



2020 **eDISCOVERY CASE LAW** Year In Review



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Legend

Throughout the report you will see icons that will direct you to content on the eDiscovery Assistant and eDiscovery Today websites.



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#CaseoftheWeek Blog Posts

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Introduction

Welcome to the 2020 eDiscovery Case Law Report!

The year 2020 gave us many challenges brought on by the COVID-19 pandemic with its associated health and economic considerations, that not only impacted the practice of law, but our daily lives as well. Social distancing requirements forced many of us into work-from-home (WFH) situations and wreaked havoc on law firms and courts. Despite these challenges, eDiscovery case law in 2020 continued—in fact, even accelerated—its dramatic rise since the enactment of the changes to the Federal Rules of Civil Procedure in 2015. As Chart 1 and Maps 1 and 2 show, since changes went into effect on December 1, 2015, the number of case law decisions in eDiscovery has increased dramatically year to year, jumping from just over 560 in 2015 to more than 1200 in 2016 and 2017. 2018 saw a bigger jump to more than 1500 decisions, with an additional 600 decisions in 2019 and another 765 cases in 2020 for a total of 2870 decisions. Not even a global pandemic seems to be able to slow down the pace of eDiscovery disputes in our court system.

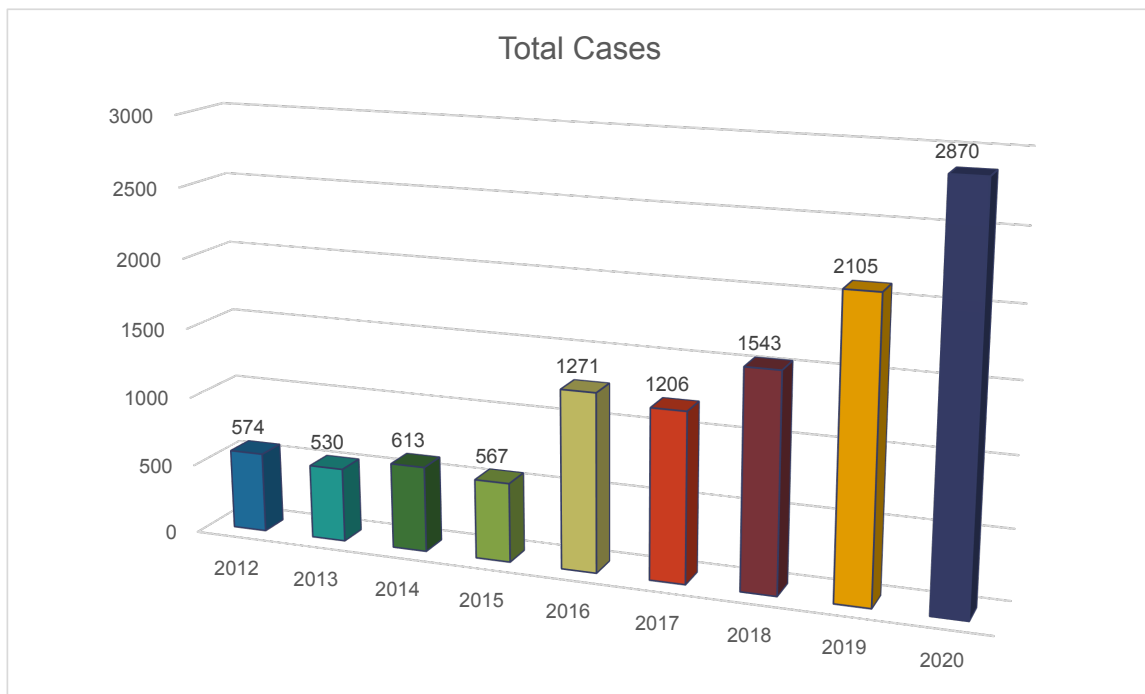
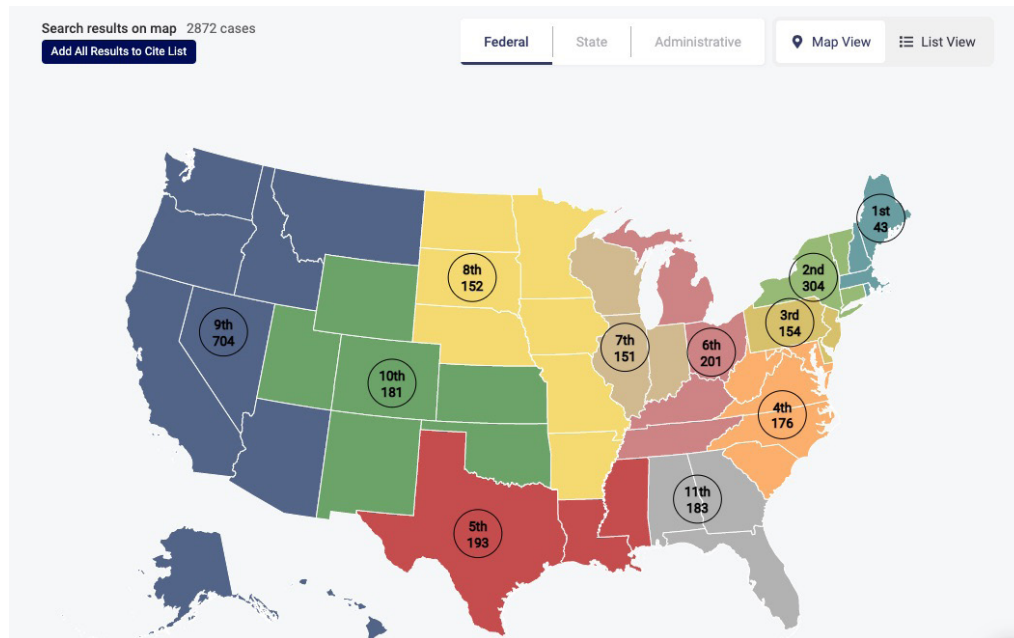
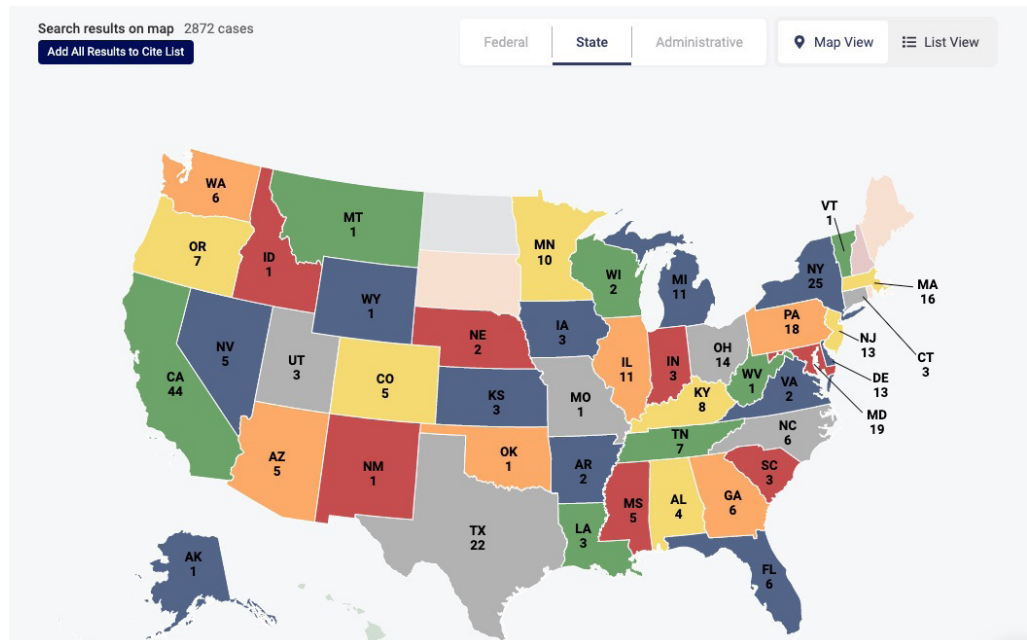


Chart 1 - eDiscovery Decisions since 2012



Map 1 - Federal eDiscovery Decisions in 2020



Map 2 - State eDiscovery Decisions in 2020

Why are we seeing this explosive growth? According to the Federal Judicial Caseload Statistics, new case filings in federal courts were up 16% in 2020, after increases of 11% in 2019 and 16% in 2018¹. While it is next to impossible to track timing of new case filings with discovery decisions, it is clear that the amendments to the Federal Rules of Civil Procedure have played a dramatic part in the increase. Covid-19 and work from home have also meant that while courts did not hold hearings for months during the early shutdown in March, they continued to move dockets forward resolving pending motions with written decisions. eDiscovery Assistant has continued to see a consistent flow of discovery decisions each week despite the pandemic.

