

# *Selected eDiscovery and ESI Case Law from 2021*

*Philip J. Favro, ed.*



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# Table of Contents

Criminal ESI .....	2
Cross-Border Discovery .....	2
Databases .....	4
Discovery Process.....	4
Ephemeral Messaging.....	6
ESI Evidence.....	6
Form of Production.....	7
Non-Party Discovery.....	8
Non-Traditional ESI .....	8
Possession, Custody or Control.....	9
Preservation Demand Letters .....	9
Privacy .....	10
Privilege and Work Product / Data Breaches .....	10
Privilege Logs .....	11
Proportionality.....	12
Protective Orders .....	13
Reasonable Inquiry .....	14
Rule 34 Objections and Responses .....	15
Rule 502(d).....	16
Sanctions—Rule 37(e).....	16
Sanctions—Other FRCP Provisions.....	18
Sedona Principle Six .....	19
Social Media .....	20
Technology-Assisted Review .....	20
Workplace Collaboration Tools.....	22



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## Criminal ESI

*United States v. Holmes*, No. 5:18-cr-00258-EJD-1, 2021 WL 3395146 (N.D. Cal. Aug. 4, 2021). In the criminal prosecution of entrepreneur Elizabeth Holmes, who founded the now defunct and sham biotech unicorn Theranos, the parties sparred over who was responsible for the loss of key evidence found on a bespoke database. The database at issue—referred to as the “Laboratory Information System”—was the repository for “patient test results and all quality control data at Theranos.” Holmes asserted the government was to blame for the database information being lost. Holmes argued that the loss of this information would deprive her of the ability to defend herself against evidence the government would offer regarding “customer complaints and testing results” and that such evidence should accordingly be suppressed. The court rejected these arguments, found that neither Holmes nor Theranos provided the government with a fully accessible copy of the database information, and that the government was not responsible for the loss of this data. In particular, District Judge Edward Davila determined that the database information Holmes (through Theranos) provided the government required both login credentials and an encryption key. While Holmes provided the login credentials, she did not disclose the encryption key. Nor did Holmes divulge that the government needed an encryption key to access information from the database. These circumstances, together with Theranos’s subsequent retiring of the database and deletion of the encryption key, led the court to conclude that it was Holmes (and not the government) who was responsible for the loss of the database materials.

*State v. Burch*, 961 N.W.2d 314 (Wis. 2021). See discussion under **ESI Evidence** and **Non-Traditional ESI**.

## Cross-Border Discovery

*In re Application of The Republic of The Gambia v. Facebook, Inc.*, --- F. Supp. 3d ---, 2021 WL 4304851 (D.D.C. Sep. 22, 2021). In November of 2019, the Republic of The Gambia, the smallest country on the African continent, filed an action in the International Court of Justice (ICJ) against Myanmar, accusing its military junta of genocide against Myanmar’s primarily Muslim Rohingya minority. Much

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of the factual predicate for the suit was presented in a report by the Independent International Fact-Finding Mission on Myanmar of the United Nations Human Rights Council in 2018. The UN report found the regime used Facebook, the most common social media platform in Myanmar, for “a carefully crafted hate campaign [to] develop[ ] a negative perception of Muslims among the broad population in Myanmar.” Facebook conducted its own internal review, finding that “ethnic violence in Myanmar [was] horrific” and that Facebook was “too slow to prevent misinformation and hate.” Facebook deleted the accounts of key individuals and organizations in Myanmar—including the commander-in-chief of Myanmar’s armed forces, the military’s television network, and scores of facially unassociated accounts, which it determined were “coordinated inauthentic behavior” that Myanmar authorities instigated in violation of Facebook’s terms of service. In 2020, The Gambia filed this action in United States District Court under 28 U.S.C. § 1782, seeking discovery of Facebook’s public and private communications associated with the deleted content, discovery of documents regarding Facebook’s internal investigation, and a Rule 30(b)(6) deposition of a Facebook officer regarding whatever documents would be produced. The court acknowledged that the statutory predicates for § 1782 were undisputed: Facebook had offices within the district, there was an ongoing action in the ICJ, and that The Gambia was a party to that action. The court devoted most of this opinion to Facebook’s objection that granting the requested discovery would violate the Stored Communications Act (SCA), 18 U.S.C. § 2702, and to the “prudential factors” for applying § 1782 enunciated by the Supreme Court in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004). The court found as initial matters that Facebook qualified as an “electronic communications service” under the SCA and the Myanmar authorities, both as individuals and as government entities, constituted “users” under the SCA. However, the bulk of the content The Gambia sought was not the type of content the SCA protected from discovery. Any privacy interest in the posts had been waived by the act of posting, including items posted in so-called private groups, which were not managed as private groups at all. The content was also not protected “backup,” as the accounts themselves had been deleted and the content preserved not for the purposes of recovery by the users, but for Facebook’s own internal investigation. The court then turned to the prudential factors, finding that the burden on Facebook in producing the requested discovery going back as far as 2012 was relatively light, as the UN report and Facebook’s own public statements had identified the scope of the proposed search, and further narrowing could be done using Facebook’s own highly developed content review capabilities or Technology-Assisted Review (TAR) (see **Technology-Assisted Review**). Regarding relevance, the UN Report and Facebook’s own prior public statements had established that the discovery sought would be highly relevant to The Gambia’s action before the ICJ, and that nonprivileged materials related to the conduct of Facebook’s internal investigation would be uniquely “significant to The Gambia’s ability to prove genocidal intent.” The court declined, however, to grant The Gambia’s application for a deposition of a Facebook officer under Rule 36(b)(6), finding it unduly burdensome and unlikely to produce any significant new evidence.

*AnywhereCommerce, Inc. v. Ingenico, Inc.*, No. 19-cv-11457-IT, 2021 WL 2256273 (D. Mass. June 3, 2021). In this commercial contract dispute between companies specializing in mobile payments, plaintiffs obtained a production order requiring defendants to produce relevant, responsive information from the U.S. in response to plaintiff’s document requests. At that time, the court bifurcated discovery of information located in France, given defendants’ objection that the EU General Data Protection Regulation (GDPR) proscribed production of such information. While acknowledging its authority to compel the production of relevant information despite the GDPR, the court held that notions of comity required the domestic discovery to proceed first, particularly given the parties’ representations at that time that most of the relevant information would likely be

located in the U.S. Plaintiffs subsequently moved for reconsideration of the production order after collectively determining with defendants that the key documents and witnesses were in fact located in France. Analyzing the issues through the lens of the U.S. Supreme Court's decision in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 (1987), the court found that reconsideration was appropriate and ordered defendants to produce "responsive documents in their custody or control without redaction or withholding of personal data pursuant to the GDPR." Importantly, the court held that the production order was subject to its protective order, which enabled defendants to designate documents subject to GDPR protection as "Highly Confidential-Attorneys' Eyes Only" with specific procedures in place as to how any such material may be disseminated."

*In re Polygon Global Partners LLP*, 21 Misc. 364 (ER), 2021 WL 2117397 (S.D.N.Y. May 25, 2021). Polygon Global Partners (Polygon) filed a petition under 28 U.S.C. § 1782 to obtain permission to serve subpoenas on Kohlberg Kravis Roberts & Co. LP (KKR, the subsidiary of an American global investment company), Jason Carss, and Terence Gallagher. The court initially granted Polygon's petition against the three respondents, but modified the order in response to respondents' motion to quash and relieved Carss from any response obligation. In connection with its order, the court held that petitioner Polygon must indemnify and hold KKR harmless for any damages KKR might incur for violating the GDPR in connection with KKR's production of documents with personal data pursuant to the court's order.

*Int'l Swimming League, Ltd. v. Fédération Internationale De Natation*, No. 18-cv-07394-JSC, 2021 WL 2075572 (N.D. Cal. May 24, 2021). The court granted defendant's administrative motion to file three documents under seal in connection with defendant's motion to compel in this antitrust action involving international swimming organizations. Defendant established to the court's satisfaction that it was bound by the requirements of the GDPR and Swiss Law to maintain the documents' confidentiality. However, the court noted in dicta that it might not order those same documents sealed if they were to be "used in connection with dispositive motions or trial."

## Databases

*United States v. Holmes*, No. 5:18-cr-00258-EJD-1, 2021 WL 3395146 (N.D. Cal. Aug. 4, 2021). See discussion under **Criminal ESI**.

