Litigation Document Management: Organizing and Indexing Discovery, Exhibits and More



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Litigation Document Management: Organizing and Indexing Discovery, Exhibits and More

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Presenters (Cont.)

Board of Directors for 10 years. She also served on NALA's Certifying Board for three years and on the Professional Development Committee for three years (including two years as chair). Ms. Scheehle served on several NALA committees tasked with developing advanced certification courses and is a frequent lecturer for NALA Campus Live and co-presented technology-related seminar tracks at three NALA national conventions.

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Case File Organization & Electronic Document Management

Submitted by Karin M. Scheehle

LITIGATION DOCUMENT MANAGEMENT; ORGANIZING AND INDEXING DISCOVERY, EXHIBITS AND MORE

Case File Organization &
Electronic Document Management

KARIN M SCHEEHLE CEDS, ACP

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Organizing and Indexing Case File Documents

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Organizing Case Files

- Organizing case files can depend on the type of law or type of cases being worked
- Most important consideration: BE CONSISTENT
- Make sure someone who is not familiar with the case can find needed information
- Organize in a logical fashion so even attorneys can find information when needed

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Organizing Case Files

- Case file organization includes both paper and electronic files
- Good organization leads to less wasted time searching for documents or case items
- May want to keep electronic working files during the case. These can be deleted when the case is over. These may allow you to more quickly find case information and information you have previously pulled.

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Organizing the Case File

- Paper File
  - Organize in a logical fashion and index
  - Use backers or separate folders for different types of case documents
  - Number additional backers as they fill up
  - Use expandos for large single documents
  - Use colored folders for special documents such as liens or privileged documents
  - Secure electronic media in sleeves

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Organizing the Case File

- Electronic File – Paperless Office
  - Have a system of folders to organize file documents similar to those used in a paper file
  - Make sure your team knows how to find stuff

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Organizing Case Files

- When deciding how to organize a case ask:

"If I didn't know anything about this case, could I find this information if someone asked me for it?"

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Organizing Produced/Received Documents

- Documents produced or received should be indexed
  - Easier to find
  - Easier to track date of production
  - More readily available to multiple staff members

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Document Index

- Type of index may depend on the type of case, the needs of the attorneys and staff, availability of technology, number of documents anticipated to be produced in the case
  - Large document cases may only have the "index" provided by a document management or review program

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Organizing Documents

- Have a standard system to organize documents so everyone knows how to find documents when needed
  - Type of system may depend on size of case and number of documents produced/received
    - Small cases – can have paper documents with index
    - Med to large cases – should organize documents electronically to save space and make them more accessible

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Organizing Documents

- Organize according to the needs of the case
  - All documents
  - By topic, when produced, who produced
  - By use in the case (depo exhibits, provided to experts, trial exhibits)

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Paper vs Computer

- Notebooks and files
  - Pros
    - Easily reorganized
    - Easily relabeled
  - Cons
    - Uses resources (space, paper, etc.)
    - Only available to one person at a time
    - Can be lost or misplaced

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Paper vs Computer

- Using Technology
  - Pros
    - Accessibility
    - Plenty of storage
    - Portability
  - Cons
    - “Paper People” can’t write on it
    - Learning curve for legal team
    - License limitations for programs
    - Need computer to use

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Organizing with Technology

- Can include multiple types of documents and information obtained during the investigation
  - Information type may vary—be creative in preserving it
- Code information with issues in case

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Organizing with Technology

- Easily access, read, copy, print, email documents and information collected
- Can easily value add by annotating, tagging, pulling data into reports
- May be able to word search for specifics

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Organizing with Technology

- Can use information entered to
  - Create a timeline
  - Identify key facts
  - Integrate with other information developed in case

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Organizing with Chronologies, Summaries and Reports

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Chronologies

- Very helpful in cases where the chronology of events is important
- Helps develop a story line for the case
- Allows integration of multiple sources of data and can be built on as case progresses giving you more “bang” for your investigation “buck”

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Summaries

- Use to inform team of important facts or investigation results
- Can use summaries to create more detailed chronologies
- Summaries are the thumbnails of reports
- Quick reference guides
- Summaries can vary by team member—make sure you know what the team wants

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Reports

- Use to document factual investigation results in detail
- Should be thorough
- Add any relevant information discovered including photos, news articles, documents, etc.
- May contain leads or suggestions for additional investigation outside the scope of the original assignment

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Reports

- Used to educate the legal team on more details of the case
- Can help to focus issues and develop story line

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Litigation Document Management Programs

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Technology for Litigation

- A variety of technology is available to help make working and managing litigation cases easier. Some of these programs include:
  - Network document management systems
  - Databases
  - Spreadsheets
  - Email management
  - Deposition management and analysis
  - Electronic notebook-type management
  - Scanners and pdf programs

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Using Technology in Litigation

- Litigation is complex
- Litigation is time consuming
- Litigation can be overwhelming
- Technology can help litigators get their work done efficiently
- Technology can level the playing field between small and large practice groups

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Using Technology in Litigation

- Using technology in document management and document production can be very useful in helping legal teams meet their goals as well as complying with ever changing and more aggressive court rules

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Using Software for Document Management

- Depending on the size of the document collection, many different types of software programs are available
- Select software based on the needs of the case, available of options, and cost considerations
- Both complex and simple software programs can be used to make organization and control of documents easier

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Handling Incoming Correspondence, Emails, etc.

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Incoming Mail and Email

- Have a system for saving and distributing
- Make sure your system is logical and your team knows how to use it
- Make sure all team members receive items for cases they are working on
- Be consistent when saving and distributing items

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Incoming Mail and Emails

- Routing and Saving
  - How the mail is delivered/who picks it up
  - How the mail is routed and processed
  - Reviewing and scanning – what to do first?
  - Scanning format? PDF? OCR?
  - Save documents in appropriate electronic file locations; have a procedure for standard naming of documents if required

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Outgoing Mail/Filed Documents

- Save/file copies
- Which copies do you save? Word? Final signed converted to PDF? Both?
- Use standard naming procedures on all documents when saving electronically
- Considerations for Email
  - Delivery receipts
  - Attachments

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Working with Different File Formats

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File Formats

- Electronically provided correspondence and email may contain documents with different file formats such as
  - PDF
  - Word
  - Excel
  - Jpeg or other image format
  - Cell phone formats
  - Other formats

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File Formats

- Electronically provided correspondence and email may contain documents with different file formats
  - Do you print this for hard file
  - How do you save them electronically
  - How do you route them around
  - What do you do when your attorney asks you to print

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Electronic Storage and Linking Solutions

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Electronic Storage & Linking

- Generally found in paperless offices
- Most paperless offices use either a foldering system or a commercial indexing/linking system
  - Foldering systems are logical for the case
  - Document management systems usually have their own indexing and linking system and often assign document numbers
    - When using these systems document consistent document naming will help staff locate documents more easily

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Electronic Storage & Linking

- Document management systems
  - There are numerous systems on the market
  - Assess your needs and find a system that works for you

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Retention and Destruction of Electronic Documents

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File Retention

- Record retention is a challenge for law firms. Computer networks, document and practice management software, and email proliferation have converted the vast majority of business records into an electronic format
- The growth of e-discovery has contributed to the sheer volume of sensitive data law firms must manage
- Technology has provided law firms with higher efficiencies and the ability to provide many new services to clients
- Increasing numbers of electronic records requires a different approach to retention

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Guidelines for Records Retention

- Know what you have
- Classify record types and locations
- Define retention rules and policies taking into consideration the special needs of different types of law specialities
- Deploy the policies/rules
- Audit compliance

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Paper vs. Electronic Records

- Paper files require considerable storage space
- Storing paper is expensive
- Pulling documents as needed takes time and has a cost
- Security considerations due to confidentiality
- Carefully consider the need to store paper files vs converting to electronic file storage
  - Paper files could be returned to client at time of closure

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Paper vs. Electronic Records

- Storage of electronic records has its own challenges
  - Privacy – Electronic records are much easier to copy and forward, making it difficult to track access and possibly leading to the unintentional disclosure of information
  - Security – Many popular electronic formats have been adapted and used as vehicles to deliver viruses into a network and law firms are targets. The more electronic records that are retained the greater the chance of an attack

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Paper vs. Electronic Records

- Storage of electronic records has its own challenges
  - Backup and Recovery – A large volume of records requires multiple resources to correctly back up the system in case recovery is necessary.
  - Performance – Record retrieval is a necessity. The build up of high volumes of records can make search and discovery of needed records slow and difficult as electronic archive are sometimes not easily searched.
  - Location – where will these files be stored and how will they be managed long term

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What to Keep and for How Long

- Attorneys are reluctant to cull files before placing into long term storage
- Attorneys are reluctant to allow destruction of files
- Movement of attorneys and breakup and combining of law firms makes it difficult to track closed files and apply appropriate destruction policies as well as gain approval from case managing attorney for distruction, archiving, etc.
- Ethically clients need to be notified of destruction or destruction policy

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What to Keep and for How Long

- All of these issues make it difficult to adopt standard policies as there are often numerous exceptions to the policies
- Keeping track of policies and procedures and the exceptions can be difficult as the firm experiences natural staff turnover
- The ultimate retention policy will likely vary from firm-to-firm depending on the needs of the attorneys and the various practice areas of the firm

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Considerations for Closing Files

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File Closure/Retention

- Retention and file closure for most law firms is accomplished based on the type of matter and the files maintained in that matter.
- Although an entire client matter will be considered for retention and closure at the same time, both the physical and electronic files must still be well-organized according to a practice-based or firm-wide standard.

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File Closure/Retention

- Even for routine scenarios such as a client requesting their files or a lateral attorney departing the firm, the file must be organized in a manner that enables administrative staff to easily make decisions regarding what should be transferred and what should be retained.
- Records should be kept as to the ultimate location of the file.
- Many jurisdictions recognize that certain aspects of the file are NOT owned by the client and typically would not be released from the firm.
- Ethical requirements for safekeeping must also be considered

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File Closure/Retention

- There are aspects of most client files that a firm may want to retain long past the required retention period, such as engagement letters, file release authorization letters, wills and probate information, and real estate information.
- These considerations may make the drafting and implementation of a retention policy difficult to formulate but necessary for the smooth handling of documents and files

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Considerations in Closing Files

- Space
- Storage cost
- Need for reference to the file in the future
- Whether the file is electronic, paper, or both
- Attorney preferences
- Practice area needs

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Resources

"Model Principles of Records Management" from the Delaware Bar Association, DSBA website, http://www.dsba.org/AssocPubs/PDFs/MPRM.pdf

Shuh, "The Importance of Appropriate Record Retention Policies," Digital Technologies Inc. 2003, http://www.dtiglobal.com/articles.htm

Nelson and Simek, "Law Firm Document Retention Policies," Law Practice Today July 2004 (includes a sample policy), http://www.abanet.org/lpm/lpt/articles/ftr07046.html

"CNA Document Retention Policies" https://www.jamisongroup.com/img/~www.jamisongroup.com/forms/risk%20management_document_retention_document_destruction_for_law_firms.pdf

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Resources

Sample File Retention Policies
https://www.alabar.org/assets/2011/05/Samples-Forms-Closed-Files.pdf

"Creating an Effection Law Firm Retention Policy"
https://technology.findlaw.com/legal-software/creating-an-effective-law-firm-records-retention-policy.html

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MS SharePoint, Word, Excel & Adobe

Submitted by Karin M. Scheehle

LITIGATION DOCUMENT MANAGEMENT; ORGANIZING AND INDEXING DISCOVERY, EXHIBITS AND MORE

MS SharePoint, Word, Excel & Adobe

KARIN M SCHEEHLE CEDS, ACP

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Document Management with SharePoint

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Microsoft SharePoint

- With Microsoft SharePoint on your PC, Mac, or mobile device, you can:
  - Build intranet sites and create pages, document libraries, and lists.
  - Add web parts to customize your content.
  - Show important visuals, news, and updates with a team or communication site.
  - Discover, follow, and search for sites, files, and people across your company.
  - Manage your daily routine with workflows, forms, and lists.
  - Sync and store your files in the cloud so anyone can securely work with you.
  - Catch up on news on-the-go with the mobile app.

