent or minimal) operates as a subject matter waiver of all protected information.

   For a pre-Rule 502 articulation of the need for Rules Committee action on this issue, see *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228 (D. Md. 2005).

Goal of Rule 502: Provide lawyers and clients with a roadmap for avoiding or limiting the effect of waiver of the privilege or work product protection.

Rule 502(a)

Rule 502(a) states:

"When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

1. The waiver is intentional;
2. The disclosed and undisclosed communications or information concern the same subject matter; and
3. They ought in fairness be considered together."

Interpreting Rule 502(a)

- How do you determine if a disclosure **constitutes a waiver** of the privilege or protection? Look to…
  - Rule 502 itself – *e.g.*, 502(b)
  - Common law of privilege/protection
- How do you determine if a disclosure **constitutes an <u>intentional</u> waiver**?
  - "Intentional waiver" not defined in Rule.
  - Committee Note equates "intentional waiver" with **"voluntary disclosure."**
  - Need <u>not</u> show subjective intent to waive the protection; rather, that production was **voluntary, purposeful, and advertent**.

Harmonizing Fed. R. Evid. 502 and Fed. R. Civ. P. 26(b)(3)(B)

- Civil Procedure Rule 26(b)(3) codifies the work product doctrine and distinguishes opinion work product, which courts must guard against, from fact work product, to which Rule 26(b)(3) does not pertain.
- Evidence Rule 502's discussion of the scope of work product waiver, however, does not distinguish between fact and opinion work product.
- **How have courts harmonized these two rules? –** By holding that Rule 502(a)(3)'s fairness provision generally (but not always) excludes opinion work product, on the rationale that Rule 26(b)(3)(B) establishes that including opinion work product is unfair. *See, e.g., Trs. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors*, 266 F.R.D. 1, 15–16 (D.D.C. 2010); *Peterson v. Bernardi*, 262 F.R.D. 424, 430 (D.N.J. 2009).

Harmonizing Fed. R. Evid. 502 and Fed. R. Civ. P. 26(b)(3)(B)

But: Rule 502(a)(3)'s fairness provision does not categorically preclude subject matter waiver of opinion work product. **Rather, although greater protections surround opinion work product, it can be waived in certain circumstances, as provided for in the common law. Thus, in some cases, the interests of fairness may warrant waiver.** *See, e.g., In re Martin Marietta Corp.*, 856 F.2d 619, 626 (4th Cir. 1988) (noting that "actual disclosure of pure mental impressions may be deemed waiver," and that "there may be indirect waiver [of opinion work product] in extreme circumstances").

Rule 502(b)

Rule 502(b) states:

"When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

1. The disclosure is inadvertent;
2. The holder of the privilege or protection took reasonable steps to prevent disclosure;
3. The holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

Rule 502(b)(1): Inadvertence

- Rule 502(b) does not define "inadvertent," and courts have disagreed over how to do so.
- Useful approach adopted by many courts: **Equate "inadvertence" under 502(b)(1) with "mistaken," "unintentional," or "unintended" production.** Then: Use the multi-factor tests found in pre-502 case law to measure reasonableness under 502(b)(2) and (b)(3).
- *See, e.g., Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009); *Amobi v. D.C. Dep't of Corr.*, 262 F.R.D. 45, 53 (D.D.C. 2009).

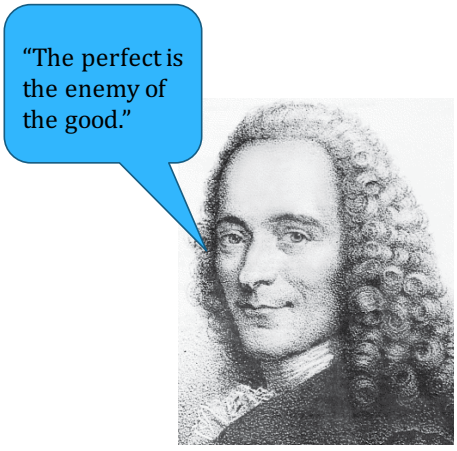
The Court should consider reasonableness if, and only if, it determines that production was inadvertent.

