

Modern Issues in e-Discovery

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It's a Brave New Petabyte World

A discovery request today
can generate nearly
10,000 times more paper
than 10 years ago.

John Bringardner, WIRED, "Winning the Lawsuit," page 112, July 2008

How Big is ESI?

- 1 Terabyte: a Hard Drive with 260,000 songs
- 20 Terabytes: All the photos uploaded to Facebook each month
- 120 Terabytes: All the data from the Hubble Space Telescope
- 530 Terabytes: All the videos on Youtube
- 1 Petabyte: Data processed by Google's servers every 72 minutes

"The Petabyte Age," WIRED, July 2008, pp 106-107

Terms of Art

- **Native File:** Electronically stored information in its original application
- **Image of ESI:** static image of a native file, such as in TIFF or PDF
- **Form of Production:** How ESI is produced, such as in native file format or TIFF
- **OCR:** Optical Character Recognition
- **Collection:** Expert using tools such as EnCase or FTK to collect ESI from computers
- **Processing:** Creation of load files from collected ESI for litigation review software in native or TIFF format
- **Hosted Solution:** Online review tool for large volume cases

The Federal Rules of Civil Procedure

Overview of Amended Rules:

- **Rule 16(b):** Pretrial Conference, early disclosure
- **Rule 26(a) & 34(a):** Specifically addressing ESI
- **Rule 26(b):** Reasonably Accessible Data
- **Rule 26(b):** Waiver of Privilege (clawback provision)
- **Rule 26(f):** Discovery planning conference, disclosure & form of production
- **Rules 33 & 34:** Form of production for ESI
- **Rule 37(e):** “Safe harbor” from sanctions
- **Rule 34(a):** Opponent access to network absent defensible process
- **Rule 45(c):** Copy & Test ESI from third party
- Preservation Duty Narrowed to Relevant Data (Judicial Committee Notes)

What is ESI?

Electronically stored information includes **data compilations stored in any medium that can be translated into a *reasonably useable form* (FRCP 34(a)).**

Committee Notes

- The Advisory Committee Notes to Rule 34(a)(1) say the Rule is intended “to be broad enough to cover all current types of computer based information, and **flexible enough to encompass future changes and development.**”

A party may produce ESI in a “reasonably useable form,” but ESI ordinarily kept in electronically searchable form “should not be produced in a form that removes or significantly degrades this feature.”

In re Payment Card Interchange Fee, Slip Copy, 1007 WL 121426 (E.D.N.Y.), 4, citing Fed.R.Civ.P. 34(b), 2006 Amendment, Advisory Committee’s Note.

Biggest Role of the e-Discovery Dice

Litigation Holds & the Preservation of Evidence

Litigation Holds

“...when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures - and our civil justice system suffers.”

United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 259 (Fed. Cl. 2007)

Pre-Litigation Notice to Enact Hold

- "The duty to preserve material evidence arises not only during the litigation but also **extends to that period before the litigation when a party reasonably should know** that the evidence may be relevant to anticipated litigation.

Toth v. Parish, 2009 U.S. Dist. LEXIS 16116 (W.D. La. Mar. 2, 2009)

Litigation Hold Letter Checklist

- General statement to **preserve digital evidence** that in all probability will be relevant to the issues in a case, or may lead to the discovery of such evidence.
- The preservation letter should include a request that the other party **suspend its regular document retention policy** pending discovery.
- The preservation letter should identify **all of the possible locations** where such evidence might conceivably reside.

Stone v. Lockheed Martin Corp., 2009 U.S. Dist. LEXIS 12105 (D. Colo. Feb. 2, 2009)

Safe Harbor

- Rule 37(e) limits the courts ability to sanction a party, except in “**exceptional circumstances**” when it fails to produce ESI “as a result of the routine, good-faith operation of an electronic information system.”
- Notes do not define “exceptional circumstances.”

