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## **Rectifying Document Production Errors: Failure to Preserve, Failure to Identify & Inadvertent Production of Confidential/Protected Materials**

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THURSDAY, JANUARY 14, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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# Rectifying Document Production Errors: Failure to Preserve, Failure to Identify & Inadvertent Production of Confidential/Protected Materials

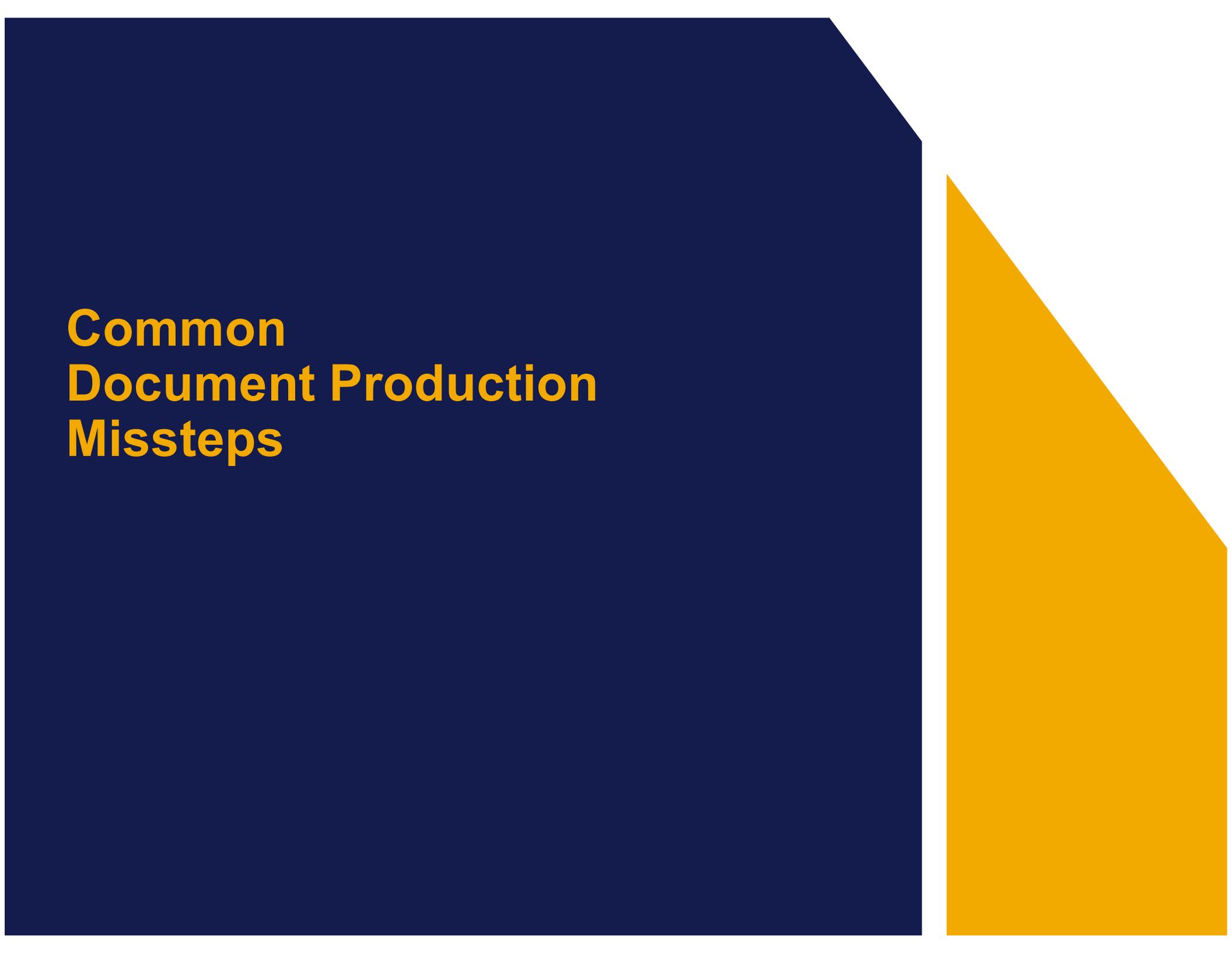
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Melinda F. Levitt

Matthew J. Hamilton

January 14, 2021

- **Panel Introductions**
- **Common Document Production Missteps**
- **Preventing Common Missteps**
- **Managing Mistakes**



