

Electronic Communications: The Importance of Preserving ESI in Employment Litigation

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It's a Digital World, and We're All Just Livin' in it

Physical
Evidence

vs.

Electronic
Evidence



Records Management Examples

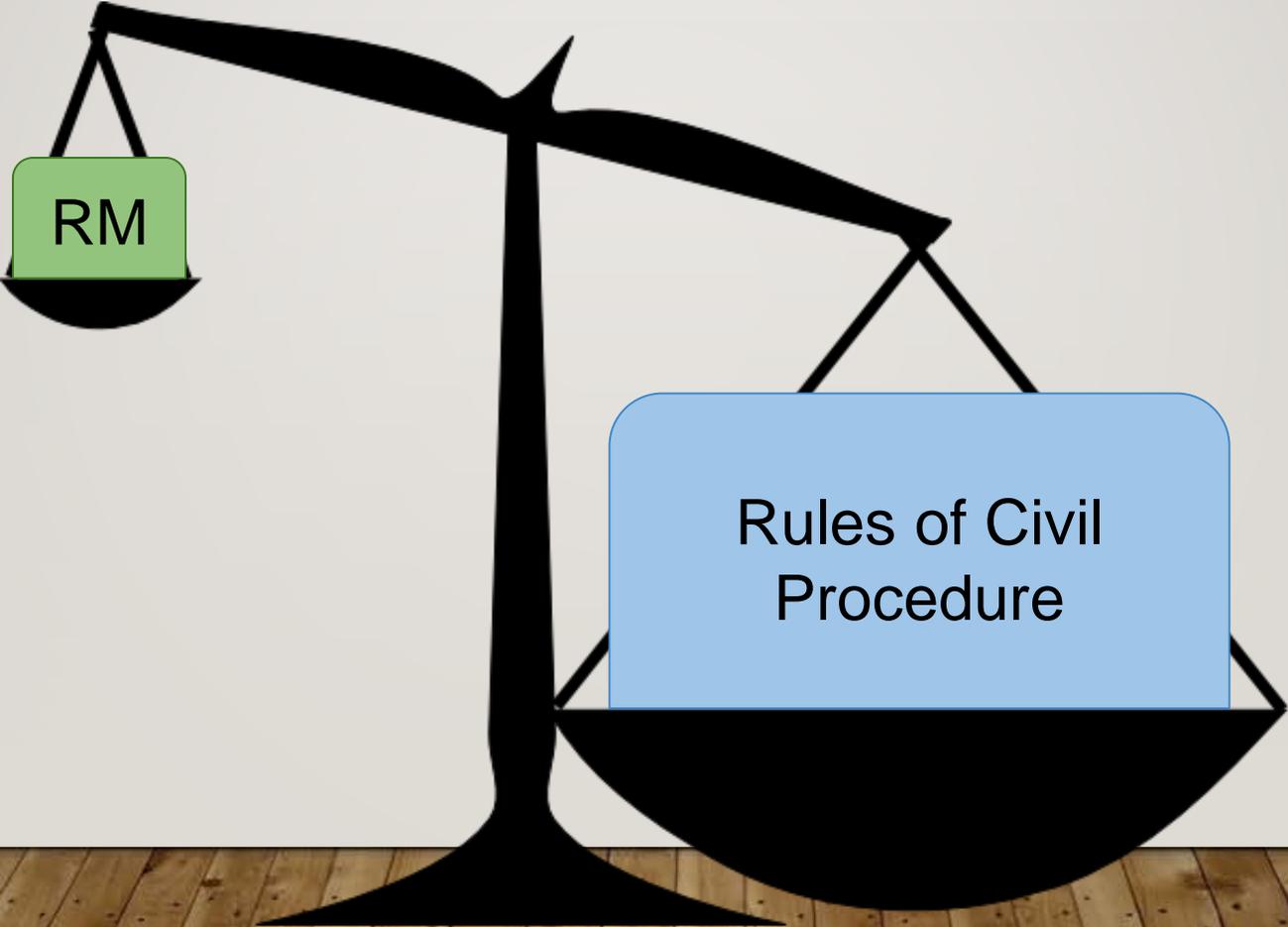
Records Management

EEOC Compliance Records (4 years)

Job Descriptions (Updated + 6 years)

Employee Files (After Last Activity + 6 years)