Committee Notes Continued

Is Rule 37(e) Dead Letter Law?

“Good faith may **require** that a party **intervene to modify or suspend certain features of the routine operation** of a computer system to prevent the loss of information, if that information is subject to a preservation obligation.” (Litigation hold).

Rule 34: ESI

“Electronically Stored Information” [ESI] is discoverable.

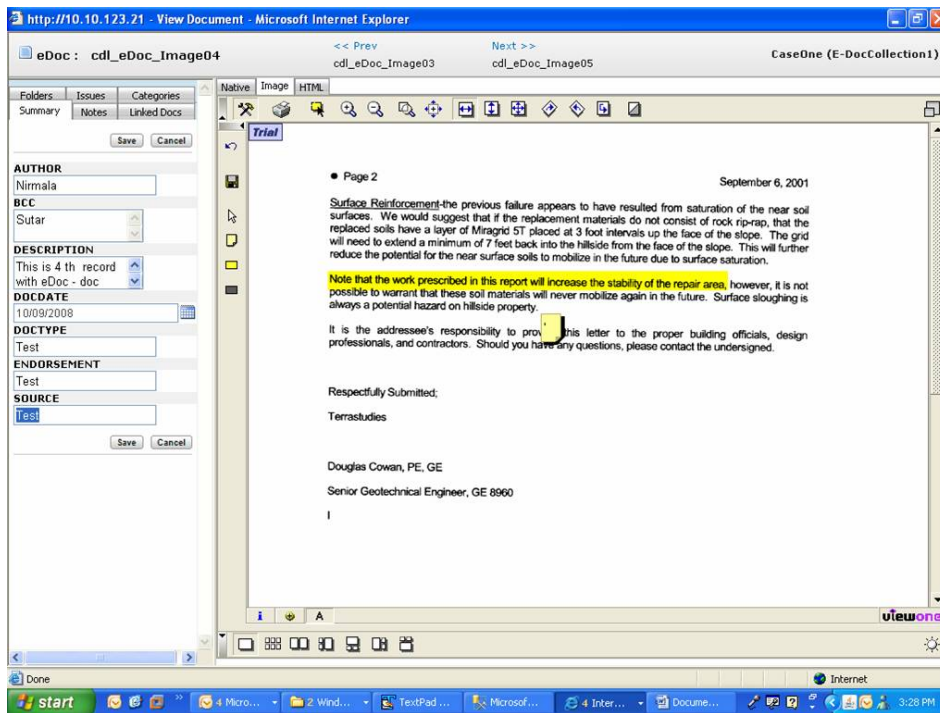
- ESI is subject to production under Rule 34(a)
- Under Rule 34(b) the **form of production** of ESI
 - can be specified by the requesting party in a request, or
 - thereafter by a responding party in a response but if you don't specify,
 - *it must be produced in the form in which is ordinarily maintained* (ie. As ESI)

A Very Bad Discovery Request

The content of any and **all electronic files, e-mail messages (with attachments), Instant Message** communications and/or other communication created any time between **August 20, 2001 to July 20, 2007** and maintained by Yahoo! related to account holder Jacqueline Hone's subscription with Yahoo!, Yahoo! mail and/or Yahoo! Messenger.

Hone v. Presidente U.S.A., Inc., 2008 U.S. Dist. LEXIS 55722 (N.D. Cal. July 21, 2008)

