

# Navigating the Stringent Legal e-Discovery Requirements & Patient Confidentiality Concerns Associated with Electronic Documentation

American Conference Institute  
Advanced Forum on Healthcare Provider Disputes and Litigation

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# Legal and Regulatory Issues

- State and Federal Discovery Rules
- HIPAA Requirements
- 2009 HITECH Act
- OCR'S HIPAA Audit Protocol
  - Privacy
  - Security
  - Breach Notification

*What? — Me worry??*



# Federal Discovery Rules Framework

- **FRCP 16(b)** encourages initial scheduling order to include provisions for addressing e-discovery disclosures and discovery.
- **FRCP 26(a)(1)(B)** includes “ESI” in the list of required initial disclosures.
- **FRCP 26(b)(2)(B)** draws distinction between accessible and inaccessible data and creates cost-shifting opportunities.
- **FRCP 26(b)(5)(B) & 26(f)(4)** authorize “claw back” and “quick peek” provisions in discovery orders.
- **FRCP 26(f)** includes e-discovery disclosure and discovery in list of topics to be discussed at initial planning conference.
- **FRCP 34(b)** establishes protocols regarding the form of production of ESI.
- **Form 35** includes a description of the parties’ e-discovery proposals.
- **FRCP 37(e)** says ESI lost as result of routine, good faith operation of an electronic information system should not result in sanctions.
- **FRCP 45** clarifies that records subpoenas include ESI.

# Local Flavors of E-Discovery Rules

- Some courts have adopted different or more detailed protocols or procedures regarding disclosure and e-discovery
- Some judges have standing orders affecting the conduct of e-discovery
- Federal Circuit Advisory Council's Model E-Discovery Order lays a solid foundation to help manage patent litigation expenses.

**UNITED STATES [DISTRICT/BANKRUPTCY] COURT**  
**FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_**  
**\_\_\_\_\_ DIVISION**

\_\_\_\_\_, )  
Plaintiff, ) Case No. \_\_\_\_\_

vs. )

\_\_\_\_\_, ) Judge \_\_\_\_\_  
Defendant. )

**[PROPOSED]**  
**STANDING ORDER RELATING TO THE**  
**DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

This court is participating in the Pilot Program initiated by the Seventh Circuit Electronic Discovery Committee. Parties and counsel in the Pilot Program with civil cases pending in this Court shall familiarize themselves with, and comport themselves consistent with, that committee's Principles Relating to the Discovery of Electronically Stored Information. For more information about the Pilot Program please see the web site of The Seventh Circuit Bar Association, [www.7thcircuitbar.org](http://www.7thcircuitbar.org). If any party believes that there is good cause why a particular case should be exempted, in whole or in part, from the Principles Relating to the Discovery of Electronically Stored Information, then that party may raise such reason with the Court.

# State Courts Have Gotten Into The Act

- Over 30 states now have e-discovery rules based in whole or in part on the 2006 Amendments to FRCP.
- Three broad groups:
  - Those that have enacted rules that generally follow the 2006 federal amendments:
  - Those that have taken some concepts from 2006 amendments to make small changes
  - Those that follow the Texas rule that preceded the 2006 federal amendments

# When a Breach Occurs, Litigation is Sure to Follow

- Breach Events:
  - Stolen back-up tapes, lost computer disks, unauthorized communications about plaintiff/patient's medical condition, lax sharing of medical record access code
- Patient Response:
  - Civil Suits

# No Private Right of Action Under HIPAA, But....

- In a case against a former treating physician who engaged in ex parte communications with defense counsel in the patient's underlying personal injury case, the patient claimed the doctor's conduct breached fiduciary duties of confidentiality and loyalty, and violated professional standards found in HIPAA, the AMA's Principles of Medical Ethics, and the Hippocratic Oath.
  - *Sorensen v Barbuto*, 143 P.3d 295 (C.A. Utah 2006)
- Staff member in a psychiatric clinic gained access to patient's medical files and shared information with a third party. Patient sued the psychiatrist for Negligent Infliction of Emotional Distress, and staff member for invasion of privacy and Intentional Infliction of Emotional Distress. Plaintiff's Complaint cites HIPAA, and doctor moved to dismiss. The Court of Appeals held that the plaintiff was only using HIPAA as evidence of the applicable standard of care, a necessary element of negligence. "[HIPAA provides] evidence of the duty of care owed by [the doctor] with regards to the privacy of plaintiff's medical records."
  - *Acosta v Byrum*, 180 N.C. App 562, 638 S.E.2d 246 (2006)