# **Common Document Production Missteps**

# Failure to Preserve

- You can't produce what you don't have
  - The duty to preserve arises when litigation is reasonably anticipated
  - A simple standard, but can be complicated in its application
- Sanctions governed by Fed.R.Civ.P. 37(e) or state equivalents
  - 2015 amendment to Rule 37 clarified the requirements and sanctions permissible
    - 37(e)(1) requires a finding of prejudice resulting from the loss, and sanctions must be limited to address that prejudice
    - 37(e)(2) requires a finding of intent to deprive before authorizing the most severe sanctions including adverse inference instructions or even termination
  - *QueTel vs. Hisham Abbas et al.*, No. 18-2334 (4<sup>th</sup> Cir. 2020)
    - Affirming entry of judgment based upon intentional destruction of a computer containing source code at issue after receipt of a cease-and-desist letter
  - *In re: Actos (Pioglitazone) Products Liability Litigation* (MDL No. 6:11-md-2299, W.D.La., Jan. 27, 2014)
    - Custodial files of 46 executives with responsibility for Actos were destroyed after the obligation to preserve had attached
    - Court issued a permissive inference instruction to the jury that the information destroyed would have been helpful to plaintiffs

## Failure to Identify or Produce

- If you fail to identify relevant material in your possession, custody or control, you can't produce it
  - ***EPAC Technologies, Inc. v. HarperCollins Christian Publishing, Inc.*, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018)**
  - ***Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, LLC*, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010)**
    - Plaintiffs were found to be grossly negligent in their discovery efforts when substantial gaps were found in plaintiff's document productions. Key here is that ALL backup tapes must be preserved.
    - "The next step in the discovery process is collection and review. Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the re-view, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records -- either paper or electronic -- from key players constitutes gross negligence or willful-ness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the key players, could constitute negligence. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category."
- If you fail to identify relevant material in your possession, custody or control, and you produce it
  - Defendant stated that it had searched the shared drive for additional documents but did not find any. However, one week prior to the hearing the defendant produced ten (10) highly relevant documents from a legacy drive. The court concluded that, although there was no indication of bad faith, Defendant's failure to search within the contents of the legacy drive was unreasonable. *Michael Rodman v. Safeway, Inc.*, Case No. 11-cv-030003-JST (N.D. Cal., Oct. 6, 2016).

# Failure to Identify or Produce

- The result is the same, however, if you have identified relevant material but fail to produce it
  - Court granted motion for sanctions after defendant failed to produce over 375,00 pages of ESI until after the close of discovery and used the search term “confidential” to justify withholding as privileged more than 150,000 pages of ESI without further review. *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12cv2884-BAS-MDD, 2015 U.S. Dist. LEXIS 104100, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015)
- Fed.R.Civ.P. 37(a) or state equivalents govern
  - Opponent can move to compel and for appropriate sanctions

# Inadvertent Disclosure of Confidential, Privileged or Protected Information

- Given the ever expanding volume of discovery, particularly ESI, the risk of inadvertent disclosure is great
  - Confidentiality may be lost or waived if material is disclosed to third parties
    - Keep in mind that the normal rule is that, absent a protective order, a party in receipt of documents produced in discovery may share those documents or the information therein with anyone or everyone. *See, e.g., Sampel v. Livingston Cty*, 2019 WL 6695916, at \*3 (W.D.N.Y. Dec. 9, 2019) (“Nevertheless, parties are free to disseminate discovery materials that are not placed under a protective order as they see fit.”) *Mitial v. Dr. Pepper Snapple Group*, 2012 WL 12868405, at \*2 (S.D. Fla. May 29, 2012) (well settled, without a protective order, parties may disseminate discovery materials as they see fit). **To avoid, always seek a Protective Order limiting dissemination.**
  - Privilege or attorney work product protection may be waived
    - Pursuant to a clawback provision in its “ESI Stipulation” with Defendant, Plaintiff attempted to claw back 378 privileged documents out of the nearly 3,000 privileged documents Plaintiff inadvertently produced. Magistrate Court balanced five factors to determine whether Plaintiff waived the privilege. *Mt. Hawley Ins. Co. v. Industrial Risk Insurers*, 2010 U.S. Dist. LEXIS 49083 (S.D.W.Va. May 18, 2010) (Mag. Judge Order), 2010 U.S. Dist. LEXIS 74970 (S.D.W.Va. July 23, 2010) (Dist. Ct. Judge Order)
  - Disclose of personally identifiable information may lead to sanctions
    - Defendant produced medical records without redactions. The trial court erred in ruling that the provider lacked standing to assert the mental health privilege because, in the absence of waiver by the patient, the privileged material was neither discoverable nor admissible at trial and provider was not precluded from asserting the privilege, which survived the patient's death. *Advantage Behavioral Health Sys. V. Cleveland*, 2019 Ga. App. LEXIS 332, (Ga. App. June 17, 2019).