Court Orders for Hosted Solutions

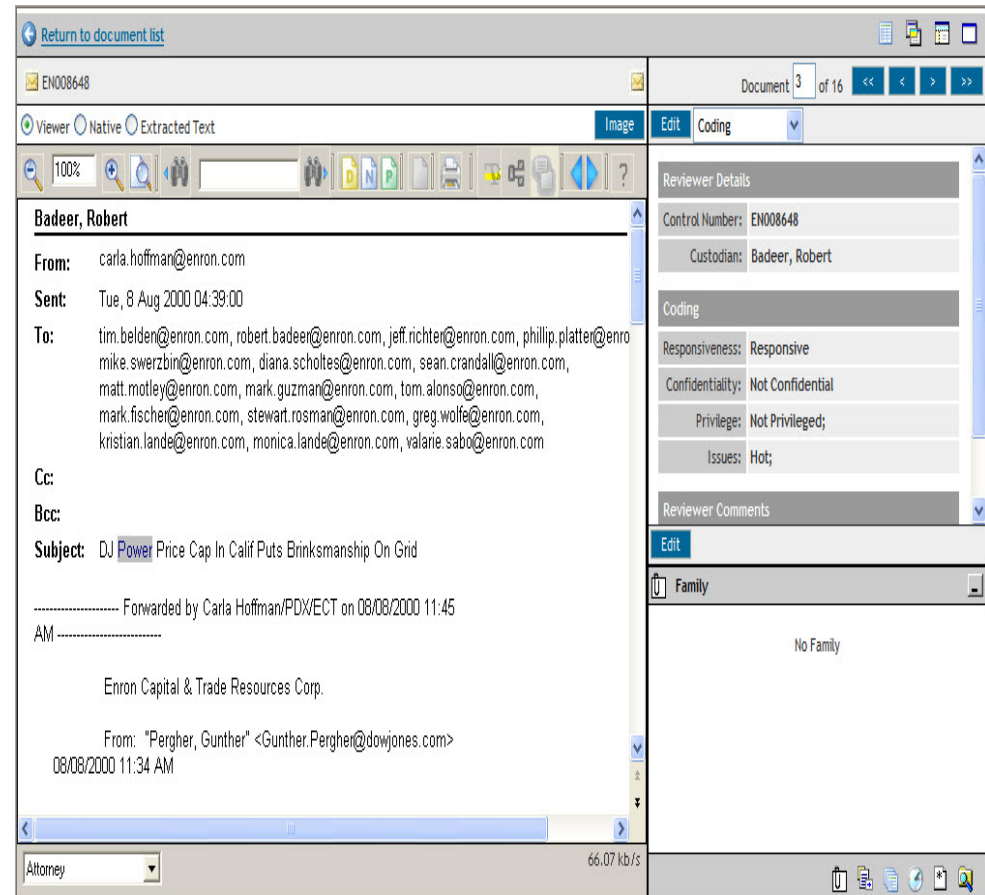


- The order set out as a “primary goal” to select a review platform with “hyper-linked to fields in a database that will permit the instantaneous retrieval from within the database of the information offered by plaintiffs in support of any factual proposition.”

El-Amin v. George Wash. Univ., 2008 U.S. Dist. LEXIS 85009 (D.D.C. Oct. 22, 2008).

Court's three secondary goals:

- A. The review software had to be **easily used** by counsel and by the Court.
- B. The **Court needed access** to the review software.
- C. The review software needed to be **self-contained**.



El-Amin v. George Wash. Univ., 2008 U.S. Dist. LEXIS 85009 (D.D.C. Oct. 22, 2008).

The Really Wrong Fight?

- Defendant produced the emails on a disc in Native format (form normally maintained).
- Plaintiff claimed they wanted the emails as TIFFs because it was “more convenient.”
- Fed. R. Civ. P. 34 only required the emails in the format in which it keeps them, Native format, and nothing more.
- “Convenience” is not a basis for requiring electronic discovery to be produced in a different format than normally maintained.
- If you want emails as Static Images, then make a specific request for the form of production.

