

Florida E-Discovery 2013

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Handout

- This Powerpoint
- Sample E-Discovery Letters
- “Social Media Policy: You’re Probably Doing It Wrong”
- “Discovery of Facebook Content in Florida Cases”

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Bio



Christopher B. Hopkins

- Shareholder, Akerman Senterfitt
- Technology Experience:
 - Social media policies
 - Web, Cloud, App contracts
 - Defamation, Criminal, Reputation Management
 - Business Obligations After Hacking Incidents
- General Civil Practice: construction, health, probate
- Palm Beach Bar Tech Column
- Mediator



E-Discovery



Topics:

- Overview “Top 10 Things to Know About E-Discovery”
- Florida Rules
- Social Media Discovery

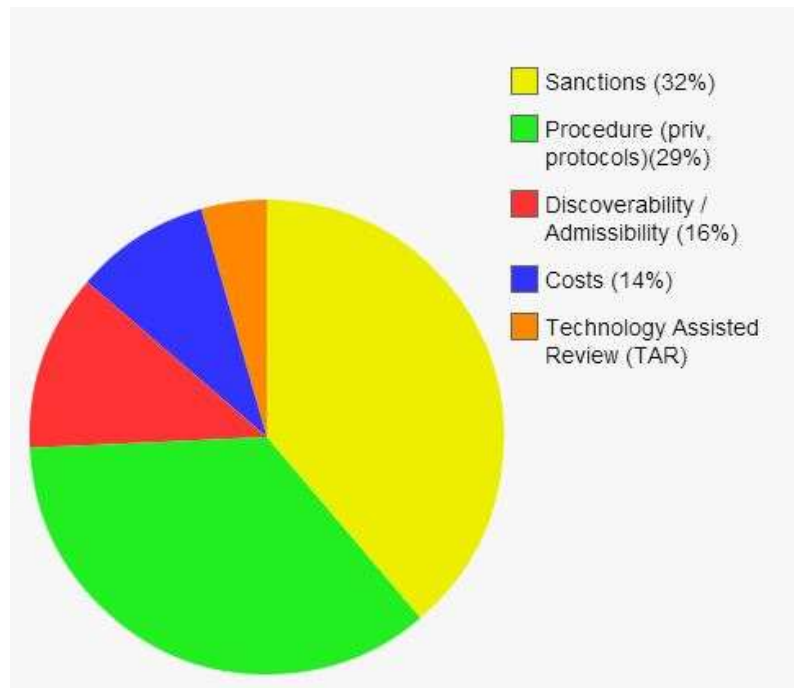
Sanctions!!



Year in Review: 2012 Judicial Opinions Emphasized Ediscovery Process and Best Practices

December 04, 2012 09:00 AM Eastern Time

MINNEAPOLIS--(BUSINESS WIRE)--Kroll Ontrack, the leading provider of [ediscovery](#), [information management](#), and [data recovery](#) products and services, today announced its yearly analysis of reported 2012 electronic discovery opinions and notable ediscovery themes.



Even The CIA Makes Mistakes



U.S. Department of Justice
Civil Division

Marcia Berman
Senior Trial Counsel
Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7132
Washington, D.C. 20530
(202) 514-2205

Washington, DC 20530

February 15, 2013

VIA E-MAIL

Michael Bekesha
Judicial Watch, Inc.
425 Third Street, SW
Suite 800
Washington, DC 20004
(202) 646-5172
Email: mbekesha@judicialwatch.org

Re: *Judicial Watch, Inc. v. DoD, et al*, Case Nos. 11-890 (D.D.C.),
12-5137 (D.C. Cir.)

Dear Michael:

I am writing to let you know that the CIA recently located seven additional images of Osama Bin Laden's body from the May 1, 2011 operation that resulted in his death. Had they been located previously, these records would have been responsive to your FOIA request.