# Redaction Mistakes

- Redaction allows the production of information without disclosing protected or sensitive information, but failure to redact appropriately risks both waiver and sanctions
- Failure to redact privileged or confidential information may result in waiver
- Over-redaction may result in challenges from opponents, motion practice and sanctions
  - Plaintiff challenged certain documents in TD Bank's privilege log in whole and others where Plaintiff believed documents were overly redacted. The court found that TD Bank may redact the substantive communications of the challenged emails where two employees discussed an earlier communication with counsel. However, the Court found it improper to redact the remainder of the email string that discusses administrative matters and TD Bank must produce it. This case resulted in a motion hearing, an additional production of the documents with redactions corrected, and an order from the court to serve an amended privilege log according to the Court's instructions. *Laveglia v. TD Bank, N.A.*, No. 2:19-cv-01917-JDW, 2020 U.S. Dist. LEXIS 4129 (E.D. Pa. Jan. 10, 2020)

# Preventing Common Missteps

# Involve the Right Stakeholders in the Preservation and Identification Process

- As outside, or even in-house, counsel, we can't possibly know the full extent of information in the possession, custody or control of our clients
  - Until we know what exists, we can't make informed judgments as to what to preserve or produce
- Key stakeholders at our clients, however, know what information exists and where to find it
  - If we identify those stakeholders, we can best identify potentially relevant information
  - Note that management or executives may not always be the best source of knowledge
    - Make sure to identify both business owners (those responsible for the business use of a system) and IT owners (those responsible for its technical maintenance)

# Document your Process from Preservation through Production

- The law doesn't require perfection, but reasonable efforts
  - Rule 37(e) requires “reasonable steps” to preserve
- Documenting your preservation reasoning makes a record that can support your position that you made reasonable efforts if you are challenged later on
  - See Sedona Guideline 9, The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger & The Process, 20 SEDONA CONF. J. 341 (2019)
    - The documentation should include sufficient information to demonstrate that the legal hold was implemented in a reasonable and good-faith manner should there be a need to defend the process. In most cases, the process of issuing and implementing the legal hold and following up to preserve the data will provide sufficient documentation.

# Know your Sources and Case Specific Risks

- Relevant information resides in more places than a filing cabinet today, and is seldom physically located in a single location
- Each system has its own retention schedule and challenges to both preservation and collection
  - Software and hardware challenges may complicate things further
    - Legacy software and hardware
    - Systems no longer supported by their manufacturers or vendors
- Data privacy laws may impact data located overseas
  
- Your case may present specific risks depending on the facts and circumstances

# Do Not Overstate What you are Doing or Producing

- Courts expect counsel to cooperate in discovery, and are seldom pleased when they have to resolve disputes they view as unnecessary
- Do not overstate your preservation efforts
  - Defendant stated and certified various forms of discovery were complete when challenged by Plaintiff through out a series of motions to compel and evidentiary hearings. Eventually the Court appointed a Special master to investigate the issues and take over the location of, preservation and full production of ESI as well as addressing lost data and other problems. *Small v. Univ. Med. Ctr.*, 2:13-CV-0298-APG-PAL, 2018 WL 3795238 (D. Nev. Aug. 9, 2018)
- Do not overstate what you are producing
  - Defendant repeatedly misrepresented the completeness of its production of certain documents produced to Plaintiff. For these and other violations the Court issued sanctions under Rule 37(b) including special jury instructions that the Plaintiff failed to comply with its discovery obligations and failed to comply with several the court's orders. Additionally, monetary sanctions were imposed for attorneys' fees and costs in connections with Motions to Compel, efforts to obtain compliance, attempts to identify and remedy deficient productions and cost of participating in special master proceedings. *Small v. Univ. Med. Ctr.*, 2:13-CV-0298-APG-PAL, 2018 WL 3795238 (D. Nev. Aug. 9, 2018)

