Litigation Technology for the Modern Practitioner

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About This Book

This is the First Edition of Litigation Technology for the Modern Practitioner. The purpose of this book is to offer both a reader-friendly guide to the use of technology in litigation as well as to provide the current case law and court rules applicable to its use. It seeks to provide a present-state summary of technology and the courts.

Litigation Technology for the Modern Practitioner addresses criminal, corporate, civil, personal injury, medical malpractice, municipal court, family law, and general practice. The book will not substantively focus on Patent, Copyrights, and Trademarks although it may reference some applicable case law.

The purpose is to assist and educate litigators. It references different applications, machines, software, and websites, based on what is presently available on the market and used by the authors. As will be addressed, technology is continuously changing.

Our hope is to provide a clear-and-concise format that will relay quick, substantive answers to the reader.
About The Authors

JONATHAN H. LOMURRO, ESQ. LLM holds his Master of Laws in Trial Advocacy and concentrates his practice on Personal Injury and Medical Malpractice. He is a graduate of Rutgers College, Widener University School of Law, and Temple University Beasley School of Law. He has lectured and published, on technology in the practice of law, for the American Bar Association, American Inns of Court, New Jersey State Bar Association, New Jersey Institute for Continuing Legal Education, Haydn Proctor Inn of Court, Monmouth Bar Association, Somerset County Bar Association, Anne E. Thomson Inn of Court, National Business Institute, and the New Jersey Association for Justice. He is co-author of the trial treatise, Try It: With Friends.

Mr. Lomurro is the President of the Monmouth County Haydn Proctor Inn of Court. He serves on the New Jersey State Bar Association’s Board of Trustees, New Jersey Association for Justice’s Board of Trustees, and the Trial Attorneys of New Jersey’s Board of Trustees. He is the current Secretary for the New Jersey State Bar Association Civil Trial Bar Section Executive Committee. Jonathan H. Lomurro is also a Trustee with the Charitable Fund of Lomurro, Davison, Eastman, & Munoz. He has received the New Jersey State Bar Association’s “Young Lawyer of the Year” and “Outstanding Professional Achievement Award.”

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Technology and the legal profession have coincided far longer than most believe. In 1978, Chief Judge Howard T. Markey of the U.S. Court of Customs and Patent Appeals authored 79 F.R.D. 209 (1978), entitled “Needed: A Judicial Welcome for Technology—Star Wars or Stare Decisis?”, a publication that specifically references the effect technology had and would have on the judiciary and the legal profession. “Technology has nothing to fear from the judicial mind open to receive it. . . . Technology is in court and is likely to stay there. It cannot be shunned. But it can be welcomed by judges made happier by the welcoming.”

You do not have to be an intellectual property attorney to understand that knowledge of today’s technology is essential to representing your clients competently. Technology is everywhere. We expect it in everything. Our phones have become portable minicomputers. Our cars tell us, in our favorite accent, what direction we’re supposed be traveling. Our television (or computer) records programs that it “thinks” we would like. Our washers and dryers even have internet-connection technology.


Moore’s Law suggests that computer processing capabilities will improve exponentially every two years. The concept is simple. Technology breeds new technology. The world went from utilizing a horse and buggy to landing on the Moon within 100 years.

Unfortunately, mastering new technology is not always easy and people remain inherently fearful of change. Yet to ignore technology is to provide a disservice to yourself and your clients. Lawyers must overcome any technological fears for the betterment of the practice. Remember, there was a time when MRIs, Ultrasounds, and CT scans did not exist. A doctor ignoring these technological advances today would be battling a malpractice lawsuit. Similarly, an attorney should consider the same when thinking about what is discoverable or relevant material. The ethics rules are changing to require such advocacy.

Technology can look confusing. To some, a car engine looks confusing but everyone knows how to use it, and what it does. It is the same thing with technology. You don’t have to
understand binary code (001100010001101000001101101110011) to know that technology may be useful to win your case.

Many lawyers believe that technology means expensive hardware, complicated software, uncontrolled internet activities, dramatic computer recreations, and expensive, overly-dramatic, and evidentially-problematic presentations. This is a common misconception.

We hope that the information in this book will conquer these fears and encourage the use of technology. This book is intended to show you how to get the evidence, how to get it into evidence, and how to present it to the finder of fact.

“Technology has nothing to fear from the judicial mind open to receive it... Technology is in court and is likely to stay there. It cannot be shunned. But it can be welcomed by judges made happier by the welcoming.” (Chief Judge U.S. Court of Customs and Patent Appeals Howard T. Markey – 1978)

Technology is defined as the science of the application of knowledge to practical purposes or a scientific method of achieving a practical purpose. However, for our purposes, technology will be the current jargon definition: any electronic or technical software, hardware, or internet that assists users in enhancing daily activities; the area of our world that deals with technical items interrelating with our lives, art, presentations, society, and work.

“The wave of the future clearly lies in the use of electronic technology both in discovery and courtroom presentation.” (U.S. Magistrate Judge John J. Hughes – Nov. 27, 2002).

Trial lawyers support efforts by the Judiciary to improve technology in the courtroom. Technology has already become a standard part of our judicial system. The New Jersey Judiciary

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1 Bender’s Binary Code for traveling through time in Futurama® Bender’s Big Score.
now has a system that sends text messages to your cell phone to automatically alert you of court closings, notices to the bar, judicial opinions, and more. Recently, they have released an App for cellphones. Most court proceedings utilize digital audio recording. Many courtrooms have video-recording capabilities. New Jersey’s Municipal Courts are equipped with video conferencing technology in order to communicate directly with the correctional institutions of the State. Newer County courtrooms are being built with the thought of bringing our system into the current technological age. As Justice Rabner stated at the 2014 New Jersey State Bar Association Annual Meeting in his speech on the State of the Judiciary, “[u]se technology to make the courts more efficient, accessible, and user-friendly. I can’t overstate how vital that is to our future.”

“The legal profession and the court must keep up with society and the business community by utilizing technological and electronic advancements to better serve clients, litigants, and keep up with competition... The legal profession cannot stay idle when technology moves forward.” (Monmouth County Chancery Judge Alexander D. Lehrer – July 10, 1998)

The United States District Court for the District of New Jersey has an entire website dedicated to attorney use of courtroom technology. The Court “encourage[s] the Bar to take advantage of [their] equipment and [they] hope its availability eases the presentation of demonstrative evidence.” The District Court provides, to the Bar at no cost, a NOMAD system, the use of a document camera (ELMO), LCD projector, Automatic Projection Screen, Shadow Box, and other technological devices. By their actions and comments, the District Court has made it abundantly clear that they are requesting the use of their technological equipment during the presentation of cases. In August of 1999, the Administrative Office of the U.S. Courts published the Courtroom Technology Manual. The Manual explains the importance of courtroom technology in its introduction: “The Judicial Conference has endorsed the use of

\[Online References\]

5 http://www.judiciary.state.nj.us/textalertsinstructions.pdf
7 http://www.njd.uscourts.gov/courtroom-technology
8 Mobile evidence presentation device
technologies in the courtroom and... urged that (a) courtroom technologies – including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record – be considered as necessary and integral parts of courtrooms undergoing construction or major renovation; and (b) the same courtroom technologies be retrofitted into existing courtrooms or those undergoing tenant alterations as appropriate.”

In addition to its benefits to the court, technology can be used in assisting the jury to understand the evidence of the case. It allows an attorney to place evidence before the judge, the jurors, the lawyers, and the witness—and all at the same time. The presentation of evidence through technology allows the jurors to feel involved in the proceedings. They are able to observe the evidence at the same time as it is referenced by the attorney or the witness. They can read the documented proofs at their leisure without having to rush to pass it to the next juror seated in the box. Further, some jurors learn better through visual means rather than auditory means and the presentation may increase their ability to understand the testimony and argument. The most important thing to remember is that there is nothing improper in the use the demonstrative or illustrative evidence.¹⁰

But what is demonstrative or illustrative evidence? It is any evidence that replicates the actual physical evidence, demonstrates some matter material to the case, or illustrates certain aspects of an expert’s opinion.¹¹ As with our District Court, our Superior Court Appellate Division has acknowledged that the use of visual aids and power point presentations are widespread and growing.¹² And that comment was made eight years ago, in 2005.

“As advances in modern technology make their way into the courtroom, the Judiciary – like the rest of society – must adapt.”¹³ (Chief Justice Stuart Rabner – March 14, 2011)

¹¹ Id. at 165 (citing State v. Scherzer, 301 N.J. Super. 363, 434 (App. Div.), cert. denied, 161 N.J. 332 (1999)).
Visual aids have been in courts for a long time. In the 1950s, blackboards were utilized.\textsuperscript{14} They progressed into large pads of paper that were propped on top of easels. Next, the court witnessed the use of large blown-up versions of evidence: photographs, maps, and documents. Subsequently, slide projectors, overhead projectors, and videotapes were utilized. CD players, DVD players, and televisions have become commonplace. Currently, we have the use of a laptop computer, slate, tablet, projector, whiteboard, or digital display. “Computer technology evolves at such a fast rate that future predictions are impossible. The courtroom of the future has already been built, the future law office has already been designed, and advanced computer technologies have already been implemented that will take the modern lawyer into the next century.”\textsuperscript{15}

Demonstrative aids have already been utilized by judges, prosecutors, criminal-defense attorneys, plaintiff attorneys, and defense attorneys.\textsuperscript{16} That does not mean that everyone is on board for its use. It is imperative that the information contained in the demonstrative aid be admissible under the New Jersey Rules of Evidence and that the attorney seeking to utilize the evidence be fair in its presentation. The evidence must be authenticated, relevant, and “its probative value must not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues.”\textsuperscript{17}

Since the trial court enjoys wide latitude in admitting or rejecting demonstrative evidence or visual aids, the evidence should not be hidden from the court. It is a surefire way to lose the support of the court if the first time the judge learns of your plan to use technology is when you are bringing equipment into the courtroom on the first day of trial. I find that it is important to make your adversary and the court aware that you will be using technological evidence or digital presentation technology in advance of trial. It makes the court more

\textsuperscript{17} Rodd, 373 N.J. Super. 154.
receptive to its use and allows your adversary an opportunity to raise an objection prior to presentation. It would be embarrassing, damaging, and frustrating if you are unable to use the evidence that you spent hours crafting due to trying to hide its existence until the time in which you wished to present it. In other words, if you can properly say it in court under our rules of evidence and case law, you can properly display it in court through the use of a visual aid. This rule has been true since the blackboard-argument days. And just as simple a rule: what you cannot say, you cannot display.

A computer’s ability to organize and present documents, graphics, and videos has given rise to numerous litigation support programming and presentation software products. Some programs allow trial lawyers to have their entire file at their fingertips, making it possible to retrieve any document in seconds and search the contents therein. With this new technology, you can create a plethora of demonstrative and visual aids that can be presented in numerous ways: tables, charts, graphs, models, demonstrations, reconstructions, animations, magnification, video depositions, and slide show presentations.

Computer technology and litigation support systems are not required in every case, nor should they not be utilized in every case. Every case is fact-sensitive and certain files do not require the use of a technological presentation. Time, effort, and cost factors may preclude you from utilizing all the technology available. If used improperly, technology can detract attention from the main argument. While technology may not be appropriate in every instance, it can be of tremendous assistance in the correct instance.

Technology can assist you in providing the jurors or the judge with a visual interpretation of testimony about an event, a location, an object, a procedure, complicated terminology, or a document. It can be utilized for the purpose of reinforcing the evidence testified to by the witnesses in the courtroom. It helps organize the presentation of voluminous facts and in presenting a summary of the admitted evidence. Because evidence must be

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18 “The purpose of this kind of use of blackboards is essentially exhortatory and not explanatory is apparent from the commonly expressed judicial justification therefore – anything which counsel has the right to argue as a legitimate interpretation of or inference from the evidence he is free, within the discretionary control of the court, to write upon the blackboard.” Cross, 60 N.J. Super. at 74-75
presented by witnesses, it rarely follows a chronological or systematic format. The use of technology allows you to reorganize the evidence for better understanding and storytelling.

The effectiveness of technology was expertly described, twelve years ago, by the Federal Judicial Center’s publication, *Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial*:

For judges, technology can increase opportunities to control the proceedings, set time limits, and decide matters expeditiously. For jurors, it can increase the sense of participation and improve the understanding of the facts. For lawyers, the faster pace, coupled with the need to respond to visual cues for objections as well as the traditional oral cues, puts a premium on a concise case theory and thorough preparation; there is less and less time for “making it up” as one goes along.¹⁹

Therefore, the question becomes: Can a lawyer still be a great litigator without knowing about the inner workings of a computer?

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CHAPTER 1: Definitions

Technological discussions contain a plethora of buzz words. Those words can confuse and befuddle the most intelligent of listeners. It is vitally important, therefore, to understand the terminology before you can grasp the usage of tech’s tools. We are going to describe some of the common terms and their common definitions. Although sometimes based in legal doctrine, it is important to remember that these definitions and descriptions are being provided for the reader to grasp the technology. The terms, many of which have not all been defined in case law, rules, or statutes, are explanatory in nature.

Cloud

The buzz word of the moment is cloud. Not the high-in-the-sky clouds, but the technological term cloud; otherwise known as a network. Yes, the cloud is a network; a network stored on one or more external drives. And there are two types.

One is a WAN or Wide Area Network (such as the internet). The other is a LAN or Local Area Network (such as a network within a particular organization or law firm). The cloud allows multiple devices to access the same information.

App

Another current term thrown about is “app.” It is the shortening of the term “Application.” Thus, think of an APP as a shortened application. The term APP is utilized when referencing a small or specialized Application that functions primarily on a mobile device.
Metadata

Metadata is commonly described as “data that describes other data.” It is information that helps to organize, utilize and understand other information. Metadata has been around for centuries. But it has only become part of everyday vernacular because of its association with electronically-stored information or ESI.

The easiest example of metadata is located within a library’s card catalog.