These additional images were not located during the CIA's search for responsive records in this case. However, these images of Bin Laden's corpse are of the same nature as the materials the CIA previously identified and discussed in the declaration of the Director of the CIA's National Clandestine Service, John Bennett, and would have been withheld in full for the same reasons discussed in Mr. Bennett's declaration. In fact, Mr. Bennett has personally reviewed these seven additional images and confirmed that they continue to be properly classified for the reasons set forth in his declaration.

Given the similar nature of these additional images, the fact that they would have been withheld in full for the same reasons as the other records, and the fact that Judicial Watch did not challenge the CIA's search, we do not believe the discovery of these additional images is relevant to the appeal currently pending before the D.C. Circuit. The CIA, however, will apply

...let you know that the CIA recently located 7 additional images of OBL's body... Had they been located previously, these records would have been responsive to your FOIA request...

...we do not believe the discovery of these additional images is relevant to the appeal pending currently before the D.C. Circuit.

Top 10



Ten Things To Know About E-Discovery

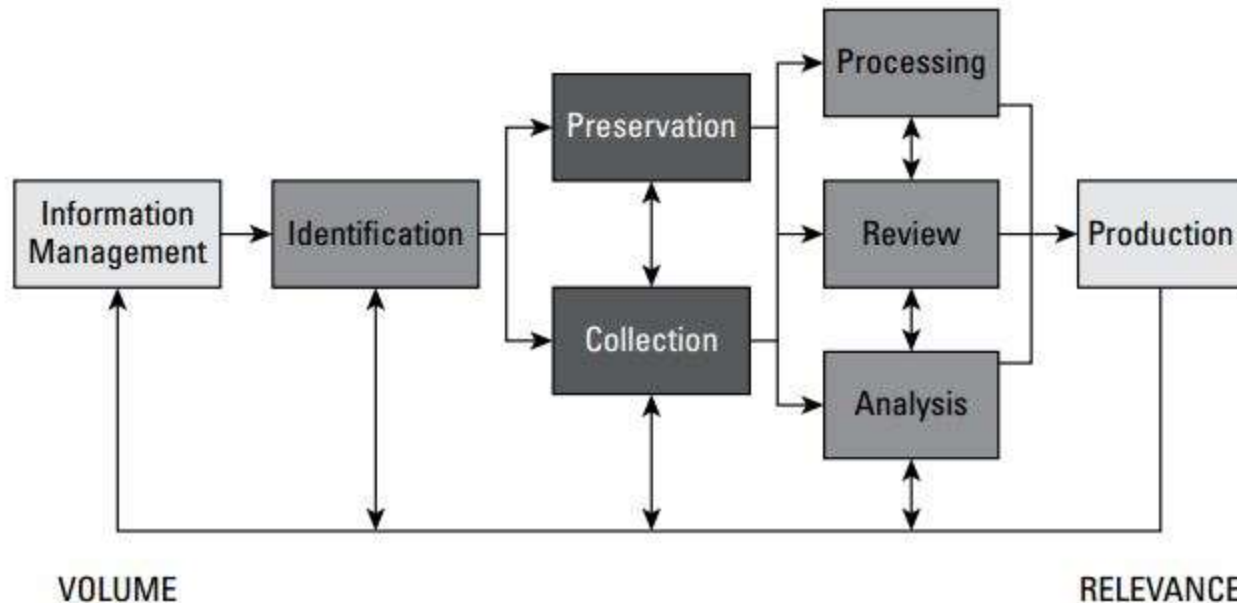


E-Discovery vs. E-Retention




- ESI: Electronically Stored Information
- E Discovery: discovery or production of information in electronic format
- E Retention: preservation policy for retention/deletion & respond to litigation hold

Electronic Discovery Reference Model



Data (or Document) Retention Policy



- “Information Governance” “Big Data”
- 93% of businesses have an DRP but 1/3 admit *it's not fully operational* 
- Delete on ongoing basis vs. infinite retention (keep simple, start minimal)
- Litigation Holds need to be able to override auto-deletion program
- Backup is for recovery; (searchable) archiving is for discovery.
- *Peerless Industries v. Crimson AV* (N.D. E. IL 1/8/13): 30(b)(6) witness could not describe computer system, DRP, or what searches were done and referred to outside vendor. Counsel and client must work closely if they use an e-discovery vendor.