Rule 502(b)(2): Reasonable Pre-Production Steps to Avoid Disclosure

- Pre-502 case law articulates a **multi-factor test** for determining whether inadvertent production constitutes waiver: (1) the reasonableness of the precautions taken; (2) the time taken to rectify the erroneous production; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness.
- The Advisory Committee Note indicates that this test is not automatically incorporated into the Rule. Rather, courts should consider these ***and any other relevant factors***, including **Fed. R. Civ. P. 26(b)(2)(C)'s proportionality factors.**
  - **Federal Rule of Civil Procedure 26(b)(2)(C)** states that a court "must limit the frequency or extent of discovery otherwise allowed . . . if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

Rule 502(b)(2): Take-Away Points from the Advisory Committee Note

1. Courts should consider both the common law multi-factor test and other relevant factors. *See* FRCP 26(b)(2)(B).
2. Reviewing courts should be receptive to the use of computer-based analytical methods that facilitate pre-production review. **Reasonableness**—not perfection—is the benchmark. For an illustration of the challenge in drawing this line, see *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125 (S.D.W. Va. 2010).
3. Fairness concerns (a common law factor) should not trump a court's evaluation of the reasonableness of the producing party's pre-disclosure precautions.



Rule 502(b)(3): Prompt and Reasonable Post-Production Steps to Rectify Inadvertent Production

Two observations:

1. Post-production review is not required until a party has notice of possible inadvertent production. The crucial determination is not how long it took to discover the inadvertent production, but how quickly the producing party reacted once discovery occurred. *See, e.g.*, *Coburn Grp.*, 640 F. Supp. 2d.; *United States v. Sensient Colors, Inc.*, No. 07-1275 (JHR/JS), 2009 WL 2095474 (D.N.J. Sept. 9, 2009).
2. The rule references compliance with Fed. R. Civ. P. 26(b)(5)(B) as a means of reasonable post-production remediation, when applicable. The Advisory Committee Note to Civil Rule 26(b)(5)(B) provides helpful guidance on that rule…

Fed. R. Civ. P. 26(b)(5)(B): Agreements Addressing Privilege and Protection Issues

- Civil Rule 26(b)(5)(B) "works in tandem" with Civil Rule 26(f), which directs the parties to address privilege and protection issues in their discovery plan and allows them to ask the court to include any agreement they reach on those issues in an order made pursuant to Civil Rule 16(b). *See* Fed. R. Civ. P. 16(b)(3)(B)(iv).
- Unsurprisingly, Evidence Rule 502 contains its own provision that recognizes that parties may negotiate such agreements.
- **Thus, an agreement among the parties to circumvent waiver of privilege or protection may be reached pursuant to Civil Rule 26(b)(5)(B), via Civil Rules 16(b) and 26(f), or Evidence Rule 502(d) or (e).** *See infra.*

Rule 502(c)

Rule 502(c) states:

"When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred."

Takeaway: As the Advisory Committee Note explains, the proper solution in this situation is for the federal court to apply the law that is most protective of privilege and work product.

Rule 502(d)

Rule 502(d) states:

"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."

The Court may enter such an order on the motion of one or more parties, **or on its own motion**. *See* Fed. R. Evid. 502(d) Statement of Congressional Intent.

For cases in which courts correctly exercised the powers set out in Rule 502(d), see *Rajala v. McGuire Woods, LLP*, No. 08-2638-CM-DJW, 2010 WL 2949582 (D. Kan. July 22, 2010); *Whitaker Chalk Swindle & Sawyer, LLP v. Dart Oil & Gas Corp.*, No. 4:08-CV-684-Y, 2009 WL 464989 (N.D. Tex. Feb. 23, 2009).

Rule 502(e)

Rule 502(e) states:

"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."

Takeaway Points:

- **A court order is the only way for the parties to obtain protection against non-parties from a finding of waiver.**
- The rule works together with Fed. R. Civ. P. 16(b) and 26(f).
- Rules 502, 16(b) and 26(f) do not require parties to take "reasonable" precautions to avoid disclosure as part of a claw-back, quick peek, or other non-waiver agreement.