## Discovery Process

*Dalton v. Town of Silver City*, Civ. No. 17-1143 WJ/GBW, 2021 WL 4307149 (D.N.M. Sept. 22, 2021). In connection with this action for wrongful death and other claims, plaintiff moved to compel a further interrogatory response regarding defendants' efforts to comply with plaintiff's corresponding document requests to defendants. Plaintiff sought (among other things) the identity of the individuals who conducted searches for relevant information, the information systems searched, and limitations on the searches, including date ranges and search terms. The court denied plaintiff's request, finding that it sought "discovery on discovery," which was not warranted at this time given that no deficiency had been established regarding defendants' request for production (RFP) responses. However, the court did order the parties to schedule a supplemental meet and confer to cooperatively plan defendants' search for relevant ESI. In addition, the court ordered defendant to

disclose its search terms and locations if a dispute arose between the parties regarding the sufficiency of defendants' production.

*Martley v. City of Basehor, Kansas*, No. 19-2138-DDC-GEB, 2021 WL 4134307 (D. Kan. Sep. 10, 2021). The court found "discovery on discovery" was permissible, generally allowed a 30(b)(6) deposition to go forward, and rejected defendant's position that the deposition was duplicative of written discovery that plaintiff had already obtained. The court explained that "there ha[ve] been continuing questions about documents withheld from discovery, issues related to the imaging of the City's servers, as well as deletion of information from City servers, and the destruction of the computer used by Plaintiff while he worked for the City . . . [accordingly] the Court finds full discovery, even if characterized as discovery on discovery, is appropriate in this case."

*Estate of Bailet by and through Searcy v. City of Colorado Springs, Colorado*, No. 20-cv-01600-WJM-KMT, 2021 WL 2912921 (D. Colo. July 12, 2021). The court held that text messages exchanged by defendants and sought by plaintiffs would only be relevant to the discovery process, which was not presently at issue in the case. Accordingly, the court reasoned the requested discovery would constitute "discovery about discovery" and would not be inappropriate at this time.

*In re Whatley v. Canadian Pacific Ry. Ltd.*, No.: 1:16-cv-74, 2021 WL 1951003 (D.N.D. May 14, 2021). In this litigation that arose from a train derailment in Canada, the court denied intervenor's motion to quash defendants' Rule 30(b)(6) deposition notice that included several topics regarding "discovery on discovery." Those topics included the search process intervenor used to respond to an earlier subpoena; the efforts the intervenor undertook to comply with that subpoena; intervenor's preservation efforts relating to the claims at issue; and the respective positions and job duties for intervenor's in-house counsel who were identified on their privilege logs. While intervenor had argued these topics were irrelevant to the litigation, speculative in nature, and unjustified given the extent of its cooperation in discovery, the court disagreed. Though discovery about discovery may be disfavored, the court found it was warranted here due intervenor's shifting representations to the court regarding its compliance with the subpoena.

*Maker's Mark Distiller, Inc. v. Spalding Grp., Inc.*, No. 3:19-CV-00014-GNS-LLK, 2021 WL 2018880 (W.D. Ky. Apr. 20, 2021). Plaintiff resorted to motion practice in this trademark dispute to compel defendant to redo its searches for relevant information. Plaintiff complained that defendant had produced too few documents and raised several points spotlighting deficiencies in defendant's discovery process, including missing custodians, flawed email searches, the use of Microsoft Outlook to conduct searches, and relevance determinations being made by defendant's employees rather than its counsel. While acknowledging there were deficiencies, the court ultimately dismissed plaintiff's concerns, holding that however flawed defendant's discovery process, plaintiff had not sufficiently shown that defendant withheld relevant information.

*Stevens v. Brigham Young University–Idaho*, No. 4:16-CV-530-BLW, 2020 WL 2841775 (D. Idaho June 1, 2020). The court authorized defendant to take the deposition of plaintiff's counsel. The court found such a deposition was necessary so defendant could explore discrepancies in the differing accounts plaintiff and her counsel offered regarding the destruction of relevant text messages regarding plaintiff's allegedly intimate relationship with her now-deceased college professor. This discovery was ultimately relevant to whether plaintiff's actions constituted an "intent to deprive" within the meaning of Rule 37(e)(2), which the court previously found would be determined by a jury. *See* 2019 WL 6499098 at \*5 (D. Idaho Dec. 3, 2019).

## Ephemeral Messaging

*F. T. C. v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021). District Judge Dominic Lanza held that a “general adverse inference” instruction under Rule 37(e)(2) was appropriate to remediate the harm caused by defendants’ intentional and bad faith spoliation of relevant communications. The individual defendants began using ephemeral messaging application Signal and encrypted email messaging service ProtonMail after they discovered the Federal Trade Commission (FTC) was investigating allegations that defendants were running their business as an unlawful pyramid scheme. Defendants enabled the ephemeral messaging feature on Signal, they encouraged employees to use Signal and ProtonMail and do so particularly for sensitive and business items, they refused to preserve relevant communications as the FTC requested, they initially refused to turn over relevant communications from Signal and their electronic devices pursuant to the Court’s temporary restraining order, and when they finally turned over their electronic devices, it was only after they deleted the Signal app from their phones.

*Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2021 WL 2767405 (S.D. Ind. July 2, 2021). The court issued a sanctions order against plaintiff for deleting relevant videos and images from his Snapchat account. Plaintiff and his counsel had represented in sworn declarations that Snapchat did not archive or retain substantive content. Those representations were not accurate, as plaintiff later acknowledged he had retained 86 videos and images (referred to as “Snaps”) on his account. However, when it came time to produce the Snaps in discovery, plaintiff improperly deleted 11 of them. This, the court found, warranted both monetary sanctions under Rule 37(b)(2)(C) and a Rule 37(e)(1) sanction award, which would allow defendants to present evidence and argument to the jury regarding plaintiff’s spoliation. See discussion under **Reasonable Inquiry**.

## ESI Evidence

*State v. Burch*, 961 N.W.2d 314 (Wis. 2021). The Wisconsin Supreme Court affirmed the circuit court finding that the State, as the movant, only needed to satisfy a sufficiency standard to authenticate evidence from a Fitbit belonging to the victim’s boyfriend. The court also held that the State did not need to introduce expert testimony to establish the reliability of the Fitbit evidence, which ultimately exculpated the victim’s boyfriend from involvement in her homicide. See discussion under **Non-Traditional ESI**.

*Edwards v. Junior State of Am. Found.*, No. 4:19-CV-140-SDJ, 2021 WL 1600282 (E.D. Tex. Apr. 23, 2021). The court imposed multiple preclusion sanctions under Rule 37(c) (see **Sanctions—Other FRCP Provisions**) and Rule 37(e)(1) (see **Sanctions—Rule 37(e)**) to address plaintiff’s failure to preserve reasonably usable versions of relevant messages from his Facebook Messenger account. Plaintiff took screenshots of allegedly “racist and homophobic messages” he received on Facebook Messenger, but failed to export or otherwise preserve those messages in a reasonably usable format such as JSON or HTML (which ostensibly should have preserved their metadata). The court determined that the screenshots were not admissible evidence under the “Best Evidence Rule” (*i.e.*, the Original Documents Rule) because they did not “‘accurately’ reflect the information” shared on the actual messages. See FED. R. EVID. 1001(d). Given the questions raised regarding the genuineness of the Facebook message screenshots, only an “original” of the exported messages

would suffice. Therefore, the court found that admissible evidence of the messages was “lost” within the meaning of Rule 37(e).

## Form of Production

*Axis Ins. Co. v. Am. Specialty Ins. & Risk Servs., Inc.*, No. 1:19-cv-00165-DRL-SLC, 2021 WL 2910814 (N.D. Ind. July 12, 2021). Magistrate Judge Susan Collins ordered defendant to produce metadata corresponding to documents it already turned over and which plaintiff originally requested in its RFPs. In addition, defendant would have to produce an affidavit both describing the steps it took ensure the production of the sought-after metadata and detailing any problems that resulted in the modification of documents or their metadata. Defendant had originally declined to produce the relevant metadata because the parties had yet to execute an ESI protocol. This, Judge Collins held, was not a valid objection nor an acceptable reason to withhold production of the requested metadata: “Indeed, the fact that Axis specifically requested the metadata at issue cannot be overstated . . . Once Axis made its request for metadata, American Specialty was not free to simply ignore it.” See discussion under **Reasonable Inquiry**.