Perfect Barrier LLC v. Woodsmart Solutions Inc., 2008 U.S. Dist. LEXIS 71863 (D. Ind. 2008)

Key Word Searching

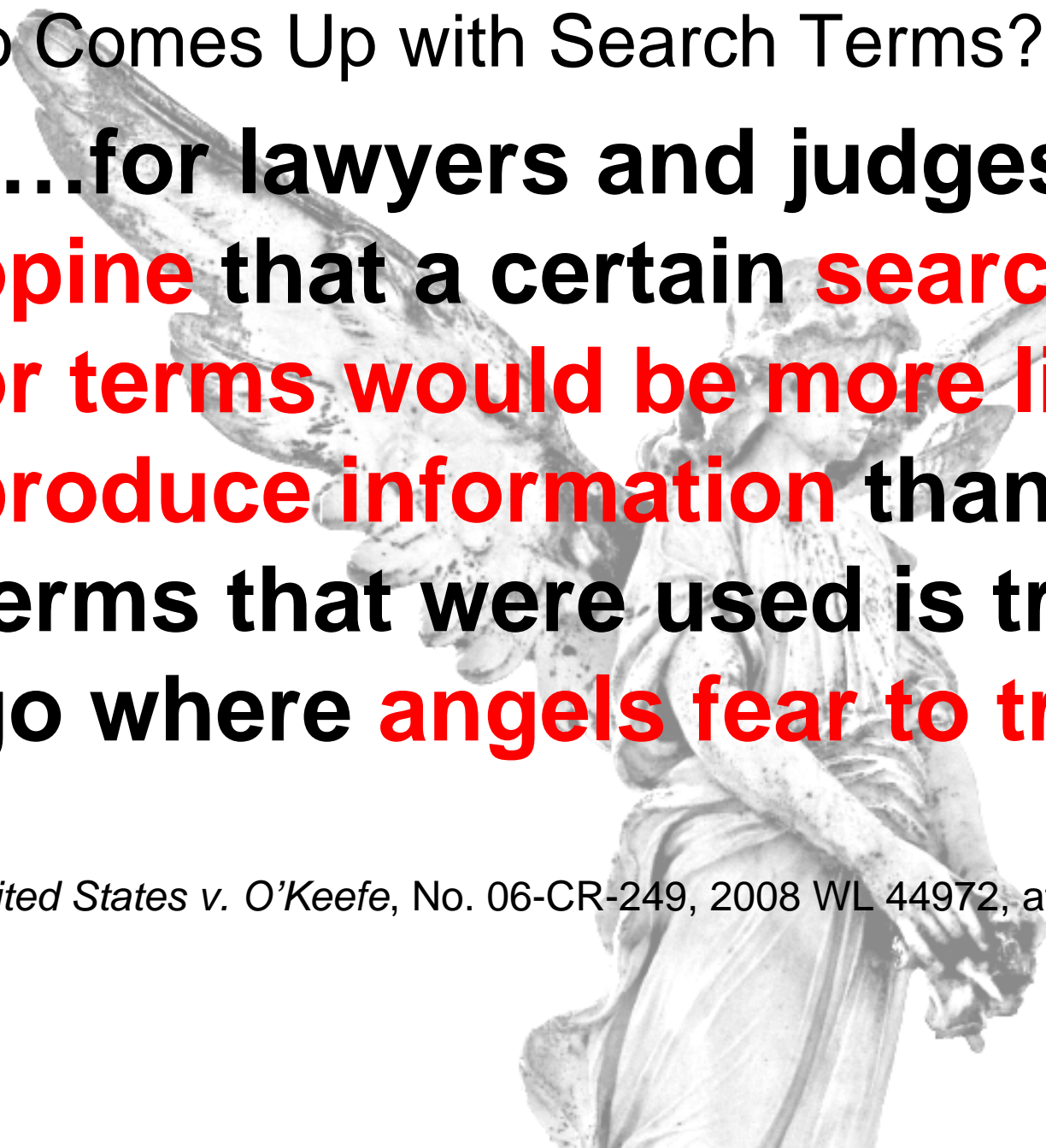
- Reviewing database for specific words or combination of words relevant to your case.
- Subject matter of case, witnesses, dates and other factors.