By far the most important amendments to the Federal Rules of Civil Procedure (FRCP) in 2015 included the revisions to Rule 37(e) and the changes to the bases for sanctions, as well as the heightened requirement to show bad faith for terminating sanctions. But instead of reducing the number of sanctions motions as some have surmised, those changes seemed to spur more motions seeking sanctions across the federal courts. As Chart 2 shows, sanctions cases have increased since 2015 and started a slow climb since 2016 leading to a dramatic uptick in decisions in 2020 to a total of 851 decisions involving sanctions rulings, nearly 30% of all case rulings in 2020.

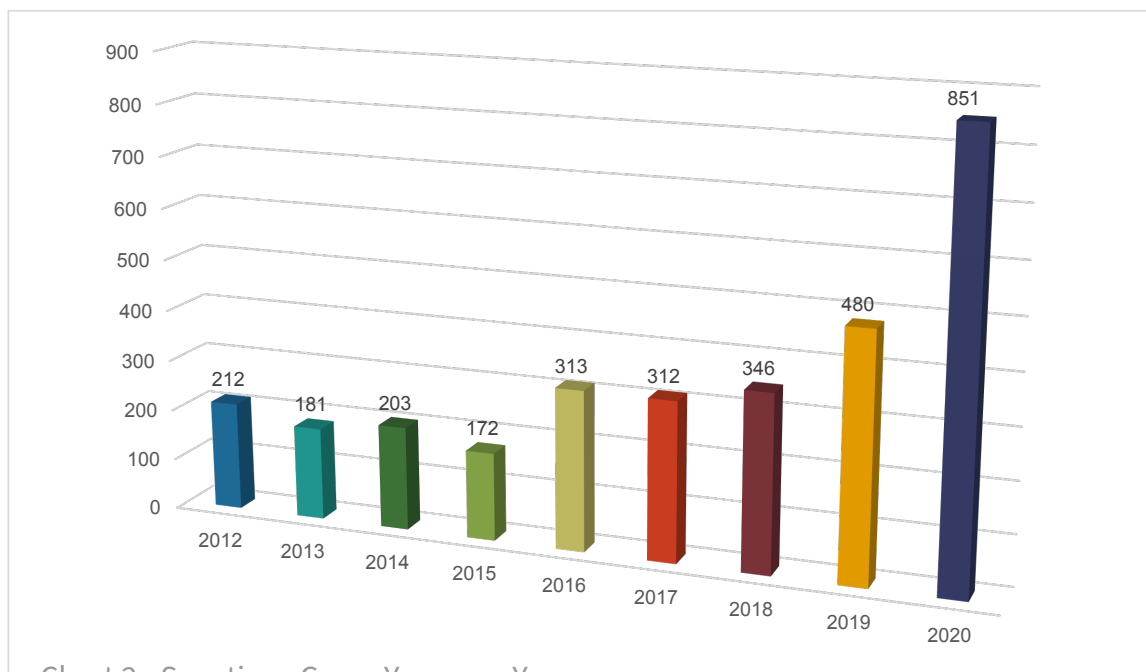


Chart 2 - Sanctions Cases Year over Year

¹ <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020>; <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019>; <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018>

Similarly, the promotion of the proportionality language within Rule 26 from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1) and addition of proportionality language to multiple other Federal Rules during the 2015 amendments has increased the number of cases in which proportionality is analyzed by the courts almost ten fold. While 2015 saw 100 cases on proportionality, 2016 jumped to 369. That number held relatively steady in 2017 before increasing over 400 in 2018, to closer to 500 in 2019 before a big jump to 889 in 2020, which represented nearly a third (31%) of all case law decisions last year. Proportionality arguments have become a weapon in arguing scope of discovery and the sharp rise in disputes has illustrated the need for more systematic and standardized approaches to assessing proportionality in cases today.

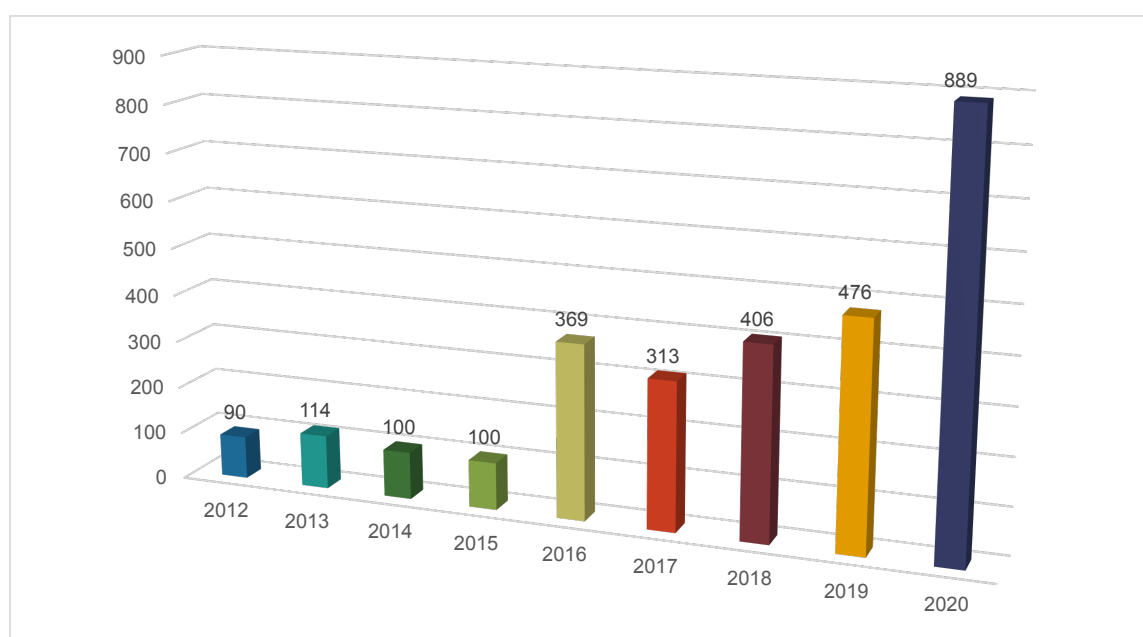


Chart 3 - Proportionality Cases Year over Year

Examining Key Issues in eDiscovery Decisions

eDiscovery Assistant reviews each decision for inclusion in the database and then tags each one with key issues analyzed in the ruling. The software includes a proprietary tagging structure of more than 80 specific issues. Each individual case entry in this report displays the issues assigned to that decision, and page 41 lists all of the issues included in this report. Issues can be combined to narrow a search, such as using Dismissal with Sanctions to narrow results to decisions including both issues. Chart 4 sets forth the top issue tags from eDiscovery Assistant for 2020.