The card catalog contains a plethora of information about the library’s books without actually providing a summary of the work itself. The metadata found on a catalog card will enable a person to find the book’s author, title, subject, location in the library, category, edition, literary or topical character, year of publication, publisher, number of pages, and any other pertinent “data about the data.”

Another easy way to understand metadata is to look at a globe. Think of the earth as the data. The metadata would be listed on the globe: latitude, longitude, axis, topography, meridian line, country lines, names and locations, and additional “data about the data.”
Moving from the physical metadata to digital metadata is not complicated. It is just like
the globe and the card catalog. You just need to know where to look and what to look for.

Digital metadata is commonly used to describe the contents, context, creation, editing
and usage of the digital data. A file may contain metadata with several property fields: program
or hardware that created the file, propose of the file, time and date of creation of file, last
edited time and date, creator or author of file, location on computer/network, and standards
used in creation. As stated in one federal case, “[t]o understand why the importance of
metadata varies, it is first necessary to explain what it is and distinguish among its principle
forms.” Metadata is an electronic fingerprint utilized to authenticate, explain, and expand.

There are several ways to describe the different types of visual and hidden information
contained in digital metadata. It is the term used to describe the structural information of a

21 The Sedona Conference, a well-known nonprofit and educational institute crafted to the
advancement of technology within a legal technology working group, found at
www.thesedonaconference.org, has crafted substantial and influential legal/tech glossary: Sherry B.
Harris, The Sedona Conference Glossary: E-Discovery & Digital Information Management, 4th ed. 2014,
available at https://thesedonaconference.org/publication/, providing an extremely comprehensive
definition of most tech terminology. Their subpart definitions of metadata includes the following seven
types of metadata: “Application Metadata: Data created by the application specific to the ESI being
addressed, embedded in the file and moved with the file when copied; copying may alter application
metadata. Document Metadata: Properties about the file stored in the file, as opposed to document
content. Often this data is not immediately viewable in the software application used to create/edit the
document but often can be accessed via a “Properties” view. Examples include document author and
company, and create and revision dates. File System Metadata: Metadata generated by the system to
track the demographics (name, size, location, usage, etc.) of the ESI and, not embedded within, but stored
externally from the ESI. Email Metadata: Data stored in the email about the email. Often this data is not
even viewable in the email client application used to create the email, e.g., blind copy addressees,
received date. The amount of email metadata available for a particular email varies greatly depending on
the email system. Contrast with File System Metadata and Document Metadata (emphasis added).
Embedded Metadata: Generally hidden, but an integral part of ESI, such as “track changes” or
“comments” in a word processing file or “notes” in a presentation file. While some metadata is routinely
extracted during processing and conversion for e-discovery, embedded data may not be. Therefore, it
may only available in the original, native file. User-Added Metadata: Data, possibly work product, created
by a user while copying, reviewing, or working with a file, including annotations and subjective coding
information. Vendor-Added Metadata: Data created and maintained by the electronic discovery vendor
as a result of processing the document. While some vendor-added metadata has direct value to
customers, much of it is used for process reporting, chain of custody, and data accountability.”
file that contains data about the file, as opposed to describing the content.\textsuperscript{22} In \textit{Aguilar}, the court explained that, in order to understand the concept of metadata, it is easiest to break the information into three subsections: System, Substantive and Embedded.\textsuperscript{23}

System metadata or application metadata is created by hardware such as a digital camera, phone, computer system or other device. It also includes the information management systems or networking data. The information is completely crafted by the system or application and does not involve user input.

Substantive Metadata reflects the changes to the document’s content by the user within an application (track changes, text changes, editorial comments etc.). The depth and history of this metadata information is application specific.

“\textit{[T]he more interactive the application, the more important the metadata is to understanding the application’s output.}”\textsuperscript{24}

Embedded metadata is the metadata coding inputted by the user (text, numbers, formulas, hidden columns, linked files, etc.) and is not typically visible to the user viewing the output display.

If you right-click on a file and choose the bottom option labeled Properties, another screen will pop up with some useful but limited metadata: location of file, size of file, time & date created, modification date, last accessed date, and file type.

If you want additional metadata, click on the details tab.

\textsuperscript{22} Ibid.
\textsuperscript{23} Aguilar, 255 F.R.D. at 354 (S.D.N.Y. 2008).
\textsuperscript{24} Id. at 353.
From there, you move to a lot of information about the file:

Title, subject, date taken, time taken, program name for creation of image, camera make and model that took the photo, image dimensions, width, height, resolution, bit depth, color representation, exposure time, F-stop, ISO speed, exposure bias, focal length, flash mode, white balance, folder path, date file was created, date file was modified, date this copy of the file was created, size of file, and the computer hosting the file are examples of information simply retrieved from the metadata. Every file type contains and creates different information.

A picture can speak a thousand words, but the metadata on the picture can speak volumes. Metadata can help provide substantive discovery. Yet, the battle over its discoverability is still in its infancy. And, if the electronically stored information is not provided in its native format, the relevant metadata may not be seen. People have begun utilizing meta-scrubbers or metadata removal tools\(^\text{25}\) to “clean” documents and limit the risk of sending unwanted sensitive data about the data. This will be addressed later in the book. Be aware that destruction of metadata may be destruction of evidence. As we will discuss later, wiping metadata may be considered voluntary destruction of evidence and lead to spoliation sanctions.

In the New Jersey Rules of Professional Conduct (“N.J.R.P.C.”), Rule 3.4 (Fairness to Opposing

\(^{25}\) Workshare Protect or Metadata Assistant
Party and Counsel) states that a lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act.26

It should be noted that the metadata of a digital photograph may be embedded on a social media site. Geotracking, a portion of metadata that permits someone to know where a phone was active or a picture was taken, has become a default on digital photographic images.27 Geotracking can tell an individual the longitude, latitude, and altitude of where a photograph was taken. This information is becoming more prevalent because of GPS-equipped smartphones and digital cameras.

Digital Metadata is electronic information that describes the characteristics, origins, usage, structure, alteration and validity of other electronic information. It is important to understand metadata so that as an attorney you can:

- Advise your client on finding, preserving, and producing metadata
- Enter into an agreement on its accessibility and production
- Seek it from the adverse party
- Explain to the court its importance to the matter or
- Determine whether to object to its production/admissibility.

26 N.J. RULES OF PROF’L CONDUCT R. 3.4(a).
E-Discovery

E-Discovery is “[t]he process of identifying, preserving, collecting, preparing, reviewing, and producing electronically stored information ['ESI'] in the context of the legal process.”28 The companies that market their e-discovery platforms and know-how are particularly useful in this context and can be amazingly helpful. They assist in the forensically-sound collection of ESI,29 technology assisted review (including predictive coding), organization, processing, review, or hosting of the E-Discovery.

ESI (Electronically Stored Information)

During our discussion on Metadata and E-Discovery, we mentioned ESI or Electronically Stored Information. This is more of a legal term than a technical term. The definition originally given by the Federal Rules of Civil Procedure was “information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software” but has been changed to “information stored in any medium.”30 The reason for the change is to “encompass future developments in computer technology” and provide a “broad” and “expansive” definition.31 It should be noted that ESI stands on equal footing with discovery of paper documents.32

The legal term can be found in our New Jersey Court Rules (“N.J.Ct.R.” or “Rule): Rule 4:10-2(f); Rule 4:18-1(a)(1), (b)(1), (b)(2)(B) and (b)(2)(C); Rule 4:23-6, Rule 4:17-4(d), Rule 4:5B-2 and Rule 1:9-2. New Jersey appears to follow the Federal Rule’s new expansive approach by purposely leaving out a specific definition and, instead, calling it “information stored

28 The Sedona Conference Glossary, supra note 21, at 18.
29 “Computer Forensics” is defined as “the use of specialized techniques for recovery, authentication, and analysis of electronic data when an investigation or litigation involves issues relating to reconstruction of computer usage, examination of residual data, authentication of data by technical analysis, or explanation of technical features of data and computer usage. Computer forensics requires specialized expertise that goes beyond normal data collection and preservation techniques available to end-users or system support personnel, and generally requires strict adherence to chain-of-custody protocols.” The Sedona Conference Glossary, supra note 21, at 10.
30 FED. R. CIV. P. 26, 34, 37, 45.
31 See FED. R. CIV. P. 34 (Committee Notes on Amendment 2006).
32 Id.
electronically”. This makes for a truly expansive definition and fixes the fears of continually growing developments.

Native Format and Imaged (or Static) File Format

Native format (or native electronic format or native file format) should be thought of as the original. It is the user-created file, in its originally-held format, derived from the first-used program. Notably, native format files are inclusive of any and all metadata. Recently, the Third Circuit defined native format as “the ‘file structure defined by the original creating application,’ such as a document created and opened in a word processing application.”

On the other hand, “static” file format or “imaged format,” such as TIFF or PDF images, is distinctly different from native format. Here, ESI is converted to a static image of a document as it would look if viewed in its original native format, but is devoid of metadata that may have assisted your legal theory; in addition, the document’s information cannot be manipulated as it could in native format. Therefore, unless agreed upon metadata and extracted text are preserved through the use of a “load file” in a prearranged or standardized format, the static image of a document is bereft or many of the enhanced search and case functionality tools that normally compel one to engage in the E-Discovery process in the first place.

When talking about native format versus imaged format and the preservation and production of metadata, it is important to consider the agreed upon or demanded format of

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34 TIFFs are electronic pictures or images of documents. TIFF is an acronym for “Tagged Image File Format,” which is “[a] widely used and supported graphic file format[] for storing bit-mapped images, with many different compression formats and resolutions.’ Id. (quoting The Sedona Conference Glossary, supra note 21, at 50). TIFFs “[c]an be black and white, gray-scaled, or color. Images are stored in tagged fields, and programs use the tags to accept or ignore field, depending on the application.” The Sedona Conference Glossary, supra note 21, at 50.
35 PDFs are electronic pictures or images of documents. PDF is an acronym for Portable Document Format. The Sedona Conference defines PDFs as “A file format technology developed by Adobe Systems to facilitate the exchange of documents between platforms regardless of originating application by preserving the format and content.” Id. at 41.
36 Id. at 31.
37 Id. at 35
production between parties in a legal proceeding. A common problem encountered by attorneys in asking for ESI is that he or she must have some familiarity and understanding of the proper way to specify the manner and format in which ESI will be produced. Therefore, to ensure you craft your discovery demands in the most useful manner for your case, then, before entering into a production stipulation or making a discovery demand, it is highly recommended that you have detailed conversations with your client and your adversary regarding the nature of your clients’ ESI and your adversary’s ESI, as well as your mutual expectations in the case. If you are in federal court, the former approach is mandatory under your meet-and-confer obligations of Federal Rules of Civil Procedure ("F.R.C.P.") Rule 26 and N.J.Ct.R. 26.1. Since you must also have a compatible system with compatible programs to open or access the ESI, this meet and confer process is absolutely necessary to ensure the efficient use of the parties’ discovery demands. Likewise, it is worth consulting with a trusted eDiscovery vendor.

This is particularly important when you are seeking to preserve and review metadata, or want certain categories (if not all) of the ESI to be produced in native format with metadata included. In these situations, if you neglect to specify or agree upon the format of production, or simply ask for ESI to be provided in a commonly useable format, you may receive the responsive ESI in imaged format that is devoid of metadata and lacks the ability to manipulate the documents’ information. Moreover, in the event you want ESI to be produced in TIFF or PDF formats, yet wish to also preserve and review the ESI’s metadata, then your discovery demand or stipulation must be crafted in such a manner to place your adversary on notice that, in addition to the static file production, the metadata and extracted text, through load files or the like, must also be processed, preserved and remain electronically associated with the imaged format. In addition, at times, some other form of production may be necessary since “not all ESI may be conducive to production in either the Native Format or imaged format . . . .” For that reason, a hybrid approach is also worth considering.

38 Id. at 50
39 Id.
Technology Assisted Review (TAR)

Also known as computer-assisted review and other similar monikers, TAR is commonly understood as an iterative process that involves “tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer.”\(^4\) Examples of TAR tools are keyword searches based on the Boolean search methodology, “fuzzy” searching that reduces words to their root and then matches up word forms (similar to word stemming in Boolean searching), predictive coding, categorization, clustering, concept searching, find similar documents or keyword expansion.\(^5\) Many of these more advanced tools use latent semantic indexing, an analytic method that recognizes correlations amongst words and how terms or words used in common everyday language (in e-mails or other documents) are semantically or substantively related; it essentially evaluates a document based upon relationships between words, as opposed to simply relying on counsel, vendors and their clients to craft specific keyword or fuzzy search terminology that may very likely return results that are either over-inclusive or under-inclusive, lacking in both precision (a measure of completeness, i.e., the ratio of the number of relevant records retrieved to the total number of irrelevant and relevant records retrieved) and recall (a measure of accuracy or correctness, i.e., – the ratio of the number of relevant records retrieved to the total number of relevant records in the database).

As with any conventional discovery method, the true issue with TAR is the defensibility and reliability of the process established and then followed by counsel and parties in collecting, retrieving, processing and producing ESI. No one is expected to be perfect: the issue is whether the process can be proven to be a reasonable method for producing a reasonably complete set of relevant documents, thereby discharging a party’s discovery obligations. As recognized by United Magistrate Judge Andrew Peck, “[t]he goal is for the review method to result in higher recall and higher precision than another review method, at a cost proportionate to the ‘value’ of


the case.” In addition, “while some lawyers still consider manual review to be the ‘gold standard,’ that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review.”

In any case, in determining whether a TAR process has produced defensible results, counsel will necessarily need to conduct various rounds of sampling and quality control tests to best ensure that relevant documents are being produced.