# HIPAA Can Set the Standard of Care

- HIPAA can be used to support a state law claim for negligence and negligence *per se*; but such a claim does not provide a basis for federal jurisdiction or removal.
  - *K.V. v Women's Healthcare Network, LLC*, No. 07-0228-CV-W-DW, 2007 WL 1655734 (W.D. Mo. June 6, 2007)
- The plaintiff alleged defendant made an unauthorized release of medical records to plaintiff's employer. Plaintiff's complaint included a state claim for negligence *per se*, citing HIPAA as the standard of care by which to judge the defendant's negligence. The Court allowed the claim to stand despite its exclusive reliance upon HIPAA.
  - *I.S. v. The Washington University*, Case No. 4:11CV235SNLJ, (E.D. Mo. June 4, 2011)



# HIPAA-Type Allegations in Class Actions

- February 2012: ten computer disks, containing PHI for 315,000 patients are lost at Emory Healthcare.
- Class action filed June 4, 2012 citing HIPAA as evidence of industry standards and duties violated by the defendants:
  - “¶62. The stated purpose of HIPAA’s Privacy Rule was also to establish minimum standards for safeguarding the privacy of the individually identifiable health information.”
  - “¶67. Plaintiff is not attempting to bring a cause of action under HIPAA for violation of HIPAA’s Privacy Rule. Under the circumstances of this case, however, Defendant Emory’s violation of HIPAA’s Privacy Rule and the state statutes referenced above constitutes negligence *per se*.”

*Bombardieri v Emory Healthcare, Inc.* Case No 2012CV215883 (Fulton Cty., GA)

# Class Actions for Privacy Breaches: The Trend Continues

- **Against:** Stanford Hospital & Clinics, when it was discovered in August 2011 that information on 20,000 Emergency Department patients appeared on a public website used for students who need help with homework, and remained publicly available online for almost a year.
  - *Class Action filed:* October 2011. (*Springer v Stanford Hospitals and Clinics, et al.*, Case No. BC470522, Superior Court, Los Angeles County, CA.)
- **Against:** Sutter Health, when in October 2011 a computer laptop containing PHI of more than 4 million individuals went missing from the offices of Sutter Medical Foundation.
  - *\$4B Class Action filed:* November 2011 (*Pardieck v Sutter Health, et al.*, Case No. 34-2011-00114396, Superior Court, Sacramento County, CA.)
- **Against:** UCLA Health System, when in September 2011 an unsecured external harddrive containing PHI of >16,000 patients was stolen during a home invasion of a physician's home (and the encryption passwords necessary to unscramble the medical information on the laptop were also stolen.)
  - *Class Action filed:* December 2011 (*Oganyan v Regents of the University of California*, Case No. BC475171, Superior Court, Los Angeles County, CA.)

# And It Gets Worse.... An MDL

- The \$4.9B lawsuit against TRICARE and Science Applications International Corp (SAIC)—8 actions filed in 4 Federal District Courts—arising out of the September 2011 theft of computer tapes containing PHI of approximately 4.9 million active duty and retired service members and their families, on June 20, 2012 were ordered transferred to an MDL in the District of the District of Columbia.
  - *In re: Science Applications International Corp. (SAIC) Backup Tape Data Theft Litigation*, MDL No. 2360.

# Preparing for Class Action Privacy Suits

- Assemble the Team: IT, HR, Patient Relations, Legal (inside counsel and outside counsel), Finance, Quality/Accreditation, Media, Forensic Consultants.
- Implement eDiscovery Basics: litigation hold notices, preservation orders, suspend routine document retention/destruction policies.
- Coordinate with IT early and often: search, identify and preserve all relevant data: look broadly to Business associates, contractors, consultants, Staffing agencies, temp employees, non-employed providers with access to the EMR?
- Choose Your Words Carefully: Press releases, breach notices, letters to affected patients, websites, social media.
- Has it Happened Before? Expect discovery on all prior breach events, big and small, as evidence of the failure to cure and correct; possible grounds for punitive damages claim.
- Personnel & Policies: plaintiffs will scrutinize training programs, attendees, refreshers and updates, background checks; did the entity follow its own policies?
- Be Careful What You Write: absent privilege, the entity's investigation, notes, emails, communications, reports, assessments, correction plans can become the Plaintiff's Playbook.
- Notify Your Carrier(s): E&O, D&O, professional liability, GL, check special breach policies for coverage.
- Notify Your Board, Executive Leadership, Key Stakeholders: the "Responsible Corporate Officer doctrine" is still alive and well.
- Anticipate Parallel Investigations: state Attorneys General, OCR

# It Pays To Be “E-Prepared”

- E-discovery “preparedness” is about:
  - **Understanding** your information technology and records management operations and environment;
  - Being able to **accurately and consistently** describe and document them in required meet & confers and disclosures; and
  - Developing and effectively implementing a **defensible** litigation response plan.