Litigation Hold Letter



- Letter sent requesting opposing party preserve ESI (often pre-suit)
- Counsel Needs to Ask Client (TIME TO COLLABORATE)
 - Do You Have A data retention policy?
 - Do You Follow It?
 - Since You Knew of the Dispute/Possible Request/Hold Letter, Have You Done Anything With Your Data? (over-ride any auto-delete programs now!)
 - Who Should I Work With to Preserve & Collect?
- Counsel Needs to Act, Part I
 - Preservation Notices
 - Stop Automatic Deletion
 - Interview Custodians
 - Backup tapes, drives; personal devices
 - ALWAYS RESPOND. Lit hold letters are usually overbroad; a responsive letter and meet-and-confer is a good solution.

Litigation Hold Letter



- Counsel Needs to Act, Part II
 - Meet & Confer
 - Propose reasonable limits
 - Propose phased discovery
 - Propose search methods
 - Cost shifting
 - Consider an early Motion for Protective Order
 - File a Motion for Protective Order to Pre-Emptively Handle Inadvertent Disclosure (Fed. Rule 502)
 - Consider Proposed Joint Omnibus E-discovery Order

Litigation Hold Letter



- Don't Forget Portable Devices

(Bring-Your-Own-Device policies!!)

- *Christou v. Beatport*, 2013 U.S. Dist. Lexis 9034, 36-39 (D. Colo. 1/23/13)(after lit hold letter, defendant did not preserve text msgs on an iPhone; defendant claimed texts weren't used for subject issue; spoliation order was that plaintiff could introduce hold letter and failure to preserve and jury could draw inference).
- Cellebrite and AccessData have smartphone-accessing software

Chin v. Port Authority



- ***Howard Chin v. Port Authority of NY and NJ*** (2nd Cir. 7/10/12)
 - Failure to institute a legal hold to preserve employment promotion folders; court found ample alternative evidence on point; held it was negligent but not grossly negligent and **rejected notion that failure to hold is per se gross negligence** as an earlier case, Judge Scheindlin's *Pension Committee*, suggested.
 - Pro-business decision: if you reasonably, competently act in good faith, a party should not be sanctioned
- ***Nat'l Day Laborer Org Network (NDLON) v. ICE*** (S.D.N.Y. 7/13/12)(Judge Scheindlin)
 - FOIA requests; government's keyword searches and methods not adequate
- ***Issuing Litigation Holds and Preserving Is Critical***
- ***Businesses Need a Proactive Plan to Preserve – or expect cases to be about discovery and spoliation and not substance.***

TAR or CAR



- Looking for patterns / relationships between words/phrases and documents
- **Keyword search**: boolean (like Westlaw)
- **Concept search**: uses variables like frequency or proximity (like advanced Westlaw)
- **Discussion threading**: puts email threads in chronological order
- **Clustering**: organize documents into categories based on similarities of docs
- **Near-Duplicate Identification**
- **Find Similar**
- **Intelligent Review** – computers are faster at reviewing and collating documents

Predictive Coding



- Machine-learning technology that allows computer to “predict” how documents should be classified by relying on input/training from reviewers.
- Use a small “training set” of docs to predict how to classify the rest; lawyers need to modify the prediction scores at each stage (% of accuracy).
- Once you get desired performance (70% or higher?), that’s your production.
- “Is Predictive Coding Better than Lawyers At Document Review?,” ABA Journal 1/22/13.
- Kroll Ontrack, Reconnind, Symantec

Da Silva Moore



- *Da Silva Moore v. Publicis Groupe*
(S.D.N.Y. 2/24/12)(Judge Peck)
- First opinion approving use of predictive coding as “an acceptable way to search for relevant ESI in appropriate cases.”
- Predictive Coding is one of several options