The Vulnerability of Rules 502(d) and (e)

Recent Case Law Developments:

- Although Rules 502(d) and (e) do not require that parties take "reasonable" precautions to avoid disclosure as part of a non-waiver agreement, **some courts have engrafted onto such agreements a "reasonableness" requirement not contemplated by the rule itself.** *See, e.g.*, *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009); *Mt. Hawley Ins.* Co., 271 F.R.D. 125; *Sensient Colors*, 2009 WL 2905474.
- Some courts have been reluctant to construe non-waiver agreements beyond their specific language, and have **construed any ambiguity in their language against the drafters**. *See, e.g.*, *Luna Gaming-San Diego, LLC v. Dorsey & Whitney, LLP*, No. 06cv2804 BTM (WMc), 2010 WL 275083 (S.D. Cal. Jan. 13, 2010).

In light of these cases, counsel drafting non-waiver agreements pursuant to Rule 502(e) should consider the following issues…

1. Asking the Court to approve a 502(e) agreement pursuant to 502(d) has two primary advantages: (1) court approval makes the non-waiver agreement **binding on 3rd parties**; (2) it provides the parties with an opportunity to inform the court of any unusual aspects of the non-waiver agreement.
2. If the parties intend to forgo pre-production review, they should **expressly state** any such agreement and consider explaining why they have chosen to forgo such review. Prudent parties will cite Fed. R. Civ. P. 26(b)(2)(C)'s cost-benefit proportionality factors in their explanation.

In light of these cases, counsel drafting non-waiver agreements pursuant to Rule 502(e) should consider the following issues…

Continued…

3. Rule 502(e) agreements apply to preclude waiver for <u>any</u> disclosure, whether inadvertent or purposeful. As a result, counsel should **explicitly state the scope of their non-waiver agreement** and insure that the scope of their agreement matches the procedures they intend to apply.
4. Rule 502 protects against waiver of both attorney-client privileged and work product protected information. Counsel should **explicitly state that their agreement applies to both categories of protected information.**
5. Counsel's agreements should **particularize what they are to do, and when they are to do so, upon discovering that privileged or protected information has been disclosed.**

Next Topic: Applicability of the Federal Rules of Evidence to Electronic/Digital Evidence

- While the Federal Rules of Evidence do not specifically address electronic evidence, the existing rules can easily be adapted to respond to new technologies.
- But, some areas are more difficult than others…
  - Rule 801(b) – What is a "declarant"?
  - Rule 803(6) – Business records exception
  - Rules 901–902 – Authentication and digital evidence
  - Rules 1001–1008 – What is an "original" digital writing?

Preliminary Matters & Conditional Relevance

- Rule 104(a) – Subject to 104(b), the **court** makes preliminary determinations regarding the **admissibility of evidence**, the qualification of witnesses, and the existence of privilege. The Rules of Evidence (except as to privileges) do not apply in making these determinations. *See also* Rule 1001(d)(1).
- 104(b) – **Conditional Relevance Rule:** When the relevance of evidence depends on the existence of an antecedent fact, the evidence is admitted subject to introduction of sufficient evidence to demonstrate that fact's existence.
  - Thus, **authentication** is a matter of conditional relevance.
  - The **jury**, not the judge, decides if the antecedent fact is contested.
  - This Rule is particularly important in the digital evidence context.

Admissibility of ESI: 5 Hurdles to Clear

#1: Relevance, Rule 401

#2: Authenticity, Rules 901–902

#3: Hearsay, Rules 801–807

#4: Original Writing, Rules 1001–1008

#5: Prejudice, Rule 403

Rule 401: Relevance

Ask: Does the digital evidence have "any tendency" to prove or disprove a fact that is "of consequence" to trial?

- **Focus is on:** claims/charges, defenses
- Rule 401 presents a low threshold!
- Rule 104(e) – weight & credibility

Rules 901–902: Authentication

Ask: If relevant, is the digital evidence authentic, as Rule 901(a) requires? Can the proponent show that the ESI is what it purports to be?