Predictive Coding

Predictive coding a popular form of TAR that uses latent semantic indexing. It uses specific software to comb through large amounts of ESI and identify the relevant documents in your case. The service is usually offered by third party vendors. Predictive coding uses input from attorneys in combination with TAR concepts to efficiently leverage the discovery retrieval, review and production process. It can be used by parties to discharge their discovery obligations by producing a reasonably complete set of documents in a case, and also offers an efficient and effective way to review documents by narrowing one’s focus and finding specific types of documents (or “hot documents”) in a voluminous discovery file.

As best explained by United Magistrate Judge Andrew Peck in Da Silva Moore, “[u]nlike manual review, where the review is done by the most junior staff, [this method of] computer-assisted coding involves a senior partner (or [small] team who review and code a ‘seed set’ of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer’s coding (Or, the computer codes some documents and asks the senior reviewer for feedback.)” Once the system’s prediction and the reviewer’s coding are sufficiently

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correlated, “the system has learned enough to make confident productions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.”

Take care to ensure the predictive coding process is producing reliable results.

This does not completely replace human review. It merely provides a cooperative approach that can reduce costs and limit the time spent on a task. This also provides a way to search for privileged documents within your own ESI prior to production. As with any discovery method, the key to predictive coding is reliability. Therefore, to ensure that the predictive coding process is producing reliable results, it may take numerous trial-and-error periods, seed set tweaking, quality control and sampling measures and the sequential review of documents that have been processed through predictive coding and determined to be “irrelevant” and the accuracy of the predictive coding process. Judges, your clients and your adversaries will want to know what you did and why and how that process sufficiently discharged your clients’ discovery obligations, including whether the process “produced responsive documents with a reasonably high recall and high precision.”

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43 Da Silva Moore, 287 F.R.D. at 184 (quoting Search Forward, supra note 39, at 25, 29).
44 Id. at 184 (quoting Search Forward, supra note 39, at 25, 29).
CHAPTER 2: Basic Hardware Overview

With the vast array of available technology, there are certain items that are commonplace in the legal profession. Commonplace, however, may not be what is best for you. This section will attempt to navigate you through the basics of available hardware. It is not meant to be exhaustive. Also, unfortunately, this chapter will become oldest fastest. With new technology changing hourly, a static publication falls into the past almost as it is written.

Cell/Smart Phones

A necessary evil in our personal lives is even more necessary once we gear up for court. Portable and personal telephones, many equipped with video functions, make our professional lives more productive and efficient. Smart phones enable you to verbally communicate with another human being immediately. This can be good or bad. But with it, you can have your calendar synced in real-time, immediately receive your email, and have access, at all times, to your files.

Smart phones have software available to download onto your phone to perform various functions. These “apps”, many of which are free, include diverse purpose as research, games, metric conversion calculators, timekeeping functions, voice recorders, etc. Practically speaking, Google Maps assists a practitioner when traveling from court to court.

Cell phones can also be used to help keep you abreast of legal developments. The bane of the litigator is the commute. From court to court, our quest for justice never ends. Practitioners who may commute by mass transit have the luxury of being able to read cases on paper, tablets, or phones. But others without this luxury are unable to use commute time for keeping up with reading material in a profession where the practitioner must constantly stay up to date on new cases, rules, and statutes/regulations. Further, a smart phone can help resolve dead time with a text-to-speech app on your phone. Some apps only read internet pages, and others can read word documents. A good way to read cases is to cut and paste them into readable word documents like .doc or .docx and email them to yourself. Then when the email comes through over the phone, open up the document, hit the text-to-speech function, and you have yourself a robotic voice reading you the case.
**Desktop Computers**

Desktop computers are perfect for an office. Their main problem is fairly obvious: easy and quick movement is almost impossible. It is called a Desktop because it is usually stuck on the top of your desk. Looking past portability, the desktop holds many benefits: desktops are easily upgradable; cheaper and easier to service than laptops; more likely to be spilled upon than dropped; the storage size can be larger than that of a laptop; the processors are faster; and contain more external ports. Due to the limitation in upgradability, laptops have a much shorter lifespan than desktops. And with technology continuously changing, a fast laptop will quickly begin to feel like it is being operated by a snail.

The desktop is the best computer to perform all your main work: set up cases, handle internet searches, and utilize complex professional software. Then, when the attorney is ready for trial, mediation, or arbitration, they need only transfer the necessary final product to their portable laptop computer. This leaves the laptop computer uncluttered and free to perform at its optimum capacity.

**Laptops**

Today, a standard laptop can have almost as much power as a desktop. The main benefit of a laptop is portability without sacrificing significant performance. Further, almost every laptop is built with the idea of dual screen capability; thus allowing for an increase in productivity and a natural use in presentation. The world has been moving toward tablet usage over laptops due to the size and weight of the more advanced laptops. Laptops, compared to tablets, provide superior performance, extended battery life, available memory, higher storage capacity, and superior third-party applications. It is important to learn about a laptop’s specifications prior to purchase and see if the technical aspects are compatible with your potential uses. Not all laptops are created the same.

**Slate/Tablet/Convertible Computers**

Slate computers were laptops that allow the user to write on the screen. The new tablets are a friendlier version of the older slate computer. They are fantastic for annotating
and note taking. Further, with the continued emphasis on touch computing, new operating systems and programs make their benefits unmatched for trial presentation. The screen can be flat on your counsel table and, therefore, unseen by wandering eyes. This allows proceeding without fear of having information compromised. The touch-screen component allows your portable tablet to work similarly to the whiteboards. If you set the tablet up to wirelessly connect to the projector or display monitor, you can hand the tablet to your witness to make markings that will appear before the jury.

There are two different types of functional tablet PCs: Slate and Convertible. The Slate Tablet does not utilize a keyboard, though you can add one with a USB or Bluetooth Connection. The Slate appears as a light flat monitor screen that can be placed on your desk like a writing pad and utilizes touch-screen technology for navigation. The Convertible is a laptop that can convert into a Slate Tablet. The screen can fold onto the attached keyboard. It is a little heavier than the Slate option but it gives you the access to a real keyboard and has greater memory capacity.

Obviously, the iPad and Surface tablets have become household items. A 3-year-old can navigate them with ease. This is a great example that demonstrates what people are expecting in their lives; simplistic and common sense machinery that function intuitively. The current problems with a tablet are the limited memory, processing speeds, and need for external devices.

**iPad**

Although we just talked about tablets and touched on the iPad, the prevalence of its usage amongst attorneys dictates a separate subsection. There are many versions of the iPad. Obviously, the newer the additions have higher quality and larger amount of available storage space. It is recommended that a user purchase 2\textsuperscript{nd} Generation or later. The 1\textsuperscript{st} Generation iPad is not as compatible with AirPlay technology, Apple TV, and it is extremely difficult to work with the evidential-presentation applications. The iPad Mini is basically a smaller iPad; which brings its own benefits and limitations.
So, why is an iPad a useful piece of hardware for an attorney? It allows an attorney an unbelievable amount of tools in a transportable piece of machinery. It is important to note that, though it can host some larger programs, the iPad does not run full-software programs familiar to most users of a PC. Microsoft, only recently, made its office suite available on the iPad.

There are many useful iPad books, and this book does not intend to replace them. It merely will demonstrate the usefulness of the tool and make certain personal recommendations. Since apps change quickly and new ones are released hourly, we recommend finding a blog that details the area on which you want to focus and see their recommendations. There are also LinkedIn groups that specifically focus on iPad applications.

So, for this chapter, it is important to note that the iPad can be utilized for note taking, calendaring, time entry, research, and presentation. It has the capability to present wirelessly when using other compatible hardware devices. If you are considering utilizing the iPad, it is beneficial to purchase certain accessories that can make it more valuable: keyboard, portable speaker, stylus, and connection adapters.

Many litigations customize their iPads with legal apps that assist with trial preparation.

Presentation Devices

There are many different manufacturers of projectors. But there are only a few specific types of projectors. There are standard, pocket, short throw and standard complete with an interactive-whiteboard module. The standard is by far the most reliable for the money. The pocket, otherwise known as PICO projector, is small and cheap. However, its size and quality are low. The short throw projector limits the “shadow effect” caused by placing an object between a projector and a screen; a short throw needs to only be 6 – 12 inches away from the screen to project the image. The interactive projector acts like a whiteboard, which will be discussed later. It allows the presenter to annotate the projection.

If using a projector, don’t forget to bring extra bulbs.

45 Tom Mighell, *iPad in One Hour for Litigators*, ABA LPM (2013).
A document camera is a common and simple piece of equipment that can be utilized in the presentation of evidence. It does not require the use of a computer or keyboard; though some have the ability to connect to one if the user wishes. A document camera allows you to place a photo, document, chart, or even an actual three-dimensional object on its surface and project a larger image onto a monitor or projection screen. There is a vertically-mounted camera aimed at the surface tray that allows for simple and quick zooming. The image that is recorded by the camera will then be presented, in color, on the chosen monitor or screen.

Document cameras are commonly referred to as ELMOs, due to a particular company brand. Document cameras or ELMOs allow for the presentation of x-rays and other negative or transparent images. They permit us to visually display, to the jury, an item in a larger scale. A massive restriction on the utilization of a document camera is the fact that it necessitates an original hard copy of the evidence. A document camera cannot present electronic images or digital documents.

Whiteboards have officially replaced blackboards. Even most classrooms, around the world, have made the switch. Whiteboards are rectangular boards that allow the operator to write with colored dry-erase markers or electronic pens. The newer whiteboards, however, provide extraordinary enhancements. IWBs (intelligent whiteboards or interactive whiteboards) can be connected to your portable laptop and display what is being written on the monitor. Their connectivity can be wired (USB or serial port cables) or wireless (Bluetooth or wireless network). Depending on the model, the writing (annotation, enlarging, and drawing) can be completed by using an electromagnetic pen or your fingertips. The desired writings can be saved to the computer or printed to be used as evidence. An expert can draw a diagram on the whiteboard and utilize numerous colors to make the image assist the jury in comprehending the testimony. The markings can be made over a photograph, document, or video sent electronically from your computer to the screen. Instead of having to erase the drawing, it can

46 Elmo is the name of a company that designs document cameras, http://www.elmousa.com
be saved and displayed at a later time. Some common makers of interactive whiteboards and intelligent whiteboards are Luidia, Hitachi, Smart Technologies, Egan Teamboard, Mimio, Promethean World, Polyvision, Julong Educational Technology, and Qomo.

Most trial presentation software (which will be addressed later) expects the presenting attorney to utilize an interactive display or touchscreen. Most operating Systems have touch capabilities. Therefore, the future of computing is interactive. With the expense of whiteboards, most attorneys purchase a large digital sign or touch-screen monitor instead of spending the large amount required for a proper whiteboard.

Unfortunately for the makers of White Boards, touch screen monitors and televisions have grown in size and reliability. For a fraction of the cost, an attorney can pick up a touchscreen television, monitor, or digital sign.
CHAPTER 3: Internet Marketing & Ethics

Increasingly, the manner of researching and picking an attorney is done online. That online research may encompass pay-per-click advertising, a directory listing social media, vlogs, blogs, and firm websites. The connectivity of Web 2.0 has created ethical issues with communication to and from potential clients but also increased ability to direct traffic to your firm. The internet has provided attorneys and firms opportunities to educate potential and current clients, publish scholarly information, and build upon their reputation.

Blogs, Vlogs, and Websites

Websites are probably the best marketing system available, particularly to the market of people with enough money to own a computer. But be careful what you have on your website. What is common in every other industry could be unethical in the legal profession. Misrepresentations are one example. Recently, the appearance of the New Jersey Supreme Court Certified Trial Attorney seal on an attorney’s website when no such designation existed caused alarm. In that matter, the attorney hired someone to create his website and did not check on the delivered product. The seal was placed on the site, without any knowledge by the hired agent of its meaning, and resulted in the misrepresentation. The court found that the publication of the website would have been unethical conduct, but for no proof that there was knowing misrepresentation.

Like any advertisement, you must keep your website free from any “techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel”.

Check your website before it is published.

48 N.J. RULES OF PROF’L CONDUCT R. 8.4(c).
51 N.J. RULES OF PROF’L CONDUCT R. 7.2(a).
Another issue may arise from the URL assigned to the host the website. The URL picked for a legal website may not be false or misleading. The website name cannot create an unjustified expectation, for instance, “BestNJLawyers.com” would violate the New Jersey Committee on Attorney Advertising’s opinion. At the time of the New Jersey Committee on Attorney Advertising’s opinion, New Jersey did not permit practice by trade names. However, in 2013, the New Jersey Supreme Court amended N.J.R.P.C. 7.5 to permit practice by a trade name as long as it was not false or misleading and accurately described the services provided by the law firm. The Supreme Court’s decision noted that a descriptive word that could be used to comment on the quality of services, such as “Alpha Divorce Center” is impermissible because it could mislead the public.

Exceeding the Geographic Scope of Your Legal License

Without a disclaimer limiting your practice to a specific jurisdiction, N.J.R.P.C. 5.5 subjects you to discipline in every jurisdiction where you have an office “or other systematic and continuous presence.” N.J.R.P.C. 8.5 exposes a lawyer to disciplinary authority in any jurisdiction where the lawyer offers to or provides legal advice. By providing electronic legal advice or drafting blogs, the lawyer may be subject to disciplinary action. The remedy is to provide a disclaimer and limitation on any blog that the advice is limited to a certain jurisdiction.

California’s Standing Committee on Professional Responsibility and Conduct suggested attorney websites should provide “1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney’s web site.”

Using a disclaimer on a website can protect an attorney.

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52 URL is a Uniform Resource Locator; the address of a World Wide Web page.
To Post or Not to Post?

Attorneys who may argue comments are protected by free speech should be careful before making negative comments about a judge or the judicial system. Making negative comments about a judge or commenting on pending matters on social media are activities that can land an attorney in big trouble.

N.J.R.P.C. 8.2 specifically prohibits a lawyer from making a false statement or with reckless disregard for the truth regarding the qualifications or integrity of a judge, adjudicatory officer, public legal officer, or candidate for election or appointment to judicial or legal office.