Arkfeld on Electronic Discovery and Evidence, 5-31, citing *Zakre v. Norddeutsche Landesbank Girozentrale*, No. 03-257, 2004 U.S. LEXIS 6026 at 1-2 (D.N.Y. April 9, 2004)

Who Comes Up with Search Terms?

- “...for lawyers and judges to **dare opine** that a certain **search term** or terms would be more likely to **produce information** than the terms that were used is truly to go where **angels fear to tread.**”

United States v. O’Keefe, No. 06-CR-249, 2008 WL 44972, at *8 (D.D.C. Feb. 18, 2008).



Search Terms: Where Angels Fear to Tread

“Determining whether a particular search methodology, such as keywords, will or will not be effective certainly **requires knowledge beyond the ken of a lay person (and a lay lawyer)** and requires expert testimony that meets the requirements of **Rule 702 of the Federal Rules of Evidence.**”

Magistrate Judge Facciola, *Equity Analytics, LLC v Lundin*, citing *United States v. O’Keefe*, No. 06-CR-249, 2008 WL 44972, at *8 (D.D.C. Feb. 18, 2008).

Something Not To Do

- Plaintiff **Supplied** Search Terms
- Information produced was found by Plaintiff's search terms.
- Plaintiff claimed **incomplete, because, "[t]he only search was one using the terms Plaintiffs supplied."**
- Plaintiffs failed to explain how a search with search terms provided by Plaintiffs' counsel was insufficient.
- Motion to Compel was denied.

Whitlow v. Martin, 2008 U.S. Dist. LEXIS 46111 (C.D. Ill. June 12, 2008)

Waiver of Privilege

- The dangers of complete subject matter waiver of the attorney client privilege and attorney work product protection.
 - Current Case
 - Other Third Parties

Waiver of Privilege

- FRCP Rule 26(b)(5) and Rule 45(d)(2)(B): Inadvertent Production
 - If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material,
 - The party making the claim may notify any party that received the information of the claim and the basis for it.
 - After being notified, a party must promptly return, sequester, or destroy the specified information and copies.

Waiver of Privilege

- The receiving party may not use or disclose the information until the claim is resolved.
- Receiving party may promptly present information to court under seal for a determination of claim.
- If the receiving party disclosed the information before notification, it must take reasonable steps to retrieve it.
- Privilege and waiver determination is still a matter of substantive law.

Waiver of Privilege

- “Quick Peek Agreements” - Enforceability
- “Claw-back Agreements” - Enforceability
- New FRE 502

FRE 502 – September 19, 2008

- The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Judicial Conference), which submitted FRE 502 to Congress, recognized the enormous expense associated with document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even an inadvertent disclosure can result in a subject matter waiver.

FRE 502 & Waiver of Privilege

- In submitting FRE 502, the Judicial Conference took the position that if there were a way to produce documents in discovery without risking subject matter waiver, i.e., pursuant to proposed Rule 502, **the discovery process could be made less expensive and less worrisome.**

Limitations on Scope of Waiver

Rule 502(a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.

Protections Against Inadvertent Disclosure

Rule 502(b) provides that an inadvertent disclosure of privileged or protected communications or information, when made at the federal level, does not operate as a waiver if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

Effect on State Proceedings and Disclosures Made in State Courts

Rule 502(c) provides that

(1) if there is a disclosure of privileged or protected communications or information at the federal level, then state courts must honor Rule 502 in subsequent state proceedings; and

(2) if there is a disclosure of privileged or protected communications or information in a state proceeding,

then admissibility in a subsequent federal proceeding is determined by the law that is most protective against waiver.

Orders Protecting Privileged Communications Binding on Non-Parties

Rule 502(d) provides that if a federal court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any federal or state proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

Agreements Protecting Privileged Communications Binding on Parties

Rule 502(e) provides that parties in a federal proceeding can enter into a **confidentiality agreement** providing for **mutual protection against waiver in that proceeding**.