# Do Not Overstate What you are Doing or Producing



- Technology Assisted Review (TAR) is an area where transparency is key
  - While courts are willing to let parties select their own methods to search for relevant material, they expect the parties to be transparent as to what they are doing
  - *In re Valsartan*, 2020 U.S. Dist LEXIS 225666 (D.N.J.) found that the defendant violated the Court's ESI Order when it failed to meet and confer about its use of TAR to cull the set of documents or review

# Use ESI Protocols & Rule 502(d) Orders to Proactively Plan and Agree to Terms

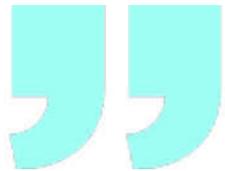
- In many cases the parties can negotiate an ESI Protocol, including:
  - What materials are not being preserved or collected due to burden, duplication etc.
  - How searches will be conducted
  - How the parties will agree upon search terms or other methodology
  - Identification of custodians and data sources
  - Deduplication methods
  - How productions are to be made
- By addressing these key issues up front, the parties can avoid costly disputes later on when substantial work has already been done
- Fed.R.Civ.P. 502(d) enables the court to enter an Order providing that privilege or protection is not waived by disclosure in that matter in any other state or federal proceeding
  - This protection is so powerful that at least one judge has characterized the entry of such an order a “no brainer.”

# Managing Mistakes

Legal, ethical & practical considerations


**A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.**



**Rule 3.3:  
Duty of  
Candor  
Toward the  
Tribunal**

## Duty of Candor

In the arena of ESI, counsel has a duty “(perhaps even a heightened duty) to cooperate in the discovery process; to be transparent about what information exists, how it is maintained, and whether and how it can be retrieved; and, above all, to exercise sufficient diligence (even when venturing into unfamiliar territory like ESI) to ensure that all representations made to opposing parties and to the Court are truthful and are based upon a reasonable investigation of the facts.”

*Brown v. Tellerate Holdings, Ltd.*, 2014 U.S. Dist. LEXIS 90123 (S.D.Ohio July 1, 2014)



## Rule 26(g)

**By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:**

**(A) with respect to a disclosure, it is complete and correct as of the time it is made;** and

(B) with respect to a discovery request, response, or objection, it is:

- i. Consistent with these rules and warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
- ii. Not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
- iii. Neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

*(emphasis added)*

## “Reasonable Inquiry”

- What steps taken by client to identify and collect ESI?
- How were sources identified?
- What sources searched?
- What tools and search criteria used?
- How were terms identified?
- How was ESI collected? What collection tools?
- How was collection validated?
- Documentation?



## Protecting Privilege: Rule 502(d)



- Non-waiver agreements should protect against *any* production of protected information – not limited to inadvertent
- Avoid litigating reasonableness of efforts and meaning of “inadvertent”

## 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.

- 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.

## Model Rule 1.6 Comments



# Asses the Issue and Identify the Solution

- Upon discovery of a problem, immediately assess its nature and scope
- Is there a duty to disclose?
- For preservation
  - What custodians or data sources are implicated?
  - What data is implicated?
  - When was data lost?
  - How was the data lost?
  - Can that data be found elsewhere, even in part? Through third parties?
- For production
  - What material was inadvertently produced or excluded?
  - When was it produced? Why wasn't it produced?
  - Has it been used or identified by your opponent?
  - Identify all copies, both produced and unproduced
  - Was production the result of an isolated error or a failure in a workflow?

# Disclose and Cure

- The longer these types of problems lie undisclosed, the worse their potential impact and so, once the scope is clear, disclose the issue to your opponent as well as the proposed solution to cure to the greatest extent possible
  - Assume that all of your communications will be exhibits to motion practice
- For preservation, remember the factors that inform Rule 37(e) sanctions, prejudice and intent to deprive, and marshal your facts to show to the greatest extent possible that
  - You have proceeded reasonably according to a thoughtful plan after fully investigating all sources
  - Despite your best efforts, some information inadvertently was not preserved
  - The loss of that information has not prejudiced your opponent
  - The information is available in full or partially from other sources which you will provide ASAP
  - You have acted promptly upon notification of the loss and are working transparently with your opponent
- For inadvertent production
  - Notify your opponent promptly and request a clawback pursuant to your protective order or Rule 502(d) order

# Questions & Answers

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## Panelist Information



Biographical information, publications and other insights for each of the panelists can be found as follows:

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