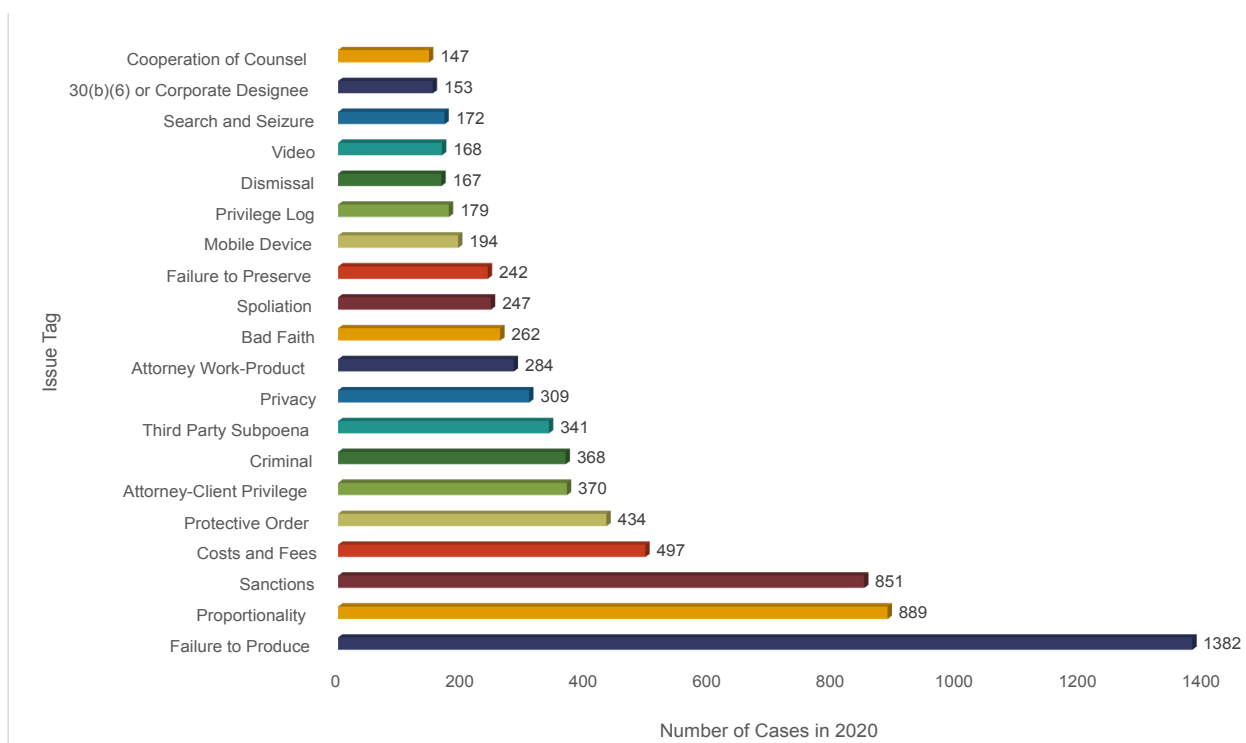


Chart 4 - Top Issue Tags in 2020

With more than 2800 decisions¹ in eDiscovery this year, eDiscovery Assistant and eDiscovery Today selected cases that highlight growing and developing issues in the law that lawyers and legal professionals in the industry will want to be aware of how courts are ruling—including sanctions, proportionality, TAR, privilege log and 30(b)(6) witnesses—as well as areas of growing technical importance including mobile devices, short messaging, audio and video files, and the use and involvement of the courts on defining search terms to locate relevant documents.

Each section begins with a brief summary of what the courts are looking at on each issue. Each decision is then listed with an abbreviated summary and links to specific blogs posts and/or video discussions for further review. Practical tips are sprinkled throughout on how to best leverage your position based on what we see from the courts. Click on the icons as denoted by the Legend key to link to blog posts and video discussions on each decision.

1. eDiscovery Assistant continues to add decisions on an ongoing basis. The number of decisions identified in this report is a snapshot of decisions available as of late February 2021.

Case Law

Sanctions

Motions for sanctions or requests for sanctions following a motion to compel were among the chart toppers of 2020. We've continued to see a dramatic increase in cases regarding sanctions (a total of 851 cases up from 478 in 2019), but what the courts are becoming clearer on is when a party is entitled to sanctions, what types of sanctions are appropriate for a given level of conduct, and that the rules more than inherent authority are the appropriate basis for sanctions.

The cases selected show the full gamut of available sanctions—from costs to exclusion of evidence to dismissal—and articulate where a party successfully (or in many cases unsuccessfully) demonstrated sanctionable conduct. A strict reading of many of the sanctions cases across eDiscovery Assistant shows that courts want factual specifics and are not willing to infer bad behavior except in the most egregious instances. What is egregious, however, can depend on the industry and the type of data at issue, as well as whether the party had been on notice in previous proceedings that preservation was an issue.

Maps 3 and 4 from eDiscovery Assistant show the jurisdictional breakdown of cases from this past year for both federal and state courts.

Jefferson v. Amsted Rail Co.

In [Jefferson v. Amsted Rail Co., No. 18-2620-KHV \(D. Kan. Apr. 6, 2020\)](#), Kansas District Judge Kathryn H. Vratil, in a case where the defendant had filed five motions in recent months due to failure on the part of the pro se plaintiff to adhere to her discovery obligations, ruled that each of the five Ehrenhaus factors used to determine whether to order dismissal as a sanction “weighs in favor of dismissal” and dismissed the plaintiff’s claims with prejudice, adopting the recommendation of the magistrate judge. 

Issue Tags:

Failure to Produce

Dismissal

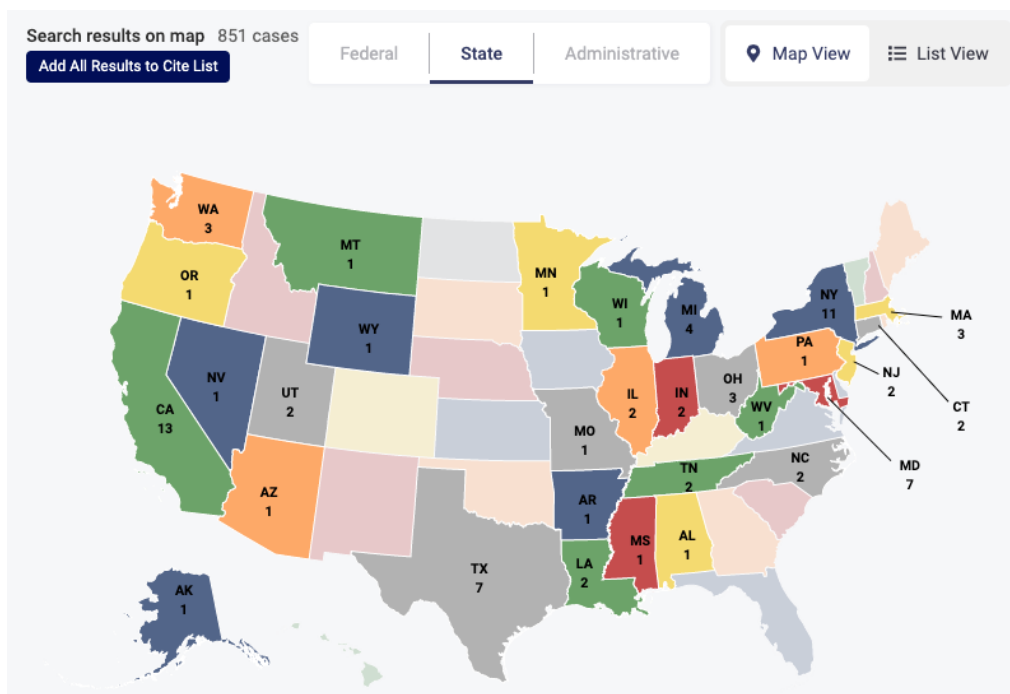
Bad Faith

Costs and Fees

Sanctions



Map 3 - Sanctions in Federal Courts



Map 4 - Sanctions in State Courts

WeRide Corp. v. Huang et al.

In [WeRide Corp. v. Huang et al., No. 5:18-cv-07233-EJD \(N.D. Cal. Apr. 24, 2020\)](#), California District Judge Edward J. Davila granted the plaintiffs' motion for sanctions through FRCP Rules 37(b) and 37(e), issuing terminating sanctions against defendants Wang, Huang, and AllRide and ordering them to "pay WeRide's reasonable fees and costs incurred in connection with (i) this motion; (ii) all discovery related to their spoliation of evidence; and (iii) the discovery motion practice before {Magistrate} Judge Cousins." 

Issue Tags:

Source Code

Dismissal

Failure to Preserve

Mobile Device

Sanctions

Legal Hold

Spoliation

Ephemeral Messaging

Solis v. United Med. Clinic, P.A.

In [Solis v. United Med. Clinic, P.A., No. EP-20-CV-2-KC \(W.D. Tex. May 29, 2020\)](#), Texas Magistrate Judge Miguel A. Torres granted the plaintiff's Second Motion to Compel Discovery from the defendant, ruling that the defendant did not fully respond to the plaintiff's interrogatory and rejecting the defendant's objections to the plaintiff's requests for production (RFPs), stating that "Defendant makes no argument to support its objections." 

Issue Tags:

Native Format

Failure to Produce

Sanctions

Proportionality

Radiation Oncology Servs. V. Our Lady of Lourdes Mem. Hosp. Inc.

In [Radiation Oncology Servs. v. Our Lady of Lourdes Mem. Hosp., Inc., No. EF15-462 \(N.Y. Sup. Ct. 2020\)](#), following review of just two of seven incidents of defendants' spoliation identified by the plaintiff, New York Supreme Court Judge Mark G. Masler ordered the defendants to produce all ESI related to the legal hold including all copies of the hold issued to allow a "full and fair opportunity to litigate the issue of spoliation sanctions."  

Issue Tags:

Legal Hold

Spoliation

Sanctions

EEOC v. M1 5100 Corp.

In [E.E.O.C. v. M1 5100 Corp., No. 19-cv-81320-DIMITROULEAS/MATTHEWMAN \(S.D. Fla. July 2, 2020\)](#), Judge Matthewman granted in part and denied in part the plaintiff's Motion to Compel a Privilege Log, Better Discovery Responses, and Fees, ordering the parties to "fully confer in good faith on or before July 9, 2020, and attempt to agree on relevant ESI sources, custodians, and search terms, as well as on a proposed ESI protocol and all other related discovery issues." Judge Matthewman also granted the plaintiff's request for the defendant to respond to a specific interrogatory and request for production, but reserved ruling on the plaintiff's request for an award of attorney's fees and costs incurred in filing its motion and denied other issues (including the privilege log) as moot because the parties resolved those issues themselves. 

Issue Tags:

Self-Collection

Privilege Log

Sanctions

Bad Faith

Charlestown Capital Advisors v. Acero Junction, Inc.