*Haywood v. Wexford Health Sources, Inc.*, No. 16 CV 3566, 2021 WL 2254968 (N.D. Ill. June 3, 2021). Magistrate Judge Heather McShain held that defendants’ production of Excel spreadsheets in PDF violated Rule 34(b)’s reasonably usable production requirement. Judge McShain compelled defendants to produce the documents in native format and imposed \$25,311.50 in monetary sanctions against defendants. Defendants had argued that the PDF version of the spreadsheets was reasonably usable “because they can be searched using the ‘ctrl+F’ function and are organized into individual binders.” Judge McShain rejected this position, holding that “converted spreadsheets do not retain one of the unique features of Excel software that has an obvious relevance to their use in litigation: ‘the ability to implement calculations and formulae that are not evident in a PDF version.’” Converting the spreadsheets from Excel to PDF therefore “significantly degraded the functionality of the ESI.”

*Nichols v. Noom*, 20-cv-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), *aff’d*, ECF No. 324 (S.D.N.Y. Apr. 30, 2021). The court held that it would be disproportionate to the needs of the case for defendant Noom to produce in family relationships every linked document referenced in particular emails. Because plaintiffs had not shown a specific need for all linked Google Drive documents in family relationships, the court refused to order Noom to replicate its collection and production of linked documents in family relationships. If there were particular emails “containing hyperlinks for which the corresponding hyperlinked document could not be located or identified,” plaintiffs could demand that Noom produce those documents in families with the corresponding messages.

*Charter Commc'n Operating, LLC v. Optimize, LLC*, No. 2018-0865-JTL, 2021 WL 1811627 (Del. Chanc. Ct. Jan. 4, 2021). In connection with the parties’ business dispute, plaintiff requested production of relevant chat messages that defendant’s employees exchanged on its Microsoft Teams communication platform. In response, defendant turned over the relevant messages, but its production segregated each message into an individual document, separate and apart from any other messages the users exchanged. The result was that defendant produced 87,000 individualized and separate messages in an email format that often memorialized just a few words or lines of text. Plaintiff then demanded that defendant produce the Teams messages in native format so plaintiff



could reconstitute the messages into conversations. After defendant declined to do so, plaintiff moved for relief and the court granted plaintiff's motion, ordering defendant to produce the Teams messages in native format.

*IQVIA, INC. v. Veeva Sys., Inc.*, No. 2:17-cv-00177-CCC-MF, 2019 WL 3069203 (D.N.J. July 11, 2019). The court-appointed special master ordered defendant Veeva to produce 2,200 Google Drive linked documents in family relationships with emails that included hyperlinks to those documents. Relying on *Pom Wonderful LLC v. Coca-Cola Co.*, 2009 WL 10655335 (C.D. Cal. Nov. 30, 2009), which held that emails and attachments should be produced in family relationships, the special master determined that considerations requiring the production of documents with attachments were indistinguishable from those involving linked documents. The special master opined that he was “not convinced that relinking these 2,200 documents is unduly burdensome in light of the issues at stake in this matter, the resources of the parties, and the amount in controversy. Accordingly, to the extent possible, Veeva is ordered to link the Google Dive documents referenced in emails within thirty days of the date of this Order.”

## Non-Party Discovery

*Lechowski-Mercado v. Seely Swan High School*, CV 21-10-M-DLC, 2021 WL 2802662 (D. Mont. July 6, 2021). Plaintiffs' Rule 45 subpoena sought to image a non-party minor's phone in order to obtain messages and posts from social media that evinced “bullying and harassment” by the minor toward plaintiff Mercado. The court quashed the subpoena in part, holding that plaintiffs could discover the minor's private communications to the extent his messages referenced Mercado, but not other private messages (see **Privacy**). While the court ordered the non-party minor to produce his smartphone for imaging and ruled that information directly relating to Mercado be produced in discovery, the court directed plaintiffs, as the subpoenaing parties, to bear the entire cost of both imaging the phone and producing the information deemed relevant and responsive. In doing so, the court, citing Rule 45(d)(2)(B)(ii), expressed reluctance to impose “a financial burden on a third-party subpoena recipient” where the costs could be significant and where the non-party is a minor.

## Non-Traditional ESI

*Rosbach v. Montefiore Med. Ctr.*, 19cv5758 (DLC), 2021 WL 3421569 (S.D.N.Y. Aug. 5, 2021). District Judge Denise Cote dismissed pursuant to its inherent authority plaintiff's wrongful termination claims after plaintiff perpetrated a fraud on the court by introducing as evidence a fabricated text message. There were several indicia suggesting plaintiff fabricated the text message at issue. One of the key indicators was the “heart eyes” emoji, whose size and colors were not consistent with those that should have been apparent on plaintiff's iPhone 5, the device on which she claimed to receive the message. Judge Cote likewise found dismissal of plaintiff's claims appropriate under Rule 37(e)(2) since plaintiff destroyed relevant, responsive information on both her iPhone 5 and her iPhone X. The court also imposed monetary sanctions jointly and severally on plaintiff, her lawyer, and the lawyer's firm for such misconduct. See discussion under **Reasonable Inquiry**.

*State v. Burch*, 961 N.W.2d 314 (Wis. 2021). In this homicide case, defendant argued he was not responsible for the victim's death and asserted that the victim's boyfriend (Detrie) committed the murder in question. However, both law enforcement and the court dismissed defendant's assertion that Detrie was the assailant based on evidence from Detrie's Fitbit. As the court observed, “Detrie

wore a Fitbit Flex, a wrist-worn device that continuously tracks the wearer's steps and interfaces with the wearer's phone or computer.” During the timeframe when the crime transpired, Detrie’s Fitbit confirmed that he took only 12 steps. In contrast, “Google Dashboard” information the police obtained from Google (based on defendant’s email address) established that defendant’s Samsung smartphone was at the following locations: “[The] bar [the victim] visited the night of her death, a location near [her] residence, the place where [her] body was found, and the on-ramp where [her] discarded clothing was discovered.” See discussion under **ESI Evidence**.

*Bartis v. Biomet, Inc.*, No. 4:13-CV-00657, 2021 WL 2092785 (E.D. Mo. May 24, 2021). The court compelled plaintiff to produce relevant health information from his Fitbit device relating to his personal injury claims arising from the “implantation of an artificial hip manufactured and marketed by Defendants.” Plaintiff complained that he had reduced activity and increased pain due to complications arising from the implantation of an artificial hip. Plaintiff also indicated that he had a Fitbit device that he used for tracking performance while he walked and jogged for exercise. The court reasoned that data from the Fitbit device regarding plaintiff’s physical health might yield information relating to his claims or the defenses: “A plaintiff’s wearing of an activity tracker like a Fitbit does not warrant a fishing expedition into the data from such device . . . But in this case, the extent of Hollins’ physical activity is relevant to his claims of long-term physical injury.”

## Possession, Custody or Control

*Hall v. Marriott Int’l, Inc.*, No.: 3:19-cv-01715-JLS-AHG, 2021 WL 1906464 (S.D. Cal. May 12, 2021). The court held that defendant, owner of an international hotel chain, had possession, custody, or control of documents reflecting amenity and resort fees customers paid to defendant’s franchisees. Defendant objected to plaintiffs’ requests for such information on “undue burden” grounds (**Rule 34 Objections and Responses**), but also argued the requests were beyond the scope of its possession, custody, or control. The court disagreed, observing that while defendant did not have physical possession of the records, it did have a legal right to obtain such information from its franchisees: “Defendant’s profit from its franchise agreements is based on a percentage of revenue. It follows that Defendant’s franchise agreements would give Defendant access to financial data to confirm a franchised hotel’s revenues.” The court ordered defendants to produce documents memorializing amenity and resort fees their franchisees charged customers and imposed monetary sanctions on defendant in the amount of \$12,375 for failing to produce such information short of motion practice.

*James v. US Bancorp.*, No. 18-cv-1762-FLA (SPx), 2021 WL 1890787 (C.D. Cal. May 11, 2021). The court considered—but did not reach a determination—regarding whether defendants had possession, custody, or control over relevant Skype messages that were deleted. While it appeared defendants had a legal right to obtain relevant Skype messages, it was not entirely clear. The court ordered additional discovery so it could determine the nature and extent of the spoliation at issue and whether defendants had possession, custody, or control over the relevant spoliated Skype messages.