# Basic RIM Objectives

- Know What you Have
- Know Where you Have it
- Know What you Have to Keep
- Know Why you Have to Keep it
- Keep What you have to Keep for as long as you have to Keep it
- Dispose of Everything Else



# Practice Good Information Hygiene

- Develop a well-defined and compliant records retention plan that fits business objectives and likely litigation demands
  - Mark or categorize to be more easily retrievable
  - Reduce what you have to account for
  - Clearly define destruction policy (be wary of overlapping holds)
- Periodically audit and update policies and practices
  - Evaluate e-mail “dumpster” storage time
- Inventory and properly label back-up tapes
- Evaluate back-up tape recycling schedules
  - How long necessary for disaster recovery?
- Don't overlook voicemail, text & instant messaging, etc.

# ESI Identification & Response Plan

- Multi-disciplinary team is essential.
- What are the applicable records management requirements, policies and practices?
- Who are the most likely custodians of relevant ESI?
- What systems, data repositories, sources, and locations of potentially relevant ESI exist for the applicable time period?
- Where are they located? Third-parties? Outside U.S.?
- Are any systems or sources subject to auto-delete functions, overwriting, recycling, archiving, etc.?
- Are ESI sources reasonably accessible? How and by whom? At what cost?



# Early Case Assessment: “Know What You Have and Don’t Have”

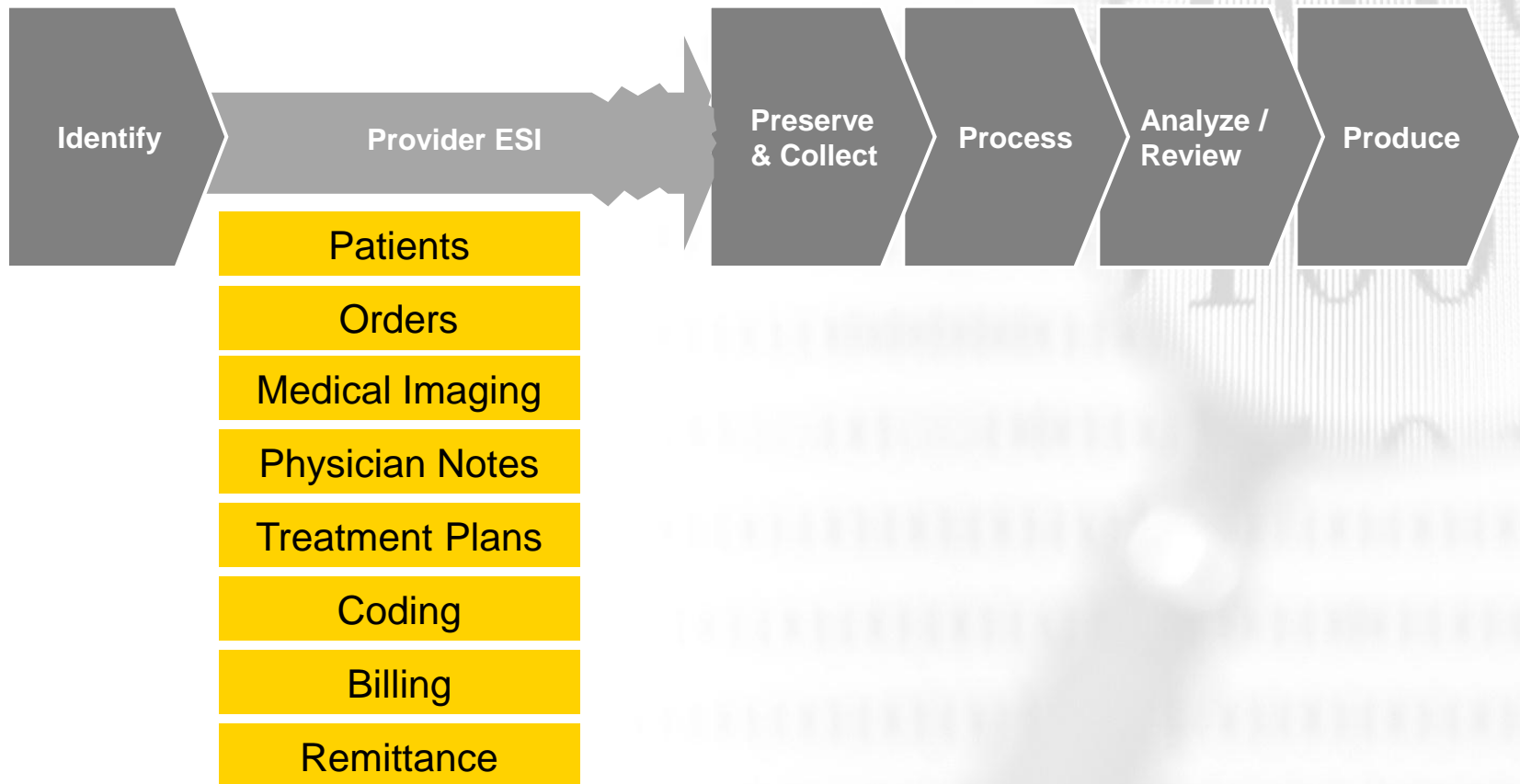
## XYZ Corp Collection Details

DRAFT | Privileged and Confidential | Attorney Work Product | Attorney Client Privilege



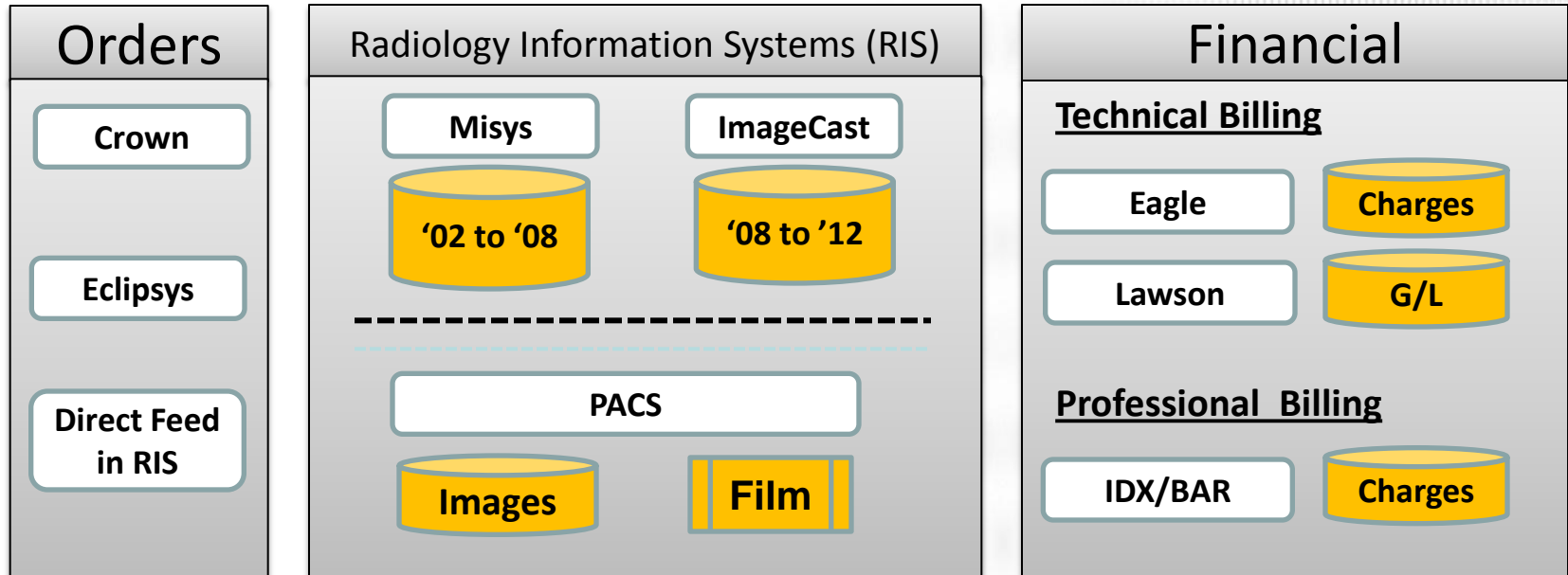
# Healthcare Provider ESI

Today's e-Discovery processes are not designed to handle ALL ESI sources



# Provider ESI Example

Following is a simplified outline of systems / data identified in connection with a recent matter.