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Microsoft SharePoint

- Organizations use Microsoft SharePoint to create websites. You can use it as a secure place to store, organize, share, and access information from any device. All you need is a web browser, such as Microsoft Edge, Internet Explorer, Chrome, or Firefox.

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Microsoft SharePoint

- SharePoint in Microsoft 365
  - A cloud-based service, hosted by Microsoft, for businesses of all sizes. Instead of installing and deploying SharePoint Server on-premises, any business can subscribe to a Microsoft 365 plan or to the standalone SharePoint Online service. Employees can create sites to share documents and information.

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Microsoft SharePoint

- Some commercial programs such as time and billing systems and document management systems base their product on a SharePoint platform
- These programs are generally cloud based thus providing easy access to their cloud-based software

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Useful MS Word Functions

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Useful Word Function

- Word has a variety of functions that can be useful for legal professionals
- Learning functions and shortcuts can make you more efficient and can improve the quality of your work

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Tricks and Shortcuts

- Set up your own Quick Access toolbar
  - Include functions you use the most
- Set up form documents that contain formatting you use for different types of documents

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Document Drafting

- Styles and standard formatting
- Table of Contents
- Table of Citations
- Paragraph configurations

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Other Helpful Skills

- Inserting images
- Inserting tables
- Summing columns
- Working with tables and inserting rows and columns and sorting
- Using special symbols
- Inserting hyperlinks
- Using headers and footers for repetitive information

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Excel Tips and Tricks

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Tricks and Shortcuts

- Set up your own Quick Access toolbar
  - Include functions you use the most
- Set up form documents that contain formatting you use for different types of documents

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Tricks and Shortcuts

- Make sure your spreadsheet is formatted to print before you save it
  - Set paper size and pages to print horizontally and vertically
- Add page numbering, date/time of printing and other headers and footers to make it more useful when printed

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Tricks and Shortcuts

- Use multiple sheets to avoid multiple spreadsheets for the same subject matter
  - However, make sure users see the multiple sheets and each sheet is formatted for printing

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Tricks and Shortcuts

- Use colored fonts and fill to make complex spreadsheets more user friendly
- Excel is more reliable for adding columns of numbers than a Word table

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PDFs: Bates Numbering, Redaction & Other Pointers

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Cool Tricks from Adobe

- Bates Numbering
- Headers/Footers
- Bookmarking
- Optical Character Recognition and File Conversion
- Stamps
- Redactions

Use of some of these features may depend on the version of Adobe you have. Adobe Professional has all of these features.

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Cool Tricks from Adobe

- Bates Numbering
  - Easy way to keep track of documents
  - Can be done quickly in a few simple steps
  - Can number multiple identified documents or multiple documents in identified folders

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Cool Tricks from Adobe

- Headers/Footers
  - Similar process to bates numbering
  - Good for adding page numbers, dates, confidentiality designations and other information needed to be added to documents

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Cool Tricks from Adobe

- Bookmarking
  - Create bookmarks wit PDFs to easily navigate to certain parts of your document
  - Use bookmarks to create or mirror a tale of contents in larger PDFs
  - Useful when sending large page volumes to experts or others for review
  - Helpful in large PDFs to identify sections; works well with large volume medical records

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Cool Tricks from Adobe

- Optical Character Recognition (OCR)
  - Scans a PDF and makes all the text searchable
  - Very useful for documents that are scanned as they are images and do not contain text as would a converted Word document (for example)
  - Allows highlighting and editing of text
  - Can help finding redaction locations

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Cool Tricks from Adobe

- File conversion
  - Can save PDFs in alternate document format
  - Can convert alternate file formats to PDFs
  - Can convert PDFs to alternate file formats such as JPEG, TIFF, Word, etc.
  - Combine multiple documents or pages into one PDF (handy for printing)

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Cool Tricks from Adobe

- Stamps
  - Use this feature like you would use an old fashioned rubber stamp
  - Multiple standard stamps included but you can also make custom stamps
  - Could be used to generate exhibit stamps for courts still requiring that method
  - Can create a stamped signature by signing a blank piece of paper, scanning it as a PDF and importing it into Acrobat through the Create Custom Stamps tool

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Cool Tricks from Adobe

- Redactions
  - Very easy to use
  - Once saved cannot be undone
  - Redactions of text and images
  - Can be used to remove information prior to productions such as PII
  - Choice of colors
  - Choice of overlay text
  - Save your redacted document with a new name to preserve the original document

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More on Redactions

- Redactions can be used to clean up a document (such as removing attorney or client notes-privileged information)
- Redactions can be used to remove irrelevant information (careful with this)
- May be necessary to produce a redaction log as a part of the privilege log to inform opposing counsel of the redaction and the reason for the redaction
- Generally documents must be produced in their original condition as received from the custodian

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Be Careful what you Redact

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Privilege and Confidentiality

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

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Privilege and Confidentiality

- Attorney-Client Privilege
- In the law of evidence, certain subject matters are **privileged**, and can not be inquired into in any way. Such **privileged information** is not subject to disclosure or discovery and cannot be asked about in testimony.
- Applies to communications made to the attorney, attorney's agents, including paralegals and other employees working in the office, experts, investigators, and outside agencies working with counsel on client's case
- Privileged information is NOT produced
- Privileged information can be the subject of inadvertent disclosures and clawback agreements

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Redaction Tips

- Decide if the entire document is privileged; if not, then how much of the document needs to be redacted
- Decide how your attorney wants the redaction to look
- Watch out for duplicate documents or similar email strings that will also need to be similarly redacted
- Be consistent with redaction format

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Discovery Document Management: Incoming Discovery

Submitted by Karin M. Scheehle

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Discovery Document Management:
Incoming Discovery

KARIN M SCHEEHLE CEDS, ACP

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Discovery Requests

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Discovery

- Scope of Discovery
  - Rule 26(b) controls the scope of discovery and allows parties to discover “any matter, not privileged, that is relevant to the subject matter involved in the pending action.”
- Current limitations to this Rule
  - Proportionality

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Types of Discovery

- Interrogatories (Rule 33)
  - Written questions submitted by one party to another during the discovery stage
  - Why they are used
  - Drafting tips
  - Deadlines to remember

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Types of Discovery

- Requests for Production (Rule 34)
  - Written request by one party to another for records, documents, and other tangible items for inspection, copying and/or testing. Entry on land or property for inspection and testing.
  - Why they are used
  - Drafting tips
  - Deadlines to remember

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Types of Discovery

- Requests for Admissions (Rule 36)
  - Written statement asking for an admission or denial of a fact or a document's genuiness
  - Why they are used
  - Drafting tips
  - Deadlines to remember

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Types of Discovery

- Depositions (Rule 30)
  - Oral questions asked in a formal setting, usually with all parties counsel present, and in front of a court reporter who prepares a transcript of the deposition. Video depositions are also used, generally for specific purposes.
  - Why they are used
  - Deadlines to remember
  - A paralegal's role before, during and after
  - Zoom depositions

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Third Party Discovery

- Subpoenas
- Considerations
- Ability of third parties to object and ask for a hearing

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Sample Interrogatories

- Interrogatories for discovery of social media

1. Identify all social media used by _____ for the past 24 months.
ANSWER:

2. For each social media site or blog identified above, provide login and password.
ANSWER:

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Sample RFP

- Request for Production for ESI from cell phone

REQUESTS TO PRODUCE

- Cell phones for _____. Phones may be produced directly to [*name of forensic exp*ert]. Protocols for ESI include:
  - Taking possession of the phones for the purpose of downloading the data
  - No data will be removed or destroyed in this process (i.e., all testing will be non-destructive)
  - Data from download will be provided to Plaintiff's in a format and content agreed upon by the parties.

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- Request for Production for ESI from cell phone (cont.)
  - Fees for the services of [*forensic expert*] will be agreed upon between the parties before any work is done.
  - Data to be extracted from phones to include: SMS messages, MMS messages, photos, videos, any SD card data as well as hard drive data, e-mails (to and from), apps and corresponding data, skype, facetime, any temporary internet files and/or cookies saved, any downloads, any social media data (feeds, photos, posts, etc.) – this includes, but is not limited to, snapchats, twitter, facebook, tinder, etc – ALL social media; contacts, telephone calls, deleted files, data, and downloads if available--**the entire contents of the phone must be downloaded and preserved.**

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Receiving Documents

- Today, most documents are produced electronically
- If paper documents are received, scanning the documents and saving them electronically will make them easier to organize and review
- Always have an index or consistent organizational structure to keep track of documents

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Tips for Discovery

- Documents produced or received should be indexed
  - Easier to find
  - Easier to track date of production
  - More readily available to multiple staff members
- Decide whether to use cumulative disclosures

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Answers to RFA

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Request for Admissions

- RFA's hold the same weight as testimony
- Deemed admitted if not answered timely
- Most jurisdictions require specific denials with details
- Can be a good discovery tool for obtaining admissibility admissions on documents for trial
- Can help pin down issues or factual allegations

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Documents Produced for You by Other Parties

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Subpoenas

- Order from court for third parties to appear and give a deposition and/or to produce documents and sometimes for other purposes.
- Why they are used and when to use them
- Deadlines to remember
- A paralegal's role before, during and after

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Discovery Document Management: Outgoing Discovery

Submitted by Laura A. Danielson

Discovery Document Management Outgoing Discovery

Laura A. Danielson

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Legal Holds

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A. Legal Holds

1. **A legal hold (also known as a litigation hold) is a notification sent from an organization's legal team to employees instructing them not to delete electronically stored information (ESI) or discard paper documents. that may be relevant to a new or imminent legal case.**

2. **Purpose: The purpose of a litigation hold is to preserve evidence for potential litigation, and the penalties for noncompliance can be severe, both procedurally and financially**

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A. Legal Holds

1. **A legal hold is a process that an organization uses to preserve all forms of relevant information when litigation is reasonably anticipated.**

2. **A legal hold will be issued as a result of current or anticipated litigation, audit, government investigation or other such matter to avoid evidence spoliation.**

3. **Trigger: Receipt of "litigation hold letter" or notice, also called a "stop destruction" or "preservation" letter, which is a written document that informs a party directly of an impending legal action.**

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A. Legal Holds

1. **Outcome: Anticipation of litigation arises when an organization is on notice of a credible possibility that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.**

2. **Failure: If a party fails to take reasonable precautions to comply with litigation hold, a judge could impose stiff penalties for noncompliance.**

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A. Legal Holds

1. **Failure To Preserve / Legal Holds:**

   - **What are the costs of failing to comply with a litigation hold?**
   - **Penalties can go beyond financial sanctions.**
   - **Compel discovery during the discovery phase.**
   - **Issue adverse jury instructions as sanctions.**
   - **Penalties during trial phase.**
   - **Enter a judgement for opposing party.**

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A. Legal Holds

1. **Key to success in managing the identification and collection of potentially relevant data is planning. All matters, small or large, will benefit from the development of an Identification Plan. The plan should consist of the following:**

    - **Identification Team Roster**
    - **Litigation Holds**
    - **Preservation Questionnaire**
    - **Custodian Questionnaire**
    - **Custodian and Data Store Index**

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A. Legal Holds

1. **Identification Team: Identifying the potential players may require a team.**

2. **Team Composition: People who are most knowledgeable about the following:**
    - **Company's Business**
    - **Company's Structure**
    - **Company's Processes**

3. **Team Consultation: This may occur not only at the beginning of a preservation / legal hold – but can also occur throughout the entire life of the matter.**

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A. Legal Holds

4. **Team Composition: People who are most knowledgeable about the identification:**