While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

FRE 502 – Final Thoughts

- Lesson: A record retention program with a well thought out and tested protocol to identify and segregate privileged documents, well in advance of litigation, may help company counsel utilize FRE 502 to combat the tremendous discovery costs associated with privilege reviews.
- Query: Will parties ever utilize FRE 502, that is, intentionally produce privileged documents subject to a claw-back agreement?

Waiver of Attorney Client Privilege

- Defendant inadvertently produced 165 documents.
- Claimed privileged and missed in their document by document review.
- Lawyers and expert came up with search terms.
- **Privilege was waived.**
- Defendant failed to
 - Prove keyword search was reasonable
 - Identify keywords
 - Show qualifications of person who came up with search terms
 - Show quality assurance testing
 - To explain what they did and how it was sufficient



Victor Stanley, Inc. v Creative Pipe, 2008 U.S. Dist. LEXIS 42025,
43

And the Kicker!

Defendants

abandoned a

clawback agreement

early in the case.

Web 2.0 and the Lack of Privacy

- Prosecution's Case Against a Driver in a fatal accident:

I'm not an alcoholic, I'm a drunkaholic"

from the driver's MySpace profile

- Sheriff in Florida fired for comments about heavy drinking and women on MySpace.
- Colleges & Schools monitoring MySpace and Facebook for "inappropriate" conduct.



Social Networking Case Examples

- **Sentence Enhancement of Criminal Defendant for MySpace Photos & YouTube Video**
 - A criminal defendant had his sentenced enhanced for photos found on his MySpace page and a YouTube video. The Defendant was photographed holding an AK-47 with a loaded clip after he had been convicted of a felony crime of violence. *United States v. Villanueva*, 2009 U.S. App. LEXIS 3852 (11th Cir. Fla. Feb. 25, 2009).
- **Police Officer Accused of Misconduct over MySpace Profile**
 - A police officer was accused of misconduct after he posted information on his MySpace profile regarding the arrest of John Michael Montgomery. *Cromer v. Lexington-Fayette Urban County Gov't*, 2008 U.S. Dist. LEXIS 65374 (E.D. Ky. Aug. 25, 2008).

- **Students Suspended from Private Religious School for Online Statements**
 - Two female students were suspended from a private Lutheran school for statements on their MySpace pages about their sexual orientations and a relationship between the two youth. *Doe v. California Lutheran High School Assn.*, 170 Cal. App. 4th 828, 833 (Cal. App. 4th Dist. 2009).
- **School Administrator Sued for Discrimination**
 - A middle school administrator was sued for multiple discrimination claims. Some of the evidence included Facebook groups entitled “Everyone Hates [WW]” and “I Love Watching Fights at School.” Threats were made on the groups and the youth was assaulted shortly after the online threats. *Wolfe v. Fayetteville*, 2009 U.S. Dist. LEXIS 15182 (W.D. Ark. Feb. 26, 2009).

On How to Get Fired

- **Flight Attendant Maintains a Blog named, “Queen of the Skies”**
- **Posts photos of herself in uniform, in a company plane, in suggestive poses.**
- **Airline: Not Happy**
- **Terminated for inappropriate conduct**

The Issue: A Blog, a Flight Attendant, and a Firing,
http://www.businessweek.com/managing/content/jul2008/ca20080715_178680.htm

Last Visited on August 1, 2008

Tried Talking to a Teenager (Or Mayor of Detroit)?

Text & Instant Communications: Translating LOL

- **ADBB**
 - **All Done Bye Bye**
- **SLAP**
 - **Sounds like a plan**
- **LMTCB**
 - **Left Message Call Back**
- **RMMM**
 - **Reading My Mail Man**



Privileged Instant Messages?

- Employment Dispute
- Plaintiff claimed spousal privilege over instant messages sent from work.
- Court Reviewed spousal privilege law in both Kentucky and Federal Courts
- One Little Issue: Plaintiff was **NO LONGER MARRIED** to wife at the time of the instant message was sent.