## Preservation Demand Letters

*Gomez v. Metro. Gov’t of Nashville and Davidson Cnty.*, Tennessee, No. 3:19-cv-00026, 2021 WL 3406687 (M.D. Tenn. Aug. 4, 2021). In this employment discrimination case, the court found defendant

failed to take reasonable steps to preserve relevant emails relating to the “I Hate” email plaintiff received from another of defendant’s employees (Smith). The court explained that defendant had ample opportunity to anticipate that litigation was forthcoming and thereby place relevant emails on hold before they were lost. Defendant should have reasonably anticipated litigation by (among other things) the following: Plaintiff sent the “I Hate” email to defendant’s legal department and to his co-workers; plaintiff’s counsel sent a preservation demand letter to defendant requesting the preservation of messages found on Smith’s “computer;” plaintiff filed a charge with the EEOC; and defendant’s chief information officer and email administrator respectively determined that the “I Hate” email originated from Smith’s email account. Pursuant to Rule 37(e)(1), the court imposed an evidence preclusion sanction against defendant and issued a jury instruction that is tantamount to a permissive adverse inference instruction.

*Peals v. QuikTrip Corp.*, No. 4:20-cv-22-KPJ, 2021 WL 2043185 (E.D. Tex. May 21, 2021). In this slip-and-fall case, plaintiff sent defendant a preservation demand letter with a broad request that it keep any and all video footage relating to the incident. In response, defendant preserved 30 minutes of video footage contemporaneous with plaintiff’s slip and fall. Thirty months later—29 months after the remainder of the video footage was overwritten pursuant to defendant’s retention policy—plaintiff asserted for the first time that residual cleaning fluids applied by defendant’s custodial staff were responsible for the slick floor that resulted in his fall and sought six additional hours of video footage preceding the incident. While plaintiff then sought spoliation sanctions for defendant’s failure to preserve the additional video, the court found defendant had no obligation to keep that footage. Magistrate Judge Kimberly Priest Johnson reasoned that nothing in plaintiff’s preservation demand or his pleadings would have apprised defendant of a purported need to maintain the additional video. Accordingly, sanctions under Rule 37(e) were not warranted.

## Privacy

*Lechowski-Mercado v. Seely Swan High School*, CV 21-10-M-DLC, 2021 WL 2802662 (D. Mont. July 6, 2021). In their action against a school district, plaintiffs served a Rule 45 subpoena on a non-party minor that sought to image his phone and thereby obtain social media posts and messages from the minor that evinced “bullying and harassment” toward plaintiff Mercado. The minor agreed to produce his public communications regarding Mercado but moved to quash the subpoena to prevent discovery of any private communications made through social media sites’ direct messaging features. The court quashed the subpoena in part (see **Non-Party Discovery**), holding that plaintiffs could discover the minor’s private communications to the extent his messages mention Mercado. Nevertheless, the court declined to allow discovery of the minor’s other private messages, reasoning that social media sites like Facebook and Instagram have promulgated rules and features (like direct messaging) designed to enhance user privacy. While those features cannot bar legitimate discovery, the court explained that disclosing the minor’s direct messages regarding “other students or staff at his high school exceed the scope of relevancy” and would violate the minor’s privacy rights.

## Privilege and Work Product / Data Breaches

*In re Rutters Inc. Data Security Breach Litig.*, 1:20-cv-382 (M.D. Penn. July 22, 2021). The court held that neither the attorney-client privilege nor the work product doctrine applied to a data breach report that a security firm generated at the direction of defendant’s outside counsel. The court determined

the report was not privileged since it only reflected facts about a company data breach and not a legal opinion or advice. In addition, the court held the report was not work product as the statement of work memorializing counsel's engagement of the security firm, together with testimony from defendant's corporate designee, respectively confirmed the firm's services were not retained in anticipation of litigation.

*In Re Marriott Int'l Inc. Customer Data Security Breach Litig.*, MDL No. 19-MD-2879, 2021 WL 2910541 (D. Md. July 12, 2021). The special master, the Honorable John M. Facciola (ret.), recommended that the court deny plaintiffs' motion to compel production of a data breach report, along with related communications and other documents that defendant's nontestifying expert prepared. Plaintiffs argued the report should be produced pursuant to an exception to the work product doctrine that provides for the discovery of fact work product where a substantial need and undue hardship are established. *See* FED. R. CIV. P. 26(b)(3)(A). Judge Facciola rejected this argument and instead found that the discovery issue was governed by Rule 26(b)(4)(d), which allows for the discovery of a nontestifying expert's report only under exceptional circumstances, a showing plaintiffs failed to meet.

*Guo Wengui v. Clark Hill, PLC*, 338 F.R.D. 7 (D.D.C. 2021). The discovery dispute in this legal malpractice case, which arose from a security breach, focused on "whether documents generated by the defendant in the wake of a data breach—*e.g.*, forensic reports, analyses, and internal communications—are privileged or instead must be turned over in discovery." The court held that neither the privilege nor the work product doctrine forbade the discovery of such information. The report that defendant's security expert generated addressed a variety of business issues, along with the potential of litigation. That the report primarily dealt with business considerations belied the notion that it was prepared in anticipation of litigation or sought legal advice from defendant's retained counsel. Moreover, the court found that defendant disseminated the report to its information technology staff and the FBI. Even assuming the report and related documents were privileged or work product, divulging the report to third parties vitiated any claim of confidentiality over the information.

## Privilege Logs

*Maxus Energy Corp. v. YPF, S.A.*, Nos. 16-11501, 18-50489, 2021 WL 3619900 (D. Del. Aug. 16, 2021). A bankruptcy court found that the attorney-client privilege did not apply to certain documents shared between a parent company and its subsidiary and ordered them produced in discovery. The parent company—a defendant in an adversary proceeding initiated by a trust for the subsidiary—had previously withheld the documents from production and identified them on a privilege log in three separate categories. Faced with an order that required the mass production of nearly 5,700 documents encompassed within the three categories, the parent and its co-defendants argued they should be permitted to conduct a document-by-document review of the materials before turning them over to the trust. In rejecting this argument, the court reasoned that defendants had long since waived their rights on this issue by reaching an agreement with the trust—and obtaining the court's approval—to instead use a categorical privilege log. While categorical logs may obviate the extensive costs and delays associated with document-by-document logs, the court noted that categorical logs also have drawbacks—such as the possibility of producing en masse documents previously designated as privileged—and that defendants were responsible for the "burdens" associated with their logs.

*Weir v. United Airlines, Inc.*, No. 19 CV 7000, 2021 WL 1517975 (N.D. Ill. Apr. 16, 2021). In this employment dispute, Magistrate Judge Heather McShain found that certain entries on defendant's privilege log needed to be revised because defendant had not provided a fulsome description for the corresponding documents it had withheld as privileged. Nevertheless, Judge McShain refused plaintiff's request to perform an *in camera* review of the documents at issue. While observing that *in camera* reviews are "increasingly common," Judge McShain rejected the notion that "an *in camera* review should be granted as a default." Doing so would simply encourage challenges to privilege logs and convert privilege logging into a "mere formality," particularly for disputes involving small numbers of documents. Instead, Judge McShain explained that *in camera* review should be reserved for those instances where a "well-founded basis" exists for doing so.

## Proportionality

*Helena Agri-Enterprises, LLC v. Great Lakes Grain, LLC*, 988 F.3d 260 (6th Cir. 2021). The U.S. Court of Appeals for the Sixth Circuit invoked proportionality limitations enshrined in the 2015 Rules amendments in affirming the district court's order denying a judgment creditor additional discovery pursuant to Rule 56(d). Writing on behalf of the court, the Honorable Jeffrey S. Sutton characterized the creditor's request for additional discovery as an effort "to look under every stone in an e-discovery world populated by many stones." Judge Sutton reasoned that such an effort ran afoul of proportionality, which—citing the Chief Justice's [2015 Year-End Report on the Federal Judiciary](#)—places "reasonable limits" on the bounds of discovery. Because the creditor's requested discovery would exceed those bounds, the court affirmed the district court's denial of the requested discovery.