   - **Corporate Legal Counsel**
   - **HR Personnel**
   - **IT Personnel**
   - **Individual Custodians**
   - **Business Management and Leaders**
   - **Subject Matter Experts**

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A. Legal Holds

1. **Corporate Legal Counsel:**

   - **E-Discovery response and identification plan.**
   - **Assist in identifying potential business units, personnel, and systems with potentially relevant information.**
   - **Manage the internal legal hold.**

2. **HR Personnel:**

   - **Provide lists of employees / contact information, business unit, or department which can be used to identify potential custodians.**

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A. Legal Holds

3. IT Personnel:

- **Nature / location of relevant systems.**
- **Information technology related policies such as security policies, business continuity plans, disaster recovery plan.**
- **Third party providers such as cloud based systems, proprietary systems, external IT resources.**
- **Rules for archiving / auto-deletion of information.**
- **Planned data migrations or conversations.**
- **Backup plans, locations and systems.**

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A. Legal Holds

4. Individual Custodians:

- **Current / former employees can tell you what systems they use(d) that may contain relevant data.**
- **Where relevant data is stored, including non-company resources.**

5. Business Management and Leaders:

- **Identification of systems used by business units, locations where data is stored.**
- **Employees who may possess potentially relevant information.**

6. Subject Matter Experts:

- **Employees who have particular knowledge of what is at issue that can assist in identifying data.**

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A. Legal Holds

1. **Litigation Holds are part of the preservation process which is meant to protect data stores in both electronically stored information (ESI) and paper formats against inappropriate or inadvertent alteration or destruction. This relates to issues of spoliation and defensibility.**

2. **Scope of potentially relevant data which is subject to preservation is often unknown in the early phases of a dispute.**

    - **Disputes evolve – custodians can evolve and change**
    - **Impact data stores due to changes**
    - **Solid process in place for initial collection**
    - **Scope change process for supplemental data collections**

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A. Legal Holds

3. **Person responsible for managing the following company policies:**

    - **Backups – Type of backups are available, backup cycles for each, requirements and timing for access or restoration.**
    - **Data archiving, overwriting of data, or deletion rule upgrades may have an impact on data availability and status.**
    - **Data migrations or consolidations may have an impact on data availability and status.**
    - **System and application upgrades schedule - Disputes evolve – custodians can evolve and change.**
    - **Data governance and management practices – essential to ensure that they are aware that preservation and legal holds overrule data retention rules and guidelines that company has deployed.**

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A. Legal Holds

4. **Litigation holds must be issued on all matters. Hold must be reviewed and approved by corporate counsel / outside counsel if needed to ensure that it accommodates identification and collection of data throughout the process, including new information identified during the interview process such as:**

    - **Personnel.**
    - **Locations.**
    - **Relevant Time Periods.**

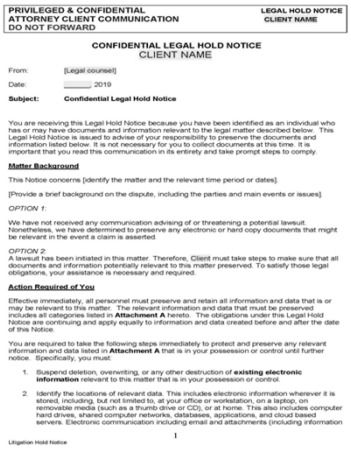
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A. Legal Holds

1. **Legal Holds outside of the U.S. may fall under GDPR or EU Data Privacy concerns.**

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A. Legal Holds



PRIVILEGED & CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION
DO NOT FORWARD

LEGAL HOLD NOTICE
CLIENT NAME

CONFIDENTIAL LEGAL HOLD NOTICE
CLIENT NAME

From: [Legal counsel]

Date: _____, 2019

Subject: Confidential Legal Hold Notice

You are receiving this Legal Hold Notice because you have been identified as an individual who has or may have documents and information relevant to the legal matter described below. This Legal Hold Notice is issued to advise of your responsibility to preserve the documents and information listed below. It is not necessary for you to collect documents at this time. It is important that you read this communication in its entirety and take prompt steps to comply.

Matter Background

This Notice concerns [identify the matter and the relevant time period or dates].

[Provide a brief background on the dispute, including the parties and main events or issues].

OPTION 1:

We have not received any communication advising of or threatening a potential lawsuit. Nonetheless, we have determined to preserve any electronic or hard copy documents that might be relevant in the event a claim is asserted.

OPTION 2:
A lawsuit has been initiated in this matter. Therefore, Client must take steps to make sure that all documents and information potentially relevant to this matter preserved. To satisfy those legal obligations, your assistance is necessary and required.

Action Required of You

Effective immediately, all personnel must preserve and retain all information and data that is or may be relevant to this matter. The relevant information and data that must be preserved includes all categories listed in **Attachment A** hereto. The obligations under this Legal Hold Notice are continuing and apply equally to information and data created before and after the date of this Notice.

You are required to take the following steps immediately to protect and preserve any relevant information and data listed in **Attachment A** that is in your possession or control until further notice. Specifically, you must:

1. Suspend deletion, overwriting, or any other destruction of **existing electronic information** relevant to this matter that is in your possession or control.
2. Identify the locations of relevant data. This includes electronic information wherever it is stored, including, but not limited to, at your office or workstation, on a laptop, on removable media (such as a thumb drive or CD), or at home. This also includes computer hard drives, shared computer networks, databases, applications, and cloud based servers. Electronic communication including email and attachments (including information

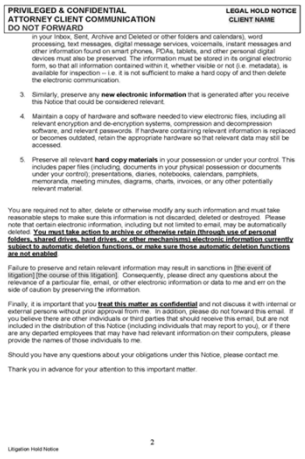
Litigation Hold Notice

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A. Legal Holds



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LEGAL HOLD NOTICE
CLIENT NAME

in your Inbox, Sent, Archive and Deleted or other folders and calendars), word processing, text messages, digital message services, voicemails, instant messages and other information found on smart phones, PDAs, tablets, and other personal digital devices must also be preserved. The information must be stored in its original electronic form, so that all information contained within it, whether visible or not (i.e. metadata), is available for inspection – i.e. it is not sufficient to make a hard copy of and then delete the electronic communication.

3. Similarly, preserve any **new electronic information** that is generated after you receive this Notice that could be considered relevant.
4. Maintain a copy of hardware and software needed to view electronic files, including all relevant encryption and de-encryption systems, compression and decompression software, and relevant passwords. If hardware containing relevant information is replaced or becomes outdated, retain the appropriate hardware so that relevant data may still be accessed.
5. Preserve all relevant **hard copy materials** in your possession or under your control. This includes paper files (including, documents in your physical possession or documents under your control); presentations, diaries, notebooks, calendars, pamphlets, memoranda, meeting minutes, diagrams, charts, invoices, or any other potentially relevant material.

You are required not to alter, delete or otherwise modify any such information and must take reasonable steps to make sure this information is not discarded, deleted or destroyed. Please note that certain electronic information, including but not limited to email, may be automatically deleted. **You must take action to archive or otherwise retain (through use of personal folders, shared drives, hard drives, or other mechanisms) electronic information currently subject to automatic deletion functions, or make sure those automatic deletion functions are not enabled**

Failure to preserve and retain relevant information may result in sanctions in [the event of litigation] [the course of this litigation]. Consequently, please direct any questions about the relevance of a particular file, email, or other electronic information or data to me and err on the side of caution by preserving the information.

Finally, it is important that you **treat this matter as confidential** and not discuss it with internal or external persons without prior approval from me. In addition, please do not forward this email. If you believe there are other individuals or third parties that should receive this email, but are not included in the distribution of this Notice (including individuals that may report to you), or if there are any departed employees that may have had relevant information on their computers, please provide the names of these individuals to me.

Should you have any questions about your obligations under this Notice, please contact me.

Thank you in advance for your attention to this important matter.

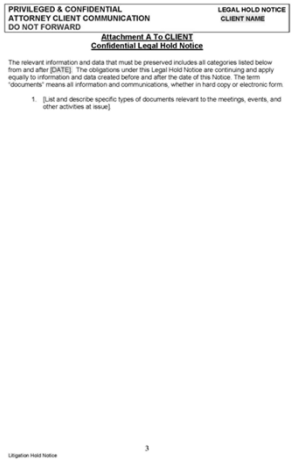
Litigation Hold Notice

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A. Legal Holds



PRIVILEGED & CONFIDENTIAL
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LEGAL HOLD NOTICE
CLIENT NAME

Attachment A To CLIENT
Confidential Legal Hold Notice

The relevant information and data that must be preserved includes all categories listed below from and after [DATE]. The obligations under this Legal Hold Notice are continuing and apply equally to information and data created before and after the date of this Notice. The term "documents" means all information and communications, whether in hard-copy or electronic form.

1. [List and describe specific types of documents relevant to the meetings, events, and other activities at issue.]

Litigation Hold Notice

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Discovery Requests & Answers

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B. Discovery Requests & Answers

1. **Manage and track dates for discovery and calendar them. Is there a Discovery Order?**

2. **Preparation of discovery should include:**

   - **Request for Admissions**
   - **Interrogatories**
   - **Productions of Documents**
   - **Remember to Supplement**

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B. Discovery Requests & Answers

1. **Spend time on drafting discovery**
2. **Be specific in your requests**
3. **Do not just do boilerplate discovery pleadings – the more specific you are – the better responses you will get in the discovery process and less objections.**
4. **Review items you may have already requested in preparation for discovery:**
   - **Photographs**
   - **Videos**
   - **Investigation Reports / Police Reports**
   - **Insurance policies**

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B. Discovery Requests & Answers

A great set of Interrogatories should be thorough, and should have a list of topics that are covered when you are drafting them for your case:

1. What is the Information Technology (IT) architecture & Information System (IS) Personnel / Staff?

2. What is the Network Architecture?

3. What is the Computer Hardware used?

4. What are the Electronic Devices that employees(s) use on a regular basis?

5. What are the software programs that are used on a regular basis that may be relevant to the litigation?

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B. Discovery Requests & Answers

6. **What is the Electronic Mail Communication that is used on a regular basis?**
7. **What Social Media Apps are used on a regular basis?**
8. **What phone / voicemail system is used on a regular basis?**
9. **Do you use surveillance cameras on a regular basis?**
10. **What is the process used for Data backups . Archives, removal media?**
11. **Miscellaneous sources for Electronic Evidence?**
12. **What is your Destruction Policies for Information?**
13. **What is your Retention Policies for Information?**

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B. Discovery Requests & Answers

1. **A Request for Production of Documents is a useful tool for lawyers to gather information during the discovery phase of litigation. A Request for Production of Documents, simply, is a formal written request directed to an opposing party to provide documents or other physical or tangible evidence regarding the subject matter of the lawsuit.**

2. **The responding party is then obligated to provide a written response indicating and/or detailing whether it will make available for inspection or copying the documents requested or whether such request is refused (and if so, why the request is refused). For example, a party in a court case may obtain copies of email messages sent by employees of the opposing party.**

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B. Discovery Requests & Answers

3. **The rules governing requests for the production of documents vary from jurisdiction to jurisdiction; in the U.S. Federal court , such requests are governed by Rule 34 of the *Federal Rules of Civil Procedure*. Some states mirror the Federal Rule or have their own specific rule regarding production.**

4. **Purpose: To provide both parties the opportunity to:**

   - **Inspect.**
   - **Copy.**
   - **Test.**
   - **Sample.**

Items in the responding party's possession, custody, or control.