Kleen Products & EORHB v. HOA



- ***Kleen Products LLC et al v. Packaging Corporation of America*** (7th Cir.)
- Plaintiff wanted Defendant to use something more than keyword searches
- Judge referenced that parties should choose tools; Sedona Principle 6 says respondent is best situated; stressed Rule 26 proportionality
- Resolution: plaintiffs withdrew request, want to meet/confer for future requests

- ***EORHB Inc. et al v. HOA Holdings, LLC*** (Del. Ch. 10/15/12): Court orders parties to use one predicting coding provider

Sedona Conference



- Nonprofit organization in AZ dedicated to advanced study of law in several areas, including complex litigation
- Workgroups involved in e-discovery issue general principles which were used to develop 2006 federal amendments
- E-Discovery Program: March 21-22, 2013

Zublake



- Series of opinions in *Zublake v. UBS Warburg*
 - Prior to 2006 federal amendments
 - Issued by Judge Scheindlin
- 7-factor test for cost shifting based upon accessibility (harder it is, more likely to get shifted to requesting party)
- Case is famous because:
 - Scope of duty to preserve ESI
 - Lawyer's duty to monitor client's litigation hold
 - Knowing cost and effectiveness of recovery in advance
 - Shifting costs to requesting party
 - Spoliation

Florida E-Discovery Rules



Florida E- Discovery Rules



- *In Re: Amendments to Florida Rules of Civil Procedure – Electronic Discovery*

SC11-1542 July 5, 2012

Effective as of Sept 1, 2012

Florida E-Discovery Rules



- Case Management Rule 1.200
- Court can make advanced ruling on admissibility; facilitate agreement on (a) scope, (b) form, and (c) limits of ESI discovery.
- See FRCP 26(f); 16(b)(1). Fed rules require meet & confer and initial disclosure. FL rules only require meeting in complex cases.

Florida E-Discovery Rules



- Scope and Limits Rule 1.280
- ESI is discoverable, limits similar to Fed Rule 26
- ESI “not reasonably accessible” is not discoverable absent good cause
- Costs can be shifted
- Proportionality and Reasonableness factors

Florida E-Discovery Rules



- Request for Production Rule 1.350
- Requesting party can specify file format
- Responding party must state format in objection (and must state format if Requesting party doesn't specify).
- FRCP 34(b): party need not produce in multiple formats.

Florida E-Discovery Rules



- Sanctions Rule 1.380
- No sanctions, absent exceptional circumstances, for failing to produce EHI as a result of “routine, good-faith operation of an electronic information system.”
- Similar to federal rule

Florida E-Discovery Rules



- Subpoenas Rule 1.410
- Respondent may object to form or not reasonably accessible
- Can be ordered for good cause
- Costs can be shifted
- Respondent must produce in ordinary or reasonably usable form
- FRCP 45 has sanction for subpoenas which are burdensome

Recommendation



- Move for a Protective Order
- Get an Agreement
- Prepare affidavits
- Use federal precedent when state rules mirror

Social Media Policy & Discovery





Technology Corner



Social Media Policy: You're Probably Doing It Wrong

By Christopher B. Hopkins

Your law firm's and clients' social media policies are likely unlawful. The National Labor Relations Board (NLRB) has issued opinions striking down employer internet policies so frequently that it has turned to issuing Cliff Notes-like "guidance memoranda" three times in less than two years in order to concisely explain the law. But the violations continue: from large corporations down to, yes, even law firms. Policies which ban employees' use of social media are frequently found to be unlawful but so are more gentle "be respectful" guidelines. Overbroad policies may arise from an overprotective corporate lawyer – hoping to "contract away" liability and risks – or if the job was handed to a lawyer deemed an expert on social media simply because she has a Facebook account. This is an area of the law which requires a fundamental understanding and a willingness to keep up with the newest cases. Pull a copy of your firm's or your clients' policies and compare them to the provisions below.