*Weidman v. Ford Motor Co.*, No. 18-cv-12719, 2021 WL 2349400 (E.D. Mich. June 9, 2021). Plaintiffs asked defendant Ford to run search terms against three custodians and produce documents relating to an inferred aspect of their product liability claims. In response, Ford argued the production of those documents was beyond plaintiffs' claims. Nevertheless, Ford conducted a search for the requested information, identified responsive documents among those it previously produced, and turned over 700 new documents to plaintiffs. Unsatisfied, plaintiffs sought a court order compelling Ford to run the originally requested searches, arguing the information was "highly relevant" and pointing to the broad scope of discovery as justifying their demand. In response, Magistrate Judge Elizabeth Stafford held that the searches were not proportional to the needs of the case. Judge Stafford observed that many lawyers "gloss over the operative rules requiring an assessment of proportionality," preferring instead to focus exclusively on relevance. Indeed, the court indicated that plaintiffs in *Weidman*—like many parties—"note[d] the proportionality factors but only briefly address[ed] them." While the searches at issue may have yielded relevant information, Judge Stafford was unconvinced they would uncover documents beyond those Ford already produced. Because the burden on Ford to conduct such a search outweighed any likely benefit plaintiffs might obtain from the requested searches, the court denied plaintiffs' motion.

*Velez v. City of Chicago*, No. 18 C 8144, 2021 WL 1978364 (N.D. Ill. May 17, 2021). Plaintiff brought a motion to compel production of "complete files for all homicide investigations" that the Chicago Police Department conducted between 1995 and 2001 in Area Four (a section on the west side of Chicago just below the O'Hare airport). The motion also sought "Complaint Register" files for the officers assigned to Area Four during that same time. Plaintiff ostensibly requested the information to obtain evidence supporting his claims that he was wrongfully imprisoned. While plaintiff's

requests may not have seemed too broad, his initial demands sought these same records over a 29-year period. Magistrate Judge Jeffrey Cole described those demands—with their unbounded scope—as “*staggeringly* overbroad” and having “no hope of being taken seriously.” In response to these requests, defendant City of Chicago responded that it would not provide substantive responses. The City then refused to produce responsive records on proportionality grounds to plaintiff’s pared-down requests. Judge Cole characterized the City’s boilerplate proportionality objections as a “non-starter,” particularly since discovery in actions like the plaintiff’s typically involve producing five years (not zero) of homicide and complaint files. Judge Cole examined and then applied the six Rule 26(b)(1) proportionality factors to the instant dispute. In addition, Judge Cole observed that proportionality is a “common sense” principle, reasoning the City would surely have to produce some relevant information in a case involving “the unlawful incarceration of a young man and the loss of sixteen years of freedom.” All of which led to Judge Cole’s conclusion that it was proportional for the City to produce five years of homicide and complaint files.

*Lamaute v. Power*, --- F.R.D. ---, 2021 WL 1978971 (D.D.C. May 18, 2021). In this employment discrimination case in which plaintiff alleged she had been passed over for promotion due to her race, sex, and age, the court held that proportionality factors weighed in favor of granting certain aspects of plaintiff’s requested discovery while also limiting aspects of that discovery. The court’s order found that many of plaintiff’s requests reached too far in terms of the information requested. And yet, defendants’ proposed responses and corresponding productions would be too limited. For example, the court held that plaintiff’s requests that sought production of emails were disproportionate. Some of the individuals whose emails plaintiff sought “had no connection to the decision-making process” and would “add little practical value . . . [where] the key information is that considered by the hiring panel.” Nevertheless, defendant’s proposed responses were too narrow and would exclude relevant communications between plaintiff and the hiring committee members. Accordingly, the court struck a balance, ordering production of relevant emails involving plaintiff, hiring committee members, or others involved with the “selection decision” while proscribing discovery of other requested communications.

*Nichols v. Noom*, 20-cv-3677, 2021 WL 948646 (S.D.N.Y. Mar. 11, 2021), *aff’d*, ECF No. 324 (S.D.N.Y. Apr. 30, 2021). See discussion under **Form of Production**.

## Protective Orders

*S.E.C. v. Volkswagen Aktiengesellschaft*, No. 19-cv-01391-CRB (N.D. Cal. Sep. 23, 2021), ECF No. 70. The Securities and Exchange Commission (SEC) sought to include a provision in the proposed protective order that would allow the regulator to share information defendant designated as confidential with other U.S. government agencies and foreign governments. The court summarily rejected this provision, reasoning it would eviscerate the protective order’s confidentiality provisions. If the SEC were permitted to share confidential documents with agencies and foreign governments beyond the court’s jurisdiction, this would effectively “make material properly designated as confidential not confidential.” The court also found that such a provision would, as a practical matter, make defendant—and other defendants in future cases—“even more reluctant to cooperate in the production of confidential discovery” for fear of having proprietary, sensitive, or other protected information shared beyond the current litigation. Such a development would unnecessarily “complicate the discovery, management and resolution of the civil case in which the documents are sought and relevant to in the first instance.”

## Reasonable Inquiry

*State Farm Mutual Auto. Ins. Co. v. Max Rehab Physical Therapy, LLC*, No.: 18-13257, 2021 WL 2843832 (E.D. Mich. June 28, 2021), *report and recommendation adopted*, 2021 WL 3930133 (E.D. Mich. Sep. 2, 2021). In connection with her report and recommendation regarding the issuance of terminating sanctions (see **Sanctions – Other FRCP Provisions**), Magistrate Judge Elizabeth Stafford found that counsel for defendants did not undertake a reasonable inquiry to determine whether relevant, responsive documents had been produced in discovery. Even though defendants had produced only 39 documents from 12 email accounts, counsel acknowledged that he simply accepted—without further inquiry—defendants’ representations that “they had searched those accounts and found no business or patient related emails.” Citing *DR Distributors LLC v. 21 Century Smoking, Inc.*, 513 F.Supp.3d 839 (N.D. Ill. 2021), Judge Stafford reasoned that counsel should have searched those accounts himself rather than wholly relying on defendants’ representations.

*Roszbach v. Montefiore Med. Ctr.*, 19cv5758 (DLC), 2021 WL 3421569 (S.D.N.Y. Aug. 5, 2021). In dismissing plaintiff’s wrongful termination claims for introducing a fabricated text message (see **Non-Traditional ESI**), District Judge Denise Cote sanctioned plaintiff’s counsel and his law firm pursuant to 28 U.S.C. §1927 for failing to undertake a reasonable inquiry. In supporting its sanctions award, Judge Cote emphasized (among other things) counsel’s failure to undertake any investigation at the outset of the litigation to confirm the integrity of the fraudulent text message. Judge Cote found that counsel could have accomplished this by examining the evidence on plaintiff’s iPhone 5 and her iPhone X, which counsel failed to do.

*Axis Ins. Co. v. Am. Specialty Ins. & Risk Servs., Inc.*, No. 1:19-cv-00165-DRL-SLC, 2021 WL 2910814 (N.D. Ind. July 12, 2021). Magistrate Judge Susan Collins ordered defendant to search all ESI storage repositories for relevant, responsive documents and also required defendant to submit an affidavit discussing the particulars regarding the nature and extent of its search. Defendant previously asserted that it had conducted a thorough search of pertinent repositories for relevant information. Nevertheless, there remained several unanswered questions regarding the precise steps defendant had taken to handle that search. That, combined with defendant’s nominal production of responsive communications, spotlighted what Judge Collins characterized as “legitimate concerns as to whether American Specialty’s research methodology was broad enough to encompass all responsive documents.” See discussion under **Form of Production**.

*Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2021 WL 2767405 (S.D. Ind. July 2, 2021). In connection with its sanctions order against plaintiff for deleting relevant videos and images from his Snapchat account (see **Ephemeral Messaging**), the court criticized plaintiff’s counsel—without sanctioning him—for failing to undertake a reasonably inquiry into the technological features of Snapchat: “[C]ounsel appears to have delegated the inquiry regarding how to retrieve Snapchat data to Plaintiff, who has no legal training or relevant experience, other than as a Snapchat user, and did so despite the fact Defendants were contesting his explanations.” In particular, the court found that counsel should have examined Snapchat to determine its potential for retaining videos and images once he received defendant’s second set of document requests, which made clear that plaintiff could in fact save Snapchat content.

## Rule 34 Objections and Responses

*F.T.C. v. Am. Screening*, No. 4:20-CV-1021 RLW, LLC, 2021 WL 2823176 (E.D. Mo. July 7, 2021). Defendants' boilerplate objections on overbreadth were unsubstantiated and defendants' failure to produce a report corresponding to the FTC's updated search terms doomed their chances of convincing the court that the search terms were overly broad. The court ordered defendants to produce documents responsive to the FTC's requests and "strongly encouraged the parties to work together" on search terms and narrowing the search term results.