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B. Discovery Requests & Answers

Objections:

1. **Judges have been saying it for years, and their tolerance for deaf ears is ebbing: "Throw away the boilerplate. You *could* object that a discovery request is overbroad or unduly burdensome, and maybe you'd be right. But if you make scant effort to explain *why* you are right, you might as well not object at all."**

2. **The rules governing objections to a request for the production of documents vary from jurisdiction to jurisdiction; in the U.S. Federal court , such requests are governed by Rule 34 of the *Federal Rules of Civil Procedure*. Some states mirror the Federal Rule or have their own specific rule regarding production.**

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B. Discovery Requests & Answers

Objections:

3. **There are different types of "boilerplate" objections that are used in responding to a party when replying to a Request for Production. Some examples are as follows to name a few:**

    - **Vague, ambiguous, overly broad.**
    - **Unduly burdensome and oppressive.**
    - **Not relevant nor calculated to lead to the discovery of admissible evidence.**
    - **Seeks material protected by the attorney/client or other privilege and the work product doctrine.**

4. **These types of objections are not sufficient. The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal discovery rules.**

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B. Discovery Requests & Answers

How to present a winning objection:

- **Comply with Rule 34's requirement that you state whether any responsive materials are being withheld on the basis of the objection.**
- **If you are not producing documents when your responses come due, state when the documents will be produced.**
- **At any discovery conference, you want to sound like the most thoughtful and reasonable lawyer in the room. Start early. Build your discovery objections with the same care that you build your case in chief.**

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B. Discovery Requests & Answers

1. **In litigation, the right documents can make the difference between winning and losing. In the pursuit of the smoking gun, make the most of the requests for production that are drafted and served on the other side.**
2. **Strong requests may get you the documents you need to win. Weak requests may get you little else than a mountain of objections. When drafting requests for production, consider the following:**

    - **Ask the opposing party to preserve all relevant documents. Along with your request, send a letter to the opposing party requesting that they preserve all the documents you consider relevant and provide categories of documents which are relevant to the case. By placing them on notice of the significance of given documents may serve as a basis for spoliation if they fail to preserve the documents**.

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B. Discovery Requests & Answers

- **Be specific. Broad requests invite objections from the other side. When they don't, they produce mountains of paper, with little useful information. Tailor your requests to be as specific as possible so as to get the documents you really need.**
- **Propound different versions of the same request. Sometimes, you know what category of documents you want the other side to produce but you don't know how to draft the request without making it too broad or too narrow. When this happens, it is best to draft several versions of the same request, ranging from a broad request to a very narrow request. Multiple requests increase the odds of getting what you were looking for.**
- **Don't leave to interpretation to opposing counsel what you meant. There are attorneys out there who will try to construe your requests as narrowly as possible so as not to produce any documents. To limit this from happening, prepare a definition section, and define all the terms you'll be using your request and define them so that the opposing counsel knows exactly what you're asking for.**

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Keeping Production Organized

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C. Keeping Production Organized

1. **Agreeing to the format of productions is one of the most important aspects of the "meet and confer" with the parties. Coming to an agreed upon format for what information will be included in the production and how it will be produced can make the management and use of production data much more efficient and cost effective.**

2. **Productions can be compromised of several parts. Deciding what will be produced and the format in which it will be produced will ensure all parties have access to the same information and can reduce costs in receiving parties.**

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C. Keeping Production Organized

3. **The following areas should be discussed and identified in the agreed upon ESI Protocol for the matter:**

   - **Deduplication.**
   - **Confidentiality Designations.**
   - **Families.**
   - **Format for production / production specifications:**
     - **Metadata and load files.**
     - **Image format.**
     - **Full Text.**
     - **Natives.**
     - **Numbering Format.**

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C. Keeping Production Organized

1. **Solid Methodology of Document Production Tracking:**
   - **Track Incoming / Outgoing Productions**
   - **Tracking Third-Party Productions**
   - **Date Received**
   - **Date Served**
   - **Date Due**
   - **Production Recipient / Address**
   - **Production Numbering**
   - **Encryption**
   - **Media IDs / Volumes by Production**
   - **Production History**
   - **Maintaining a Copy of Productions sent out in the event they need to be reproduced. i.e. MDL, Class-Action**
   - **Easy Access for Team to Production Log**

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Logs

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D. Logs

TRACK…. TRACK…. TRACK

- **Legal Hold Logs**
- **Preservation Logs**
- **Collection Logs**
- **Processing Logs / Reports**
- **Production Logs**
- **Redaction Logs**
- **Privilege Logs**

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Bates Labeling and Indexing

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E. Bates Labeling and Indexing

1. **Bates Labeling: In some cases, the number of documents produced is inconsequential, making bate-stamping a novel, but necessary procedure. However, in most cases, many documents will exchange hands. To facilitate the use of these documents during the course of litigation, secure an agreement with opposing counsel that whenever anyone produces a document, it will be bate stamped. Agree with opposing counsel to bates stamp all documents and agree to a format.**

2. **Types of Bates Labeling:**
   1. **Physical stamp applied – paper label / Bates Stamper**
   2. **Electronically applied bates stamp by software technology**

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E. Bates Labeling and Indexing

Indexing: Is another step in the "processing" stage and it is one of the steps that can take some time to complete, depending on the volume of data that needs to be indexed.

- **In simple terms, the indexing process will go grab every word in every document and then generate a list of those words, sorted in alphanumeric order. This facilitates fast and more accurate information retrieval when we perform a full-text search across all of the documents in the database.**
- **Alternatively, if an index exists, the search will be much faster because it can jump right to the term within the sorted list of words and the index already knows everywhere that term exists.**

REMEMBER: Keep in mind that if an index already exists and we are adding new electronic data, we will need to perform a re-index so that all of the new words can be added, as well as sorted, along with all the previous words in the pre-existing index. Additionally, if documents are removed from a database, we also perform a re-index.

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Redaction

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F. Redaction

Redaction: On the surface, it may seem easy enough to redact a document during eDiscovery review to obscure confidential or privileged information. All you need to do is draw a black box over the affected text, right? Not so fast, my friend. There's a lot more to consider in order to ensure that you don't inadvertently produce information that was intended to be redacted.

Let's talk about redaction failures as they happen more than you think….

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F. Redaction

Redaction Failures To Avoid:

1. **Failure to "Burn" the Redaction into the Image – understand your software or technology you are working with – commonly happens with Adobe. If the redaction isn't "burned" into the image so that it cannot be removed, the redacted data can still be viewed:**

    - **Especially when your images are Adobe Acrobat PDF files, the most common mistake is to redact by obscuring the text by drawing a black box over the text or images you want redacted.**

    - **A simple "cut and paste" can remove the black box, revealing the redacted text. Acrobat provides a redaction tool (for those editing the PDF there) to properly apply a redaction – it's best to save the file to a new name after the redaction.**

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F. Redaction

Redaction Failures To Avoid:

2. Failing to Update Corresponding Text Files to Remove Redacted Text:

- **Even if the image is handled properly, you can still disclose redacted text if you don't make sure that the corresponding text file, whether extracted from the native file or generated via Optical Character Recognition (OCR), isn't updated to remove the redacted text.**

- **If you don't update the corresponding text files, you're allowing redacted text to slip through the production "back door". This happens more often than you might think.**

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F. Redaction

Redaction Failures To Avoid:

3. Producing Un-Redacted Native Files:

- **If you're producing native files, you've hopefully discussed with opposing counsel how to handle native files that require redaction.**
- **The approach is to convert native files to an image format and redact the image. Sometimes the parties agree to "redact" the native files themselves and produce those. If so, as is the case with Adobe PDF files, there's a right way and wrong way to redact native files.**
- **Changing the text to white or the background to match the text color is not the same as redacting the text. you'll want to agree on a procedure where the text is deleted or replaced with an equal amount of meaningless content (e.g., all "X"s) to preserve text flow and pagination (make sure track changes is off before redacting).**
- **You may even want to agree to copy the entire content of a redacted document to a new file (to remove residual document composition information that might remain). To see what I "redacted" up above, highlight it with your cursor.**

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F. Redaction

Redaction Failures To Avoid:

4. Failing to Redact Metadata:

- **You may redact content on the document that you produce separately as metadata, via a load or data file.**
- **Failing to check the produced metadata for redacted documents could enable redacted data to slip through. Don't forget to check and remove any sensitive data here, as well.**

5. Quality Control (QC) Check before Producing:

- **When producing documents with redactions, you should have a checklist that ensures that image redactions are "burned" in, that redacted native files (if produced natively) are properly redacted, and that corresponding text files and metadata have been checked to ensure that redacted data has been removed from those as well. Otherwise, your production of redacted materials can wind up as an "epic fail".**

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Tips For Managing Large Productions / Multiple Parties

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G. Tips For Managing Large Productions / Multiple Parties

Solid Methodology of Document Tracking:

- **Electronically Track all Parties / Defendants**
- **Agree on an ESI Protocol**
- **Agree on a Bates Numbering Schema / Format**
- **Collection Tracking**
- **Track Incoming Paper / Data by Custodian / Source / Date Received**
- **Track Processing by Custodian / Source**
- **Track Review / Responsive / Non-Responsive**
- **Track Parties / Counsel**
- **Track all Logs: Redactions, Privilege, Production**
- **Production Numbering**
- **Production History**
- **Production Date Sent, Received, etc.**
- **Production Recipient / Address**

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G. Tips For Managing Large Productions / Multiple Parties

Solid Methodology of Document Tracking:

- **Track all Incoming Productions for all Parties / Third Parties, etc.**
- **Encryption Keys or Passwords**
- **Media IDs / Volumes by Production**
- **Maintaining a Copy of Productions sent out in the event they need to be reproduced. i.e. MDL, Class-Action**
- **Easy Access for Team to all Tracking Logs**
- **Use a Relational Database for easy access / storage to documents in case / easy tracking by field across all sources / parties**

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Managing Medical, Financial, & Other Types of Records

Submitted by Laura A. Danielson

Managing Medical, Financial, & Other Types of Records

Laura A. Danielson

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Retrieving The Records

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A. Retrieving The Records

Interview your client to identify all providers for treatment, and get a number of signed releases to request records that are needed:

Track the following:

- **Date**
- **Service**
- **Provider**
- **Amount**
- **Date Received**
- **Date Last Requested**
- **Important to supplement with multiple requests**

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A. Retrieving The Records

Medical Records:

Request the following on behalf of your client:

- **Medical Records: Clinic, Hospital, Rehab, Psychological, Dental**
- **Bills and Radiology**
- **ER (hospital and physicians)**
- **All treating physicians (f/u, PT, etc.)**
- **Ambulance**
- **Life Flight**
- **Anesthesia Services**
- **All other treatment**
- **Prescriptions**
- **Remember to supplement on a regular basis for ongoing treatment.**
- **Confirm in an interview with your client all treatment received.**

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A. Retrieving The Records

Other Records that Need to Be Requested:

- **Request all Investigative Reports, Videos and Photos**
- **All involved police departments**
- **All involved Fire Departments/Ambulances**
- **Request all Employment Records**
- **Payroll, benefits used/remaining, PTO, etc.**

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A. Retrieving The Records

Other Records that Need to Be Requested:

- **Tax Records - 5 years prior to accident – present.**
- **Get from client if they have, if not, request from the IRS .**
- **Academic Records (if necessary) • Discuss this with your attorney (good to know, schools typically destroy a few years after graduation. (To be safe, request from district / college also).**

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Making Sure You Have A Complete Set

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B. Making Sure You Have A Complete Set

Medical Records and Bills:

- **Tracking your pending requests – calendar them.**
- **Once received, verify you have all records requested.**
- **Organize records in chronological order.**
- **Once organized, place in a binder/file by provider.**

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B. Making Sure You Have A Complete Set

Review Medical records:

- **Important to understand medical terminology.**
- **Create detailed medical record summaries.**
- **Go over treatment and summaries with client to make sure accurate and no emissions.**
- **Track all expenses thoroughly and document with receipts and medical bills for expense reimbursement.**
- **Medical records can also play into future medical treatment, consideration for damages, pain and suffering.**

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B. Making Sure You Have A Complete Set

A chart can be used to track records and bills requested and received. It can also be used to keep track of lien information.