Examples of Authentication in 901(b):

- 901(b)(1) – witness with personal knowledge
- 901(b)(3) – expert witness, comparison
- 901(b)(9) – system or process capable of producing accurate/reliable results
- A few of the examples contained in Rule 901(b) are commonly used with ESI…

901(b)(4) – Distinctive Characteristics

- Rule 901(b)(4) frequently applies to ESI.
- *See, e.g.*, *United States v. Siddiqui*, 235 F.3d 1318 (11th Cir. 2000) (authentication of email by circumstantial evidence); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146 (C.D. Cal. 2002) (authentication of web postings).
- Note: Authenticating digital evidence with hash values and metadata.

Your digital fingerprint

901(b)(7) – Public Records; Custody

- Authentication by certificate of authenticity from public agency.
- Used to authenticate ESI in public records; paired with Rule 803(8)'s hearsay exception for public records.
- Courts hold: Must show custody; need not show reliability. *See, e.g., United States v. Meienberg*, 263 F.3d 1177 (10th Cir. 2001) (authentication of law enforcement agency's computer records; necessary to show custody by public body, not reliability).

901(b)(9) – System/Process Capable of Producing Reliable/Accurate Result

- Very commonly used for ESI. *See, e.g., United States v. Washington*, 498 F.3d 225 (4th Cir. 2007) (computer read-out of electronic forensic analysis of defendant's blood sample for drug and alcohol content admissible if authentic; read-out was not hearsay because there was no "declarant" under Rule 801(b)).
- Important for authenticating **computer simulations**. *See State v. Sipin*, 123 P.3d 862 (Wash. Ct. App. 2005) (simulation showing car crash); *Ruffin ex rel Sanders v. Bolder*, 890 N.E.2d 1174 (Ill. App. Ct. 2008) (simulation showing force exerted in childbirth).
- Note: This kind of authentication requires proof of reliability of scientific or technical principles underlying simulation, triggering Rules 702–703 and *Daubert*.

Rule 902 – Self-Authentication

- Some items of evidence require no extrinsic evidence of authenticity.
- 902(5) – **Official publications** of public authority, including website content, are self-authenticating. *See, e.g.*, *Williams v. Long*, 585 F. Supp. 2d 679 (D. Md. 2008) (printed copies of state agencies' websites).
  - Official publications frequently qualify as public records, and are therefore admissible under the hearsay exception in 803(8).

Rule 902 – Self-Authentication

- 902(7) – **Inscriptions, signs, tags, or labels** purporting to be affixed in the course of business and indicating ownership, control, or origin are self-authenticating. Possible use: Email from an organization or entity that uses a logo or symbol to indicate origin.
- 902(11) – **Certified copies of domestic business records** are self-authenticating. Courts often merge the 902(11) authentication analysis with the 803(6) business records analysis for digital records. *See, e.g.*, *Rambus v. Infineone Techs. AG*, 248 F. Supp. 2d 698 (E.D. Va. 2004); *In re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005).

Rule 902 – Self-Authentication

- 902(6) – **Print newspapers and periodicals** are self-authenticating. Courts have had difficulty, however, permitting the self-authentication of electronic news sources under this rule because digital media lacks the indicia of reliability typically present in print media (*e.g.*, typeset, logo, etc.).
- Courts hold: There is a presumption of authenticity for documents produced by the adverse party in litigation. *See Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, No. IP 94-1175-C-T-/G, 1998 WL 1988826 (S.D. Ind. May 13, 1998); *Perfect 10, Inc.*, 213 F. Supp. 2d 1146.

Remember: Rules 901 and 902 provide examples only. They do not provide an exhaustive list…

- Courts have recognized other ways to authenticate digital evidence…
- Example: Use of a "wayback machine" (www.archive.org) to authenticate websites as they appeared at various dates relevant to the litigation. *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, No. 02-C-329, 2004 WL 2367740 (N.D. Ill. Oct. 15, 2004).

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Email:

Ubiquitous form of communication; often offered. Methods of authenticating:

901(b)(1) – witness with personal knowledge	**901(b)(3)** – expert witness; comparison of known to unknown
901(b)(4) – distinctive characteristics or circumstances **(reply doctrine)**	**902(7)** – labels, tags, or logos used in the course of business
902(11) – certified copy of domestic business records →	Note: Some courts are skeptical about accepting email as a business record.