The Rules of Civil Procedure Trump the Rules of Records Management



North Dakota Rules of Civil Procedure

Rule 26(b)(1)(A)	Parties may obtain discovery of non-privileged matters that is relevant to any party's claims, including electronically stored information (ESI)
Rule 26(b)(1)(B)(ii)	For purposes of discovery, ESI includes reasonably accessible metadata (date sent/received, sender, recipient, etc.); Not necessary to provide discovery of ESI from sources that are not reasonably accessible b/c of undue burden or cost
Rule 34(a)(1)(A)	Parties may request ESI, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data compilations; or, if not easy to obtain, translated into a reasonably usable form if necessary
Rule 37(f)	A court may not impose sanctions on a party for failing to provide ESI lost as a result of "routine, good-faith operation of an electronic information system"

Federal Rules of Civil Procedure 34

Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, For Inspection and Other Purposes

- (a) **In general.** A party may serve on any other party a request within the scope of Rule 26(b):
- (i) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
 - (A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

Electronically Stored Information (“ESI”)

ESI includes, but is not limited to:

- Digital communications (emails, text messages, voicemail, instant messages, social media);
- Word Processed documents;
- Presentations (like this one!);
- Spreadsheets and tables;
- Accounting Application Data (QuickBooks, Money, Peachtree data files, payroll);
- Image and Facsimile Files (.PDF, .TIFF, .JPG, .GIF);
- Sound Recordings (.WAV and .MP3);
- Video and Animation (.AVI and .MOV);
- Databases;
- Contact and Relationship Management Data (Outlook);
- Calendar and Diary Application Data (Yahoo, blog tools, Outlook PST);
- Online Access Data (Temporary Internet Files, History, Cookies);
- Network Access and Server Activity Logs;
- Backup and Archival Files.

Federal Rules of Civil Procedure 34(E)

- (E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
- (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
 - (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
 - (iii) A party need not produce the same electronically stored information in more than one form.

Federal Rules of Civil Procedure 37(e) - 2015 Amendment

Before amendment, Rule 37(e) provided that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

The 2015 amendments completely overhauled the rule as a result of significant deviation between courts as to the severity of sanctions.

Federal Rules of Civil Procedure 37

Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable; or
 - (C) dismiss the action or enter a default judgment.

Litigation Holds (Destruction Holds)

**POTENTIAL
EVIDENCE
AT THE
AGENCY**



"I reasonably
foresee
litigation."

**DESTRUCTION OF
POTENTIAL EVIDENCE**

Litigation Holds - Reasonably Foreseeable Litigation

1-2 Employees believe the Employee may file a grievance for discrimination

An EEOC Complaint has been filed against the Agency



Several Supervisors believe the Employee may file a grievance for retaliation



Litigation Holds - Implementation

Notice:



Litigation Holds - Implementation

Prepare Destruction Hold Notice:

“Describe the incident, claim, or lawsuit.”

“Identify the main business functions affected.”

“List the types of records that may be involved.”



DESTRUCTION HOLD NOTICE
STATE OF NORTH DAKOTA
SFN 52376 (Rev. 12-2001)

Upon receipt of this notice, cease destruction of all records, including paper, microforms, and electronic information regarding the matter described below. **DO NOT** alter or destroy any of these records until further notification from management or legal counsel.

Date	Department	Prepared By
Contact Person		Telephone Number

Describe the incident, claim, or lawsuit.

Identify the main business functions affected.

List the type of records that may be involved.

Litigation Holds - Implementation

Appropriate Agency Personnel and Counsel Meeting:

**Person(s)
Most
Knowledgeable
About:**

Relevant computer systems and network operations of the Agency

The storage and retrieval of information

Procedures for backing up and archiving electronic information

Director, or designee, of the Information Technology Department (ITD)

Litigation Holds - Implementation

Decision to Implement - Scope of Implementation:

Who?

Who has the relevant documents and electronically stored information, or other materials in their possession?

What?

What information, including the electronically stored information, is relevant to the litigation?

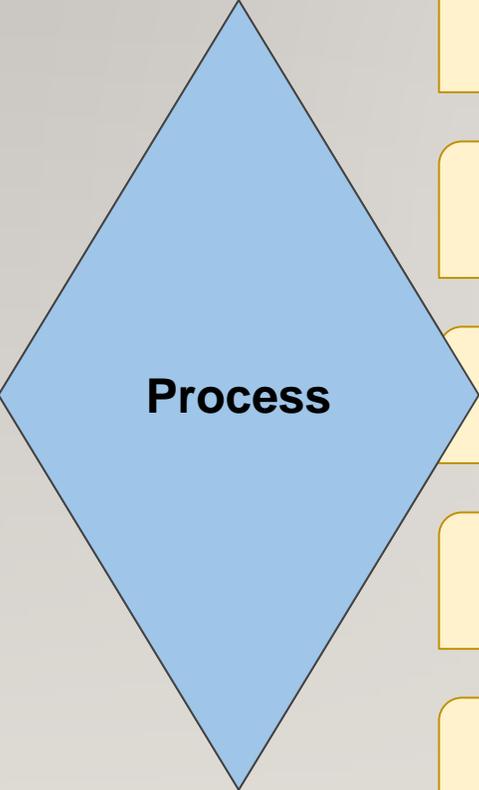
Where?