Medical Expenses Summary

Date	Facility	Provider	Service	Amount
	TOTAL			Total Meds $0.00

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How To Go About Record Organization

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C. How To Go About Record Organization

- When all the medical records are received in the office, the next important task is organizing them effectively.
- The records have to be organized and managed in such a way that they are useful for anyone working on the case.
- How long it takes to organize the records would depend on whether the medical records are typed or handwritten, how they are provided, as well as the program used to create the records.
- The records may be paper-based, scanned or generated by an EMR system.

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C. How To Go About Record Organization

1. When organizing the medical records, ensure a consistent format. Information can be easily located if there is consistency, i.e. place the same sections of the medical record in the same sequence each time.

2. Organize the paper records in a spacious area where they can be spread out, for instance, on a table. Ensure that you are dealing with only one client's records at a time on your work surface. This is to avoid mixing up the records of different clients and entering the wrong information in the wrong chart.

3. When organizing the records, include subsections that are tabbed and marked, such as Progress Notes, Lab Notes, Radiographic, and so on. Make an index of all major sections and their sub-sections.

4. Determine whether the medical records received are complete. Carefully compare the medical records to the medical history the client has provided. It is important to be aware that even if the records come along with a notarized affidavit, the affidavit is only proof that the records are authentic copies, not that they are a complete set.

5. Bates stamp the medical records, either manually or using a software program for numbering the pages. This process is helpful for attorneys and expert witnesses to refer to a specific page number in the medical record.

6. Organize them in a relational database for better searching / indexing..

7. Lastly, remember to supplement the records as needed, especially before trial.

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Privacy Rules & Compliance Tips

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D. Privacy Rules & Compliance Tips

Protected Health Information (PHI) is any information, including genetic information, whether oral or recorded in any form or medium, that:

- **Is created or received by a health care provider, health plan, or health care clearinghouse;**
- **Relates to the past, present, or future physical or mental health or condition of an individual;**
- **The provision of health care to an individual; or,**
- **The past, present, or future payment for the provision of health care to an individual.**

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D. Privacy Rules & Compliance Tips

Omnibus Final Rule:

- **On January 17, 2013, HHS released the Omnibus Final Rule ("Final Rule") interpreting and implementing provisions of the HITECH Act**
- **Effective date: March 26, 2013**
- **Compliance date: September 23, 2013**
- **Revision date for certain existing business associate agreements: September 22, 2014**

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D. Privacy Rules & Compliance Tips

Core Elements of HIPPA – Unchanged:

- **The Privacy Rule – establishes individuals' privacy rights and addresses the use and disclosure of protected health information ("PHI") by covered entities and business associates**
- **The Security Rule – establishes requirements for protecting electronic PHI**
- **The Breach Notification Rule – requires HIPAA covered entities and their business associates to provide notification following a breach of unsecured PHI**
- **The Enforcement Rule – establishes both civil monetary penalties and federal criminal penalties for the knowing use or disclosure of PHI in violation of HIPAA**

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D. Privacy Rules & Compliance Tips

- **Patient request – 45 C.F.R. 164.502(a)(1)(i) – 45 C.F.R. 164.524**
- **Patient authorization of third party – 45 C.F.R. 164.502(a)(1)(iv) – 45 C.F.R. 164.508**
- **Subpoena or other discovery order**
- **Court or administrative order**

Reminder: In all cases, must follow the more restrictive of HIPAA or applicable state law.

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D. Privacy Rules & Compliance Tips

- **Patients have the right to request copies of most medical records, whether in paper or electronic form**
- **Requestor must be patient, patient's parent or guardian, or caregiver (with patient's permission)**
- **Request must be made in writing**
- **Providers required to keep HIPAA records for six years (state law may require longer)**
- **In limited cases the provider may refuse the request (e.g., mentally ill patient at risk of self-harm) Potential more rigorous accounting of disclosures may be requested in future**

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D. Privacy Rules & Compliance Tips

Several states are putting in place privacy laws to protect consumers and protect personal data.

1. **US - California, Nevada, and Maine – currently have privacy laws in place.**
2. **EU – GDPR in place.**
3. **33 other states are working on implementing privacy laws at this time.**

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Managing Medical, Financial, & Other Types of Records

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Cell Phones Record Terminology and Record Retentions

Here is some basic terminology that is important to learn when it comes to cellular phone information:

- **SMS content:** Text message detailed content. This includes standard text message only and is a different service from Apple proprietary iMessages and third-party text message apps.

- **Cell Tower:** The sole-source connection that a device makes on the given cellular network. Call detail records generally provide this information via GPS latitude & longitude. Many will also have the sector or side of the tower detailed as well.

- **Tower Dump:** A listing of all devices connected to a given cellular tower at a certain point in time. These are mostly passive connections, but all cell phones need to be connected to a cellular tower in order to receive cellular phone calls.

- **PCMD:** Per call measurement data. This data helps determine the distance a cell phone (or handset) is from a particular cell tower during a call. It is allegedly accurate within 10 meters or so.

- **NELOS:** The same as PCMD, only NELOS is the term used by AT&T

- **RTT:** Range to Tower. The same as PCMD & NELOS, but RTT is used by Verizon Wireless

These definitions will become important as I have listed the data areas and their retention periods.

Cellular Provider Retention Periods

All cellular service providers retain different types of data for different time periods. When investigating a case, it's important to know how long you may have access to this data for, otherwise it could be an investigative red herring. It's also important to note that these retention policies are not written in stone and can be modified by the provider at any time.

I researched the retention periods below for the major cellular carriers as listed below:

Verizon Wireless
Subscriber Information: 7-10 years
Call History: 7 years
Tower Locations as they related to Call History: 1 rolling calendar year
SMS Content: 3-5 days (although I also found it may be as much as 7-10 days)
Tower Dumps: 1 year
Range to Tower (RTT) Data: 8 days

AT&T
Subscriber Information: 7 Years
Call History: 7 years
Tower Locations as they related to Call History: 7 years
SMS Content: Not Available
Tower Dumps: 7 years
Range to Tower (RTT) Data: 180 days

Sprint – Merged with T-Mobile – still market themselves separately
Subscriber Information: 10 years
Call History: 18 months. Bill reprint form 7-10 years, pre-pay accounts only 18 months regardless.
Tower Locations as they related to Call History: 18 months
SMS Content: Not Available
Tower Dumps: 18 months
Range to Tower (RTT) Data: 14-90 days. The technician advised that after 14 days, certain detail in these records is purged, but the remainder is kept for up to 90 days.

T-Mobile
Subscriber Information: 3-5 years. Canceled accounts are purged after account closes.
Call History: 23 months
Tower Locations as they related to Call History: 23 months
SMS Content: Not Available
Tower Dumps: 3 months
Range to Tower (RTT) Data: 23 months. This seems rather long to me, but the technician repeated it on the phone.

U.S. Cellular
Subscriber Information: up to 7 years
Call History: 1 rolling calendar year. Bill reprint: 7 years.
Tower Locations as they related to Call History: 1 rolling calendar year
SMS Content: 3-5 days
Tower Dumps: 1 rolling calendar year
Range to Tower (RTT) Data: Not Available (technician stated would be coming soon).

As you can see, the retention periods and even the types of available records are not uniform, making this type of information crucial in both criminal and civil investigations alike. For records such as bill re-print, the detail in this data will be far less than we normally see in traditional investigative cellular call detail records, so I wouldn't rely on this information for anything other than basic communication documentation. As a rule, I recommend checking with the provider first to see if the data you're looking for is still available.

Powerful Evidence

In the right hands and in the spirit of the holistic mobile investigation, cellular call detail records can be a powerful piece of evidence to help confirm or refute a person's location during a given time frame or incident. However, the ability to know what types of data are available, how long the data is accessible for and how to analyze and explain that data is a crucial intangible in any case. Without that, it's all just one big spreadsheet….

Organizing Documents for Trial: Notebooks, Exhibits, Exhibit & Witness Lists

Submitted by Laura A. Danielson

Organizing Documents for Trial: Notebooks, Exhibits, Exhibit & Witness Lists
Laura A. Danielson

1

Trial Binders / Notebooks

2

A. Trial Binders / Notebooks

Prepare Binders / Notebooks:

- **Color code books to differentiate between Pltf / Def**
- **Label books clearly**
- **Copy of exhibit list in each binder**
- **Use good binders**
- **Don't overfill the binders**

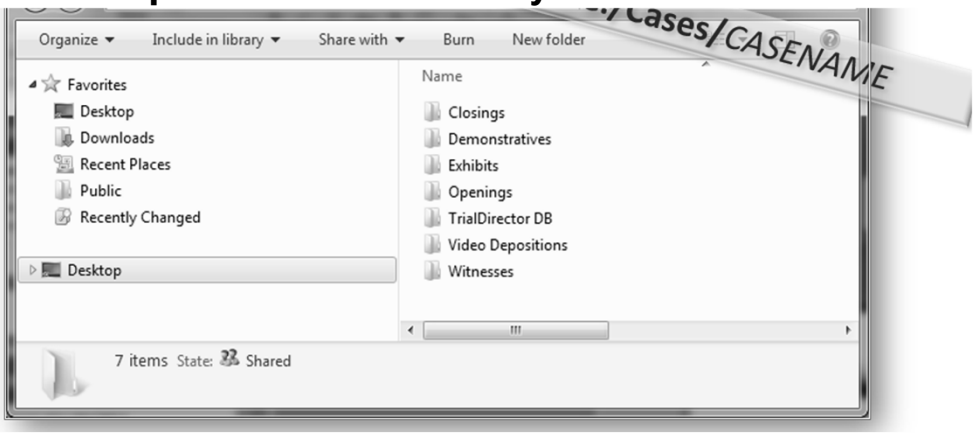
Determine how many sets of the exhibits you will need. Count a working set for the attorney, a set to have in court, a set for opposing counsel, a set for the Court, a set in the office, etc. Include at least four copies to be placed into file folders labeled with corresponding exhibits stickers for use at trial.

3

A. Trial Binders / Notebooks

Electronic File Management:

Keep in a central location for easy access for the trial team.