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Web Postings:

Methods of authenticating:

901(b)(1) – witness with personal knowledge	**901(b)(3)** – expert witness
901(b)(4) – distinctive characteristics	**902(5)** – official publications
901(b)(7) – public records →	Note: Some courts require the proponent to establish that the sponsoring organization actually posted the content, not a third party or hacker. *See United States v. Jackson*, 208 F.3d 633 (7th Cir. 2000); *Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060 (C.D. Cal. 2002).

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Text Messages and Chat Rooms:

Frequently introduced in child pornography cases; increasingly prevalent in civil cases. Methods of authenticating:

901(b)(1) – witness with personal knowledge	**901(b)(3)** – expert testimony
901(b)(4) – distinctive characteristics or circumstances	*See In re F.P.*, 878 A.2d 91 (Pa. Super. Ct. 2005) (permitting authentication of text messages by circumstantial evidence).
United States v. Tank, 200 F.3d 627 (9th Cir. 2000) (permitting authentication of chat room evidence circumstantially).	*United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) (authenticating chat room discussions by circumstantial evidence, such as defendant's email address and chat room user name).

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Computer-Stored Records/Data:

As explained below, courts are split on how to handle records/data created or stored on a computer. Methods of authenticating:

901(b)(1) – witness with personal knowledge	**901(b)(3)** – expert witness
901(b)(4) – distinctive conditions	**901(b)(9)** – system/process capable of producing reliable/accurate result
Some courts: Use a more lenient approach; proponent not required to demonstrate accuracy, completeness, or integrity of evidence. Inadequacies affect weight, not admissibility. *See, e.g., Meienberg*, 263 F.3d 1177.	**Other courts:** Use a strict approach; must be authenticated by showing that, *inter alia*, the exhibit is an accurate representation of the record as originally created, and that it was not altered later. *See, e.g., In re Vee Vinhnee*, 336 B.R. 437.

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Computer Animations v. Computer Simulations:

Computer Animations: Most courts view animations as demonstrative evidence used to illustrate a witness's testimony.	**Computer Simulations:** Differ from animations in that simulations are not just demonstrative evidence; rather, they are independently admissible as substantive evidence.
Admissible if animation's contents: (1) are sufficiently similar to the facts of the case at issue; (2) fairly and accurately portray the facts; and (3) are not unduly prejudicial.	Authentication commonly done through an expert's testimony under Rule 901(b)(3).
See, e.g., *Hinkle v. City of Clarksburg*, 81 F.3d 416 (4th Cir. 1996); *Friend v. Time Mfg. Co.*, No. 03-343-TUC-CKJ, 2006 WL 2135807 (D. Az. July 28, 2006).	Because simulations are substantively admitted, and invariably involve scientific, technical, or other specialized information, the proponent must address the foundational issues required by Rule 702 and *Daubert* (or *Frye*, if the court is in a state that has not adopted 702/*Daubert*).

Examples of Authentication Methods for Various Kinds of ESI/Digital Evidence

Digital Photographs: Three general types…

1. **Original Digital Images** – Rule 901(b)(1); authenticated the same way as a picture made from film: testimony of a witness with personal knowledge that the photo fairly and accurately depicts its subject.
2. **Digitally Converted Images –** Rule 901(b)(3); an expert is usually required to explain the conversion from film to digital image and to testify that digital image is a fair and accurate depiction of original.
3. **Digitally Enhanced (or Computer Enhanced Images)** – Options: Rule 901(b)(3) authentication by expert, or Rule 901(b)(9) authentication by proving reliability of computer enhancement process used and that resulting image is not altered from original in a way that renders the digitally enhanced image inaccurate or unfairly prejudicial.

Rules 801–807: Hearsay

If relevant and authentic, next hurdle: Hearsay

Core concern: Testimonial risk (perception, memory, sincerity, narrative ambiguity) associated with introduction of assertive statements not made under oath before the fact finder.