In [Charlestown Capital Advisors v. Acero Junction, Inc., No. 18-CV-4437 \(JGK\) \(BCM\) \(S.D.N.Y. Sept. 30, 2020\)](#), New York Magistrate Judge Barbara Moses granted in part the plaintiff's motion for sanctions of the defendants for failure to preserve the business email account of the defendant's co-President and Director, whose signature appeared on an agreement between the two parties at the heart of the dispute, but denied it with respect to the level of sanctions, stating that "the record does not contain clear and convincing evidence that the Acero Defendants acted 'with the intent to deprive [plaintiff] of the information's use' in this action." 

Issue Tags:

Exclusion of Evidence

Default Judgment

Failure to Preserve

Legal Hold

Adverse Inference

Costs and Fees

Spoliation

Sanctions

Bad Faith

John, et al. v. Cnty. of Lake, et al.

In [John, et al. v. Cnty. of Lake, et al., No. 18-cv-06935-WHA\(SK\) \(N.D. Cal. July 3, 2020\)](#), California Magistrate Judge Sallie Kim ruled that “Defendants or their counsel breached their obligations to provide discovery and that monetary sanctions are appropriate.” Judge Kim also recommended that the District Court provide an adverse inference instruction to the jury at trial. 

Issue Tags:

Failure to Preserve

Text Messaging

Legal Hold

Mobile Device

Adverse Inference

Sanctions

Spoliation

Costs and Fees

QueTel Corp. v. Abbas

In [QueTel Corp. v. Abbas, No. 18-2334 \(4th Cir. July 17, 2020\)](#), the Fourth Circuit Court of Appeals affirmed the judgment of the district court which awarded judgment to the plaintiff as a sanction for the defendants’ spoliation of evidence and also imposed a permanent injunction against the defendants. 

Issue Tags:

Source Code

Default Judgment

Custody or Control

Failure to Preserve

Spoliation

Sanctions

Bragg v. SW Health Sys., Inc.

In [Bragg v. SW Health Sys., Inc., No. 18-cv-00763-MSK-NRN \(D. Colo. July 13, 2020\)](#), Colorado Magistrate Judge N. Reid Neureiter denied a motion for terminating sanctions where the plaintiff produced “zero evidence that SHS destroyed any relevant evidence or that any such evidence was lost or deleted.”  

Issue Tags:

Failure to Preserve

Forensic Analysis

Legal Hold

Sanctions

Spoliation

Burress v. Mr. G&G Trucking, LLC

In [Burress v. Mr. G&G Trucking, LLC, No. 19-cv-791-jdp \(W.D. Wis. July 31, 2020\)](#), Wisconsin District Judge James D. Peterson gave defendants Aguilera and Rivadeneria “a final opportunity to respond to plaintiffs’ discovery requests,” stating that “[i]f they fail to do so by the deadline, the court will grant plaintiffs’ motion” for sanctions that requested the court enter judgment against them on the issue of liability. 

Issue Tags:

Default Judgment

Failure to Produce

Bad Faith

Sanctions

Packrite, LLC v. Graphic Packaging Int’l, LLC

In [Packrite, LLC v. Graphic Packaging Int’l, LLC, No. 1:17CV1019 \(M.D.N.C. Dec. 4, 2020\)](#), North Carolina Magistrate Judge Patrick L. Auld recommended that the plaintiff’s instant Motion for Sanctions for Spoliation of Evidence should be denied, noting that “The instant Motion does not identify the ESI that allegedly meets Rule 37(e)’s four predicate elements.” In addition, Judge Auld stated that “the record does indicate that portions of the plaintiff’s Memorandum in Support of the instant Motion may run afoul of Federal Rule of Civil Procedure 11, thus warranting entry of a show-cause order directed to Plaintiff and its counsel.” 

Issue Tags:

Failure to Preserve

Sanctions

Spoliation

Bad Faith

Optronic Tech., INC. v. Ningbo Sunny Elec. Co., Ltd.

In [Optronic Tech., Inc. v. Ningbo Sunny Elec. Co., Ltd., No. 16-cv-06370-EJD \(VKD\) \(N.D. Cal., June 1, 2020\)](#), California Magistrate Judge Virginia K. DeMarchi granted in part and denied in part the plaintiff’s motion for sanctions pursuant to Rule 26(g) of the Federal Rules of Civil Procedure against defendant Ningbo Sunny Electronic Co., Ltd. (Ningbo Sunny) and its counsel, granting the plaintiff’s motion for sanctions with respect to Ningbo Sunny’s responses to the plaintiff’s document requests but denying the motion with respect to Ningbo Sunny’s responses to the plaintiff’s interrogatory. 

Issue Tags:

Self-Collection

Failure to Produce

Sanctions

Bad Faith

Costs and Fees

Alsadi v. Intel Corp.

In [Alsadi v. Intel Corp., No. CV-16-03738-PHX-DGC \(D. Ariz. July 17, 2020\)](#), Arizona District Judge David G. Campbell, among other rulings, denied the plaintiff's motion for a negative inference for failing to collect data from a gas detector regarding hazardous emissions, citing *Small v. Univ. Med. Ctr.* in stating "The 2015 amendment to Rule 37(e) now 'forecloses reliance on inherent authority' to determine whether and what sanctions are appropriate for a party's loss of discoverable ESI."



Issue Tags:

Exclusion of Evidence

Exclusion of Witness

Failure to Preserve

Adverse Inference

Spoliation

Sanctions

Bad Faith

EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.

In [EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., Nos. 19-5836/5838 \(6th Cir. Apr. 15, 2020\)](#), an unpublished decision, the Sixth Circuit Court of Appeals, in affirming the decision by the district court, found that "District courts have broad discretion to craft sanctions for spoliated evidence" and "[t]he fact that Thomas Nelson was only 'negligent' does not defeat the [permissive adverse inference] instructions" that were issued. 

Issue Tags:

Failure to Preserve

Spoliation

Sanctions

Adverse Inference

Costs and Fees

30(b)(6) or Corporate Designee

eDiscovery Assistant collected 150 cases involving FRCP 30(b)(6) or the state equivalent corporate representative in 2020, and most crack down on parties for a failure to provide an appropriately knowledgeable and prepared witness for a 30(b)(6) deposition. The moral of this section of case law is know your processes and take this deposition seriously.

The map below from eDiscovery Assistant shows the federal jurisdictional breakdown of cases from this past year.



Map 4 - 30(b)(6) or Corporate Designee in Federal Courts

Smith v. Forest River, Inc., et al.

In [Smith v. Forest River, Inc. et al., No. 19-14174-CIV-ROSENBERG/MAYNARD \(S.D. Fla. Apr. 3, 2020\)](#), Florida Magistrate Judge Shaniek M. Maynard granted the plaintiff's Motion for Reconsideration after the defendant's 30(b)(6) depositions illustrated that sources of information were more readily available and easier to search than what the defendant explained in its response to the plaintiff's original Motion for Sanctions. 

Issue Tags:

Failure to Produce

30(b)(6) or
Corporate Designee

Sanctions

Costs and Fees

Saleh v. Pfister

In [Saleh v. Pfister, No. 18 C 1812 \(N.D. Ill. July 30, 2020\)](#), Illinois Magistrate Judge Jeffrey Cole, after the defendant submitted boilerplate objections and only produced four pages of discovery (late), granted the plaintiff's Motion to Compel Responses to Requests for Production and to Compel a Fed.R.Civ.P. 30(b)(6) deposition from the defendant. 

Issue Tags:

Failure to Produce

30(b)(6) or
Corporate Designee

Cooperation of Counsel

Proportionality

Proportionality takes the prize for the largest number of decisions in the eDiscovery Assistant database this year at a whopping 889 cases, up from 475 cases in 2019. Decisions articulated the six factors under FRCP 26 but, more often than not, discussed undue burden versus the value of the information sought as the primary factor in determining whether a request was proportional. Judges did not hesitate to examine specific requests under the proportionality microscope and throw out requests that were clearly overbroad and where parties failed to articulate a clear nexus between the claims and the information sought. Proportionality extended not only to Requests for Production but to Requests for Admission and Interrogatories.

Maps 5 and 6 from eDiscovery Assistant show the jurisdictional breakdown of federal and state cases from this past year.

Pertz v. Heartland Realty Invs., Inc.

In [Pertz v. Heartland Realty Invs., Inc. et al., No. 19-cv-06330-CRB \(TSH\) \(N.D. Cal. Mar. 27, 2020\)](#), California Magistrate Judge Thomas S. Hixson issued orders to the defendants to address certain discovery deficiencies, but indicated his frustration with some arguments by the plaintiff with regard to relevance, proportionality, privacy and handling of redactions. 

Issue Tags:

Privacy

Redaction

Custody or Control

Failure to Produce

Nahum v. Boeing Co.