4

Organizing and Copying Exhibits

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5

B. Organizing and Copying Exhibits

- **Create a cross-referenced list of trial exhibits.**
- **Let your vendor know what's coming if you are outsourcing. Also CHECK YOUR COPIES when they come back to make sure they are exact duplicates.**
- **Once you receive opposing counsel's exhibits have a working copy made ASAP for the attorney(s) to use. If the parties don't agree to exchange the actual exhibits, be prepared to create a set of the opposing party's exhibits based upon their exhibit list.**

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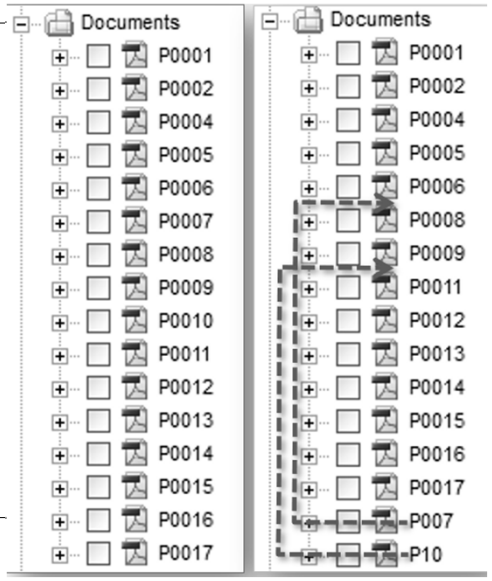
Numbering Exhibits

7

C. Numbering Exhibits

Exhibit Numbering:

- **Does the Trial Order require a specific exhibit numbering schema?**
- **What types of exhibit stickers are required based upon the Local Rules for the Court?**



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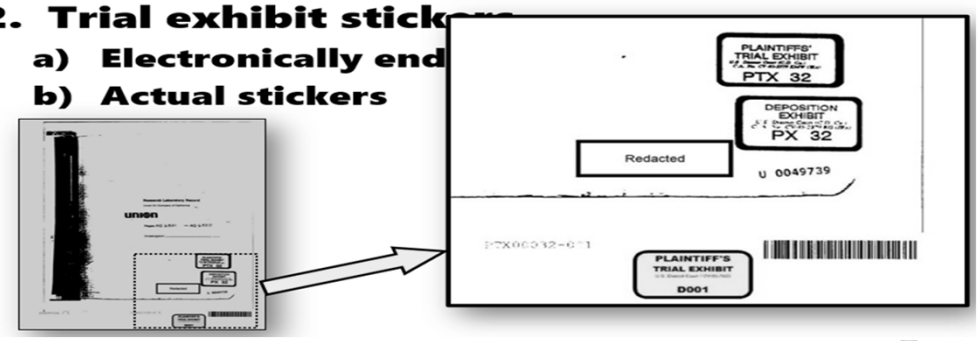
Electronic Exhibit Stickering

9

D. Electronic Exhibit Stickering

Exhibits

1. **Identify paper and electronic**
2. **Trial exhibit stick**
   a) **Electronically end**
   b) **Actual stickers**



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D. Electronic Exhibit Stickering

File Management

- **All other numbering**

John Smith
SJ001
SJ002
SJ003

Videos
V001
V002
V003

Video Depositions
SJ100817a
SJ100817b
SJ100817c

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Exhibit Lists

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E. Exhibit Lists

Pulling together potential trial exhibits can be a cumbersome task but there are some general sets of documents you should always start with the following:

- **All marked deposition exhibits.**
- **Any Key Documents that have been identified**
- **All affidavits with exhibits filed by the parties**
- **All documents relied upon by plaintiff's and defendant's expert witnesses.**
- **All documents produced by third parties pursuant to subpoena.**
- **Pull any other documents (from document productions) identified by attorneys.**

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E. Exhibit Lists

Identification of Exhibits to Use for Trial:

- **Put potential trial exhibits into a chronological set for the attorney to review and identify exhibits.**
- **Leave duplicates in the stack – sometimes an attorney may choose one document over another based upon which party produced the document.**
- **Generally, documents should be organized in date order.**
- **Identify any groups of documents that need to be dealt with outside of date order and consult with attorney about their placement in the exhibit list.**
- **If not specified in the Trial Order, contact the judge's clerk to see if the judge has any numbering preferences. If not, coordinate with opposing counsel so there are not duplicate trial exhibit numbers.**
  - **Find out from the clerk how the Court wants to deal with the original stickered exhibits.**
  - **You should also ask if the Court will want its own set of exhibit notebooks and plan accordingly.**

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E. Exhibit Lists

Trial Exhibit Preparation:

- **Once you start preparing trial exhibits <u>don't throw anything away</u>!**
- **Give the attorney a copy of potential trial exhibits to review.**
- **Put a date and time on each draft you prepare and distribute for review. That way you can always identify your most recent version.**
- **Encourage the attorney(s) to focus on identifying the trial exhibits first. This way they get a working copy sooner.**
- **Deposition designations should be next on the list.**

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E. Exhibit Lists

Drafting the Exhibit List:

- **This may vary based upon the preferences of the attorney trying the case, so check with the attorney before you begin drafting and what format is requested. i.e. Word, Excel, etc.**
- **Start drafting your exhibit list early and continue to add documents in date order but don't physically number trial exhibits too soon.**
- **Always include the Case Caption above your table on the Trial Exhibit list. Identify the party you represent, e.g., "Defendant ABC Company's Trial Exhibit List".**

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Witness Lists

17

F. Witness Lists

- **If there is no requirement in the Trial Order regarding organization of the Witness List prepare this list in alphabetical order.**
- **Review Trial Order closely: it may require a summary of the testimony that will be provided by each witness.**
- **Always include the Case Caption on the Witness List Exhibit list. Identify the party you represent, e.g., "Defendant ABC Company's Witness Exhibit List".**
- **Create a separate contact list for witnesses (e-mail, cell phones, etc.) for your own use**

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F. Witness Lists

Each witness should have a red rope containing the following materials to be used by the attorney to prepare witnesses for trial:

- **Any deposition testimony provided by the witness. This should also include any exhibits marked during that testimony as well as exhibits shown to the witness that were previously marked during another deposition.**
- **Any Affidavits and the exhibits provided by the witness and filed with the court during the course of the litigation.**
- **Any signed statements.**
- **Any key documents authored by or sent directly to the witness.**
- **Any other documents identified by the attorney(s).**

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F. Witness Lists

Expert Witnesses:

Talk with the attorney about what trial testimony your expert needs to be present for at trial.

- **Many experts come from out of town. If your expert(s) has to travel to testify for trial you should arrange for the following:**
  - **Travel Arrangements, including transportation to and from the airport**
  - **Hotel Accommodations**
    - **Either close to the courthouse or close to the office**
  - **Meetings with attorney and dinner prior to trial.**
  - **Out of town experts may also need access to computers, fax machine, and phones while they are in your office, so be accommodating. This is where the LAA can be very helpful to both the attorney and paralegal**

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Electronic Media, Audio, Video For Court Presentation

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G. Electronic Media, Audio, Video For Court Presentation

TrialDirector



Sanction



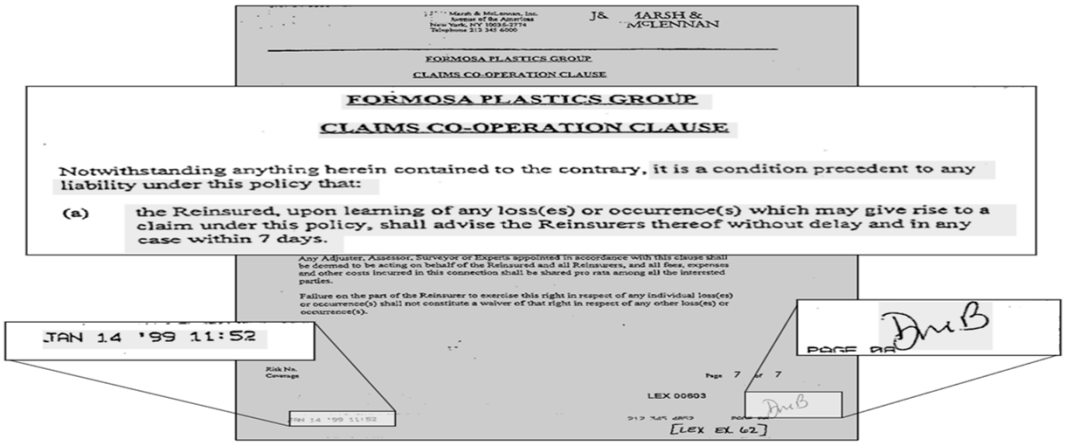
PowerPoint



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G. Electronic Media, Audio, Video For Court Presentation



G. Electronic Media, Audio, Video For Court Presentation

1. **Videos**
   a) **VHS**
   b) **DVD's**
   c) **Internet – YouTube**
   d) **All need to be converted to approved formats (mpeg, avi or wmv)**
2. **Video editing**

G. Electronic Media, Audio, Video For Court Presentation

1. Audio
   a) Cassette
   b) DVD's
   c) Internet
   d) All need to be converted to approved formats (wav, mp3)
2. Audio editing

25

G. Electronic Media, Audio, Video For Court Presentation

1. Native Documents
   a) Excel
   b) Word
   c) PPT

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G. Electronic Media, Audio, Video For Court Presentation

In Trial

1. **Multiple Exhibit Formats**
   - **Electronic Exhibits**
   - **Document Camera (Elmo)**
     - **Marking up documents with witness**
   - **Enlargements**
   - **Physical Exhibits**
   - **Easel pad**
2. **Nightly preparations**
   - **Exhibits to be used for next day**

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G. Electronic Media, Audio, Video For Court Presentation

1. **Video Depositions**
   a) **Begin preparing 2-4 weeks prior to trial**
      - **Synchronize**
      - **Deposition Designations**
   b) **Review designations prior to trial**
      - **Talking over objections**

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G. Electronic Media, Audio, Video For Court Presentation

1. **Video Depositions**

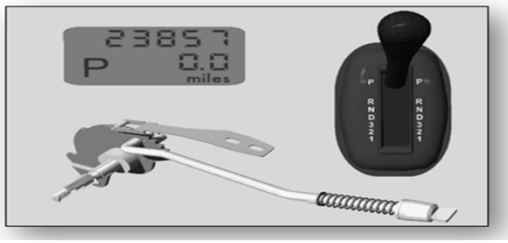


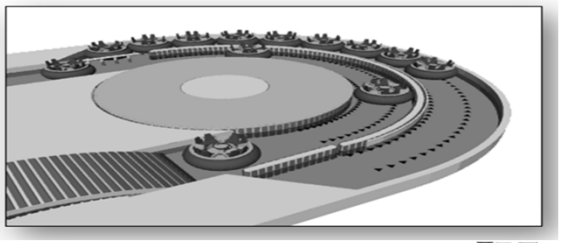
17 Q Did you have any approximation of the number of
18 drinks you had that night?
19 A I never counted them.
20 Q Do you think that you had more than five drinks?
21 A Yes.
22 Q Do you think you had more than ten?
23 A No.
24 Q So you had between five and ten drinks?
25 A [The witness nods.]

G. Electronic Media, Audio, Video For Court Presentation

Animations

- **Product demonstrations**
- **Accident recreations**
- **Sooner rather than later**





G. Electronic Media, Audio, Video For Court Presentation

- Wireless printers
- Portable scanner
- Pointers
  - Yard stick
  - Laser Pointers - Green v Red
- PowerPoint clicker
- USB Drives
- External hard drives

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Electronic Document Management and Storage

Submitted by Jon Eric Stuebner

Litigation Document Management for Paralegals

Jon Eric Stuebner, J.D., M.A.

III. Electronic Document Management and Storage

A. Handling Incoming Correspondence, Emails, etc.

Emails and other electronic forms of correspondence are the norm, and the most widely used for legal communication. As such, attorneys and paralegals can expect, or already receive, hundreds to thousands of emails a day. These emails may be case related, internal office communications, related to legal associations, list serve notifications, SPAM, etc. Within each type of category there are likely subcategories, such as communications from clients, opposing counsel, experts, etc. for case related communications. Keeping track can be maddening without a method of organizing these communications. Additionally, without an organizational system there is the risk of missing an important communication that could have an impact on the outcome of a case.

Law firms may use a variety of different email platforms, but the two most common are Outlook and Gmail. Regardless of the email platform, nearly all email services have the ability to sort and organize emails into different folders. If your firm already has organizational protocols or organizational software place, some of this organization may already be done for you. If not, you will have to develop your own system. There is no one size fits all. The method that works for one paralegal may not work for another. Ultimately, the goal is to keep your emails organized so that they can be found when needed, and to limit the number of emails in your inbox.

Even with more sophisticated searching methods, having thousands of emails in your inbox is not recommended. With an efficient organization system, your inbox can be used as “to-do” list containing only the emails that need to be addressed in some way. Many email services also allow color-coded tags to be affixed to an email. These tags can be used to help keep track of what needs to be done. For instance, a red tag could be used for emails that require a response. A yellow tag could be used for emails that contain other work that needs to be done such as a motion to be drafted or other task to be completed. Blue tags could be used for emails that be used as exhibits or that contain attachments to be used as exhibits. However, often times only one color tag can be used per email, which may cause problems if an email fits in several different categories. Ultimately, when an email comes in, the goal is to identify the next step, even if that next step doesn’t need to happen right away.