In 2008, the Florida Bar publicly reprimanded a Florida attorney for posting negative comments on a legal blog about a judge whom he believed was pressuring defendant into waiving their speedy trial rights. The lawyer called the judge an “evil, unfair witch,” “seemingly mentally ill,” and “clearly unfit for her position and knows not what it means to be a neutral arbiter.” The Florida Bar found these comments were improper because they were prejudicial to the administration of justice.

In addition, N.J.R.P.C. 3.6 limits extrajudicial comments publicly made that have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Under N.J.R.P.C. 8.4(d), an attorney may be disciplined for any action that “is prejudicial to the administration of justice.”

Paid Advertising / Pay per click / Deals of the Day

If you pay for advertising in a source that is not commonly known for advertising, such as paying for a listing on a restrictive attorney list that only has one attorney per type of law, etc., you must have a disclaimer in size equal to the largest and most prominent font declaring

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“all attorney listings are a paid attorney advertisement, and do not in any way constitute a referral or endorsement by an approved or authorized lawyer referral service.”\textsuperscript{57}

While N.J.R.P.C. 7.2 permits reasonable advertising expenses, N.J.R.P.C. 5.4 precludes an attorney from sharing fees with non-attorneys. In recent years, a type of marketing deal known as a “Groupon” or group-coupon where people over the internet buy the right to purchase goods or services at a reduced fee. Lawyers have recently attempted to translate the group-coupon concept into a marketing tool.

The ABA Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion warning of the dangers of a “Groupon” type program.\textsuperscript{58} The opinion explained under this model of advertising, a marketing organization notifies potential customers who have signed up to receive deals of deals in an email. Once an agreed upon number of buyers purchase the deal, marketing organization and the local business share the proceeds in an agreed-upon division. Each successful buyer is then given notification explaining how to purchase the goods or services. While lawyers may market their services with this type of group-coupon, the lawyer must exercise care that all aspects of the group-coupon comply with the R.P.C.s, including avoiding false or misleading statements, conflicts of interest, competency, and avoiding sharing legal fees with non-lawyers.

In discussing group-coupons, the ABA opinion also considered prepaid deals where a marketing organization advertises a deal where a client may pay the marketing organization a flat fee, such $25 for five hours of legal services. Because the marketing organization collects the money, and the lawyer will not be compensated beyond the $25, the deal could run afoul of N.J.R.P.C. 5.4. However, if the group-coupon is marketed as a client buying the opportunity for discounted legal services, such as for $25, the client has the right to pay only half the lawyer’s normal hourly rate, the coupon most likely will not run afoul of the R.P.C.s, according to the ABA. As long as the rate charged by the marketing organization is reasonable, then under the ABA opinion, it does not constitute improper fee-sharing, but rather is a reasonable cost of

\textsuperscript{57} N.J. Comm. on Attorney Adver., Op. 36 (Dec. 26, 2005)
advertising. Despite this ABA opinion, several states have expressly precluded an attorney from participating in group-coupon deal-of-the-day marketing. For instance, Pennsylvania expressly precludes use of deal of the day marketing programs because it views them as improper fee sharing.59

While New Jersey has not dealt with this issue directly, it is likely to follow the ABA’s opinion given the similarity of its rules to the Model Rules. The New Jersey Rules of Professional Conduct require advertisements be reasonable and not misleading. In addition, New Jersey’s Rules only permit an attorney to pay a marketing organization a reasonable rate for the advertisement.

In addition to these issues, lawyers should be careful not to violate other R.P.C.s by using deal-of-the-day type marketing programs. For instance, an attorney owes duties to prospective clients under R.P.C. 1.18. The purchaser of a group-coupon is not automatically a prospective client, and the attorney should take steps to make sure that the advertisement explains that no attorney-client relationship will be formed without a conflict check or until a consultation is completed.

Offering a pre-paid deal on legal fees may also cause problems. For instance, if the lawyer offers a group-coupon for pre-paid legal fees rather than a coupon that offers a discount on future fees, then the monies must be deposited into the attorney’s trust account and allocated into the ledger for that client. In the event that the lawyer structures the coupon so that the fees are non-refundable even if the coupon is never used, sufficient notice must be given to the client.60 However, doing so may put the attorney in jeopardy of violating R.P.C. 1.5 that requires that all legal fees be reasonable. The ABA Standing Committee found that “monies paid as part of a prepaid deal likely need to be refunded to order to avoid the Model Rules prohibition of unreasonable fees.”61

60 See New York State Bar Ass’n Comm. on Prof’l Ethics, Op. 897 (2011) (lawyer may retain coupon proceeds if buyer never seeks the discounted services).
In the event the attorney has a conflict of interest, the attorney has an ethical duty to fully refund the cost of the coupon to the purchaser. This includes even the monies that the attorney may have paid to the marketing organization for the cost of advertisements.

⚠️ **Care should be used in utilizing group-coupons or deals-of-the-day to make sure they are not misleading, require the attorney to exceed the attorney’s competencies, or inadvertently create an attorney-client relationship.**

**Endorsements and Testimonials**

Attorneys selected to be included on the “Super Lawyers” list, or a similar accolade list, must be careful in the manner of listing that information. The Comment to N.J.R.P.C. 7.1 only permits the attorney to refer to honors or accolades if the 1) the conferrer inquires into the attorney’s fitness; 2) the honor is not presented for a price; and 3) the conferrer’s methodology for presentation of the award is available for inspection.

The Committee further found that an attorney cannot use superlatives due to N.J.R.P.C. 7.1’s prohibition on misleading advertising.⁷²

In 2008, a Special Master appointed by the Supreme Court to review the issue with Super Lawyers found: “Where superlatives are contained in the title of the list itself, such as [Super Lawyers], the advertising must state and emphasize only one’s inclusion in the Super Lawyers or The Best Lawyers in America list, and must not describe the attorney as being a “Super Lawyer” or the “Best Lawyer.”

The Special Master also found: “Claims that the list contains the “best” lawyers or e.g., the “top 5% of attorneys in the state or similar phrases are misleading, are usually factually inaccurate and should be prohibited.”

⚠️ **Special rule for Super Lawyers**: The advertisement must include a disclaimer making it clear that inclusion of a lawyer in a Super Lawyers or The Best Lawyers in America list, or the rating of an attorney by any other organization based on a peer-review ranking is not a

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designation or recognized certification by the Supreme Court of New Jersey or the American Bar Association.\(^{63}\)

Advertising may not be misleading. Generally, endorsements and testimonials are dangerous topics. N.J.R.P.C. 7.2 prohibits testimonials that compare an attorney to another attorney, provide a lay opinion as to the quality of the lawyer’s legal knowledge, ability and effectiveness, or extol the lawyer’s professional efficiency. Professional networking sites like LinkedIn and Avvo encourage users to solicit and post testimonials and endorsements. Lawyers must take care to review the social media about themselves in order to avoid inadvertent violations of N.J.R.P.C. 7.2. The rules are not well-developed as to attorney’s obligations for third-party content. Most lawyers are resistant to the idea that they may be held responsible for posts made by third-parties. However, if a third party’s testimonial clearly violates N.J.R.P.C. 7.2 and the attorney has the means to remove or edit the post, it is most likely that the attorney may be in ethical trouble for not taking the appropriate action to edit the testimonial.

A client testimonial is permissible if the client comments upon the lawyer’s interaction with the client.\(^{64}\) For instance, a client’s testimonial may state the attorney was always punctual, or the attorney empathized with the client, returned phone calls or the attorney was professional in the handling of the case. The attorney must obtain the client’s consent to utilize the client’s comments. Thus, if a client makes an off-handed remark about the attorney’s punctuality, the attorney may not put that comment on a website unless the client agrees.

Attorneys also must be careful regarding the comment utilized. For instance, if one client’s perspective is skewed, that perspective should not be used in a testimonial. N.J.R.P.C. 7.1(a)(2) prohibits an attorney from using a statement that will cause the potential client to have unjustified expectations. A client testimonial may not be used when the “the lawyer no longer has a reasonable basis to believe that the client’s opinion remains essentially unchanged.”\(^{65}\)


\(^{65}\) *Id.*
Moreover, if the attorney learns that the client’s opinion that was expressed in a testimonial has changed, the lawyer has an affirmative obligation to no longer use that testimonial – even though it was true at the time it was given.

Because a client testimonial is a form of advertisement, attorneys should keep the testimonial for three years.  

**Testimonials must be used with a client’s permission and cannot create unjustified expectations.**

**Advertisements**

The United States Supreme Court has held that attorney advertisements are protected forms of commercial speech. This opinion forms the basis for the permissibility of attorney advertisements in this State and others. Although advertising is protected free speech, attorneys must still understand the forms of acceptable advertising. This is particularly troublesome for new forms of media, such as the Internet and social media.

The general rule is that attorney advertisements may not be false or misleading. N.J.R.P.C. 7.2 expressly permits a lawyer to advertise via the “internet or other electronic media.” All advertisements must be maintained for three years.

An attorney may not provide a person “anything of value to a person for recommending the lawyer’s services.” There are exceptions to the rule, however, including paying reasonable advertising fees and expenses. In addition, referral fees or fees paid through a county bar association lawyer’s referral service are permissible.

N.J.R.P.C. 7.3 prohibits soliciting clients unless the lawyer has a prior relationship or the communication is marked as an “advertisement”; the rule further prohibits contacting a victim of a mass tort for 30 days, or a person who could not reasonably exercise judgment to hire the lawyer, or a person who has made known a desire not to receive such communications.

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66 N.J. RULES OF PROF’L CONDUCT R. 7.3.  
69 N.J. RULES OF PROF’L CONDUCT R. 7.3.  
70 N.J. RULES OF PROF’L CONDUCT R. 7.2.
Recently, the ABA Ethics 20/20 Commission issued a recommendation to change Rule 7.3 of the Model Rules of Professional Conduct to define solicitation in light of new electronic media. As an example, a post on Twitter would not need an “advertising” disclaimer because it is not a form of “solicitation.” The ABA House of Delegates adopted this change, and the New Jersey Supreme Court has formed a Special Committee to review all of the changes to the ABA Model Rules adopted as a result of the ABA Ethics Commission 20/20.71

The Advertising Rules also apply to conduct in chat rooms. Although New Jersey does not have a specific advisory opinion on the subject, Florida and California do have rules.

In Florida, the solicitation rules prohibit lawyers from soliciting clients, but lawyers are permitted to answer questions posed to them while in a chat room.72 In California, on the other hand, attorneys are prohibited from communications with a potential client in a mass-disaster victim chat room.73

Recently, the ABA Ethics 20/20 Commission suggested changes regarding pay-per-click advertisements as being acceptable as long as there is no “recommendation” as to the attorney to be hired. These changes were also adopted by the ABA House of Delegates.74

In a decision of the New Jersey Supreme Court Attorney Advertising Committee, the Committee specifically authorized the use of pay-per-click and pay-per-lead advertisements.75 The Opinion found a website that listed only one attorney per zip code was misleading. If certain attorneys are selected to be featured on the website, the methodology must be clearly posted on the website. “Websites may state that the participating attorneys meet these requirements but must refrain from making statements vouching for the quality of the

74 http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105b.authcheckdam.pdf
participating attorneys or comparing participating attorneys to other attorneys.” The Opinion also requires that the website have an obvious disclaimer listed it as “Attorney Advertisement.” The Opinion also precluded listing the website as an “Attorney Referral Service.”

In New Jersey, attorneys must take care not to misleadingly refer to themselves. This includes referring to oneself as a “Super Lawyer” as explained above. Lawyers are not permitted to compare their services to other lawyers. The New Jersey Supreme Court Committee on Advertising found that “advertisements describing attorneys as ‘Super Lawyers,’ ‘Best Lawyers in America,’ or similar comparative titles, violate the prohibition against advertisements that are inherently comparative in nature, N.J.R.P.C. 7.1(a)(3), or that are likely to create an unjustified expectation about results, N.J.R.P.C. 7.1(a)(2).” N.J.R.P.C. 7.1(a)(3) requires a lawyer who compares their services to include the name of the comparing organization (e.g., Super Lawyers), the basis for the comparison can be substantiated, and that the communication includes a disclaimer that the advertisement has not been approved by the New Jersey Supreme Court.

Pay-per-click advertising is permissible in New Jersey with limitation.

Lawyer Rating Websites

There are many types of electronic listings such as LawyerRatingz.com, Avvo.com, and Martindale Hubble. Some of these sites, such as LawyerRatingz.com permit the public to post commentary regarding the attorney. A third party’s posting might be misleading or otherwise violate the Rules of Professional Conduct. Although New Jersey does not have specific rules regarding these types of listings, the advisory opinion limiting the form of testimonials and endorsements applies.77

Unlike New Jersey, Florida has specifically dealt with these types of issues. Its Bar Standing Committee on Lawyer Advertising, Guidelines on Social Networking Sites set guidelines for attorneys to follow when third-parties post information about an attorney. If the attorney

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did not request the post but the information is misleading or otherwise violates the Rules of Professional Conduct, the attorney is required to request the third-party remove the post. However, if the other party refuses to comply, the lawyer is not deemed responsible for the content.78

**Judge’s Use of Technology**

In New Jersey, there is no proscription against a judge’s participation on social media. In fact, the Code of Judicial Conduct states: Canon 5. A Judge Shall so Conduct the Judge's Extra-Judicial Activities as to Minimize the Risk of Conflict With Judicial Obligations. The Commentary to the rule states: “Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.”

However, in other states, judges are not permitted to participate in social media. On November 17, 2009, the Florida Supreme Court’s Judicial Ethics Advisory Committee issued Ethics Opinion Number 2009-20, which said the Canons of Judicial Conduct do not permit judges to have attorneys that appear before them as a social network friend but they may use social networking for campaigning (judges are elected in Florida).79

In October, the South Carolina Advisory Committee on Standards of Judicial Conduct concluded that a judge may be a member of Facebook and may friend law enforcement officers and employees as long as they do not discuss anything related to the judge’s official position.80

In North Carolina, a judge was reprimanded for “friending” a lawyer in a case before him and ‘Googling’ a litigant.81

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81 Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer*, ABA JOURNAL (June. 1, 2009) available at
The ABA Model Rule of Professional Conduct 8.4(f) prohibits lawyers from knowingly assisting judges in acts that violate the rules of judicial conduct which in terms of ‘friending’ judges means the proscription goes both ways.