In [Nahum v. Boeing Co., No.: 19-cv-01114-BJR \(W.D. Wash. July 24, 2020\)](#), Washington District Judge Barbara J. Rothstein denied the plaintiff's motion to compel discovery, disagreeing with the defendants' argument that the plaintiff's motion was procedurally defective because he failed to exhaust the meet and confer requirement, but accepting their argument that the defendants had complied with their discovery obligations. 

Issue Tags:

Failure to Produce

Cooperation of Counsel

Proportionality



Map 5 - Proportionality in Federal Courts



Map 6 - Proportionality in State Courts

Coventry Capital U.S., LLC v. EEA Life Settlements, Inc.

In [Coventry Capital U.S., LLC v. EEA Life Settlements, Inc., et al. No. 17 Civ. 7417 \(VM\) \(SLC\) \(S.D.N.Y. Dec. 16, 2020\)](#), New York Magistrate Judge Sarah L. Cave ruled, among other rulings, that a subset of documents (the “Guernsey Manager Documents”) “shall be excluded from the TAR review and shall be manually reviewed and produced” and also ruled that “Phase II discovery shall include: (a) a search of Barry John’s ESI but not the other six custodians; and (b) application of search terms to the Mimecast data, production of a hit report, and a meet-and-confer among the parties as to whether any responsive data shall be produced and if so, on what timeline.” 

Issue Tags:

Search Terms

Technology Assisted Review (TAR)

Custody or Control

Cooperation of Counsel

Redaction

Privilege Log

Proportionality

Failure to Produce

United States Ex Rel. Bonzani v. United Technologies Corp.

In [United States Ex Rel. Bonzani v. United Technologies Corp, No. 3:16-CV-01730 \(AVC\) \(D. Conn. Dec. 14, 2020\)](#), Connecticut Magistrate Judge William I. Garfinkle ruled on various discovery motions, including granting in part and denying in part the plaintiff’s Request for Production for another thirty-five custodians, granting the request with regard to the individuals listed in the plaintiff’s and defendant’s initial disclosures, as well as four out of five custodians identified by the plaintiff as specifically relevant (with attached documentation). Judge Garfinkle also rejected the defendant’s “liberal and reflexive use” of boilerplate responses to discovery requests. 

Issue Tags:

Attorney-Client Privilege

Waiver of Privilege

Failure to Produce

Proportionality

Gross v. Chapman

In [Gross v. Chapman, No. 19 C 2743, \(N.D. Ill. July 28, 2020\)](#), Illinois Magistrate Judge Jeffrey Cole denied the plaintiffs’ motion for additional discovery on discovery in part and granted it in part “but only insofar as defendants must produce the attachments to text in reviewable format within 10 days of this Opinion.” Judge Cole also denied the defendants’ motion for a protective order barring discovery of their vendor as moot, given the ruling on plaintiffs’ motion. 

Issue Tags:

Protective Order

Text Messaging

Failure to Produce

Proportionality

Timmerman Starlight Trucking, Inc. v. Ingredion Inc.

In [Timmerman Starlight Trucking, Inc. v. Ingredion Inc., No. 2:19-cv-01876-JAM-AC \(E.D. Cal. Oct. 21, 2020\)](#), California Magistrate Judge Allison Claire granted the plaintiff's motion to compel, finding the defendant's arguments were "not persuasive" with regard to its attempt to moot the discovery dispute by concessions and also refused to delay ruling on the matter because of COVID-19 complications and the closing of its counsel's law firm and merger with another firm.



Issue Tags:

Failure to Produce

Costs and Fees

Proportionality

Form of Production

Form of production, and specifically when native production is required, stayed constant as an issue in eDiscovery case law in 2020. Case law addressed specific forms of data that require native production—spreadsheets and database reports among them. Courts have not yet taken on the issue of whether parties are fully entitled to native productions with assigned bates numbers for tracking, so that argument will have to wait.

Form of production decisions also included issues with redactions on ESI—whether and on what basis that redactions are appropriate, as well as the scope of those redactions.

Map 7 from eDiscovery Assistant shows the jurisdictional breakdown of federal cases from this past year.



Map 7 - Forms of Production in Federal Courts

Lundine v. Gates Corp.

In [Lundine v. Gates Corp., No. 18-1235-EFM \(D. Kan. Mar. 30, 2020\)](#), Kansas Magistrate Judge James P. O'Hara, depicting the situation as a “classic case of what happens when lawyers (even good, experienced lawyers such as those involved here) don't spend the requisite time on the front end of a case nailing down how discovery of ESI will be handled,” denied the plaintiff's motion to compel production of data in Excel or native format, as well as the request for plaintiff's experts to retrieve the data under defendant's supervision. 

Issue Tags:

Native Format

Form of Production

U.S. v. Town of Irmo, S.C.

In [U.S. v. Town of Irmo, S.C., No. 3:18-cv-03106-JMC \(D.S.C. Mar. 3, 2020\)](#), South Carolina District Judge J. Michelle Childs granted in part plaintiff United States of America's Motion to Compel, ordering defendant Town of Irmo, South Carolina to respond to several requests for production and interrogatories and produce corresponding evidence in native format. Judge Childs, after concluding that the defendant's privilege log was “inadequate,” also ordered the defendant to “promptly” supply a privilege log to the plaintiff that conformed to Rule 26(b)(5). 

Issue Tags:

Native Format

Proportionality

Privilege Log

Form of Production

Failure to Produce

White, et al. v. Wiseman, et al.

In [White, et al. v. Wiseman, et al. No. 2:16-cv-01179-CW-JCB \(D. Utah July 6, 2020\)](#), Utah Magistrate Judge Jared C. Bennett ordered the plaintiff to “produce complete and full responses to the production requests at issue,” stating that “[t]he production of documents shall be Bates stamped and indexed to identify which documents are new, which documents are replacements, and which documents are responsive to which requests.” 

Issue Tags:

Manner of Production

Proportionality

Failure to Produce

Costs and Fees

Corker, et al. v. Costco Wholesale, et al.

In [Corker, et al. v. Costco Wholesale, et al., No. C19-0290RSL \(W.D. Wash. Apr. 27, 2020\)](#), Washington District Judge Robert S. Lasnik granted the plaintiffs' motion to compel defendant BBC Assets to produce a document, that had previously been produced as a 2,269-page PDF, in its original native Excel format without redactions and also granted the plaintiffs' motion to seal the document for confidentiality reasons, while denying defendant BBC Assets's motion for a protective order confidential commercial information contained in the responsive spreadsheets.



Issue Tags:

Manner of Production

Redaction

Failure to Produce

Criminal/Mobile Devices

Since the United States Supreme Court decision in *Riley v. California*, and coupled with the proliferation of technology in mobile applications that allow for encrypted communications, the discovery of data from mobile devices has skyrocketed in criminal cases. The seizure of mobile devices, opening of devices using a person's face or thumbprint, or requesting passcodes has become regular in stops. As a result, we've seen an increase in cases seeking exclusion of evidence from mobile devices as fruit of the poisonous tree for an unwarranted search, or a violation of privacy asserted. We've seen in discovery that often new forms of technology are utilized primarily to hide criminal conduct, and often our body of law on these issues develops first in criminal matters before bleeding into civil.

Maps 8 and 9 from eDiscovery Assistant shows the jurisdictional breakdown of cases from this past year.

U.S. v. Sam

In [U.S. v. Sam, No. CR19-0115-JCC \(W.D. Wash. May 18, 2020\)](#), Washington District Judge John C. Coughenour granted the defendant's motion in part to suppress cell phone contents ruling that the FBI "'searched' the phone within the meaning of the Fourth Amendment...And because the FBI conducted the search without a warrant, the search was unconstitutional." As for a second search, conducted by the Tulalip Police Department, Judge Coughenour ruling that "the record is devoid of concrete evidence regarding the inventory search purportedly conducted by the Tulalip Police Department," ordered the parties to "file supplemental briefing addressing the circumstances surrounding Office Shin's and the Tulalip Police Department's alleged examinations of Mr. Sam's phone." 