Once the next step or task is completed, the email should be placed into a designated folder. The easiest and most common system is to designate a folder for each active case for all case related emails. Subfolders can be created for client communications (or multiple folders for multiple clients on a single case), opposing counsel, experts, etc. For some paralegals, more subfolders may be helpful, while for others, a single folder for each case be sufficient. However, too many folders can become daunting if you have to search through multiple layers of subfolders for a particular email. Folders can also be designated for potential clients who have not, or do not retain, for internal office communications, etc. as necessary or helpful.

Within some firms, email communications may be organize in more than one way. For instance, if your firm uses ProLaw or similar software, emails can be profiled according to certain categories so that anyone with

access to the ProLaw file can review the communication. Profiling an email within these programs generally does organize the email within the email program. As a result, emails may need to be profiled and also organized into folders in the email program. Although this requires an extra step, it can be useful because the search capabilities are limited in some forms of legal software. Sometimes searching for an email in the email program is easier.

In addition to the emails themselves, communications may be in the form of electronic letters (i.e. formal correspondence attached to emails). Depending on the storage programs utilized by your particular firm, letters will likely be organized separately from the emails themselves. For example, with legal software programs like ProLaw, letters can be organized separately. Although less common, you may actually receive a letter or other correspondence in the mail. In that event, the letter should be scanned and organized electronically in a similar manner as letters attached to emails.

In the end, the goal is to find way or managing and organizing emails and correspondence so that communications can be easily retrieved when necessary and so that communications do not get overlooked or ignored.

B. Smart Scanning

Smart scanning can have a variety of functions, but generally smart scanning refers to the scanning of documents and information beyond simply creating an electronic copy of the document. Ultimately, as with most “smart” devices, the goal is to make things easier and more efficient for the user. Perhaps the simplest and most common example of smart

scanning is using Optical Character Recognition or OCR. Without OCR when a document is scanned as a PDF the characters are not searchable. When a document is scanned using OCR, the individual characters are recognized so that specific words, phrases, etc. can be found using the search function of the PDF program. This can be incredibly helpful when trying to find a specific phrase, number, or amount within a large document. It can also be helpful when trying to find repeated words, phrases, or numbers within a document. Certain storage or document retrieval programs use OCR to allow users to search within the text of multiple documents for certain phrases. Most PDF programs, such as Adobe Acrobat, have the capability to use an OCR function once documents have already been scanned, but this can be time consuming for larger documents and you are often not able to work from other PDF documents while the program is converting to OCR.

Other examples of more basic smart scanning include converting a document into a different file type. For example, rather than scanning a paper spreadsheet as a PDF, that spreadsheet could be scanned and converted into Excel or Word. When it works as it is supposed to, this can be an incredible time saver if the information needs to be converted to other formats. However, sometimes the documents and information do not convert as planned or formatting issues may prove problematic.

Other examples include scanning programs that provide predictive file naming, the ability to upload documents to cloud based services, extract certain data from the document, or export data into third-party programs such as Quicken, Turbo Tax, Quickbooks etc. Other smart scan functions allow documents to be scanned and directly sent by email or directed to a specific storage folder or location. Finally, portable scanning devices may

also have certain smart scanning capabilities that allow scanning remotely, such as at mediation, or from home (which is certainly more relevant as a result of the Coronavirus).

The use of the different smart scanning functions will of course depend on access to the technology and the specific needs of each case. However, as more legal work is based on electronic documents, at the very least, the OCR function should be used on most, if not all, PDF documents. The ability to quickly search and locate information is one of the main benefits of electronic documents.

C. Organization Methods for Scanned Documents

Just like with email, having an organizational system for scanned document is essential to keeping track and retrieving documents. If your firm uses legal software like ProLaw or other document storage software, an organizational system may already be in place.

If not, then many of the same tips for email can be used for organizing scanned documents. The first step is to have a consistent protocol for naming documents. Some scanners will allow you to name the document prior to scanning, although this process can be more time consuming, particularly when scanning multiple documents, when using the scanner touchpad. Whether the document is named prior to or after scanning, having a consistent file name protocol can save a lot time and stress. As with email, there is not necessarily a right or wrong way for naming files, but there are some general tips. Many of these may depend on how the documents are ultimately stored, i.e. using a document storage/retrieval program or simply on your computer.

Things to consider when naming documents are including the date of the document, the type of document, case name, and description. However, if a file name is too long it can create problems trying to retrieve the document later. When using dates, it is generally best to use a year/month/day format. This is particularly true if you are storing the documents on your computer, because the files can be easily sorted in chronological order. Whatever method your firm uses, or you decide to use, for naming files, keeping the method consistent will make it easier to locate and retrieve documents when necessary.

Once the document is scanned and named, you will have decide what to do with it. If you are using storage software, you might be able to send the scan to the location where it will be ultimately be stored. With some storage programs, you may still have to scan the document to your computer before sending it where it needs to go in your case file. Folders and subfolders can help with this task, particularly if you ultimately store the documents on your computer. If you work on a number of different types of case such as criminal, family law, civil, etc., your primary folder categories will likely be for those different areas of the law. The next set of folders may be for different types of cases within that area such as divorce, allocation of parental responsibilities, and post-decree matters within family law. The next subcategory will likely be for individual case names, followed by different folders for different aspects of the case, such as disclosures, discovery, experts, etc. Those folders can be broken down into subcategories as necessary, such as including folders for your client's discovery requests/responses as compared to those for the other side.

Paralegal Ethics:
Following the Rules & Your Moral Compass

Submitted by Karin M. Scheehle

LITIGATION DOCUMENT MANAGEMENT; ORGANIZING AND INDEXING DISCOVERY, EXHIBITS AND MORE

Paralegal Ethics: Following the Rules & Your Moral Compass

KARIN M SCHEEHLE CEDS, ACP

1

Legal Ethics

- Attorneys must represent clients zealously: exercise best efforts on the client's behalf within the boundaries of law and ethics
- Balance zeal with other duties:
  - Lawyer's duty of candor to the court
  - Administration of justice
  - Client confidentiality
  - Search for the truth

2

2

Legal Ethics

- Paralegals must be diligent in their efforts to meet high standards of competence and ethics and keep up with the ever-changing ethics rules and court decisions that govern conduct in litigation

3

3

Paralegal Ethics

ABA Model Rule 5.3

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

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Protecting Confidentiality and Privilege

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Confidentiality

- Ethical rules on confidentiality are
  - Broader than the attorney-client privilege
  - Require a lawyer not to divulge virtually any information about a client in any context
  - Under Rule 5.3 paralegals must be held to the same standard

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Attorney-Client Privilege

- Attorney-client privilege
  - The rule of evidence that protects confidential communications between a lawyer and client made in the course of a professional relationship
  - Under Rule 5.3 paralegals must be held to the same standard

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Attorney-Client Privilege

- Privilege belongs to the *client*, not the attorney.
- Lasts indefinitely including after representation ends
- Can only be waived by the client

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Attorney-Client Privilege

- Applies to communications made to the attorney's agents, including paralegals and other employees working in the office, experts, investigators, and outside agencies working with counsel on client's case

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Attorney-Client Privilege

- Can prevent the attorney from testifying, or forcing the client to testify, regarding communication made in confidence
- May also prevent paralegals and other non-lawyers from testifying so long as they were working under the supervision and performing permitted tasks

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Attorney-Client Privilege

- Application to paralegals
  - Privilege extends to attorneys' employees acting under the attorney's supervision
  - Example of application to paralegals:

We hold that a lawyer does not forfeit the attorney-client privilege by receiving otherwise privileged client communications through the conduit of a properly supervised paralegal employee. *Samaritan Foundation v Superior Court*, 844 P.2d 593 (Ariz.App.Div. 1 1992)

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Attorney-Client Privilege

- Usually "lost" when the client divulges to a third party
- *Might* be lost if attorney, paralegal or staff member discloses to third party
- Should be made in confidential setting, without the presence of those not covered by privilege (friends, family members)

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Attorney-Client Privilege

- Privilege and inadvertently disclosed information:
  - Accidently giving opposing counsel a privileged document (cases not uniform – usually hinges on protective measures taken)
  - Practical problems even if privilege preserved – opposition has the info.
  - Receiving privileged information has ethical challenges for the recipient

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Work Product Privilege

- Court-created doctrine to allow confidential preparation "in anticipation of litigation."
  - Mental impressions – unqualified privilege
  - Informational material – qualified privilege (factual research)
- "In anticipation of litigation" often includes items prepared if litigation was contemplated
- Includes information prepared by supervised non-lawyers doing permitted activities

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Work Product Privilege

- Indexes, summaries, and compilations may be privileged because they reflect mental impressions
- Privilege logs for documents must reflect grounds for claiming privilege by document.

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Ethical Issues with AI-Powered Document Management

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What is AI-Powered Document Management

- Electronic management of documents can take many forms depending on the needs of the case
  - We all use some form of electronic document organization
- In large document cases it is often not feasible or cost effective (proportional) for humans to review each document produced
  - In these cases parties may use TAR (technology assisted review

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What is TAR

- Technology Assisted Review
  - TAR is a computer process that uses human knowledge plus computer algorithms to identify relevant document in large databases
  - Essentially the humans teach the computer how to identify these documents
  - TAR can also be referred to as Continuous Active Learning (CAL), Simple Passive Learning (SPL) or Simple Active Learning (SAL). The name as well as the process varies by e-discovery vendor/program
  - TAR generally requires the use of an e-discovery vendor as it tends to be a complex process and the process must be monitored for accuracy
  - Recently courts have ordered the use of the TAR process to save money and expedite cases
  - Statistics on the use of TAR show it to be considerably more accurate than human document review

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Ethical Concerns with TAR and ESI

- E-discovery increases the potential for inadvertent production of privileged information
- Lawyers required to properly supervise third-party contractors
- Lawyer must take reasonable care to protect the confidentiality of electronic files where the lawyer has entrusted the files to an outside provider

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Ethical Concerns with TAR and ESI

- Lawyers need to supervise the process and usually participate in it

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Spoliation of Evidence

- Spoliation-Adverse Inference Instruction
  - In a sexual harassment case, the defendants claimed that the plaintiff and her two main witnesses intentionally destroyed text messages and Facebook posts
  - The court found that the plaintiff had spoliated evidence by deleting posts
  - Plaintiff's counsel argued that plaintiff did not know better than to delete her Facebook posts or texts
  - The court rejected that argument, stating that "once plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence"
  - The court ruled that dismissal was too harsh, and found an adverse inference instruction to be appropriate.

Painter v. Atwood, 2014 WL 1089694 (D. Nev. March 18, 2014).

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Ethical Challenges with Technology and TAR-like processes

- Technology evolves faster than legal decisions and ethical rules
- User has little or no control of information once shared
- Rules vary by state/jurisdiction

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Ethics Rule Changes Related to Technology and Lawyers' Responsibilities

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

...

Maintaining Competence

[6-8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Revisions to ABA Model Rules August 2012

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Ethics Rule Changes Related to Technology

Rule 1.6 Confidentiality of Information

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

...

Revisions to ABA Model Rules August 2012

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Ethics Rule Changes Related to Technology

Rule 1.6 Confidentiality of Information

Acting Competently to Preserve Confidentiality

[~~18~~6] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

Revisions to ABA Model Rules August 2012

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Can TAR Processes Meet this Standard?

- TAR looks for relevant documents that meet a specific criteria
- Inadvertent disclosures can still happen

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Ethics, TAR and Spoliation

- What is Spoliation
- Could TAR prevent spoliation
- Could TAR contribute to spoliation

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Ethics and Spoliation

- Spoliation-Adverse Inference Instruction
  - In a sexual harassment case, the defendants claimed that the plaintiff and her two main witnesses intentionally destroyed text messages and Facebook posts that would contradict the plaintiff's claim that the defendants fostered a work environment that was sexual in nature.
  - The court found that the plaintiff had spoliated evidence by deleting certain Facebook posts; however, the defendants did not meet their burden of showing culpability for the deletion of the text messages.
  - The plaintiff's counsel argued that the plaintiff was a 22-year old girl who did not know better than to delete her Facebook posts or texts. The court rejected that argument, stating that "once plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to plaintiff the full extent of that obligation." The court ruled that dismissal was too harsh, and thus found an adverse inference instruction to be appropriate.