Four-step hearsay analysis:

1. Rule 801(a) statement – assertion; may be written/oral, non-verbal conduct intended as an assertion; non-assertive verbal conduct
2. Rule 801(b) human declarant – thus, computer generated statements are not hearsay (because non-human)
3. Rule 801(c) statement offered for substantive truth – if relevant only if true, then statement is substantive
4. Statement not removed from hearsay by Rule 801(d)(1)–(2)

Examples of ESI/Digital Evidence Determined Not To Be Hearsay

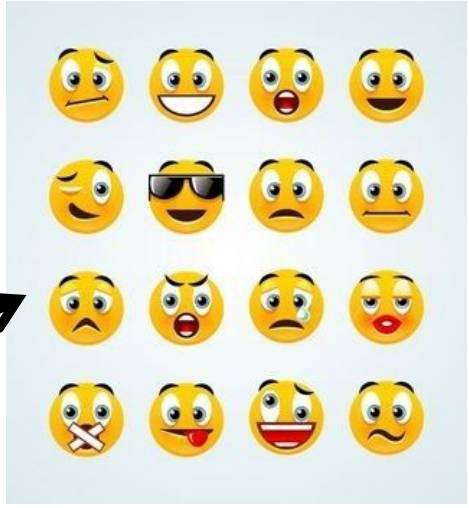
Email between co-workers, when offered to prove only that relationship existed between them, not to prove the truth of the email's contents. *Siddiqui*, 235 F.3d 1318.	Email in criminal case, when offered only to show how a lobbyist attempted to influence a government official. *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006).
Exhibit showing defendant's website content on a particular day, when offered not for the truth of its contents, but to show trademark and copyright infringement. *Perfect 10, Inc.*, 213 F. Supp. 2d 1146.	Any email, text message, voicemail, tweet, or other digital communication made by a party opponent that is introduced against him/her is not hearsay because it constitutes a party admission under Rule 801(d)(2).

Rule 803: Hearsay Exceptions (Availability of Declarant Immaterial)

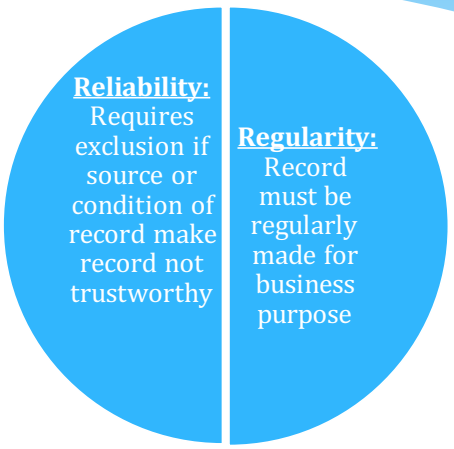
- 803(1) – **Present Sense Impressions:** Statements made while perceiving an event or immediately thereafter that explains and/or describes the event, such as a text message, instant message, chat room statement, or tweet made by someone describing an event as they watch it. Notes taken on a computer or PDA contemporaneously describing events recorded also qualify under the Rule.
- *Compare United States v. Ferber*, 966 F. Supp. 90 (D. Mass. 1997) (email recounting phone call written shortly after phone call occurred admitted as present sense impression), *with New York v. Microsoft*, No. 98-1233 (CKK), 2002 WL 649951 (D.D.C. Apr. 12, 2002) (email describing phone call written several days after call occurred not admitted as present sense impression).

Rule 803: Hearsay Exceptions (Availability of Declarant Immaterial)

- 803(2) – **Excited Utterance:** Statement, such as a text message, tweet, or email, made while in state of emotional excitement describing the events causing the excitement.
- 803(3) – **Then Existing State of Mind/Condition:** Statements, such as blog postings, MySpace or Facebook postings, email, or text messages that describe an existing state of mind. Think: Emoticons!
- *See Microsoft*, 2002 WL 649951 (email could be admitted under 803(3)); *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006) (same).



Rule 803: Hearsay Exceptions (Availability of Declarant Immaterial)



Keep in Mind: Rule 803(6)'s Two Separate Analytical Components

- Rule 803(6) – **Business Record:** This exception is often used in this context…
- Initially: Most courts were relatively relaxed about admitting digital evidence as business records. *See, e.g.*, *United States v. Kassimu*, 188 Fed. App'x 264 (5th Cir. 2006); *United States v. Fujii*, 301 F.3d 535 (7th Cir. 2002).
- But: Some courts are becoming more strict, requiring that all elements of 803(6) are met for digital evidence. *See, e.g.*, *In re Vee Vinhnee*, 336 B.R. 437; *Rambus*, 248 F. Supp. 2d 698; *Canatxx Gas Storage Limited v. Silverhawk Capital Partners*, No. H-06-1330, 2008 WL 1999234 (S.D. Tex. May 8, 2008).