*Bidwell Family Corp. v. Shape Corp.*, No. 1:19-cv-201, 2021 WL 2209821 (S.D. Ohio June 1, 2021). The court declined to impose sanctions on defendant despite having produced "one of the most egregious 'document dumps' that the undersigned has witnessed in her decade plus time on the bench." One example (out of many) demonstrating that defendant's production was nothing more than a data dump was the irrelevant emails defendant produced regarding Duke University and British royalty in response to a document request concerning Duke Energy. The court also declined to issue sanctions pursuant to Rule 37(b)(2) for defendant's failure to comply with the court's prior discovery order. The court noted that defendant had cooperatively engaged with plaintiff since the filing of its sanctions motion such that most of the relief plaintiff had otherwise sought had now been addressed.

*Bursztein v. Best Buy Stores, L.P.*, No. 20-cv-00076 (AT) (KHP), 2021 WL 1961645 (S.D.N.Y. May 17, 2021). Magistrate Judge Katharine Parker imposed sanctions on defendant for failing to preserve relevant video footage (see **Sanctions—Rule 37(e)**) allegedly showing plaintiff's slip and fall. In doing so, Judge Parker observed that defendant's discovery responses and tactics in responding to discovery were improper and did not satisfy the Rule 34(b) standard. By way of example, Judge Parker mentioned that the "vast majority of Best Buy's responses in this case start with the phrase 'Defendant Best Buy objects to this demand as vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Furthermore, please refer to Best Buy's General Objections outlined above. Defendant moreover objects to materials sought which were prepared in contemplation of litigation,' or some variation thereof." Judge Parker characterized these objections as "boilerplate," "baseless," and a "paradigm of discovery abuse," ultimately calculated to avoid production of relevant documents.

*Hall v. Marriott Int'l, Inc.*, No.: 3:19-cv-01715-JLS-AHG, 2021 WL 1906464 (S.D. Cal. May 12, 2021). In this consumer class action case, Magistrate Judge Allison Goddard generally found that defendant's discovery objections were boilerplate in nature and lacked the specificity required by Rule 34(b)(2)(B). While Judge Goddard addressed and overruled those objections on a request-by-request basis (see **Possession, Custody, or Control**), she also generally examined (and rejected) those objections at the outset of the opinion. Judge Goddard was particularly frustrated that defendant refused to produce many documents based on what she considered to be a meritless objection that class discovery was premature. Judge Goddard had previously informed the parties that it would not bifurcate out class discovery, making class discovery permissible at the outset of litigation. This was one of several aspects of defendant's conduct that factored into the monetary sanctions award against it in the amount of \$12,375.

*Blaier v. Amps Staffing, Inc.*, No. 1:20-cv-02324-AT-RDC, 2021 WL 2451741 (N.D. Ga. Mar. 18, 2021). The court imposed monetary sanctions in the amount of \$9,896.25, jointly and severally, on



defendants for failing to produce responsive documents and for serving boilerplate or otherwise frivolous objections. The court emphasized the role of defendants' objections and other conduct in delaying the litigation: "[T]he delay is mainly due to Defendants' unsubstantiated objections and apparent refusal to produce relevant documents . . . Defendants' repeatedly asserted general and boilerplate objections to Plaintiff's requests for discovery . . . Other objections asserted frivolous positions on the issues . . . when Defendants indicated that documents existed, they stated that production was forthcoming . . . However . . . these documents were never produced."

*Smash Tech., LLC v. Smash Sol., LLC*, 335 F.R.D. 438 (D. Utah 2020). The court found that plaintiff's boilerplate objections were meritless and therefore overruled. In a colorful opinion, Magistrate Judge Jared Bennett analogized boilerplate and general objections to the famous musical *Fiddler on the Roof* to spotlight the dangers of following traditions that lack substantiation or basis in the law: "In many ways, civil litigators live in Anatevka. With ominous warnings in the Federal Rules of Civil Procedure such as 'any ground not stated in an objection is waived,' civil discovery litigation is difficult and, like fiddling on a roof, can even feel dangerous." See discussion under **Sanctions—Other FRCP Provisions**.

## **Rule 502(d)**

*Klein v. Facebook, Inc.*, No. 20-cv-08570-LHK (VKD), 2021 U.S. Dist. LEXIS 105516 (N.D. Cal. June 3, 2021). The parties requested the court to determine the contents for certain provisions memorialized in a proposed nonwaiver order under Federal Rule of Evidence 502(d). In particular, the parties sought to ascertain whether the order was limited to inadvertent disclosures or whether it included *any* disclosure of privileged information. The court determined that the order should include intentional as well as inadvertent disclosures: "[T]he production or disclosure of any documents and accompanying metadata . . . does not result in the waiver of any privilege or protection, including subject matter waiver, associated with such Protected Documents as to the receiving party or any third parties in this or in any other state or federal proceeding solely by virtue of such production or disclosure." The court also set a particular time frame—ten business days from the parties' receipt of a deposition transcript—to make a clawback request and thereby assert a claim of privilege over a document

## **Sanctions—Rule 37(e)**

*Winecup Gamble, Inc. v. Gordon Ranch LP*, 850 Fed. Appx. 573 (9th Cir. 2021). A three-judge panel from the U.S. Court of Appeals for the Ninth Circuit reversed a district court order imposing terminating sanctions against plaintiff pursuant to Rule 37(e)(2). The court found the sanctions were inappropriate where plaintiff's actions, which resulted in the loss of ESI, were negligent at best. The court determined there was no evidence demonstrating an intent to deprive; replacement evidence for the lost information had already been produced; and the lost ESI did not appear to be critical or, in any event, case dispositive.

*Hughes v. City of New York*, 1:18-cv-09380-MKV, 2021 WL 4295209 (S.D.N.Y. Sep. 21, 2021). In this case involving § 1983 claims, plaintiff sought both to stave off summary judgment and obtain discovery sanctions against defendants for their failure to preserve relevant photographs, along with recordings of 911 calls and police radio transmissions. The court found defendants' evidence preservation shortcomings violated Rule 37(e) and warranted the imposition of monetary sanctions.

In particular, the court found that defendants should have reasonably anticipated litigation and thus preserved relevant evidence after plaintiff filed his “Notice of Claim” (which summarized plaintiff’s legal claims against defendants) with the New York City Law Department. While bereft of an evidence preservation demand, the Notice was still sufficient to trigger defendants’ preservation duty. The court also held that defendants failed to take reasonable steps to preserve the relevant ESI. Defendants did not advise the police officer—on whose NYC-issued phone were located the relevant photographs—to keep those pictures. Without a hold instruction, the officer exchanged his phone containing the images for a new phone, which resulted in their destruction. Defendants also neglected to suspend aspects of their automated deletion program to keep the relevant 911 and radio transmission recordings. Finally, the court dismissed defendants’ proffered replacement evidence (the “SPRINT” report) as being insufficient to replace the lost ESI. Nevertheless, the court found that plaintiff did not suffer additional prejudice from the lost ESI to warrant other sanctions or otherwise prevent the court from granting defendants summary judgment on plaintiff’s claims.

*Manning v. Safelite Fulfillment, Inc.*, No. 17-2824 (RMB/MJS), 2021 WL 3542808 (D.N.J. Aug. 11, 2021). The court adopted in part Magistrate Judge Matthew Skahill’s report and recommendation regarding the imposition of certain Rule 37(e) sanctions. The court declined to accept Judge Skahill’s finding that plaintiff had not acted with “an intent to deprive” and that defendants should be allowed to “present evidence of the deleted Facebook messages to the jury at trial” pursuant to Rule 37(e)(1). Instead, the court, without explaining why, decided it would “reserve judgment” on the “appropriate sanctions” and would “submit to the jury the issue of whether Plaintiff acted with an intent to deprive Defendants of relevant information when he deleted his Facebook messages.”