# Provider ESI Considerations

- Identification, Preservation & Collection
  - Provider systems functions and data formats
  - Completeness and accuracy
  - Data context or role
  - Transformation and consolidation
- Analysis & Review
  - Attorney decision & input into query logic
  - Review platform
- Production
  - Scope
  - Format

# Provider ESI – Analysis / Production

Data Collection

Data Analysis

Data Production

Patients

Physician  
Notes

Imaging

Coding

Interactive  
Dashboards

Population  
Summary

Department  
Summary

Patient  
Summary

Gaps/  
Anomalies

Billing  
Summary

Verify Consistency

Financial and Operational  
Reports

Care Delivery  
Statistics / Volume

Billing & G/L

## A. Tabular Record Listing

Meeting ID	Meeting Date	Category	Brand Name	Status	Speaker Honorarium	Title
11183	9-Feb-08	POD Lunch Program	Neuro	Cancelled		POD3: The Power of (Med)Ox® (poster)
82404	12-Jul-07	Orimv Program	Fourth Qtr	Cancelled		Overview of Ear Infections: Pathology and Treatment
80184	25-Jun-06	Orimv Program	Senior	Cancelled		Helping Patients With Hypertension Reach Blood
82292	14-Jun-06	Orimv Program	Senior	Cancelled		Helping Patients With Hypertension Reach Blood
81698	24-Aug-06	POD Lunch Program	Neuro	Cancelled	500	POD1: NCEP Guidelines Update

B. Detailed Medical Record hosted as individual documents



C. Detailed Medical Record hosted with related documents / data



# Incorporating Provider ESI into review: Physician Notes

To enhance attorney review capability of physician notes, extract data from the native system and customize in the review platform.

**Call Notes**

**Review Code**

**Call Information**

**Link to manager**

**Physician notes**

**Physician ranks**

NOTE00000065

Extracted Text

Client asked, "A lot of the disappointment with Redbox had to do with expectations being so high as opposed to the actual results being bad. When you look at DVD rentals, the growth is still there," said Mark Harding, an analyst with Maxim Group.

Also worth nothing: This was the first holiday period in which Redbox had to deal with the fact that it no longer has many new releases in its kiosks on the day that the DVDs go on sale.

Redbox bowed to pressure from the big studios earlier this year and agreed to only offer prominent new movies 28 days after their on-sale date. That took away one competitive advantage Redbox had over Netflix, which also has a four-week delay for new movies.

Michael Pachter, an analyst with Wedbush Securities, said it is stunning that Coinstar didn't factor in the possibility of lower sales in the fourth quarter because of the delay.

A big chunk of DVDs go on sale just in time for the holidays, and the studios do their best to market the heck out of them, Pachter noted. So it's a bigger problem in the fourth quarter (than, say, in the middle of July) if a consumer goes to a Redbox kiosk and can't immediately get a widely touted new release.

"Coinstar's biggest problem is they suck at guidance, not that their business is bad," he said. "They are a good company, but they are subject to growing pains." Wold said he still likes the stock because he believes Netflix is becoming a de facto standard for video streaming. The company is being savvy in striking partnerships with gadget makers, he said. For example, Netflix announced at last week's CES that Sharp, Sony, and Toshiba will soon include a Netflix one-click button on remote controls for their Internet-connected TVs. Harding expects Netflix to report strong results for the fourth quarter. Analysts forecast earnings per share growth of 27% on the back of a sales increase of 34%. But will that be enough to satisfy investors?

Annotation

Responsiveness: Not Responsive

Comments: Hot notes

Call Info

Call Date: 5/7/2003 12:00 AM

Call Type: Physician

Call Updated Date: 5/7/2003 10:52 AM

Comments for Best Time To Call:

Detailed Products & Product Priority: Medicine ABCD

Rep Employee ID: 0000990386

Rep Name: John Smith

Manager: [Anthony O'Neal, From \[2002-04-01\] To \[2004-12-31\]](#)

Call Address:

Professional

ProfName: Dean Howard

Primary Address: 100 N Bud Road, Chicago, IL 65342

Physician Notes: this medicine is effective.

Ranking File

	Name	Prof Name	Month Ending Date	CP Rank	R6m Rank	R6M Scripts	Region Rank
<input type="checkbox"/>	<a href="#">Edit</a> 65340	Dean Howard	7/31/2003 12:00 AM			50	435
<input type="checkbox"/>	<a href="#">Edit</a> 65350	Dean Howard	6/30/2003 12:00 AM				416
<input type="checkbox"/>	<a href="#">Edit</a> 65362	Dean Howard	10/31/2003 12:00 AM				465
<input type="checkbox"/>	<a href="#">Edit</a> 65370	Dean Howard	9/30/2003 12:00 AM				454
<input type="checkbox"/>	<a href="#">Edit</a> 65387	Dean Howard	8/31/2003 12:00 AM			53	453