Gooden v. Ryan's Restaurant Group, Inc., Slip Copy, 2006 WL 2946313 (W.D.Ky. Oct. 12, 2006).



Protocol for Text Message Production



- City Employees
- Plaintiff was to serve a Rule 34 request for the text messages as narrowed to April 30, 2003 from the hours of 1:30 a.m. to 5:30 a.m.
- The City of Detroit was to forward the request to the text message service provider with the City's authorization to release the text messages to the court for in camera review.
- The service provider was to send three copies of the text messages on CD to the District Court for two magistrate judges to review in camera.

Quon v. Arch Wireless Operating Co., Inc., 2009 U.S. App. LEXIS 2259 (9th Cir. Cal., 2009).

MP3 Players...as exhibits?

- Mom bought a “new” MP3 player from Wal-Mart.
- Wal-Mart sells used MP3 players as new.
- 12 year daughter started using the “new-to-her” MP3 player.
- MP3 Player contained **sixty-two photos** and **six and a half hours of video** of hardcore gay porn.
- **Mom: Not Happy**
- Similar thing happened to another child before Christmas 2007. Case might turn into a class action.



Martin v. Wal-Mart Stores, Inc., Slip Copy, 2007 WL 4374175 (N.D.Ill.)

Blogs & Specific Personal Jurisdiction

- Two attorneys were in a relationship in law school.
- Plaintiff in California, Defendant in Florida.
- Defendant referred to Plaintiff on his **blog** as a “**mentally ill alcoholic prostitute.**”
- Defendant sued in California.

Fatima R. Dos Santos Fahmy v. Stephen Graham Hogge, 2008 U.S. Dist. LEXIS 87103

Personal Jurisdiction Requirements

- Defamatory information on Net **not sufficient for personal jurisdiction.**
- Plaintiff must show Defendant **“expressly aimed”** conduct at Plaintiff and Defendant **knew Plaintiff was resident of California.**
- Plaintiff failed to prove specific personal jurisdiction, because 1) No competent evidence to support her claims 2) rested on Complaint and opposition brief.

Fatima R. Dos Santos Fahmy v. Stephen Graham Hogge, 2008 U.S. Dist. LEXIS 87103

Defamation & Anonymous Posters

- The internet is creating emerging legal issues, from jurisdiction to discovery. The **identification of anonymous bloggers-posting defamatory statements on the internet--is one of those issues.**

Ottinger v. Non-Party The Journal News, 2008 N.Y. Misc. LEXIS 4579 (N.Y. Sup. Ct. 2008)

- Plaintiff sued Doe Defendants for anonymous posts on newspaper website.
- Postings on newspaper blog that Plaintiffs bribed local government officials.
- Newspaper challenged 3rd party subpoena to identify specific users who left the defaming messages.

Test to Identify Anonymous Posters

1. Plaintiff must undertake efforts to **notify the anonymous posters** that they are the subject of a subpoena and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve their opposition.
2. Plaintiff **must identify and set forth the exact statements** purportedly made by each anonymous poster than plaintiff alleges constitutes actionable speech;
3. Court should review complaint and all information to determine whether plaintiff has set forth **a prima facie cause of action against the fictitiously-named defendants and sufficient evidence to support each claim**; and
4. The court must **balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case** presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff properly to proceed.

Ottinger v. Non-Party The Journal News, 2008 N.Y. Misc. LEXIS 4579 (N.Y. Sup. Ct. 2008)

The Watershed Admissibility Case

Lorraine v. Markel American Insurance Company,
241 F.R.D. 534 (D. MD 2007)

e-Admissibility: Review of Traditional Rules

1.Relevant

2.Authentication

3.Hearsay

**4.Best Evidence Rule
(Original Writing)**

**5.Probative Value &
Unfair Prejudice**



Thank You

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