Issue Tags:

Search and Seizure

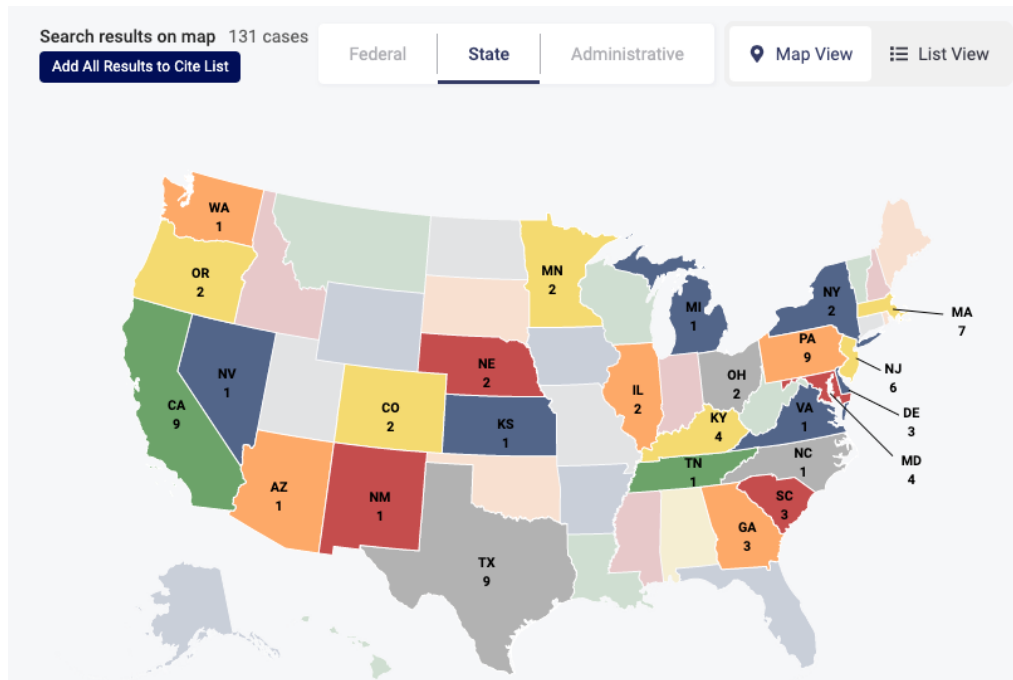
Criminal

Mobile Device

Privacy



Map 8 - Criminal/Mobile Devices in Federal Courts



Map 9 - Criminal/Mobile Devices in Federal Courts

Third Party Subpoena

There was no shortage of case law rulings involving third party subpoenas in 2020, with 335 of them, mostly in Federal courts (only 14 were in State courts). Compared to 229 cases in 2019, this represents a 46% increase in case law rulings covered by eDiscovery Assistant regarding third party subpoenas. Not surprisingly, over half of those 2020 rulings also included proportionality disputes (182 cases with both components). Recent changes to the Federal Rules have impacted the number of cases involving third party subpoenas, including revisions to Rule 45 in 2013 and the 2015 amendments to the Federal Rules (which impacted scope of discovery under Rule 26). However, perhaps the biggest reason for the growth in the number of cases involving third party subpoenas is the increased use of cloud computing providers for hosting organization data, leading to subpoenas of those organizations for those sources of ESI.

Map 10 below from eDiscovery Assistant shows the jurisdictional breakdown of federal cases from this past year.



Map 10 - Third Party Subpoenas in Federal Courts

Whatley v. World Fuel Servs. Corp.

In [Whatley v. World Fuel Servs. Corp., No. 20-20993-MC-SCOLA/TORRES \(S.D. Fla. May 22, 2020\)](#), Florida Magistrate Judge Edwin G. Torres granted Canadian Pacific Railway Company's and Soo Line Railroad Company's ("CP") motion to compel the defendant to comply with a subpoena issued in the United States District Court for the District of North Dakota to produce certain documents in response to CP's discovery requests related to a train derailment in Québec Canada. 

Issue Tags:

Third Party Subpoena

Failure to Produce

Proportionality

Pfaff, et al. v. Merck & Co., et al.

In [Pfaff, et al. v. Merck & Co., et al., No. 20-mc-80148-AGT \(N.D. Cal. Sept. 28, 2020\)](#), California Magistrate Judge Alex G. Tse denied the plaintiff's motion to quash a subpoena on the company at which the plaintiff's husband (the subject of a products liability and wrongful death action related to his suicide allegedly being caused by his use of Merck's prescription drug Propecia), finding "The documents that Merck seeks from Trace3 are relevant to the parties' claims and defenses." 

Issue Tags:

Protective Order

Third Party Subpoen

Audio/Video

Discovery of audio and video ESI continued to be a significant source of discovery disputes in 2020, with 204 cases involving disputes associated with either audio or video evidence (or both). With discoverable sources of ESI ranging from call center and daily trading recordings to voicemails to videos on social media to mobile device messages and videos to surveillance videos, there is no shortage of potentially discoverable audio or video evidence in cases today. And the impact of the pandemic is expected to only increase the volume of potentially discoverable ESI as many more web conference meetings, on platforms such as Teams and Zoom, are being recorded.

Perhaps the most significant audio/video case ruling of 2020 was *Tate v. City of Chicago* (shown below), where Illinois Magistrate Judge Jeffrey T. Gilbert denied third party CBS's motion to quash with respect to video and audio recordings, while granting it with respect to the other evidence, illustrating the importance of audio and video evidence in these cases.

Map 11 below from eDiscovery Assistant shows the jurisdictional breakdown of federal cases from this past year.



Map 11 -Audio/Video in Federal Courts

Nat'l Lawyers Guild v. City of Hayward

In [Nat'l Lawyers Guild v. City of Hayward, S252445 \(Cal. May 28, 2020\)](#), the Supreme Court of California rejected the defendant's attempt to charge the plaintiff for approximately 40 hours its employees spent editing out exempt material from digital police body camera footage, "conclud[ing] the term 'data extraction' does not cover the process of redacting exempt material from otherwise disclosable electronic records" and ruled that the defendant "must bear its own redaction costs." 

Issue Tags:

Open
Records/Sunshine Laws

Video

FOIA

Redaction

Costs and Fees

Privacy

Reed v. Royal Caribbean Cruises, Ltd.

In [Reed v. Royal Caribbean Cruises, Ltd., No. 19-24668-CIV-LENARD/O'SULLIVAN \(S.D. Fla. Oct. 2, 2020\)](#), Florida Magistrate Judge John J. O'Sullivan denied the plaintiff's Motion for Sanctions for Spoliation of Evidence and Supporting Memorandum of Law for failing to preserve video beyond the six minutes of video it preserved of an incident that happened aboard the defendant's cruise ship that resulted in injury to the plaintiff, finding the amount of video preserved "to be sufficient."



Issue Tags:

Video

Failure to Preserve

Spoliation

Sanctions

Talbot v. Foreclosure Connection, Inc.

In [Talbot v. Foreclosure Connection, Inc., No. 2:18-cv-169, \(D. Utah July 29, 2020\)](#), Utah District Judge Clark Waddoups granted the plaintiff's Motion for Sanctions on the ground that the defendants engaged in discovery abuses, awarding default judgment to the plaintiff in the amount of \$18,657.49, as well as attorney's fees to be determined and a sanction amount of \$2,500 to be paid by defense counsel to the plaintiff. 

Issue Tags:

Audio

Default Judgment

Failure to Preserve

Bad Faith

Spoliation

Adverse Inference

Sanctions

Costs and Fees

Tate v. City of Chicago

In [Tate v. City of Chicago, No. 18 C 7439 \(N.D. Ill. Aug. 3, 2020\)](#), Illinois Magistrate Judge Jeffrey T. Gilbert granted in part and denied in part CBS's Motion to Quash Defendants' Subpoenas Duces Tecum. Judge Gilbert granted it to the extent that CBS "need not produce any notes or documents concerning interviews with Plaintiffs or any communications, correspondence, text messages or other messages between individuals at CBS, Plaintiffs, or Plaintiffs' attorneys". But, he denied CBS's motion to the extent "CBS is ordered to produce any and all video or audio recordings containing Plaintiffs' statements regarding the search of their residence on August 9, 2018, and the events that followed."  

Issue Tags:

Audio

Criminal

Video

Text Messaging

Third Party Subpoena

Failure to Produce

Privacy

While GDPR continues to loom large overseas, in the United States privacy issues lean more in favor of protecting PII as well as whether a consumer's data has value or whether a person has a privacy interest in specific types of data. Privacy comes up in the numerous search and seizure cases we are seeing every year, and 2020 was no exception.

Maps 12 and 13 from eDiscovery Assistant shows the jurisdictional breakdown of cases from this past year.

Giorgi Global Holdings, Inc. v. Smulski

In [Giorgi Global Holdings, Inc. v. Smulski, No. 17-4416 \(E.D. Pa. May 21, 2020\)](#), Pennsylvania District Judge Jeffrey L. Schmehl ruled that the defendant, “an American citizen sued in the United States, bears the burden of showing that the GDPR and/or Polish privacy law bar production of... relevant documents” which “he cannot do.” As a result, Judge Schmehl ruled that the “GDPR and/or Polish privacy law does not bar Smulski’s production of relevant documents in this matter.”