Mediators might have the same duties as judges. In Florida, the rule is that mediators “may designate mediation clients (parties) or attorneys who participate in mediations with the mediator as ‘friends’ on a social networking site, and permit clients or attorneys to add the mediator as their ‘friend.’”\(^8\) However, mediators must determine whether the nature of the relationship with the attorney or party presents a potential conflict of interest or would impair the mediator’s impartiality. If so, the mediator must disclose the relationship so the parties can evaluate whether there is a conflict of interest or the mediator must not mediate the matter.

Be careful in sending a friend request to a judge before whom you appear – you might end up conflicting yourself out of the matter.

**Trial Publicity**

N.J.R.P.C. 3.6 limits statements a lawyer may make regarding a pending matter. The Rule states:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:
   
   (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
   
   (2) the information contained in a public record;
   
   (3) that an investigation of the matter is in progress;
   
   (4) the scheduling or result of any step in litigation;
   
   (5) a request for assistance in obtaining evidence and information necessary thereto;


\(^8\) Florida’s Mediator Ethics Advisory Ethics Op. 2010-001 (June 1, 2010).
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):
   (i) the identity, residence, occupation and family status of the accused;
   (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
   (iii) the fact, time and place of arrest; and
   (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

A lawyer must take care to abide by this rule even on social media. This means any discussion of a case must comply with the trial publicity rule, and of course, the confidentiality rules. Trial publicity or comments made on a blog, may also cause an ethical infraction under N.J.R.P.C. 8.4, which prohibits an attorney from “[e]ngag[ing] in conduct that seriously interferes with the administration of justice.” An attorney must be diligent in what statements are made to the press, on a website, on a social media cite, or in a blog given three different ethical infractions could result.

⚠️ **Follow the R.P.C.s before publicizing an open case on social media.**

**Confidentiality**

N.J.R.P.C. 1.6 requires an attorney to maintain confidences. This duty applies when the attorney is on and off the clock. The duty similarly applies to former clients.\(^3\) In the day of

\(^3\) N.J. Rules of Prof’l Conduct R. 1.9.
social media, it might be easy to forget this duty while commenting to friends on Facebook about one’s day, but lawyers have been sanctioned for such abuses. Be careful while discussing anything on lawyer blogs, list serves, bulletin boards, and chat rooms. For instance, one blogging lawyer became a defendant in a defamation suit based upon the blog post. Another attorney was disciplined for blogging about cases using loosely veiled descriptions of her clients, though the lawyer defended on the basis that identities could not be determined based upon what was posted.

Even if you are communicating for the purpose of obtaining advice or strategy tips, you must refrain from providing details that would disclose the identity of your client. This is also important because your adversary might be reviewing the same list-serve feed.

An attorney also may disclose an identity of a client by befriending that client through social media, such as LinkedIn. Although it might help for networking purposes, you should avoid inviting clients to connect with you on social networking sites. Only the client may disclose the confidential relationship, so accepting an invitation to network is acceptable.

The ABA Standing Committee on Ethics and Professional Responsibility has issued a formal opinion that provides lawyers must obtain client consent prior to posting any information about a client, or a current or past legal matter on a website. The Opinion also warns not to disclose the identity of current or past clients.

⚠️ Your duty to maintain confidentiality trumps social media.

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84 See e.g., Debra Cassens Weiss, Too Much Information: Blogging Lawyers Face Ethical and Legal Problems, ABA Journal (9/14/09) available at http://www.abajournal.com/news/article/too_much_information_blogging_lawyers_face_ethical_and_legal_problems/
85 Id.
86 Id.
Social Media and Ethics, Advertising, and Marketing

Social media, as an investigation tool, will be addressed in Chapter 4. However, it is important to understand how social media can market and advance the education of potential clients as well as the ethical pitfalls that can be associated with its use. Social media is a commonly-used phrase that describes internet technology that facilitated interactive communication between user-created content and receiver-created response.

In 2012, the ABA Legal Technology Survey Report indicated that 88% of responding attorneys had a LinkedIn Presence, 55% utilized Facebook, and 13% could be found on Twitter.\(^8\) A social media presence is not limited to those in private practice; in-house counsel also utilize social media. In a 2012 survey,\(^9\) in-house counsel reported using LinkedIn, blogs, and Wikipedia as social media tools, used for professional reasons. Seventy-six percent of in-house counsel cited blogs as their top “go-to” media source, while 34% cited social media sites, like Twitter, Facebook, and LinkedIn.

An attorney should be careful not to unintentionally create an attorney-client relationship through the interactivity of social media. Social media has allowed anyone to self-publish articles and information. (NOTE: See your malpractice insurance to insure your ability to blog and vlog online and if there are restrictions to those activities). With the interconnectedness of various social media platforms, it is impossible to keep one’s spheres completely separated, unless one fully understands the media.

With the expansion of social media becoming a part of lawyer’s lives, if a lawyer chooses to utilize social media, then the lawyer has a duty to understand the consequences of that decision. The New Jersey Supreme Court Special Committee on Ethics and Attorney Admissions is reviewing whether to adopt changes to our Rules of Professional Conduct based upon changes to the Model Rules of Professional Conduct recently passed by the American Bar Association (“ABA”) as part of its Ethics Commission 20/20. If the changes to the Model Rules are adopted.

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in New Jersey, under R.P.C. 1.1, the attorney must “keep abreast of changes in the law and its practice,” including understanding the “the benefits and risks associated with relevant technology.”

Even without the proposed change, a lawyer must understand the consequences of using social media before its use. For instance, a lawyer who does not want to share an opinion with the world should not tweet about it via Twitter. Also problematic is the fact that a lawyer’s use of social media for self-promotion may constitute advertising. A trend has been to analogize social networking sites to a lawyer’s own firm website. Direct social media communications are analogized to email. Pay particular attention to N.J.R.P.C. 7.1 through 7.3.

The Supreme Court Special Committee is also reviewing whether to adopt changes to the advertising R.P.C.s. These changes could include modifying the terminology of a client solicitation. For instance, under the ABA Model Rules, a communication resulting from a client’s internet search would not constitute a solicitation as long as the client did not have a reasonable expectation that an attorney-client relationship would be created. This new rule change emphasizes a good practice, which is if you have an interactive website advertising your services, place a disclaimer alerting potential clients that an attorney-client relationship will not be formed without confirmation from the law firm.

✅ Distinguish between personal and professional use.

⚠️ Attorneys should ensure their social media use does not violate ethics rules.

Unintended Advertising

Publication of information can provide useful tips to potential clients and allow them to learn of your expertise in a particularized field. Social media also has the ability to assist in furthering your firm’s branding or marketing. However, social media also allows the potential to take a moment of pride and turn it into an ethical violation. For example: you receive your letter explaining that you have been selected as a Rising Star in Super Lawyers; you then take a picture of the letter with your phone; then you upload it onto your Facebook page. Is this advertising? Is this promotion? Is this an ethical violation?
Although no tribunal has addressed this issue, the Facebook post could be considered advertising. However, the New Jersey Committee on Advertising has issued an opinion relating to the information that may be posted relating to Super Lawyers. The Committee found that an attorney cannot use superlatives to describe their abilities due to N.J.R.P.C. 7.1’s prohibition on misleading advertising.\(^90\) In addition, the New Jersey Supreme Court amended R.P.C. 7.1 in 2008 to permit an attorney to reference such honors and accolades in certain circumstances.\(^91\)

Attorneys selected to be included on the “Super Lawyers” list must be careful in the manner of listing that information. The Comment to N.J.R.P.C. 7.1 only permits the attorney to refer to honors or accolades if the 1) the conferrer inquires into the attorney’s fitness; 2) the honor is not presented for a price; and 3) the conferrer’s methodology for presentation of the award is available for inspection. In 2008, the Supreme Court adopted findings of a Special Master it appointed to review the issue with Super Lawyers: “Where superlatives are contained in the title of the list itself, such as [Super Lawyers], the advertising must state and emphasize only one’s inclusion in the Super Lawyers or The Best Lawyers in America list, and must not describe the attorney as being a “Super Lawyer” or the “Best Lawyer.” In addition, the Supreme Court requires a disclaimer that the inclusion of the lawyer on such a list is not approved by the Supreme Court.\(^92\)

**False or Misleading Statements**

Another issue that lawyers must be aware before utilizing social media is that once an attorney, always an attorney. An attorney should not utilize social media to make false or misleading statements. In 2010, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 10-457, where it found lawyer websites must comply with N.J.R.P.C. 7.1 that prohibits false or misleading statements.

This might include a lawyer who presents himself as an expert on his LinkedIn site. Due to LinkedIn’s pre-set fields, a lawyer might improperly portray himself as an expert in a field against individual state attorney regulations, such as N.J.R.P.C. 7.4. You might want to rephrase

\(^{91}\) In re Opinion 39 of the Committee on Attorney Advertising, 197 N.J. 66 (2008).
the Headline portion of LinkedIn to state “accepting cases in” and listing the attorney’s area of practice rather than including a “specialty”.

**Unanticipated Solicitations**

Lawyers should also be aware that online communications through social media might constitute a solicitation under the N.J.R.P.C. 7.3. A “friend request” or other social networking invitation used for professional purposes may violate the rules against solicitations, if sent to a non-lawyer with whom you do not have any existing familial or professional relationship. Such prior existing relationships include current or former clients, relatives, other lawyers, or someone who has requested information from you.

N.J.R.P.C. 7.3 prohibits soliciting clients unless the lawyer has a prior relationship or the communication is marked as an “advertisement”; the Rule further prohibits contacting a victim of a mass tort for 30 days, or a person who could not reasonably exercise judgment to hire the lawyer, or a person who has made known a desire not to receive such communications.

The direct solicitation prohibition also applies to attorney’s conduct in chat rooms. In a Florida Bar Standing Committee on Advertising Advisory Opinion, the Committee found that lawyers could not enter a chat room to solicit clients but could answer questions posed to them. However, the California Standing Commission on Professional Responsibility and Conduct found attorney communications with a potential client in a mass-disaster victim chat room were strictly prohibited.

Attorneys may also create unanticipated solicitations merely by using the automatic features of the social networking website. For instance, LinkedIn features an option to scan or import your Outlook contacts to send automatic batch invitations. Sending batch invitations may result in invitations being sent inadvertently to represented parties and witnesses whose information is stored in your Outlook address book. These batch invitations are not personalized by person. If the person does not accept, LinkedIn sends two automatic reminders unless the sender affirmatively withdraws the invitation. Each invitation sent could constitute a separate R.P.C. violation.

LinkedIn also presents a potential N.J.R.P.C. 7.3 violation in its introduction feature. The site encourages users to “introduce” people within their network to each other. If one of your
connections improperly introduces you to a potential client on your behalf, it could constitute an improper solicitation.

**Duty of Confidentiality**

Social media also presents issues relating to inadvertent disclosure of confidential relationships. For instance, on LinkedIn, if you become connected to a former client, you could inadvertently breach the duty of confidentiality owed by N.J.R.P.C. 1.6. Including a client on a professional networking site, like LinkedIn, might inadvertently disclose a relationship the client thought was confidential, particularly if someone like a secretary accepts the relationship on the client’s behalf. ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information on websites about current or past legal matters or the identity of current or past clients.\(^9\)

**Duty of Confidentiality and Cloud Computing**

As a result of the ABA Ethics Commission 20/20’s in-depth study of new technologies upon the Model Rules of Professional Responsibility, the ABA House of Delegates adopted a change to Model Rule 1.6 in August 2012. The change adds a new provision: (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.

Even though New Jersey has not yet proposed or adopted this language, the broad language in N.J.R.P.C. 1.6(a), prevents an attorney from utilizing remote storage techniques that do not provide ample protection from unintentional disclosures, including sharing information or hacking. The Supreme Court has enacted a Special Committee to review whether this rule should be adopted in New Jersey.

**Friending Judges or Mediators**

In traditional networking spheres, attorneys love to network with judges. Different jurisdictions have divergent opinions on whether a judge may befriend a lawyer on social media.

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In jurisdictions where ethics authorities have said judges cannot friend the lawyers through Facebook or other social media, the restriction is typically reciprocal, meaning a lawyer cannot attempt to “friend” a judge through social media if the judge would be prohibited from doing so. Florida has provisions against judges and mediators “friending” attorneys. North Carolina also has an opinion finding “friending” is a violation of the R.P.C. However, New York, Kentucky, and South Carolina permit “friending” as long as discretion is exercised.

In fact, the ABA Model Canon of Judicial Conduct 4A, indicates, “Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.” Variations of this Canon have been adopted in states like New Jersey, New York, Florida, and South Carolina.

Kentucky has an Ethics Opinion permitting friending of attorneys on social media sites: “While the nomenclature of a social networking site may designate certain participants as ‘friends,’ the view of the Committee is that such a listing, by itself, does not reasonably convey to others an impression that such persons are in a special position to influence a judge.”94 South Carolina has taken a similar stance.95 In South Carolina, a judge may “friend” law enforcement officers on Facebook as long as they do not discuss matters associated with the judge’s position.

Inadvertently Creating Attorney-Client Relationships

Blogs, websites, and other electronic communication may blur the line designating the creation of an attorney-client relationship. Prior to these new forms of communication, it was easier to justify not having an attorney-client relationship. However, now with new technology, a potential client may misunderstand when that relationship is created.