# At the Outset: Duty to Preserve

- Institute a legal hold and preserve relevant records
- Failure to preserve is the most common basis for sanctions.
  - Goal is to document “reasonable and good faith efforts, taken as soon as is practicable and applied proportionately, to identify and, as necessary, notify persons likely to have relevant information to preserve the information.”
  - The Sedona Conference® Commentary on Legal Holds, Guideline 6 (September, 2010 version)  
[http://www.thesedonaconference.org/dltForm?did=legal\\_holds\\_sept\\_2010.pdf](http://www.thesedonaconference.org/dltForm?did=legal_holds_sept_2010.pdf)



# Spoliation & Sanctions:

## When Bad Things Happen to Good Evidence



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# FRCP 37(e) “Safe Harbor” Provision

- “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”
- To take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business.
  - Where a party fails to suspend it at any time, courts have found that the party cannot take advantage of Rule 37(e)'s good faith exception. *Doe v. Norwalk Community College*
  - Where defendant used a wiping tool before handing computers over to bankruptcy trustee, Rule 37(e) did not apply. *United States v. Krause*

# ESI Stored With Third Parties

- Potential evidence must be in a party's "possession, custody, or control" for any preservation duty to attach. See *Phillips v. Netblue*, 2007 WL 174459 (N.D. Cal.) ("One cannot keep what one does not have.")
- Some courts "require production if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents." See *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000) (quoting *United States v. Skeddle*, 176 F.R.D. 258 (N.D. Ohio 1997)).
- Other courts require parties to produce only those documents they have a legal right to obtain. See, e.g., *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) ("But the fact that a party could obtain a document if it tried hard enough ... does not mean that the document is in its possession, custody, or control").

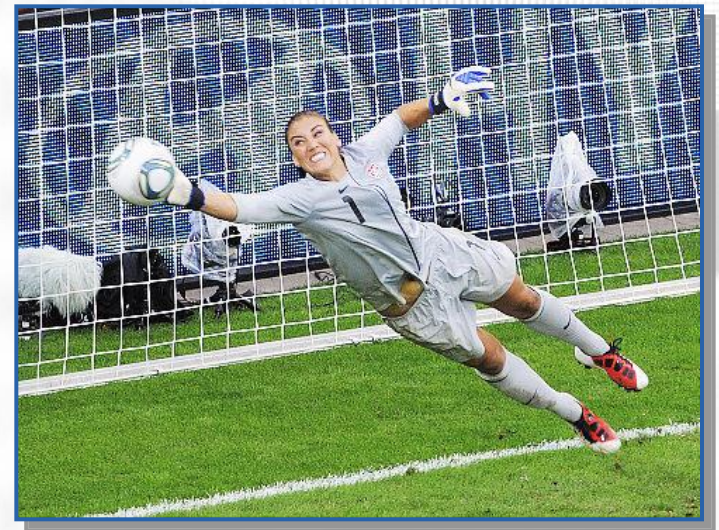
# Federal Rule of Evidence 502

- FRE 502 can provide a viable means of reducing discovery costs associated with privilege review, but ...
- Always negotiate and enter into a clawback agreement as part of a court order
- Negotiate and stipulate to ESI search methodology whenever possible.
- If must go it alone:
  - Implement and maintain efficient document retention policy
  - Plan and document reasonable steps taken to avoid inadvertent disclosure
  - Act promptly once aware of an inadvertent disclosure



# Defense of Process

- The best defense is not having to defend at all.
  - Do it right the first time
  - Conduct meaningful, iterative meet & confers – regardless of venue
  - Cooperate
  - Reach agreements and reduce them to writing, or court orders, as appropriate
  - Be translucent/transparent
  - Document efforts
  - Seek relief if requesting party is uncooperative or refuses to reach reasonable agreements