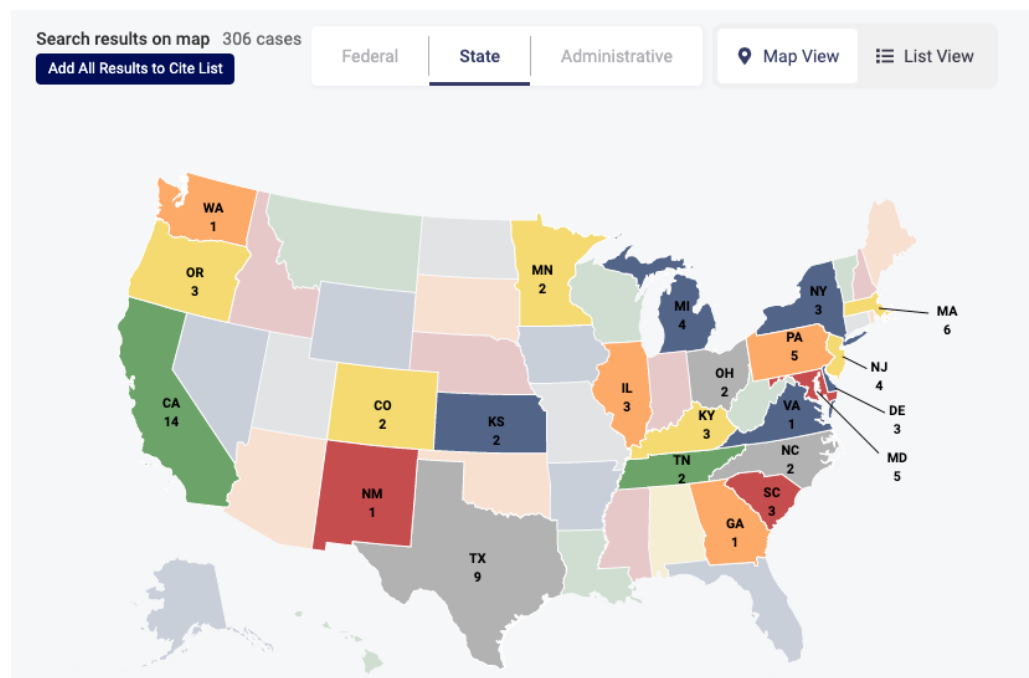
Issue Tags:

Privacy

Failure to Produce



Map 12 - Privacy in Federal Courts



Map 13 - Privacy in State Courts

Privilege Log

When and how to create an effective privilege log as required by the FRCP and state equivalents was a popular topic for discovery decisions in 2020. 179 different decisions addressed the issue of privilege logs, ranging from whether full email threads need to be listed individually to whether a party must provide a log at the time of each production vs. at the end of discovery. Spoiler alert -- many judges have now developed their own rules on when and how privilege logs need to be handled in their local rules, so be sure you're paying attention to the individual materials for your judge.

Maps 14 and 15 below from eDiscovery Assistant shows the jurisdictional breakdown of federal and state cases from this past year.

Washtena Cty. Employees' Retirement Sys. v. Walgreen Co. et al.

In [Washtena Cty Employees' Retirement Sys. v. Walgreen Co. et al., No. 15 C 3187 \(N.D. Ill. July 14, 2020\)](#), Illinois Magistrate Judge Gabriel A. Fuentes denied plaintiffs' request for in camera review of 75 documents included on defendant Walgreens' privilege log where the descriptions all alleged "legal" review of issues that were highly disputed in the case.  

Issue Tags:

In Camera Review

Attorney-Client
Privilege

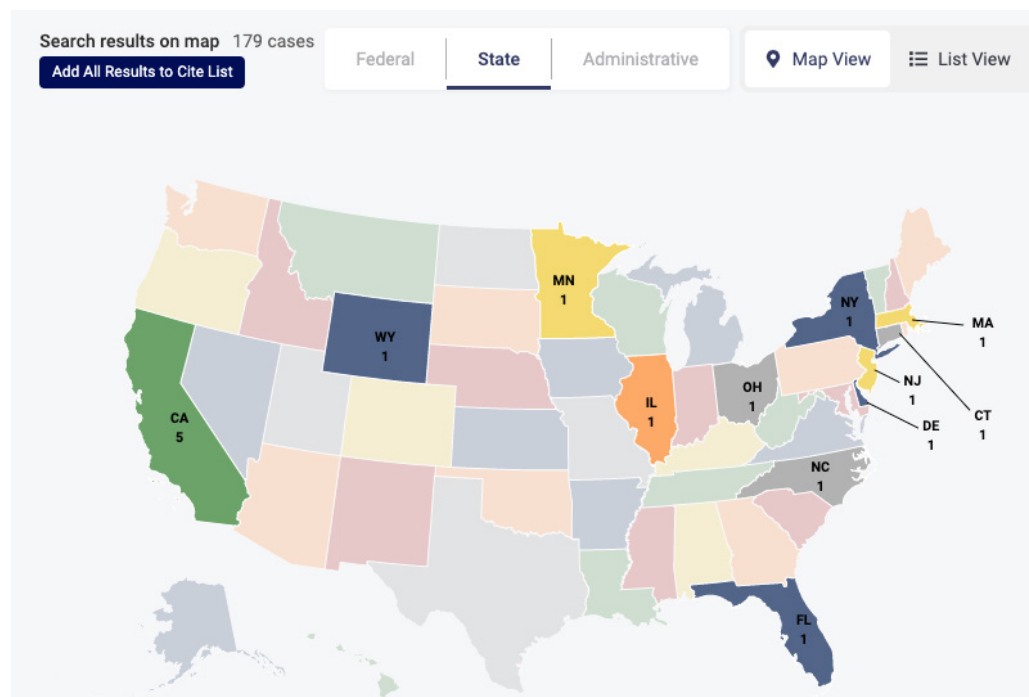
Privilege Log

Waiver of Privilege

Proportionality



Map 14 - Privilege Log in Federal Courts



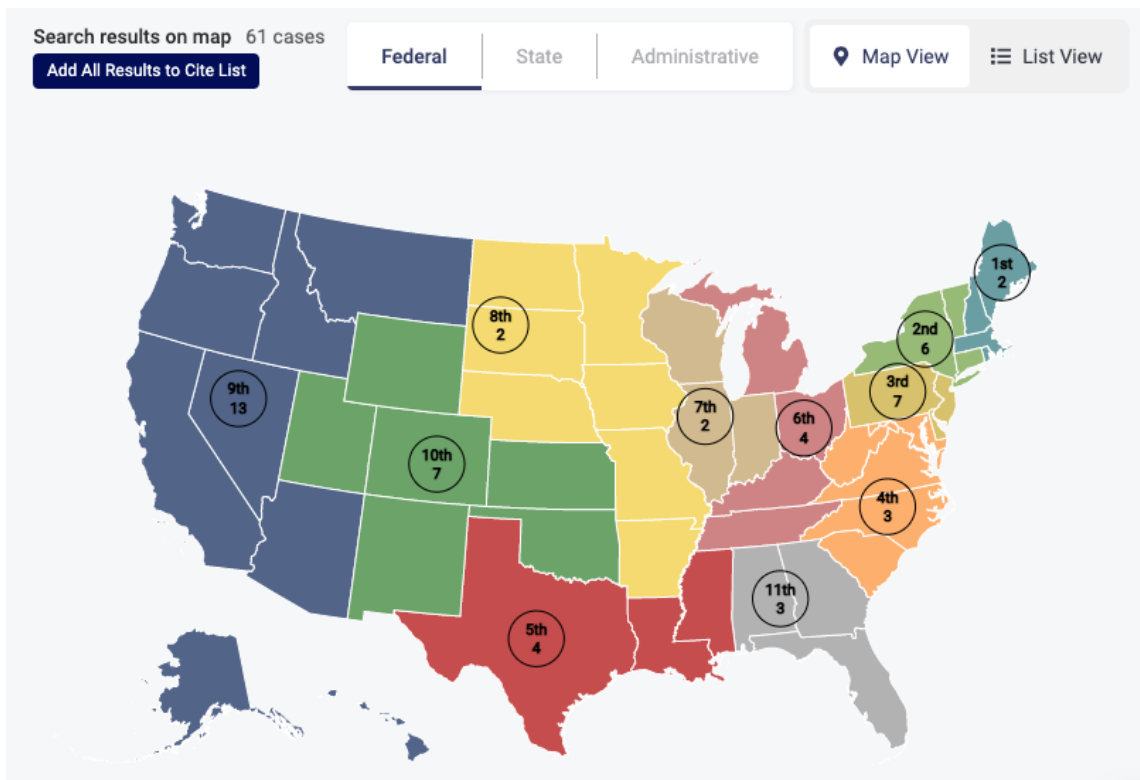
Map 15 - Privilege Log in State Courts

Search Terms

Search Terms continue to dominate the landscape of how attorneys identify relevant information for litigation with 61 new cases this year. But how those terms are agreed upon, whether search term hit reports (STRs) from software are required, and whether those terms are appropriate for different types of ESI are all issues raised by case law in 2020. One thing is for certain in reading this year's case entries—the courts are not entertained by parties' need to revisit search terms repeatedly, and some are ordering third party experts to assist in resolving them.