Under the Restatement (Third) of Law Governing Lawyers, § 14 (2000), an attorney-client relationship is created when a person manifests an intent to be represented and the attorney either consents or has a reasonable belief the person who will rely on the lawyer for the advice. Unintended advice given through social media, such as an interactive blog, might

94 Formal Judicial Ethics Opinion JE-119, Ethics Committee of the Kentucky Judiciary (Jan. 20, 2010).
95 South Carolina Advisory Committee Opinion 17-2009.
create an attorney-client relationship. Protect yourself by adding disclaimer regarding lack of legal representation.

N.J.R.P.C. 1.18 provides that attorneys owe duties to prospective clients. A prospective client is defined as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship.” An attorney that permits unsolicited communication from a client regarding a potential matter may inadvertently create an attorney-client relationship. The creation depends upon the person’s “reasonable” expectations. The solution to avoid an inadvertent attorney-client relationship is to use a disclaimer on websites, blogs, or any other media where a prospective client may seek to retain you or obtain legal advice. The standard is no reasonable person would think that a representation is formed. In Comment 2 to the Model N.J.R.P.C. 1.18, “a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship is not a prospective client.”

In New Jersey, an attorney must maintain confidentiality and protect such information even for a prospective client. The Ethics Committee issued an advisory opinion requiring an attorney to maintain the confidence of a prospective client who was an employee of a current corporate client so that the attorney could not inform the corporate client that the employee wanted to retain the attorney.96

ABA Ethics Commission 20/20 recommends revising N.J.R.P.C. 1.18 to add factors so that a prospective client must have a reasonable belief that attorney-client relationship is formed prior to the relationship being created.

An attorney-client relationship may be formed over the internet. N.J.R.P.C. 1.18. Under the Restatement (Third) of Law Governing Lawyers, § 14 (2000), an attorney-client relationship is created when a person manifests an intent to be represented and the attorney either consents or has a reasonably belief the person who will rely on the lawyer for the advice. Unintended advice given through social media, such as an interactive blog, might create an attorney-client relationship.

ABA Formal Opinion 10-457 addresses the possibility that, by enabling communications between prospective clients and lawyers, websites could produce inadvertent lawyer-client relationships. The opinion addresses the related concern that website-based communications could trigger a lawyer’s duties to prospective clients under N.J.R.P.C. 1.18.

ABA Formal Opinion 10-457 addresses the possibility that by enabling communications between prospective clients and lawyers, websites might produce an inadvertent lawyer-client relationship. Protect yourself by adding disclaimer regarding lack of legal representation. For instance, if your website contains a form for prospective clients to complete and then send back to you, you should consider adding a disclaimer so that the user understands that an attorney-client relationship is not formed until you respond to the request.

Before you blog or tweet, consider whether the post might contain any confidential or privileged information. Be aware that other social media users may pull information from a variety of sources and glean confidential or privileged information using other publicly available facts, data, or information. For instance, an Illinois Assistant Public Defender blogged about her client committing perjury; the Illinois State Bar recommended her disbarment.97

警告 Remember, the R.P.C.s still govern your conduct on social media – on the clock or off!

Duty of Candor

Similar to the duty of confidentiality, a lawyer always owes the duty of candor.98 Social media has been used to uncover lies. For instance, a lawyer who asked for adjournment due to a death in the family was caught in a lie when he discussed his social plans on Facebook.99 Even when privacy settings may be set to block access to your social media accounts, remember to always be candid in everything you do.

Congratulations Once a lawyer, always a lawyer; Online or Offline.


99 Molly McDonough, Facebook Judge Catches Lawyer in Lie, ABA Journal (July 31, 2009).
CHAPTER 4: Initial Intake and Investigation

A call comes in. It is a new client. Don’t forget about technology. The most relevant information could be only a few keystrokes away.

If you delay, the digital data may go away.

Conflict Check

It is a necessity to ascertain any possible conflict upon receiving a call. Today, there are many programs available for an almost instantaneous conflict check. Some require a more in-depth analysis, but the software points the way. The hardest part is always the analysis of the report. That is not technology’s job. As with everything provided in this book, the human component will always remain. Some people keep a simple Excel spreadsheet with a list of their prior clients and a short synopsis of the matter. This is a quick and easy way to organize and determine potential conflicts without having to spend for complex conflict software. There are also free open source alternatives available.100

Creating a Digital File Folder

The second step is to begin organizing the file. This may sound rather odd being that you have not been retained. However, the mark of an impressive lawyer is one that is ready. Think of this preparation as protecting yourself from potential danger. We all have had difficult clients. If we were able to ascertain the complex nature of the case before they walk in the door, then we would be able to avoid substantial strains on our practice. The file would not be physical, so the time involved will be minor and simple to close.

The easiest way to begin digital representation is to create a digital folder on your server or hard drive. This does not need to be linked to your case management system at this time. It is merely a temporary digital folder in which to keep miscellaneous information during the early determination on whether or not to take the case.

100 http://www.libreoffice.org and http://www.openoffice.org
1. Click on the Windows Icon ("Start Button")

2. Click on “Computer”

3. Choose which drive you want the file on

4. Choose “New Folder”

5. Name file after Case Name

Let’s assume that you received some basic information from the phone call prior to your setting up your conference: name, date and location of accident/crime, other parties involved, and overview of matter. You can either dictate a memo or type a memo and have it placed within the directory as a reference.

It is also a good way to capture and preserve evidence for your future presentation of evidence at trial. It is never too early to think about the final stages of litigation. It will be a huge benefit at the end of the case if it has been organized since the beginning. At each step in the litigation process, attorneys should consider trial presentation.
Since we mentioned dictation, it should be noted that technology has allowed for the progression of dictation machines. Currently available are the old-fashioned tape driven recorders, digital dictation recorders, and smartphone/tablet recording programs. The concept of quick creation is to limit the amount of duplicative work and make your notes as expeditiously as possible. Digital dictation is done as follows:

a. Attorney dictates into recorder
b. Attorney connects recorder to computer
c. Software transfers audio to computer and sends to secretary/transcription service
d. Dictation is typed and added to file with an e-mail to attorney

Transcription is a step that is up to the attorney. Files can be left in audio format; especially pre-suit. However, you want to dictate what transpired on the phone conversation and subsequent client interview.

So, we have the basic facts, we’ve done a background check, we’ve dictated a memo to the file, and made an appointment for the client to arrive at your office. The next step would be the utilization of a calendaring system.

The printed calendaring system was nice years ago, but has been surpassed by digital calendaring. Refering to the utilizing of a digital calendar system, such tools as Microsoft Outlook or Google Calendar, will allow the organization of appointments, and in most cases, provide real-time syncing across several platforms including internet, cellphone, and tablet. It will allow an attorney the ability to inform staff and reserve an area and time without conflict for the conference. Also allowed is the ability to accept and reject appointments setup by other individuals. This allows for a more efficient way to verify availability of participants for a meeting.
Outlook Calendar:

iCloud Calendar:

Google Calendar:
Early Case Analysis and Data Collection

Here today; gone tomorrow. The internet is even faster. Preservation and research must, therefore, begin at the initial call. There are certain steps that can be completed to collect and preserve potentially relevant internet evidence before meeting with the client. This research may help the attorney determine if they even want the potential individual to be his or her client. Further, attorneys should consider, even at the earliest stage of intake, the best way to preserve evidence for future presentation. How should the attorney capture, preserve, and present? This differs depending on the particular case. Hopefully, the following chapters will provide a guide to answer this question. An attorney should know at the beginning of the case what will be necessary by the end of the case in order to prove the case. “Counsel who is looking ahead to the pretrial and trial phases of the case will appreciate that obtaining documents, photographs, and video in digital format is a substantial advantage.”

Before we get into more tools for finding information on the web, it is important to learn how to preserve that information. There are several means of gathering information from the internet. They are all a combination of a screen shot or screen grab. Well, what does that mean? A screen shot is a picture of what is currently displayed on your computer’s monitor. The technique for preserving the screen shot is called a screen capture. This is the transferring of the current on-screen image to a graphics file or the clipboard of a computer. The clipboard is a reserved section of the memory in a computing device that is used as a temporary staging area for data that are being copied or moved from one application to another using the copy/cut and paste methodology. Think about every time you have copied a file and pasted it somewhere else. During the transfer, the data is in your computer’s clipboard.

There are many ways to capture your screen and the information contained on it. The first and oldest is the “Print Screen” button that has been on every computer since the 1980.

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When you press the printscreen button, a duplicate image of your screen is placed in the computer’s clipboard. This is then able to be pasted into any other program that allows image editing, including most word processing programs. The image can then be cropped utilizing the software on your computer. Another neat trick is, by holding the ALT key and then pressing the Print Screen Button, the computer will capture the currently selected window.

If you have Windows 7 or Windows 8, then you will be able to cutout a portion of the screen as opposed to the entire screen. You can do this by utilizing the “Snipping Tool”. It is located under the accessories folder on you start menu.

If you do not have Windows 7, there are a few opensource or freeware options available; such as: PicPick, Screenshot Captor, DuckCapture, and Snapdraw. These programs additionally allow for screen shots of a scrolling window on your computer; usually an internet page.

Another way to preserve a webpage that you are visiting is to create an image of the site by printing the site to a Portable Document Format; otherwise known as a PDF. PDFs allow for the preservation of the formatting and content of a document regardless of the original application. The PDF, therefore, allows production of the document, including text, fonts, and graphics, without the need for the user to own the license for the native program. It is probably easiest for PDF documents to be thought of as an image-replication file of a document. Originally owned and distributed by Adobe Systems, the format, since 2008, has been released in an open standard. The open standard for Portable Document Format is explained at the International Organization for Standardization’s website.

One of the great benefits provided for attorneys within the Portable Document Format is that the file may be encrypted for security. Further, the document can be digitally signed for authentication purposes. It allows for an Ink Signature; which is created on a touch screen

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102 See The Sedona Conference Glossary, supra note 35.
monitor, ink or pen input device, or mouse input. The better process is the Adobe security signature.

PDF documents can be converted to searchable documents when combined with an optical character recognition (OCR) program. Adobe provides the tool as “Recognize Text.” This is a great way to search through voluminous documents for particular set of characters.

There are many types of PDF software available that allow for annotation of PDF documents. These programs allow for highlighting (in a multitude of colors), adding comments, adding text boxes, and adding shapes (squares, rectangles, arrows, etc.). If you have an iPad, there are some fantastic annotation tools available: GoodReader, iAnnotate PDF, and PDF Forms. These tools are great for depositions. You can review your digital file and place notes or comments within the document for questioning of the witness. It is also a great way to review transcripts without spending a lot of money of deposition review applications.

There are many software applications that allow for creating a PDF printer; meaning that, instead of printing a paper copy, the computer will print to a PDF file. Hardcopy printing of information from a webpage provides the potential of being misplaced, spilled on, or placed in the wrong physical file. Digital printing, by PDF, allows placement and protection in your digital folder. In order to complete this task, the computer being utilized to view the webpage needs to recognize your PDF creation software as a printer:

The software, called PDF writers, self-install to the printing section of the computer. Adobe Acrobat is a PDF writer. Due to Adobe’s cost, freeware options have become available: BullZip, PDF24, PDFCreator and CutePDF. When the attorney wants to utilize the PDF writer instead of their installed printer, they merely change the selected printer to the writer.

**Types of Social Media**

Today's internet is interactive. Originally compiled of static websites with limited interaction between user and publisher, sites are no longer read only; they have evolved to
read, respond, rate, and redistribute. Web 1.0 was a place to gather information. With the current Web 2.0, internet has become a place to generate, disseminate, and discuss. Once limited to purchasing, reading and watching. The users generate original content and vocalize their unique thoughts. The “Like button”, “friendling”, and “Googling” have become part of our everyday off-line vocabulary. Sharing, tagging, and commenting have transformed original content into living content; thus truly making a piece of information into a web along the internet. Social media’s success is contingent upon the free dissemination of private information.

User ages can span generations; from toddlers to great-grandparents. In fact, preschool teachers utilize iPad apps and interactive internet sites for toddlers to learn upon. All that is required is a computer (or tablet) and an internet connection. Many businesses offer free WIFI hotspots. Many public buildings and most New Jersey courthouses provide free internet access. And with WIFI units embedded in our phones, those that would have no voice are suddenly able to express views to anyone that will listen (i.e. read online). And people want to listen. Then they want to respond. Users reading content now wish to connect with the content creator. Users seek to join the discussion. Their thoughts then become their own publications; one that another user can comment on, share, or “like.” Its simplicity provides a fantastic use in litigation. Ease of dissemination and creation can eliminate the second thought that people have. How many times have you written a letter and never sent it? But how often do you contemplate anger without expressing those thoughts? Social media seeks and lives on the “excited utterance”, the “state of mind” and the “presence sense impression.” All of course utilized for their exceptions to hearsay. We’ll delve into this later. But social media is ripe for litigation. And with billions of users it has cultivated an audience that most likely is connected to every case that is handled.

It is beneficial to prepare to capture this ever-changing flow of information. Google Alerts or web-tracking service is a good starting place. But it may be wise to create a system, within your office, where the attorney, paralegal, or staff member goes online every day, every other day, or once a week to look at key witnesses or party activity on social media sites.
Social media has been defined as “internet applications which permit individuals or organizations to interactively share and communicate.”\(^\text{104}\) And since the progression of Web 2.0, interactivity exists, in some form, on every website.

Although social media has been organized into several different categories by several different organizations\(^\text{105}\), we will focus on social media consisting of five different categories: Collaboration, Directory Listings, Community Connections, Quick Communications, and Archiving Sites.

Before we enter into these categories, one thing must be mentioned. An attorney and his agents (staff, investigators, etc.) must never use deception or misrepresentation in your communications— including aliases and screen names that do not clearly identify you or your agents. In other words, you cannot friend someone for the purpose of litigation under false pretenses. This is not negotiable. It is an ethical violation and has led to problems for New Jersey lawyers and lawyers in several other states.\(^\text{106}\) With this knowledge, social media holds valuable information and must be looked at and not ignored. We will address the ethical implications later in the book.