Rule 803: Hearsay Exceptions (Availability of Declarant Immaterial)


- 803(8) – **Public Records:** Increasingly used in ESI context…
- Courts have applied a very deferential standard for the admissibility of public records. *See, e.g.*, *United States v. Oceguerra-Aguirre*, 70 Fed. App'x 473 (9th Cir. 2003) (public records are presumed trustworthy); *EEOC v. E.I. DuPont de Nemours & Co.*, No. Civ. A. 03-1605, 2004 WL 2347556 (E.D. La. Oct. 18, 2004); *Lester v. Natsios*, 290 F. Supp. 2d 11 (D.D.C. 2003).
- Note: Public records may be self-authenticating under 902(5).

Rule 804: Hearsay Exceptions (Declarant Must Be Unavailable)

- There is little published in case law or treatises regarding the applicability of the Rule 804 exceptions to digital evidence.
- Requires a showing that the declarant is **unavailable** due to:
  1. Assertion of privilege
  2. Refusal to testify
  3. Imperfect memory
  4. Death
  5. Illness or incapacity
  6. Inability to compel attendance

How might this come up?

Use of a cell phone/PDA to send a communication that would qualify as a dying declaration under 804(b)(2).
Digital statements regarding an unavailable declarant's personal or family history under 804(b)(4).
Use of email, etc. in connection with committing a wrongful act intended to produce a declarant's unavailability under 804(b)(6)'s forfeiture by wrongdoing exception.

Other Hearsay Issues

- 805 – **"Chain Hearsay" Rule:** Likely to be implicated when admitting email or similar digital communications. There could be multiple levels of hearsay in a single piece of evidence, such as in email chains. Each link in the email must satisfy an exception.
- 806 – **Impeachment** of a hearsay declarant, just as if testifying at trial.
- 807 – **"Catchall" Hearsay Rule:** (1) guarantees of trustworthiness; (2) offered to prove a material fact and highly probative; (3) reasonable advance notice is given; (4) in the interests of fairness.

Rules 1001–1008: Original Writing

If the relevance, authenticity, and hearsay hurdles are cleared, **ask:** Does the evidence satisfy the Original Writing Rule?

Rule's Focus: Situations where writings, recordings, or photographs are closely related to controlling issues in the litigation.

Requirement: When proving the content of an important writing, recording, or photograph, the proponent must introduce the **original or a duplicate**.

If neither the original or duplicate is available, Rules 1004–1008 govern.

Rule 101: Definitions

- Definitions of writings, recordings, photographs, originals, and duplicates are very expansive and **undoubtedly includes ESI/digital writings.**
- 1001(3) – "If data are stored in a computer or similar device, any printout or other output readable by sight shown to reflect the data accurately, is an 'original.'"
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002) (content of internet chat room "cut and pasted" into Word program constituted an original); *In re Gulph Woods Corp.*, 82 B.R. 373 (Bankr. E.D. Pa. 1988).

Both the screen display on a computer monitor, and a copy of the screen display are "originals" under the Rule.

Original Writing: Rules 1002 and 1003

- 1002 – **The essence of the Original Writing Rule:** When proving the content of a writing, recording, or photograph, the proponent must introduce an **original** (defined in 1001), or a **duplicate** (defined in 1001). If an original or duplicate is not available, the content may be proved by **secondary evidence**, as authorized by Rules 1004–1007. *See infra.*
- 1003 – Duplicates are admissible co-extensively as originals, unless they are unauthentic or it would be unfair to do so. As a result, the difference between an original and a duplicate is rarely important. *See, e.g.*, *People v. Huehn*, 53 P.3d 733 (Colo. Ct. App. 2002) (duplicate computer records).

Rule 1004: Secondary Evidence

[Secondary evidence is any evidence other than an original or duplicate.]