Practice tip—Let the data tell you which search terms will provide the most relevant information. Leverage the STR's to not only show how many relevant hits a search term generates, but to reveal the unique hits.

Map 16 below from eDiscovery Assistant shows the federal jurisdictional breakdown of cases from this past year.



Map 16 - Search Terms in Federal Courts

McMaster v. Kohl's Dep't Stores, Inc.

In [McMaster v. Kohl's Dep't Stores, Inc., No. 18-13875 \(E.D. Mich. July 24, 2020\)](#), Michigan Magistrate Judge R. Steven Whalen granted the plaintiff's Second Motion to Compel Discovery in part and denied it in part, including his ruling to have the parties "share the cost of retaining an expert to assist them" in search term disputes. 

Issue Tags:

Search Terms

Failure to Produce

Proportionality

Murray v. City of Warren

In [Murray v. City of Warren, No. 19-13010, \(E.D. Mich. Aug. 17, 2020\)](#), Michigan Magistrate Judge R. Steven Whalen granted the plaintiff's Motion to Compel Discovery and Motion to Compel Defendant's Answers to Plaintiff's Second Request to Produce in part and denied it in part, including his ruling regarding search terms that "some of the designated search terms are evidently relevant" while, for others, "the parties should follow the procedure set forth" in [McMaster v. Kohl's Dep't Stores, Inc.](#), "and if they cannot agree on additional, appropriately narrowed terms, will share in the cost of an expert to assist them." 

Issue Tags:

Search Terms

Proportionality

Failure to Produce

Privacy

Technology Assisted Review (TAR)

2020 saw 12 new federal cases on TAR with the Lawson decisions discussed below taking up one-third of those decisions. The Livingston case, in which Judge Kim discusses how the TAR algorithm works, shows how courts are not only becoming more familiar with the technology, but also the benefits of it in promoting both judicial efficiency and controlling costs in discovery.

Pay close attention to whether the Federal Rules of Civil Procedure require parties to discuss the use of TAR, and if so, what is an appropriate protocol and what are the considerations for establishing one. Courts are getting involved with parties in large MDL cases debating the makeup of TAR protocols and, hint, hint, you need to have your hands in the data to craft something that will really work.

Map 17 below from eDiscovery Assistant shows the jurisdictional breakdown of cases from this past year.



Map 17 - Technology Assisted Review (TAR) in Federal Courts

Livingston v. City of Chicago

In [Livingston v. City of Chicago, No. 16 CV 10156, \(N.D. Ill. Sept. 3, 2020\)](#), Illinois Magistrate Judge Young B. Kim denied the plaintiffs’ motion to force the defendant to either use agreed-upon search terms to identify responsive documents and then perform a manual review for privilege or use TAR on the entire ESI collection with an agreed-upon coding system for responsiveness instead of the defendant’s proposed TAR protocol to use TAR to identify responsive documents from the documents retrieved by the search terms.   

Issue Tags:

Search Terms

Technology Assisted
Review (TAR)

Proportionality

In re Valsartan, Losartan and Irbesartan Prod. Liab. Litig.

In the case [In re Valsartan, Losartan, and Irbesartan Prod. Liab. Litig., No. 19-2875 \(RBK/JS\) \(D.N.J. Dec. 2, 2020\)](#), New Jersey Magistrate Judge Joel Schneider rejecting the defendant’s “unilaterally developed and administered TAR” approach because it violated the Court Ordered Protocol, denied the defendant’s request for an Order foreclosing additional review of documents that were predicted to be non-responsive or to shift to the plaintiffs the cost of its further manual review of alleged non-responsive documents that its platform predicted to be non-responsive. Judge Schneider instead ordered the defendant “to conduct its review of non-responsive documents using the TAR protocol the parties almost finalized but for two provisions” and permitted the plaintiffs “to review 5000 alleged non-responsive documents of their choosing.” 

Issue Tags:

Search Terms

Technology Assisted
Review (TAR)

Cost-Shifting

Cooperation of Counsel

Lawson v. Spirit Aerosystems

The Lawson case saw nine decisions in 2020, four of which were covered by both eDiscovery Today and the Case of the Week video series.

In *Lawson v. Spirit Aerosystems, Inc.*, Kansas Magistrate Judge Angel D. Mitchell, having previously granted the defendant's motion to shift the expenses it incurred in connection with a technology-assisted review ("TAR") of approximately 322,000 documents to the plaintiff and subsequently awarding the defendant \$754,029.46 in TAR expenses (which was later affirmed by the District Court), awarded the defendant an additional \$94,407.25 in expenses incurred in connection with its July 10 original fee application and its renewed application.

ACEDS Case of the Week:

- [Episode 4](#)
- [Episode 7](#)

eDiscovery Today Blog Posts:

- [Court Grants Motion of Defendant to Shift "Disproportionate" TAR Costs to Plaintiff: eDiscovery Case Law](#)
- [Court Awards Defendant Over \\$750K in TAR Costs Shifted to the Plaintiff: eDiscovery Case Law](#)
- [District Court Affirms Defendant Award for Cost Shifting of TAR Costs: eDiscovery Case Law](#)
- [Cha-Ching! Lawson Dinged for More Money Due to Spirit's Application Expenses: eDiscovery Case Law](#)

Issue Tags:

Search Terms

Technology Assisted
Review (TAR)

Manner of Production

Failure to Produce

Proportionality

Conclusion

Generally, 2020 was a very unusual year, but despite reports of a court slowdown, the pace of eDiscovery case law decisions actually shows no signs of slowing down. As new technologies are implicated in litigation—think O365, Slack, TikTok, SnapChat, source code—courts will have to continue to adapt and apply the growing body of decisions from across the country. The majority of eDiscovery decisions continue to stream from the federal district courts and lower state courts, shredding the traditional notion of stare decisis and instead replacing it with a consideration of whether other jurists across the country have considered the issue. Whether additional rule changes may be required to address inequities in how current rules are applied may come up sooner than planned. Cases show parties weaponizing proportionality, abusing the role of the 30(b)(6) witness, and failing to enter FRE 502(d) orders or negotiate effective ESI protocols. As a result, courts that are backlogged with overwhelming dockets and dwindling resources are spending more and more time helping parties navigate these issues to the detriment of those who need the court's resources.

What the case law makes clear is this—if you are moving forward with a matter involving ESI, and almost every case today includes ESI—you need to know the issues in eDiscovery and be prepared to address them early in your case. Whether you are responding to discovery requests (and leaving out the boilerplate objections), drafting an ESI protocol, negotiating search terms, considering how to collect data from a mobile device without imaging the entire device, arguing proportionality to save your client money, or just drafting discovery requests, you need to understand the concepts of eDiscovery and how they will shape your case. The cases included here are a starting point to identify and understand what you need to do to be prepared and (in many cases) illustrate the consequences of not being prepared. As Winston Churchill (paraphrasing Spanish philosopher George Santayana) said in a 1948 speech to the British House of Commons “Those who fail to learn from history are condemned to repeat it.”

For regular updates on case law as they develop (and to learn from the mistakes from the past), please sign up for notifications at [eDiscovery Assistant](#) and at [eDiscovery Today](#).

Issue Tags Cited In Report

Issues

28 U.S.C. § 1782	Criminal
30(b)(6) or corporate designee	Custody or Control
Adverse inference	Cybersecurity
Attorney-Client Privilege	Default Judgment
Attorney Work-Product	Disciplinary Action
Audio	Dismissal
Authentication	Ephemeral Messaging
Bad Faith	Ethics Opinion
Blackbox	Exclusion of Evidence
	Exclusion of

30(b)(6) or Corporate Designee
Adverse Inference
Attorney-Client Privilege
Audio
Bad Faith
Cooperation of Counsel
Costs and Fees
Cost-Shifting
Criminal
Custody or Control
Default Judgment
Dismissal
Ephemeral Messaging
Exclusion of Evidence
Exclusion of Witness
Failure to Preserve
Failure to Produce
FOIA
Forensic Analysis
Form of Production
In Camera Review

Legal Hold
Manner of Production
Mobile Device
Native Format
Open Records/Sunshine Laws
Privacy
Privilege Log
Proportionality
Protective Order
Redaction
Sanctions
Search and Seizure
Search Terms
Self-Collection
Source Code
Spoliation
Technology Assisted Review (TAR)
Text Messaging
Third Party Subpoena
Video
Waiver of Privilege

Thank you!

2020 eDiscovery Case Law Year In Review

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