⚠️ Do not misrepresent who you are when using social media to research your case!

Further, the knowledge of preservation regarding social media is best exemplified by the $542,000 sanction applied to a Virginia Plaintiff’s attorney that allowed his client to remove information from his Facebook account.\(^\text{107}\) If an adversary has intentionally hidden or destroyed evidence necessary to a party’s cause of action, the party seeking that evidence is entitled to the

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\(^\text{104}\) The Sedona Conference Glossary E-Discovery & Digital Information Management (Fourth edition) (April 2014)


\(^\text{107}\) Lester v. Allied Concrete Co., No. 08-150, 2011 WL 9688369, (Va. Cir. Ct. 2011), rev’d. on other grounds, 285 Va. 295 (Va. 2013). (where attorney was sanctioned $542,000 and the client was sanctioned $180,000).
adverse inference that the evidence would be unfavorable to the party responsible for the evidence, may amend the complaint to add fraudulent concealment or spoilation, or may seek discovery sanctions.\textsuperscript{108}

\textbf{Do not conceal or destroy evidence on social media that is unhelpful to your case.}

Reviewing social media has become, whether wanted or unwanted, a part of the practice of law. In 2010, 81\% of divorce attorneys used social networking evidence in cases, 92\% utilized evidence taken from iPhones, Droids, and other Smart Phones in the previous 3 years, and 94\% have cited a rise in the use of text messages as evidence.\textsuperscript{109} In the first half of 2012, 320 published cases substantively discussed social media. “[I]t should now be a matter of professional competence for attorneys to take the time to investigate social networking sites.”\textsuperscript{110}

There are five categories of social media that will be addressed:

<table>
<thead>
<tr>
<th>Category</th>
<th>Explanation</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Collaboration</td>
<td>Multiple Users working together on a project, document, or presentation</td>
<td>Wikipedia, Kickstarter, Dropbox, Google Drive, Box, OneDrive</td>
</tr>
<tr>
<td>2) Directory Listings</td>
<td>The new yellow pages; a business-oriented, directory-style listing of individuals</td>
<td>LinkedIn, Avvo, SuperLawyers</td>
</tr>
<tr>
<td>3) Community Connections</td>
<td>People-to-people contact; a place to share videos, photos, and personal information</td>
<td>Facebook, Google+, IRC</td>
</tr>
<tr>
<td>4) Quick Communications</td>
<td>Methods of quickly providing thoughts and information</td>
<td>Twitter, Blogs, Vlogs, Blogger, Drupal, Live Journal, Open Diary, Wordpress, Foursquare, Yelp, Skype, SnapChat</td>
</tr>
<tr>
<td>5) Archiving Sites</td>
<td>Preserving and organizing documents, audio and video</td>
<td>Youtube, WayBack Machine, Flickr, Photobucket, Instagram</td>
</tr>
</tbody>
</table>

\textsuperscript{109} American Academy of Matrimonial Lawyers
\textsuperscript{110} Griffin v. Maryland, 192 Md. App. 518, 535 (2011);
Collaborative Social Media

Collaboration sites provide the environment and the tools to permit media to be transferred and worked on by multiple users. Collaboration sites allow for collaboration without the need for physical mailings or constraints due to e-mail limitations. The tools provide real-time collaboration with clients, experts, and other attorneys. It allows for the utilization of the internet’s WAN (wide area network) as if it was a LAN (local area network). It allows for the direct communication with another over a restricted portion of the internet; sometimes referred as cloud computing. The speed and diversity of group feedback allows work on a project to be completed in partnership.

If your case file has been kept in electronic format, it may be beneficial to utilize a form of collaborative social media to transfer necessary information to an expert for review. Larger files that are unable to be attached to an e-mail are easily transferred through collaborative social media. This will expedite the response and allow for communication on the file names rather than on a description of a particular piece of paper. Further, printing 20,000 pages of information and mailing it can be tedious, costly, and frustrating to all involved. A collaborative social media transferring technique can be further assisted by electronic bates stamping of the documents.

Obviously the biggest fear of this area of social media is security. An attorney utilizing Collaborative Social Media should be cognizant of the contracts entered into and the terms of service each of the cloud computing/collaboration sites. Please see Chapter 3’s section on Duty of Confidentiality and Cloud Computing.

Some common collaborative social media sites are SkyDrive, Google Drive, and Dropbox: Dropbox was utilized in the creation of this book. All contributors were given access to a DropBox folder and were able to access and work on the file at their own desks when they were able to do so.
Directory Listings

The next type of social media is a directory-listing site. These are best described as today’s yellow/white pages. Most directory-listing pages are setup as a resume-style presentation. They will provide different information than found on other types of social media. These sites are not interested in providing non-business discussions or information. It is also a fantastic place to look for admissions of a party, information on an expert, or delve into the past places of business of a witness.

The most common directory-style site is LinkedIn. Since Linkedin members consider the site as a business tool, users provide significant details about their profession that may be useful on your litigation and may not be available in other locations. With that, it is a very useful place to provide information, about you as an attorney, for marketing and referrals. Although the ethics rules have not caught up with internet based activities, there are some general guidelines that cover activities on directory-listing sites that were addressed in Chapter 3.

As for a Linkedin page, a profile allows for short descriptive updates of activities, similar to those available in both community connection sites and quick communication sites which will be addressed in the next two sections. After the activity section, the user has an opportunity to provide a summary of their work and experience. There is a section for honors and awards, volunteer experience and causes, publications, education, organization affiliation, recommendations, connections with other Linkedin Users, and a list of groups that were joined within the Linkedin site. One of the newer Linkedin tools is its skills and endorsements section. The section allows other users to endorse the skills held by the user.

Super Lawyers

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111 http://www.linkedin.com
SuperLawers focuses on attorneys. Here, lawyers are given an opportunity to provide information about themselves and, if they meet a criteria, may be listed on the site as a SuperLawyer or Rising Star. In New Jersey, if an attorney is publicizing their selection, they must provide a significant disclaimer defined by our Supreme Court:

Ethics Statement: “No aspect of this advertisement has been approved by the Supreme Court of New Jersey. This honor is not issued for a price. Selection for inclusion to the New Jersey Super Lawyers List, published by Thomson Reuters Co., follows a 4-step selection process which is a comprehensive, good-faith and detailed attempt to produce a list of lawyers that have attained high peer recognition, meet ethical standards, and have demonstrated some degree of achievement in their field. Step one is the creation of the candidate pool where lawyers enter by being formally nominated by a peer; identified by the research department in the “Star Search” process; or informally nominated. The second step includes evaluation of the lawyers in the pool. Super Lawyers’ research department evaluates each candidate based on 12 indicators of peer recognition and professional achievement: verdicts and settlements; transactions; representative clients; experience; honors and awards; special licenses and certifications; position within law firm; bar and or other professional activity; pro bono and community service as a lawyer; scholarly lectures and writings; education and employment background; and other outstanding achievements. These indicators are not treated equally; some have a higher maximum point value than others. The third step in the selection process is to be evaluated by the attorney’s peers by practice area. Final selection is by grouping candidates into four firm-size categories. Those with the highest point totals from each category are selected. The Rising Star selection process is the same as the Super Lawyers selection process except that: 1) to be eligible for inclusion in Rising Stars, a candidate must be either 40 years old or younger or in practice for ten years or less; 2) Candidates for Rising Stars do not go through step-three above in the selection process - peer evaluation by practice area.”

Another site that attorneys need to be cognizant of is Avvo.112 Avvo lists every lawyer that has been licensed in each state. Therefore, you should check and monitor your own listing. The site does not just list the attorneys; it rates them. Rating services are dangerous when it comes to attorney ethics. And this site does not give the attorney a chance to opt not to be ranked. This site also allows for direct interaction with potential clients through question and answer portions of the site. It is important to check with your malpractice carrier to see if such activity is covered. It cannot be said enough: be aware of accidently creating potential attorney-client relationships through the social media interaction as explained in Chapter 3.

112 http://www.avvo.com
Ethics Statement: “No aspect of this advertisement has been approved by the Supreme Court of New Jersey. Avvo Rating, generated by Avvo, Inc., is calculated using a mathematical model that considers elements such as years of experience, board certification, education, disciplinary history, professional achievement, and industry recognition – all factors that are relevant to qualifications. This honor is not issued for a price.”

Community Connections

When people think about social media, their minds go to Community Connections sites. There are too many individual sites to mention. However, the top sites are Facebook, Twitter, and Google+. Facebook’s 1.28 billion monthly active users should be reason enough to look for information on its site. Twitter has 300+ million users and Google+ has crossed the 300 million mark. These numbers are always changing. The reason they are provided is to demonstrate the sheer volume of users providing information over social networks.

Obviously, these sites should be continually checked for information. Google Alerts, Mention, and Talk Walker Alerts are not going to register social media changes. (Mention does locate a large quantity of quick media mentions on the web; such as Twitter). Therefore, archiving, screenshots and recordings, by utilization of an API or application programming interface, will be useful in preserving the continually changing sites.

We will address collection and preservation throughout the future chapters of this book. As for now, it is worth noting the information that is exchanged on community connection sites. Locations, e-mail addresses, phone numbers, physical locations, photos, videos, friendships, personal likes and dislikes, and thoughts are freely provided to the public. The debate over public versus private in regards to the law is delved into later in the book.

These sites succeed on providing private information in a friendly and accessible format. The GeoTracking, referenced in Chapter 1, allows Facebook to provide maps on a person’s wall:

The maps can be zoomed in to locate exact locations of activity:

http://newsroom.fb.com/company-info/
Something that initially appears friendly can be filled with a variety of personal data.

Community connection sites are ripe for discovery of evidence. Chapter 5’s New Jersey Facebook Cases section provides examples of how social media has been utilized in the courts. The sites provide insight into a person’s activities, friendships, business endeavors, shopping habits, hobbies, thoughts, travels, and more. And most of this information is being freely distributed without any privacy or security settings. This chapter focuses on explaining social media and gathering freely available information. In order to gather discoverable evidence behind privacy settings, please refer to Chapter 7, Discovery Requests for ESI and Discovery Process.

Facebook does not play nice with attorneys and there have been successful matters quashing a subpoena on Facebook. Most times, they refuse to cooperate with investigations or provide information. So, how can you get access to data from a Facebook account? Assume that the Facebook information belongs to your client. If you have your client access their page, you can gather their Facebook history; including photos, posts, messages, friends, etc. The process for retrieving the archive is found in Chapter 5’s subsections, How to Download Facebook Archive Data. For non-client information, you may attempt to access the information through court order. After an order has been entered, Facebook may comply.

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115 Ehling v. Monmouth-Ocean Hospital, 961 F.Supp.2d 659 (D.N.J. 2013)
Quick Communications

Information published instantly, with creation-limited characters to relay place, point, or thought, encompass quick communications. The main quick communication social media sites are Twitter and Foursquare. Facebook check-ins, although a subpart of Facebook, would fall into this category as well. Twitter is a real-time information network that allows users to provide a “tweet”, a 140 character message, which details thoughts, photos, videos, or links. These tweets are time-stamped messages.

A client can complain about their kids, spouse, adversary, lawyer, judge, or someone important to the case. Posts may provide the admission that resolves your matter. Further, these quick communications may be deemed to be excited utterances or state of mind examples. For instance, in a motor vehicle matter, it may be beneficial to check all tweets in the area of an accident to check for potential witnesses to that scene.

Foursquare and Facebook check-ins are types that tell the world the individual’s location along with any comments from the creator. This information may be invaluable in litigation. It may demonstrate quality of life, habits, friendships, etc. It may provide an alibi. Most of the check-in applications/websites are accessed by cellphone. Quick communications can vanish in an instance. The post may be visible for only a short period of time and then disappear. Therefore, you should monitor and preserve as quickly as possible.

Archiving Sites

Archiving social media is history at your fingertips. Archiving sites are collections of electronically stored information; usually in a searchable format. They provide a place for people, corporations, or web crawlers to create inventories of information. The obvious sites that provide these services are YouTube (video), Flickr (photos), and the Wayback Machine (webpages). Here, the user is not saving comments and activities; although, some of these sites

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116 [http://www.twitter.com/about](http://www.twitter.com/about)
secondarily allow for comments and activities. The primary purpose is to preserve documents, videos, photographs and other types of data. These sites can provide details that have been destroyed in the normal course of business.

We just talked about corporate websites. Therefore, it is vital to mention one of the most useful website tools on the internet: the Wayback Machine at Archive.org. The Wayback Machine is free and has been around since 1996. The site has been archiving the internet since that time. Yes, they have been recording the contents of most Web sites for each year of their existence. They are a 501(c)(3) non-profit that was founded to build an internet library. Recently, Archive.org has been working with the Library of Congress and the Smithsonian to preserve the records of the web and other electronically stored information.

The site brings you back in time. Like a time machine or Tardis, it can take you to a particular website, if available, at a past date. An attorney will, therefore, be able to see how the site has changed and what admissions were available on a certain date. Obviously, this is all conditioned on whether the site archived the website and the attorney knows the web address of the company. From there, the attorney can learn how the company functioned, what admissions they were making, and a plethora of useful information and contacts.

STEP 1: Enter the web address you wish to access. Then click “Go Wayback!”

http://www.lomurrolaw.com

STEP 2: Pick the year that you want to see.

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117 [http://www.archive.org/about/](http://www.archive.org/about/)
118 Time traveling machine in the BBC series Dr. Who
STEP 3: Pick the Blue Circle (date of archive) closest to the date you want to access.

![Calendar](image)

STEP4: View the old website

**Google®**

Whether you like it or not, Google® is an asset to attorneys. It provides, primarily for free, services that place you ahead of the game. Google Drive, Google Alerts, Google Scholar, Google Maps, and Google Earth are some of these powerful tools. Although originally a search engine, the site has grown to provide a multitude of services to the public. They provide internet based e-mail services using Gmail. It provides social media activities through Google+. It even has its own web browser, Google Chrome. Their video archival site is YouTube. Their electronic literature can be found at Google Books. It provides cloud storage with Google Drive. It allows users to blog with their Blogger site.