Where is the relevant information stored? Computers, Network Servers, Email Servers, Flash Drives, Cell Phones, Work Phones, etc.

How?

How to best implement the litigation hold?

Litigation Holds - Implementation



Process

Agency head, division director, or counsel sends written notice to all applicable levels the materials that should be preserved

Notifying personnel of steps needed to preserve electronic data, such as segregation, removal, or exchange of computers/hard drives

Notifying director of ITD, or designee, steps ITD needs to take to preserve electronic data (halting deletion, automatic updates, etc.)

Determining how to monitor compliance with the litigation hold by periodically checking back with affected management and staff

Determining who will assist in reviewing documents for production and assertion of privileges; How to notify when hold is removed

Spotlight: Preserving Text Messages & Social Media

A 2010 study found that American teenagers send an average of 3,339 texts each month, or six texts each hour they are awake, and those between ages 18 and 24 send nearly half that amount.

A September 2013 survey by the Pew Research Center revealed that:

- 91% of American adults own a cell phone.
- 97% of cell phone users ages 18 to 29 send and receive texts.
- 94% of owners ages 30 to 49 send and receive texts.
- 75% of owners ages 50 to 64 send and receive texts.

Pew Research surveys in 2015-16 found:

- 52% of online adults use 2 or more social media sites.
- More than half of online adults, 65+ use Facebook.
- 79% of people ages 30-49 used social media.
- In 2016, 61% of people ages 50-64 used social media.



What Are the Rules

Generally speaking, “the resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.” *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, No. 08-CV-6048 (2013) WL 1742689.

ESI in your possession, custody, or control--inconsistent.

Ultimate determination also rests on relevance.

Preserving in litigation-hold notices.

Social media and text messages in employment litigation.

But, wait! There is more...



Methods of Preservation

- Facebook “Download Your Info;”
- Twitter downloads all Tweets posted by requesting a copy of user’s “archive;”
- Case-by-case basis;
- Need to request preservation and discuss with your employees.

BYOD (not B) to Work

Bring Your Own Device (“BYOD”) to work is increasing in popularity with companies.

- Decreases IT costs;
- 74% of organizations are either utilizing this trend or plan to in the future;
- The IT, technology, and education industries are most likely to permit BYOD, while government is most likely to prohibit it;
- 67% of people are using personal devices in the workplace.

Failure to Preserve is Sanctionable

- A party has a duty to preserve written communications, including text messages, related to the litigation. *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378 (2010); and *Cytec Carbon Fibers LLC v. Hopkins*, No. 11-cv-217 (2012).
- A company must explain to its employees that the litigation hold includes text messages. *In re Pradaxa (Dabigatran Etexilate) Prods. Liability Litig.*, No. 12-md-2385 (2013).
- Failure to stop the automated deletion of employee text messages on company-issued phones is sanctionable. *In re Pradaxa*.
- Discarding a cell phone containing potentially responsive text messages is sanctionable. *Christou v. Beatport, LLC*, No. 10-cv-2912 (2013); *Barrette Outdoor Living, Inc. v. Min. Resin Reps.*, No. 11-cv-13335 (2013).
- The absence of any text messages or e-mails on employees' mobile device is a red flag. *Se. Mech. Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293 (2009); *In re Pradaxa*.
- Text messages are as prominent a form of communication as e-mails. *In re Pradaxa; Passlogix, Inc.*
- Defendant changed profile picture and court determined the defendant committed spoliation of evidence. *Katiroll Company, INC., v. Kati Roll and Platters, Inc.*, No. 10-3620 (GEB) (D.N.J. Aug. 3, 2011).

Retention Period of Major Cellular Service Providers

Data gathered by the Computer Crime and Intellectual Property Section, U.S. Department of Justice

	Verizon	T-Mobile	AT&T/Cingular	Sprint	Virgin Mobile
Call detail records	1 rolling year	Pre-paid: 2 yrs. Post-paid: 5 yrs.	Pre-paid: varies Post-paid: 5 years	18-24 months	2 years
Text message detail	1 rolling year	Pre-paid: 2 years Post-paid: 5 years	Post-paid: 5-7 yrs.	18 months (depends on device)	60-90 days
Text message content	3-5 days	Not retained	Not retained	Not retained	90 days (search warrant required with "text of text" request)
Pictures	Only if uploaded to website (customer can add or delete pictures any time)	Can be stored online and are retained until deleted or service is cancelled	Not retained	Contact provider	Not retained