*Via Vadis, LLC v. Amazon.com, Inc.*, No. 1:14-CV-00813-LY, 2021 WL 3134257 (W.D. Tex. July 23, 2021). The court declined to impose Rule 37(e) sanctions against defendant Amazon for its failure to preserve allegedly relevant server log data since there was replacement evidence that was readily available. The court found that plaintiffs failed to satisfy the fourth factor in the FRCP 37(e) because Amazon readily supplied replacement evidence for the destroyed server log data, *i.e.*, customer usage data. As the court observed, “Amazon has shown that it replaced the relevant data from the server logs, and therefore, Plaintiffs have not satisfied the fourth predicate element for sanctions under Rule 37(e). Because Amazon has established that it has replaced the relevant information, and that the server logs were lost without Amazon’s ‘intent to deprive [Plaintiffs] of the information’s use in the litigation’ under Rule 37(e), Plaintiffs’ motion for spoliation sanctions is denied.”

*F. T. C. v. Noland*, No. CV-20-00047-PHX-DWL, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021). See discussion under **Ephemeral Messaging**.

*Gomez v. Metropolitan Government of Nashville and Davidson County, Tennessee*, No. 3:19-cv-00026, 2021 WL 3406687 (M.D. Tenn. Aug. 4, 2021). See discussion under **Preservation Demand Letters**.

*Doe v. Purdue University*, No. 2:17-CV-33-JPK, 2021 WL 2767405 (S.D. Ind. July 2, 2021). See **Ephemeral Messaging** and **Reasonable Inquiry**.

*F. T. C. v. Vyera Pharm., LLC*, No. 20cv00706 (DLC), 2021 WL 2201382 (S.D.N.Y. June 1, 2021). In this antitrust action, District Judge Denise Cote imposed Rule 37(e)(1) sanctions on defendant Martin Shkreli, who is serving a seven-year prison sentence for fraud. The “lost” ESI—relevant text messages—was previously located on two different phones Shkreli used: a smartphone that defendant Vyera Pharmaceuticals issued to Shkreli and a contraband phone that Shkreli used to

conduct business for Vyera while in prison. Judge Cote declined to impose sanctions against Vyera or Shkreli for the ESI lost from Shkreli's Vyera phone given the possibility that text messages may be available on cloud backup. However, Judge Cote found Shkreli should have preserved relevant WhatsApp messages from his contraband phone that reflected communications relevant to plaintiffs' claims and imposed an issue preclusion sanction to remediate the harm caused by his spoliation.

*Torgersen v. Siemens Bldg. Tech., Inc.*, No. 19-cv-4975, 2021 WL 2072151 (N.D. Ill. May 24, 2021). The court issued a mandatory adverse inference instruction against plaintiff pursuant to Rule 37(e)(2) for deleting his Facebook account. Defendants had sought discovery of social media posts plaintiff made on Facebook that might show plaintiff leading a healthy and active lifestyle, thus belying his personal injury claims. In response to their discovery requests and his counsel's directive to preserve his Facebook page, plaintiff deleted his Facebook account, resulting in that information being permanently "lost" for purposes of Rule 37(e). Against this backdrop, the court had little difficulty concluding that defendants complied with Rule 37(e)'s threshold requirements. In particular, the court rejected plaintiff's argument that his production of 600 images in PDF was satisfactory replacement evidence for the information lost from his Facebook account. The court observed that the images were not in their native format, did not include metadata, and were unaccompanied by the posts or comments made on the social media site.

*Bursztein v. Best Buy Stores, L.P.*, No. 20-cv-00076 (AT) (KHP), 2021 WL 1961645 (S.D.N.Y. May 17, 2021). In this slip-and-fall case, the court held that Rule 37(e)(1) sanctions were appropriate to remedy the harm that defendants caused by failing to preserve (among other things) relevant video footage of the incident. Those sanctions included allowing plaintiff to present evidence at any trial regarding defendant's spoliation of evidence and an award of monetary sanctions. In connection with this order, Magistrate Judge Katharine Parker found that defendants failed to take reasonable steps to preserve the relevant video footage. While defendants denied the video footage even existed, their general manager confirmed multiple times—including in deposition testimony—that the footage did exist and that he had seen the video, including a "trip" in the footage. Such testimony, together with defendants' "obstructive" discovery tactics (see **Rule 34 Objections and Responses**), led Judge Parker to conclude the footage did exist and that defendants did not take reasonable steps to preserve it.

*Edwards v. Junior State of America Found.*, No. 4:19-CV-140-SDJ, 2021 WL 1600282 (E.D. Tex. Apr. 23, 2021). The court imposed 37(e)(1) sanctions against plaintiff for failing to preserve reasonably usable evidence of Facebook Messenger messages. Plaintiff purportedly took screenshots of the messages, but then deleted his Facebook account and failed to retain admissible evidence of those messages (see **ESI Evidence**). The court found that defendant satisfied the Rule 37(e) threshold requirements and, as a curative measure designed to ameliorate the harm the lost evidence caused to defendant, imposed an evidence preclusion sanction against plaintiff, proscribing him from offering any testimony or evidence regarding the alleged text message exchange.

## Sanctions—Other FRCP Provisions

*State Farm Mutual Auto. Ins. Co. v. Max Rehab Physical Therapy, LLC*, No.: 18-13257, 2021 WL 2843832 (E.D. Mich. June 28, 2021), *report and recommendation adopted*, 2021 WL 3930133 (E.D. Mich. Sep. 2, 2021). Magistrate Judge Elizabeth Stafford issued a report and recommendation (which the

court subsequently adopted) recommending that terminating sanctions be imposed against defendants pursuant to Rule 37(b)(2) for a series of discovery abuses relating to ESI. Defendants implausibly indicated they did not use “email, phones, or computers for business purposes;” asserted their email production was complete despite producing only 39 emails from a grand total of 12 custodians; and argued they undertook a reasonable inquiry when in fact they failed to issue litigation holds to key players, neglected to collect relevant ESI, and failed “to identify, preserve, and search devices storing requested patient and other [relevant] business records.” See discussion under **Reasonable Inquiry**.

*Haywood v. Wexford Health Sources, Inc.*, No. 16 CV 3566, 2021 WL 2254968 (N.D. Ill. June 3, 2021). See discussion under **Form of Production**.

*Bidwell Family Corp. v. Shape Corp.*, No. 1:19-cv-201, 2021 WL 2209821 (S.D. Ohio June 1, 2021). See discussion under **Rule 34 Objections and Responses**.

*Hall v. Marriott Int’l, Inc.*, No.: 3:19-cv-01715-JLS-AHG, 2021 WL 1906464 (S.D. Cal. May 12, 2021). See discussion under **Possession, Custody or Control** and **Rule 34 Objections and Responses**.

*Edwards v. Junior State of America Found.*, No. 4:19-CV-140-SDJ, 2021 WL 1600282 (E.D. Tex. Apr. 23, 2021). The court imposed a preclusion sanction against plaintiff pursuant to Rule 37(c)(1) that prohibited plaintiff from introducing testimony, reports, or any other evidence obtained from his experts relating to the alleged Facebook Messenger messages that plaintiff failed to timely disclose to defendant. See discussion under **ESI Evidence** and **Sanctions—Rule 37(e)**.

*Blaier v. Amps Staffing, Inc.*, No. 1:20-cv-02324-AT-RDC, 2021 WL 2451741 (N.D. Ga. Mar. 18, 2021). See discussion under **Rule 34 Objections and Responses**.

*Smash Tech., LLC v. Smash Sol., LLC*, 335 F.R.D. 438 (D. Utah 2020). The court overruled plaintiffs’ boilerplate objections and ordered plaintiffs to provide full and complete responses to defendants’ interrogatories and document requests (see **Rule 34 Objections and Responses**). In addition, while finding plaintiffs’ written responses lacked substantial justification pursuant to Rule 37(a)(5)(A), the court declined to impose sanctions given that plaintiffs had just retained new lawyers and that it would be “unjust” to punish those attorneys or their clients for the transgressions that former counsel committed in preparing the offending objections.

## **Sedona Principle Six**

*In re Diisocyanates Antitrust Litig.*, No. 2:18-mc-01001-DWA, 2021 WL 4295729 (W.D. Pa. Aug. 27, 2021), *report and recommendation adopted*, 2021 WL 4295719 (W.D. Pa. Sep. 21, 2021). In his report and recommendation to the court regarding the parties’ competing protocols for using technology-assisted review, the court-appointed special master—the Honorable James C. Francis IV (ret.)—discussed the application of Sedona Principle Six (without mentioning it by name) to the disputed TAR protocols. Judge Francis observed that the general rule that parties responding to discovery have the right to determine how they will handle their document production processes is subject to the condition that those processes must be reasonable. Viewing the parties’ dispute through this lens, Judge Francis determined that defendants’ positions on recall and validation were not reasonable under the circumstances. Nevertheless, Judge Francis did not suggest that the court

adopt plaintiffs' rival protocol, finding that their protocol went "beyond what the law requires in at least some respects" and that defendants could still develop a reasonable TAR protocol. The court subsequently adopted Judge Francis's report and recommendation. See discussion under **Technology-Assisted Review**.