- private/confidential. The absence of such a definition (and how it was applied in a specific case) made it unlawful.
- **No posts which would embarrass, harass, or defame an employee, officer, or director:** This rule was overbroad as it would include terms that would commonly apply to protected criticism of the employer's labor policy or treatment of employees. The policy failed to define the terms or limit them in any way that would exclude section 7 activity.
- **No revealing personal information of employees, clients, partners, or customers:** This restriction on revealing personal information was unduly broad and could reasonably be construed as restraining section 7 activity. For example, employees have a right to discuss wages and other terms and conditions of employment; a rule which prohibits sharing personal or other employee information violates section 8. This type of rule would need a clear context and/or limitations and definitions.
- **No making disparaging comments about the company:** This rule was unlawful because it would reasonably be construed to restrict section 7 activity, such as statements that the employer is not treating employees fairly or paying them sufficiently.

Social Media Discovery



DISCOVERY OF FACEBOOK CONTENT IN FLORIDA CASES

By Christopher B. Hopkins and Tracy T. Segal

The constant expansion of social networking websites means that defense practitioners will increasingly have to confront issues of how and when to seek information from these sites during discovery. This article explains how to seek information from Facebook and

"Facebook helps you connect and share with the people in your life," proclaims the Facebook homepage. As of December 2011, 152.5 million people in the United States were posting monthly on their Facebook accounts.¹ Based on these figures, it is likely that a personal injury plaintiff may have an active Facebook account. But how can you access that information in litigation? Courts around the country, including at least one Florida Circuit Court, have compelled discovery of Facebook and other social

and wearing shorts.⁴ Similarly, a plaintiff who alleged she was in constant physical pain and needed a cane to walk posted photographs that showed her enjoying life with her family and wrote a status update about visiting the gym.⁵ Another plaintiff, who claimed to be largely confined to her home and bed, posted pictures on Facebook and MySpace which revealed she had traveled from up and down the East Coast and enjoyed an active lifestyle.⁶ In each of these cases, the courts allowed the defendants access to the plaintiffs' social networking accounts.

At the beginning of a case, counsel

Florida Order on Social Media



IN THE CIRCUIT COURT FOR THE
17TH JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO: 07-020592 CACE (03)

SHELLY BESWICK and CHRIS
BESWICK, individually and as parents and
natural guardians of KACIE BESWICK,
their minor daughter,
Plaintiffs,

vs.

HON. MILY RODRIGUEZ POWELL

NORTHWEST MEDICAL CENTER, INC.,
d/b/a NORTHWEST MEDICAL CENTER, a
Foreign corporation; DEBRA ALLEN, R.N.,
LYNETTE M O'TOOLE, R.N.; FERN
TAISENCHOY-BENT, M.D. and FERN
TAISENCHOY-BENT, M.D., P.A.,
Defendant.

**ORDER ON DEFENDANTS' MOTION TO COMPEL PLAINTIFFS' AMENDED
ANSWERS TO SOCIAL MEDIA INTERROGATORIES NUMBERS 1 AND 2 AND TO
COMPEL EXECUTION OF AUTHORIZATION FOR RELEASE OF RECORDS FROM
FACEBOOK**

THIS CAUSE came before the Court on Defendants' Motion to Compel Plaintiffs' Amended Answers to Social Media Interrogatories Numbers 1 and 2 and to Compel Execution of Authorization for Release of Records from Facebook. The Court having considered same, having heard arguments of counsel and being otherwise duly advised in the premises, finds and decides as follows:

Plaintiffs commenced the current suit alleging, *inter alia*, medical negligence. Plaintiffs

Resources



- This PPT: www.InternetLawCommentary.com
- Predictive Coding for Dummies: <http://bit.ly/predictivecodingdummies>
- Sedona Principles: <http://bit.ly/sedonaconference>
- Bow Tie Law's Blog: <http://bowtielaw.wordpress.com/>
- JD Supra "Electronic Discovery Updates": <http://www.jdsupra.com/>
- Delaware E-Discovery Guidelines (Dec 2012):
<http://courts.state.de.us/chancery/rulechanges.stm>
- Top E-Discovery Cases of 2012: <http://www.clearwellsystems.com/e-discovery-blog/category/da-silva-moore-v-publicis-groupe/>