Secondary evidence is permitted in four circumstances:

If the original/duplicate is…

1. Lost or destroyed, absent bad faith or improper conduct by the party seeking to introduce the secondary evidence;
2. In the custody or control of an opponent who has been placed on notice (actual notice or inquiry notice) of the need to produce the item at issue, but has failed to do so;
3. Beyond the subpoena power of the court; or
4. Collateral to the litigation…

… secondary evidence is permitted.

Rules 1006–1007: Secondary Evidence

1006 – Written or oral **summaries of voluminous** writings, records, or photographs are admissible (provided advance notice is given to opponent).	**1007 –** Permits the proof of the content of a writing, recording, or photograph by the **written or testimonial** (in-court or deposition testimony) **admission** of a party against whom it is offered, without having to account for non-production of the original or duplicate item. Examples: Fed. R. Civ. P. 30, 33, 36 discovery.
Under the **majority view:** The summary, rather than the underlying documents, are admitted. Thus, this is a *de facto* exception to the hearsay rule.	Note: When questioning an adverse party in deposition or trial, counsel can ask him to testify as to the content of a writing, and his answer proves its content without having to produce the original or duplicate.

Rule 1008: Conditional Relevance

- 1008 – Special application of Rule 104(b)'s conditional relevance rule. When there is a **factual dispute** as to…
  - The **existence** of a writing/recording/photograph; or
  - **Competing versions** of duplicates or originals; or
  - **Competing versions** of secondary evidence
  - … The finder of fact must resolve the conflict to determine whether the original existed, or the content of the competing versions of originals, duplicates, and/or secondary evidence.

Objections to violation of the Original Evidence Rule must be timely raised. Failure to do so waives the objection. *Lorraine*, 241 F.R.D. at 579.

Original Writing Rule: An Unresolved Issue

- Given the existence of **metadata**, what is the "original" of a digital writing, recording, or photograph?
- Is it only the "readable" portion on the computer screen when the digital document is open? Or does the "original" include all the underlying metadata?
- **Probable resolution:** The "top view" version (or the version that is customarily viewed) constitutes the "original." The underlying metadata is likely not required.

Last Hurdle: Rule 403

If the relevance, authenticity, hearsay, and original writing hurdles are cleared, **ask: Is the probative value substantially outweighed by the danger of unfair prejudice?**

As for any evidence, once all evidentiary issues are resolved, it is appropriate to assess whether there is any unfair prejudice that would occur if the ESI/digital evidence is admitted.

Exclude the digital evidence if: The danger of unfair prejudice substantially outweighs the probative value.

Note: Rule 403 tilts towards admissibility, not exclusion.

References

Cases:

- *Hopson v. Mayor of Balt.*, 232 F.R.D 228 (D. Md. 2005).
- *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007).

Articles:

- Hon. Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 RICH. J.L. & TECH. 8 (2011).
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RESTORING AND SAVING ELECTRONIC DATA IN BANKRUPTCY

12th Annual Mid-Atlantic Bankruptcy Workshop
August 5, 2016

2

The Obligation to Preserve Data When Filing For Bankruptcy:

What is the obligation of a bankrupt company to preserve its electronic data when preparing to file for bankruptcy, and does that obligation change because the filing is a "prepack"?

The "New Rules" applicable to preservations of electronic data.

3

Cost of Preserving Electronic Data:

What if the debtor cannot afford to pay for the cost of preserving data, is there a reasonableness standard that applies, and must the debtor seek permission from the court before deciding to let the data go?

4

Admissibility of Electronic Data:

Now that you have it, how do you get it into evidence?

5

The Types of Electronic Data and Where to Find It:

What are the different types of data that a debtor should be thinking about before filing for bankruptcy that need to be preserved, and where might that data be located?

6

Responding to Discovery Requests:

What are the obligations of a debtor to produce electronic data in response to discovery and what if the debtor cannot afford to pay for its collection?

What if the debtor needs the information to prove its own case?

7

Collecting Electronic Data in Response to Discovery:

How should a debtor go about collecting electronic data, is it best to use an outside vendor or can the debtor act on its own?

8

Personal Identification Information:

What are the obligations of the debtor to ensure personal information of customers is not disclosed?