# Defensible By What Standard?

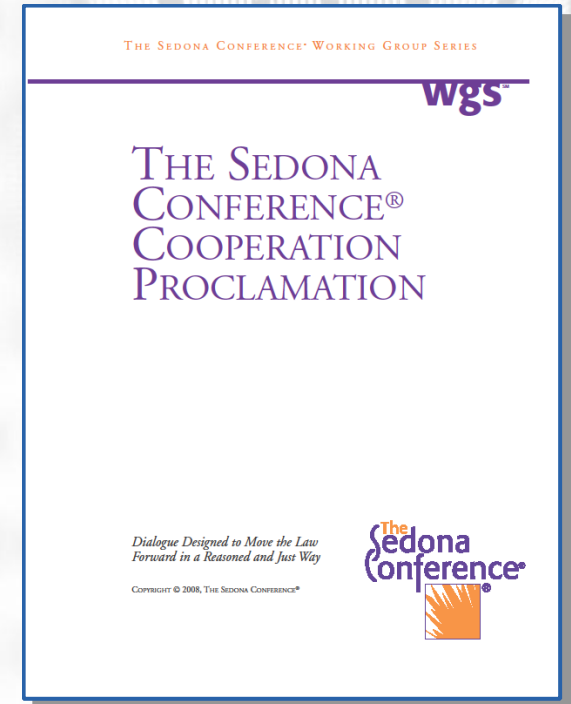
- “A defensible e-discovery plan should lead to the accurate identification and production of responsive, non-privileged materials and data using a search methodology that is reasonably transparent and justifiable in light of the circumstances of the particular case. A defensible e-discovery plan should also expedite the discovery process and minimize, if not eliminate completely, the need for judicial interference. **All of these goals can best be achieved through cooperation and dialogue between the parties from the outset of the litigation.**”

-- *United States Magistrate Judge Craig B. Shaffer*



# Cooperation is Cool

- Cooperation is consistent with zealous advocacy
- Cooperative discovery is required by the FRCP
- Methods to accomplish cooperation may include:
  - Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses;
  - Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
  - Jointly developing automated search and retrieval methodologies to cull relevant information;
  - Promoting early identification of form or forms of production;
  - Developing case-long discovery budgets based on proportionality principles; and
  - Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.



# Prominence of Proportionality

## The Sedona Conference Institute

- “When balancing the cost, burden, and need for [ESI], courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state law equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing [ESI], as well as the nature of the litigation and the amount in controversy.” (Principle #2)

## The Seventh Circuit Electronic Discovery Pilot Program

- “The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) should be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.” (Principle 1.03 – Discovery Proportionality)



# Are E-Discovery Costs Recoverable?

- ***In re Ricoh Co., Ltd. Patent Litig.***, No. 2011-1199, 2011 WL 5928689 (Fed. Cir. Nov. 23, 2011) (Appellate court concluded that district court did not err in determining that costs related to the parties' use of a third-party electronic database for the production of e-mail could be recovered pursuant to 28 U.S.C. § 1920(4)).
- ***Race Tires America, Inc. v. Hoosier Racing Tire Corp.***, No. 11-2316, 2012 WL 887593 (3d Cir. Mar. 16, 2012) (Third Circuit held that most e-discovery costs are not recoverable after trial under either Fed. R. Civ. P. 54(d) or 28 U.S.C. § 1920).
- ***In re Online DVD Rental Antitrust Litig.***, No. M 09-2029 PJH, 2012 WL 1414111 (N.D. Cal. Apr. 20, 2012) (Despite “well-reasoned opinion in *Race Tires*,” court concluded that absent directly analogous Ninth Circuit authority, “broad construction of section 1920 with respect to electronic discovery production costs—under the facts of this case—is appropriate,” and declined to disallow taxation of e-discovery costs. )



# Response to Subpoenas & Search Warrants

HIPAA rules provide:

- “covered entities” may disclose PHI without patient consent:
  1. In response to a court order, provided only the information specified in the court order is disclosed; or
  2. In response to a subpoena or discovery request if the health care provider receives adequate assurance that the individual whose records are requests has been given sufficient notice of the request, or if reasonable efforts have been made to secure a protective order.



45 C.F.R. § 164.512(e)(1)

# Response to Subpoenas

Courts have held:

- “Generally, HIPAA does not constitute a bar to discovery or medical records, and it has been held that it is a purpose of the Act that health information which may eventually be used in litigation should be made available during the discovery phase.”
  - *State Farm Mutual Auto. Ins. Co. v Kugler, M.D.*, No. 11-80051-Civ., 2011 WL 6945165 (S.D. Fla. Dec. 23, 2011) (citing *Bayne v Provost*, 359 F. Supp.2d 234, 237 (N.D.N.Y. 2005)).
- “All that [HIPAA reg] 45 C.F.R. § 164.512(e) should be understood to do, therefore, is to create a procedure for obtaining authority to use medical records in litigation . . . We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege.”
  - *Northwestern Mem. Hosp. v Ashcroft*, 362 F.3d 923 (7th Cir. 2004)

# In Federal Criminal Cases

## Grand Jury Subpoenas:

- In cases arising under federal law brought in federal court, a grand jury subpoena alone is sufficient to permit a Covered Entity to release PHI for law enforcement purposes.
  - *In re Grand Jury Proceedings*, 450 F. Supp.2d 115 (D. Me. 2006); citing 45 C.F.R. § 164.512(f)(1)(ii)(B)