## Social Media

*In re Application of The Republic of The Gambia v. Facebook, Inc.*, --- F. Supp. 3d ---, 2021 WL 4304851 (D.D.C. Sep. 22, 2021). See discussion under **Cross-Border Discovery**.

*Manning v. Safelite Fulfillment, Inc.*, No. 17-2824 (RMB/MJS), 2021 WL 3542808 (D.N.J. Aug. 11, 2021). See discussion under **Sanctions—Rule 37(e)**.

*Cleveland v. The Behemoth*, No.: 19-cv-0672-GPC-BGS, 2021 WL 2184852 (S.D. Cal. May 28, 2021), *Sustained in Part and Overruled in Part*, 2021 WL 3701575 (S.D. Cal. Aug. 19, 2021). In this sexual harassment suit, plaintiff argued that discovery sanctions should be imposed on defendant pursuant to Rule 37(c)(1) for failing to timely supplement its initial disclosures with plaintiff's YouTube Watch History from the computer she used while working for defendant. Magistrate Judge Bernard Skomal found defendant's tardy production of the YouTube Watch History was not justified since defendant did not perform a comprehensive search of plaintiff's computer files that it previously collected using the Google Takeout feature. Nevertheless, Judge Skomal declined to impose sanctions because he determined plaintiff had not established sufficient prejudice to warrant additional discovery. For Judge Skomal, plaintiff had not shown why he needed additional details beyond those defendant already provided, *i.e.*, "how the account was preserved, how and when it was searched, what was found, when it was found, and when it was produced." The district court, however, disagreed with Judge Skomal and sustained plaintiff's objection to this aspect of his order. Unlike defendant's belatedly produced Slack messages (see **Workplace Collaboration Tools**), the district court found the YouTube Watch History was unique evidence and that defendant had failed to provide sufficient details beyond its Google Takeout collection disclosure. To address this issue, the court allowed Plaintiff "to reopen discovery for the limited purpose of propounding discovery addressing the origin, creation, custody, and extraction of the YouTube Watch History only."

*Allen v. PPE Casino Resorts Maryland, LLC*, --- F.Supp.3d ---, 2021 WL 2434404 (D. Md. June 14, 2021). The court limited defendant's discovery requests for relevant social media posts reflecting plaintiffs' "emotions, feelings, or mental states" to specific events in time (*e.g.*, doctor visits) or specific events that might have caused emotional distress (*e.g.*, death of a loved one, marital problems, etc.). The court reasoned that the discovery needed reasonable boundaries given the "garden variety" nature of plaintiffs' emotional distress claims. Otherwise, all social media posts might arguably reflect on or relate to plaintiffs' emotional state and thus make them subject to discovery. In addition, the court held that plaintiffs' responses would also be limited (at that time) to the content available to them from the social media platform's download features.

*Torgersen v. Siemens Building Technology, Inc.*, No. 19-cv-4975, 2021 WL 2072151 (N.D. Ill. May 24, 2021). See discussion under **Sanctions—Rule 37(e)**.

## Technology-Assisted Review

*In re Application of The Republic of The Gambia v. Facebook, Inc.*, --- F. Supp. 3d ---, 2021 WL 4304851 (D.D.C. Sep. 22, 2021). The court emphasized that Facebook, as the respondent to a 28 U.S.C. § 1782 petition (see **Cross-Border Discovery**), could use TAR to ameliorate the normal burdens typically associated with the discovery process: “Ultimately, this case raises at most the normal burdens of discovery—including for § 1782 requests. Facebook can mitigate the primary burden it identified by using ‘technology assisted review [which] is cheaper, more efficient and superior to keyword searching.’”

*In re Diisocyanates Antitrust Litig.*, No. 2:18-mc-01001-DWA, 2021 WL 4295729 (W.D. Pa. Aug. 27, 2021), *report and recommendation adopted*, 2021 WL 4295719 (W.D. Pa. Sep. 21, 2021). In this Multi-District Litigation involving antitrust claims over the pricing of chemicals used in the manufacture of polyurethanes, the parties advanced competing proposals for how defendants should handle the identification of relevant information in response to plaintiffs’ discovery requests. In response, the court appointed the Honorable James C. Francis, IV (ret.) as special master to evaluate the parties’ respective proposals and facilitate a resolution of their dispute. While observing that responding parties ordinarily control how they will handle their document production processes (see **Sedona Principle Six**), Judge Francis determined that defendants’ positions on recall and validation were not reasonable under the circumstances. Regarding recall, Judge Francis found that defendants’ initial proposal to measure recall based only on the documents processed using TAR was too limited and did not account for other responsive documents that may have been inadvertently excluded at earlier stages of culling. On validation, Judge Francis determined that defendants’ approach—general elusion testing at the end of the TAR process—was underinclusive. Judge Francis explained that general elusion testing might be an adequate recall measure in other circumstances, but the TAR 2.0 technology defendants intended to use in this case would allow for a more granular evaluation of the quality and nature of relevant documents and accordingly might reveal with greater exactness when a review should stop. Nevertheless, Judge Francis did not suggest that the court adopt plaintiffs’ rival protocol, finding that it went “beyond what the law requires in at least some respects” and that defendants could still develop a reasonable TAR protocol. The court subsequently adopted Judge Francis’s report and recommendation, rejected plaintiffs’ assertion that their TAR protocol should be adopted, and allowed defendants to proceed with the search and identification process based on a newly revised version of their TAR protocol.

*Huntsman v. Sw. Airlines Co.*, No. 19-cv-00083-PJH, 2021 WL 3504154 (N.D. Cal. Aug. 10, 2021). The court summarily approved defendant’s proposed workflow to identify relevant, responsive documents, which included using search terms and then TAR. As the court observed, defendant’s “approach to using keyword searches and technology-assisted review in tandem does not offend the court’s expectation that the parties conduct a reasonable inquiry as required by the rules.”

*Maurer v. Sysco Albany, LLC*, No. 1:19-CV-821 (TJM/CFH), 2021 WL 2154144 (N.D.N.Y. May 27, 2021). In this wrongful termination case, plaintiff sought to compel defendants to search for relevant information using a combination of either search terms and manual review or running predictive coding against the email accounts for various custodians. In response, defendants proposed running predictive coding after using general search terms to limit the universe of potentially relevant ESI. The court found defendants’ approach to be more reasonable while observing that the search term and linear review approach would be disproportionate under the circumstances given defendants’ anticipated review costs. Nevertheless, the court ordered defendants to augment their search terms with certain keywords supplied by plaintiff to better ensure relevant, responsive information that plaintiff sought would be identified and produced.

## Workplace Collaboration Tools

*Charter Communic'n Operating, LLC v. Optimize, LLC*, No. 2018-0865-JTL, 2021 WL 1811627 (Del. Chan. Ct. Jan. 4, 2021). See discussion under **Form of Production**.

*Cleveland v. The Behemoth*, No.: 19-cv-0672-GPC-BGS, 2021 WL 2184852 (S.D. Cal. May 28, 2021), *Sustained in Part and Overruled in Part*, 2021 WL 3701575 (S.D. Cal. Aug. 19, 2021). In this sexual harassment suit, plaintiff argued that defendant improperly withheld and then belatedly produced ten relevant communications from its Slack account and accordingly moved for sanctions against defendant under Rule 37(c)(1). Nevertheless, Magistrate Judge Bernard Skomal found defendant's tardy production to be "harmless and substantially justified." While the delay was substantial—effectively six months after the close of discovery—the court observed that plaintiff, unlike its showing with the YouTube Watch History (see Social Media), had neglected to spotlight anything unique or otherwise of substance from the messages at issue that would suggest the court should reopen discovery or that required the issuance of other sanctions to remediate any prejudice. In addition, the court deemed the late production excusable given that it resulted from "vendor error." Defendant's eDiscovery provider apparently experienced a "flaw" in its "algorithm," which resulted in the ten Slack messages being inadvertently withheld. The district court subsequently affirmed Judge Skomal's order regarding the Slack messages.