Painter v. Atwood, 2014 WL 1089694 (D. Nev. March 18, 201[illegible]

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Ethics and Spoliation

- Spoliation-Attorney Sanctions
  - A former employee was caught throwing her computer into the river. *Simon Property Group, Inc. v. Lauria*, 2012 U.S. Dist. LEXIS 184638 (M.D. Fla. 2012). Her attorney was sanctioned.
  - An employee claiming reverse discrimination decided to get rid of her computer after it looked like a forensic examination would be ordered. *Evans v. Mobile Cnty. Health Dep't*, 2012 U.S. Dist. LEXIS 8530 (S.D. Ala. 2012). She burned her computer in her backyard. Her attorney was sanctioned.

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Avoiding UPL

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Practice of Law Defined

- There is no single, unified, comprehensive, accepted definition or list of activities accepted across the United States.
- Some states have adopted a definition of the practice of law while others may follow "tests" developed through case law.

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Common Tests Used to Define the Practice of Law

- States may define tests to use to determine whether a specific activity constitutes the practice of law. Examples of these tests may be:
  - *The Professional Judgment Test:* Is the activity one that requires the lawyer's special training and skills.
  - *The Traditional Areas of Practice Test:* Is the activity one that would traditionally be performed by an attorney or is commonly understood to be the practice of law
  - *The Incidental Legal Services Test:* Is the activity essentially legal in nature or, conversely, is a law-related activity *adjunct* to some business routine or transaction.

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Practice of Law Defined

The definition of the practice of law may be specifically defined by individual states.

As an example, Arizona Supreme Court Rule 31(a)(2)(A) defines the practice of law as:

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Practice of Law Defined

(A) "Practice of law" means providing legal advice or services to or for another by:

(1) Preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

(2) Preparing or expressing legal opinions;

(3) Representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;

(4) Preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or

(5) Negotiating legal rights or responsibilities for a specific person or entity.

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Practice of Law Defined

(B) "Unauthorized Practice of law" includes, <u>but is not limited to</u>:

Engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d)

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Lawyers are Ethically Required to Prevent UPL

- Non-lawyers (including paralegals)
  - Cannot do any of the permitted activities unless supervised
  - Cannot do any of the non-permitted activities, even if they are supervised (such as giving legal advice)

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Non-Permitted Activities

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Practice of Law Defined

- Providing legal advice or services to or for another by:
  - Representing another in judicial, administrative, or dispute resolution process
  - Preparing documents for filing with court without lawyer supervision
  - Negotiating legal rights or responsibility of a client

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Practice of Law Defined

- Providing legal advice or services to or for another by:
  - Preparing any document intended to affect or secure legal rights for a specific person or entity
  - Preparing or expressing legal opinions
  - Forming the attorney-client relationship
  - Setting fees

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Practice of Law Defined

- Exceptions to UPL in some states
  - Some of the law-related "adjunct" functions
  - Appearing before state administrative agencies

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What Activities Constitute the Practice of Law?

- Court Appearances
  - Clients protected by lawyers' ethical rules
    - Attorney-client privilege
    - Conflict of interest
    - Confidentiality
  - Court matters typically decide a person's legal rights

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What Activities Constitute the Practice of Law?

- Court Appearances – Exceptions
  - Right of self-representation in state and federal court
    - But this does *not* give you the right to be represented by a non-lawyer

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What Activities Constitute the Practice of Law?

- ► Court Appearances – Exceptions
  - Law Students
    - ►All states allow it to some extent, including representing clients, but under supervision
  - Paralegals, on behalf of their attorney, in uncontested matters (may be available in some states)
  - Some states have expanded paralegal appearances to other areas

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What Activities Constitute the Practice of Law?

- ► Taking of Depositions
  - Questioning under oath
  - Can be introduced at trial
  - May require evidentiary, privilege, and relevancy objections
- ► Signing of Pleadings
  - Constitutes an “appearance” in court

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What Activities Constitute the Practice of Law?

- Giving Legal Advice:
  - Recommending a course of conduct
  - Evaluating the probable outcome of a proposed course of legal action
  - Outlining legal rights or responsibilities

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What Activities Constitute the Practice of Law?

- Giving Legal Advice:
  - Interpreting and applying statutes, cases, or legal documents
    - A tricky area for paralegals because of their frequent client contact.
      - How should you handle this?

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What Activities Constitute the Practice of Law?

- ► Establishing the Attorney-Client Relationship & Setting Fees
  - Cannot be delegated
  - Lawyers must establish a direct relationship with the client and be able to show they have exercised "independent professional judgment"
    - ►Paralegals *can*
      - communicate fee info to a client at the lawyer's instruction
      - Draft retainer agreements
      - Present lawyer-approved documents for the client's signature

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Permitted Activities

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Paralegal Tasks that may Constitute UPL

- Common Paralegal Functions Performed with Supervision
  - Legal and factual research and investigation
  - Draft memoranda, pleadings, other documents
  - Prepare standard form documents
  - Prepare correspondence for attorney signature
  - Reviewing documents
  - Manage case projects and documents

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Paralegal Tasks that may Constitute UPL

- Common Paralegal Functions Performed with Supervision
  - Interview clients and witnesses
  - Serve as liaison with clients, vendors, others
  - Organize, analyze, and summarize legal documents, including depositions
  - File documents with courts
  - Handle procedural and scheduling matters

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Paralegal Tasks that may Constitute UPL

- Specialized tasks some states permit, others don't
  - Will execution – the process of signing and witnessing a will
  - Real estate closings – finalizing the sale of real estate by delivering payment, the deed, etc.
  - Negotiating settlements
    - Paralegals frequently do case "work-up" but the attorney must ultimately communicate with the client and get the client's consent to settle

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Disclosure of Paralegal Status & Title

- Paralegals must ensure that those they deal with are aware they are not a lawyer
  - May otherwise appear to be committing UPL
    - Can be misleading
    - May be misinterpreted or misunderstood
    - Lack of disclosure may be perceived as intentional

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Disclosure of Paralegal Status & Title

- Signing Correspondence
- Business Cards
- Firm Letterhead
  - What does your state permit/require?
- Independent Contract Paralegals
  - Same rules

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Supervision and Prevention of UPL

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Lawyers' Responsibility to Prevent UPL

- Lawyers
  - Cannot, absent specific permission, practice in a state where they are not already licensed
    - What about *pro hoc vice* admission?
  - Cannot aid others in UPL
    - How can this happen?

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Disclosure of Paralegal Status & Title

- Paralegals must ensure that those they deal with are aware they are not a lawyer
  - May otherwise appear to be committing UPL
    - Attorney may also be subject to discipline for aiding the UPL
    - May be called on to perform prohibited functions, such as giving advice

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Disclosure of Paralegal Status & Title

- The attorney is responsible for informing clients of the paralegal's status
  - Orally or in writing
  - Early in the relationship or at the "outset"
  - The paralegal's title must be one that is not misleading (cannot include terms or designations that might be misinterpreted, such as associate, etc.)

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Lawyers' Responsibility to Prevent UPL

- Lawyers are:
  - Responsible for training and supervision of their paralegals, including
    - Confidentiality
    - Conflicts
    - Competence
  - Specifically who is responsible to supervise paralegals and other non lawyers?
  - How can proper training and supervision be accomplished?

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Lawyers' Responsibility to Prevent UPL

- Lawyers are:
  - Responsible for actions of their paralegals, even those constituting UPL
  - Responsible for delegating work to competent paralegals
    - What types of penalties are possible if lawyers do not properly supervise or delegate?
    - What can be done to make sure there is proper supervision and delegation?

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Areas of Concern for UPL

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Unmet Need for Legal Services

- The unmet need for legal services
  - Acknowledged, but continues
    - Monopolistic/economic concerns
    - Legitimate professional and societal concerns
      - Access to legal services
      - Self-help
      - Rising cost of legal services
    - Non-lawyer legal providers: independent paralegals, legal technicians, document preparers

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Unmet Need for Legal Services

- Access to legal services by non-lawyers
  - Defended on the grounds that
    - "not giving advice", just "giving information"
    - "I've been granted power of attorney"
      - Courts largely unpersuaded

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Areas of Concern for UPL

- Real estate
  - States vary on definition of the practice of law
- Immigration
  - Federal laws
- Living Trust documents
  - Require lawyer's judgment & involvement

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Areas of Concern for UPL

- Large volume practices
  - Personal injury practices
- Lawyer websites
  - Advertising or Advice??

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Expanded Non-Lawyer Practice

- ► Licensed Document Preparers
  - Arizona
- ► Legal Document Assistant
  - California
- ► Expanded non-lawyer practice
  - Washington
  - And several other states

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Enforcement

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Enforcement

- UPL cases get into court through:
  - Criminal prosecution of non-lawyer or out-of-state lawyer (UPL is a misdemeanor in more than 30 states and a felony in a few)
  - Civil contempt proceedings brought when a non-lawyer appears in court on behalf of a client (25 states)
  - Cease and desist

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Enforcement

- Deterrents to UPL
  - Liability for negligent performance
  - Unenforceability of contract for legal services
  - Court dismissal of action brought by non-lawyer for a client
  - Court voiding a judgment for a prevailing party represented by a non-lawyer

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Truthfulness

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Ethical Rules

ER 5.3. Responsibilities Regarding Nonlawyers

(a) A lawyer in a firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the conduct of nonlawyers engaged in activities assisting lawyers in providing legal services and those who have access to attorney-client information, is compatible with the professional obligations of the lawyer. Reasonable measures include, but are not limited to, adopting and enforcing policies and procedures designed:

(1) to prevent nonlawyers in a firm from directing, controlling, or materially limiting the lawyer's independent professional judgment on behalf of clients or materially influencing which clients a lawyer does or does not represent; and

(2) to ensure that nonlawyers assisting in the delivery of legal services or working under the supervision of a lawyer comport themselves in accordance with the lawyer's ethical obligations, including, but not limited to, avoiding conflicts of interest and maintaining the confidentiality of all lawyer client information protected by ER 1.6.

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Ethical Rules

ER 8.4. Misconduct

- It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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Truthfulness

- Ethical duties
  - Balancing what we know with what we can say
  - Is there ever a reason to lie
  - What do we do if we know something is wrong
  - Do we have duties as paralegals?

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Truthfulness in Billing

- "Inflating" time spent on a matter
  - This is brought about by the pressure put on lawyers and paralegals to meet their billable requirements. 1500-1700 are often billing requirements for paralegals. However, not all firms have billable minimums for paralegals.
- Billing of personal expenses

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Truthfulness in Billing

- Double-billing:
  - Charging two clients for the same hour
    - Driving to a matter for one client while talking on the phone for another client
    - Flying across the country for one client while working on the file for another client
- Billing for work done, but which was not needed
- Billing for work not done, even though the client agreed to it

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Truthfulness in Handling Client Funds

- The mishandling of client funds is one of the leading causes of disciplinary sanctions imposed on attorneys
- "Borrowing" funds from trust accounts
- Trust account shortage due to poor bookkeeping

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Truthfulness in Handling Client Funds

- Duty to keep accurate and complete records of client funds and property
- Duty to notify the client of receipt of funds or property
- Duty to deliver client funds or property promptly
- Duty to provide a full accounting

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Truthfulness and Client Property

- Duty to turn over papers, funds, money, and unearned advanced fees on termination of representation
- Firms required to have file retention policies
- Client file is the property of the client and cannot be destroyed without informing the client and gaining permission

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Reporting Misconduct

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Reporting Misconduct

- What is misconduct
- Who should report
- What should be reported

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Reporting Misconduct

ER 8.3. Reporting Professional Misconduct

- **(a)** A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority, except as otherwise provided in these Rules or by law.

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