## Civil Investigative Demands (pursuant to 31 U.S.C. § 3733):

- “Nothing in [HIPAA], nor the regulations promulgated thereunder . . . known as the Privacy Rule. . . prohibit the release of the patient medical records sought by the CIDs.
- “Furthermore, the Court finds that the patient medical records sought in the CIDs can be furnished to the [DOJ] in its capacity as a “health oversight agency” in furtherance of its “health oversight activities” pursuant to 45 C.F.R. § 164.512(d).”
  - *Cleveland Clinic Foundation v United States*, No. 1:11MC14, 2011 WL 862027 (N.D. Ohio March 9, 2011) (citations omitted).

# Response to Federal Search Warrants

- Privileged materials may be taken in the course of a search, but will be segregated for purposes of review by a “taint team” or “dirty team.”
- Filter teams serve as an ethical barrier so that the main investigative team of agents does not become tainted by having access to privileged material. This practice is controversial; some criminal defense counsel believe that “taint teams” pose significant risks to privilege holders.
- The custodian should identify privileged materials at the time of the search, to expedite the segregation of these materials and reduce the risk of inadvertent seizure of privileged material.
- If a “dirty team” is not present at the time of the search, counsel should file a motion and seek the return of the privileged material.

# Federal Criminal Cases: eDiscovery Post-Indictment

*New!* “Recommendations for ESI Discovery in Federal Criminal Cases”

- [http://pdfserver.amlaw.com/legaltechnology/USDOJ\\_Intro\\_Recommendations\\_ESI\\_Discovery.pdf](http://pdfserver.amlaw.com/legaltechnology/USDOJ_Intro_Recommendations_ESI_Discovery.pdf)
- Issued: February 2012 by The Joint Electronic Technology Working Group (consisting of representatives from DOJ, federal public defenders offices, Criminal Justice Act lawyers, and liaisons from the United States Judiciary)
- Purpose: To promote the efficient and cost-effective post-indictment production of ESI in discovery between the Government and defendants charged in federal criminal cases....and creating a predictable framework for ESI discovery by establishing methods for resolving EDI discovery disputes without the need for court intervention.
- Scope: The eDiscovery protocol will only apply to disclosures of ESI under Fed. Crim. Procedure 16 and 26.2, and disclosures of exculpatory material under *Brady v Maryland*, impeachment material under *Giglio v United States*, and statements of witnesses under the Jencks Act.

# Framework for the Joint ESI Protocol

- Introduction: which sets forth 10 core principles which are the foundation for the Protocol.
- Recommendations: which provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
- Strategies and Commentary: provide technical and particularized guidance for implementing the recommendations, including definitions of key terms. (It is expected that the Strategies will evolve over time, in response to changing technology and experience.)
- ESI Discovery Checklist: a one-page Checklist for addressing ESI production issues.

# Framework for the Joint ESI Protocol

## Important features of the Protocol:

- No single approach to ESI discovery is suited to all cases; in simple or routine cases, discovery should proceed in accordance with the F.R.Cr.P., local rules, and custom and procedure in the district.
- Attorneys have a responsibility to have a basic understanding of eDiscovery.
- Unlike most civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. This may affect the format, integrity, and legal discovery obligations of the parties.
- The importance of involving individuals with sufficient technical knowledge and experience dealing with ESI.
- Emphasis on the meet-and-confer process and the importance of making good faith efforts to resolve ESI disputes without court intervention.

# Post-litigation Release

- Once litigation is complete, determine if, when and how preservation holds can be released
- Consider overlapping litigation holds
- Standard retention policy rules apply
- Applies to both ESI and paper records





# Don't Forget About Paper!



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# Some Useful Resources

- The Sedona Conference WG1:  
[http://www.thesedonaconference.org/publications\\_html?grp=wgs110](http://www.thesedonaconference.org/publications_html?grp=wgs110)
  - Publications regarding electronic document retention and production
- Seventh Circuit E-Discovery Pilot Program: <http://www.discoverypilot.com/>
  - Guidelines and helpful educational webinars and written materials
- Federal Judicial Center:  
[http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/\\$file/eldscpkt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf)
  - Managing Discovery of Electronic Information: A Pocket Guide for Judges
- E-Discovery Law Training <http://www.e-discoveryteamtraining.com/>
  - Online electronic discovery law training
- Electronic Discovery Law <http://www.ediscoverylaw.com/>
  - Searchable database of e-discovery cases published by K&L Gates

# Questions?