**Google Alerts® & Alternatives**

One of the best Google tools for marketing, investigating, and preservation is Google Alerts. One of the first things an attorney should do is setup Google Alerts. It is easiest if the attorney has a Gmail account but it is not necessary. The attorney can utilize any e-mail address for the process. It is recommended that the attorney have an e-mail just for the receipt of alerts. Google Alerts is a free service. Instead of having to continuously search the internet for information on a person, topic, or set of topics; the service searches for you. This saves a significant amount of time. Once the search is completed, if there is a new result, the service e-mails you.

First, you have to go to your internet browser (Internet Explorer, Firefox, Chrome, etc.). Then you have to type in the web address: [http://alerts.google.com](http://alerts.google.com)
Step 1. Enter into the “Search Query spot” the information you want to be notified about. Examples: client name, witness name, adversary name, defendant name, judge’s name, location, topic, company, yourself, etc.

Step 2. Choose where you want the search to focus. Usually it is best to leave as everything on the web. Choices: Everything, News, Blogs, Video, Discussions, and Books.

Step 3. Choose how often you would like to be e-mailed with results from the search. These can be sent: as-it-happens, once a day, or once a week.

Step 4. Choose if you want “all results” or “only the best results.”

Step 5. Enter the e-mail address to which you want the notifications sent.

Finally. Click “create alert.”

Attorneys are not limited to a single alert. You can determine what alerts would be relevant to you. Marketing Note: An alert to your own name or firm name will highlight when someone is talking about you or your firm. It is also recommended to have your e-mails go to a rarely used e-mail address that is linked to your smartphone. This way, you do not miss any important updates.

It is recommended to place witnesses, parties, adversaries, and subjects relating to your case in an alert. Be cognizant that a name like John Smith may create too many search results than you would like to receive. As with any web searching, an attorney should try to focus and utilize terms that will provide the maximum benefit to the file.

Since Google Alerts is a free offering, it is always subject to disappearance. Google Alerts has been rumored to be headed to the chopping block for years. Although we hate that idea, there are some fantastic alternatives. Talkwalker® has mirrored the Google Alert with its TalkwalkerAlerts.119 Another more complete service, which also provides a more comprehensive search of the internet, is Mention®.120 Mention has several plans: Free (3

119 http://www.talkwalkeralerts.com/alerts
120 http://www.mention.net
alerts), Pro Plan (unlimited alerts), and Team Plus (unlimited for multiple users). Obviously, the second and third options require payment. The key is to monitor the web for activity relating to the subject matter, person, or company. These services are fantastic alternatives to a daily search for the terms.

Google Maps, Google Earth, and Google Street View

Ask any successful attorney and they will tell you that to understand an incident, you need to see the location. This is still worthwhile and the preferred approach. It can assist in an attorney’s determination on whether or not to take the case. And there is not always an abundance of time to get to the scene prior to meeting with a client. The ability to access the scene on an iPad or computer while sitting with the client will also provide valuable insight into the occurrence of an incident. The ability to immediately observing the scene is Google Maps, Bing Maps, Yahoo maps, or any internet map. For ease of discussion, we will focus on the most powerful internet map source, Google Maps (which encompasses Google Earth and Google Street View). It is accessible at http://maps.google.com and provides satellite imaging and street labeling. There is a more powerful desktop version which is called Google Earth. This is also free and provides several additional features; such as Google 3D, satellite distance measuring, and virtual tour. Both Google Maps and Google Earth allow the user to operate in Google Street View. Google Street View allows the opportunity to view the scene as if the user was standing on the roadway. The benefits are self-explanatory.

Obviously, the way to admit the images is to have a witness verify that the image is a fair and accurate depiction of the intersection at the time of the accident. Google’s Street View, a feature on Google Maps and Google Earth, is a service offered by Google that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. “Google Earth is an internet-based program that provides a virtual globe through a compilation of, among other things, satellite imagery, maps, terrain, buildings, and

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121 N.J. R. EVID. 901.
other structures. In short, it is a virtual repository of countless overhead photographs of the entire globe.”\textsuperscript{123} To create the Street View program, representatives of Google attach panoramic digital camera to passenger cars and drive around cities photographing the areas along the street. Google Maps also gives users the ability to look up addresses, search for businesses, and get point-to-point directions plotted on an interactive street map.

Similarly, Google Maps, and other mapping websites, can be very useful for a Family Law attorney. In custody or parenting time disputes, location of a school, parent’s home, caregiver’s residence, camp, extracurricular activity or other destination can “make or break” an argument. Mapping websites allow an attorney to display more than just the distance between two points. These websites give the user a real life understanding of the time it takes to get from point “A” to point “B,” to assess traffic flow in a particular area, and to realistically understand the anticipated travel time at a specific time of day. The street view can give a glimpse into an area’s safety features such as fences or street lights in a particular location. For issues as simple as pick-up and drop-off of children, Google Maps can assist in finding mid-way points such as police stations, rest stops, restaurants, or parks. Once an attorney knows how to effectively use these tools, Google Maps can permit a creative, easily displayed argument in a format which is familiar to even those most non-technologically savvy judges and adversaries. While these details may seem small, they can add to or detract from arguments over parenting time, custody, relocation, and other issues that arise in every day family practice.

Although sparse, New Jersey case law has addressed the other non-photographic benefits of Google Maps, Earth, and Street View. Unfortunately, most cases are unpublished.

The United States District Court for the District of New Jersey appears to look kindly upon Google Maps. One judge took judicial notice of “the fact, obtained from Google Maps, that all three beach towns are located over one hour from Atlantic City.”\textsuperscript{124} Another took judicial notice that the case was taking place 10 and a half miles from a particular location based

on Google Maps. The case cites to a District Court of Massachusetts decision where the court took judicial notice of distance provided by a comparable online map service, www.mapquest.com.

In a family court matter, the Appellate Division noted, without criticizing or commenting, that the trial court found that the distance between defendant’s residence and plaintiff’s residence was 38 minutes (29.8 miles) according to Google maps and added that it recognized that with traffic and weather conditions, the travel time, in minutes, may vary. In another case, the Court stated it “observes that, according to Google Maps, a vessel which is 108 nautical miles south of Isle de Coiba would also be well over 12 miles from the coast of Columbia.” In one personal injury case, an expert utilized Google Earth Pro to view overhead images of an accident location to formulate his opinions and never actually went to the scene. Though this was not relevant to the Appellate Division’s decision, it is an interesting way to look at expert testimony and the use of online maps. In a civil matter, Google Maps revealed distances between three places. In a juvenile case, a prosecutor attempted to utilize a Google Earth image, without authentication or testimony, to demonstrate that the defendant’s home was closer to one location than another location. However, it should be noted that the purpose changed by the end of the trial and its admission was completed without being offered as substantive evidence. In reviewing a motion to suppress evidence in a criminal matter, the Appellate Division noted the location of an address and configuration of streets was taken from Google Maps. These cases demonstrate that Google Maps, Google Earth, and Google Street View can be useful in the presentation of your matters. It is important to determine what you

are going to utilize it to show and how you can have it substantively admitted at the time of trial.

In Google Earth, if you enter the location that you want to see in the “Fly to” box, it will take you to a satellite image that you would see on Google Maps. And like Google Maps, there is a Yellow Man that you can bring down to the applicable roadway to garner the Street View.

However, Google Earth provides an additional set of tools:

A unique feature, in Google Earth, is the measurement tool or ruler tool. The ruler tool allows a user to measure the distances between two points on the satellite image.

Further, Google Earth allows the inputting of GPS coordinates (these may be retrieved by a forensic expert from cellphone data, black box information in a vehicle, or through Motor Vehicle Recorders). This allows the program to create an animation of the driving that took place over a particular period of time along the satellite imagery in Google Earth.
Google Scholar

Google Scholar is another useful Google product. It is setup like a regular search engine. However, its results are based on an index of the full text of scholarly literature. The articles span across a plethora of disciplines and sources: articles, theses, books, abstracts, and court opinions, from academic publishers, professional societies, online repositories, universities and other web sites. The search engine allows users to search for digital or physical copies of the authoritative works. Many, but not all, of the publications are free. The search results can link, however, to a commercial journal’s site and require a fee to access the entire article.

The searches are ranked by weighing the full text of the document, where it as published, who wrote it, as well as how often the document was cited in other scholarly literature. The site is a useful way to search for information about expert witnesses, adversaries, and case law.

One of the benefits of Google Scholar is that it is free legal research. There is no Shepards Report and it is only limited to published case law. However, the service contains a very easy to navigate collection of published decisions. This is a fantastic venue to gather case law where you already know the citation.

If you are a New Jersey State Bar Association member, you have free access to Fastcase®; a service that provides case law research similar to Westlaw and Lexis. Fastcase also provides a free app online app. Westlaw has an iPad app called WestlawNext. Lexis has an iPad app called LexisAdvance. All three apps allow for research through you iPad; anywhere, anytime, as long as there is an internet connection available.

Initial Client Conference

You’ve done your initial research, conflict check, calendared the appointment, and the client is waiting in the front of the office for your first consultation. Some people have laptops

setup in the conference rooms or bring their client’s into their offices for consultations. Others prefer the utilization of a tablet for initial consult so as to not be overwhelming. Some still rely on the simple yellow-pad presentation. Technology, however, provides the attorney with the opportunity to demonstrate preparation with an impressive display. We are going to go over a few technology tools for the initial client consultation.

Quick overview of some iPad Apps

The iPad provides a unique way to gather information and produce notes. The device allows audio recording, video recording, handwritten notation, and typewritten notation. Therefore, it provides a fantastic compliment or replacement to your yellow pad. These apps provide very good tools for the initial interview. A warning: some apps cost money and the amounts can change depending on the hour of the day. The PC provides similar benefits during in the initial consult. Accordingly, these subjects will be addressed together. The true benefit of the PC software in this section is best derived from a laptop with a touchscreen or touch input.

There are many note-taking applications. They provide for typing and handwriting notations. Some of the note-taking apps present on my iPad are show below:

These tools provide way to turn your handwritten notes into a digital file without the necessity of a scanner or having someone type the notes. These notation apps are useful at intake, meetings, mediations, or at trial. The note programs provide the ability to write, highlight, edit, erase, and export to PDF or image formats. Most of the programs are compatible with Dropbox or Evernote to allow for transfer of information quickly.
If you are obsessed with Evernote®, then the obvious recommendation is Penultimate. It was recently acquired by Evernote and allows for the easy transfer of notes taken on the iPad. Penultimate can be integrated with your calendaring software and GPS coordinates to provide additional services on the place, time and appointment where the notations were crafted.

A useful tool on the iPad is called SoundNote. It tracks what you type and draw while recording audio. Designed primarily as a tool for lectures, it can be utilized to protect the attorney. As you take notes on the application, it is recording what your potential client is saying. When reviewing your notes, you can click on the drawings or typed notes and it will take you to the audio playing at the time they were created. Never again will you miss an important detail.

Form Connect® is a fantastic application for initial intake. Here is an example of an intake form for a personal injury client created utilizing Form Connect:
Obviously, the app allows for easy modification through dropdown menus, checkbox marks, date box, labels, text boxes, note boxes, images, and lines. No longer will there you forget to ask a foundational question. It allows for a checklist of activities to be addressed at the intake. The application allows for the taking of a photograph of your client, which is extremely useful for everyone that may touch the file. Once the file is completed, it can be exported in PDF, CSV, XML, or HTML through Dropbox.

Many people assume that Powerpoint and Slideshow presenters are for trial and not before. However, a slideshow presenter is a tool to teach. Teaching occurs from the second your client arrives until the resolution of the case. Powerpoint is the standard presentation graphics program for Windows and Mac. It is created by Microsoft and is the most widely used application for creating computer-based slide shows. Powerpoint has been around since May 22, 1990. It is not the only slideshow program, it is just the most well-known. And yes, it is now an app for the iPad.

Powerpoint  Keynote  SlideShark  OpenOffice Impress  LibreOffice Presentation

It is recommended that the user utilize the larger and more powerful desktop version of their favorite slideshow program and transfer the creations to Keynote or Slideshark for a more fluid presentation on the iPad. Find what works best for you. How can a presentation program assist in the intake? Well, the best example is a new criminal client. People do not easily understand the criminal justice system and an overview of penalties is necessary.

It is always beneficial to have a printed version of the last slide to hand to the client after reviewing the law with them. On the printed version, you can circle the potential risks for that specific client.

A different type of slideshow program is useful to walk a client through the process of a case. This is called PREZI. It is a web-based slideshow presenter that has a companion APP that works on the iPad. This slideshow presenter differs from the remainder because it doesn’t just go from slide to slide. It is fluid and allows back and forth movement with alternative steps. So,
in the image below, it would walk the client from Arrest to Expungement, step by step. Instead of just being a scary single overwhelming image, it would be a map of the possibilities for the future of the case.

Obviously, this can be done for any type of matter. The time will be in the initial creation of the slideshow. After that, the slideshow can be manipulated, added, and perfected for the newer clients. It is a time-benefit analysis that is up to the attorney. As with all technological activities, good tech takes time.

Technology takes time.

Trial presentation software on your laptop, iPad or Tablet can be useful at the client consultation. The software will be discussed in more detail in the Trial Presentation Chapter. We will discuss trial presentation software for use at trial later in the book. For now, the attorney can take the screenshot from Google Maps that we did before the client arrived at the office and place it into Trial Director, Trial Pad or another Trial Presentation software with annotation ability. Note: Trial Director’s App is free.

You add it to a slideshow presentation program and pull it up for the client. Here, you can utilize the touch function of the laptop, iPad, or mouse to have the client describe and draw what transpired at the accident scene. Then you can save the markings for your digital file.
Family attorneys may feel that the investment in trial presentation software is not worth the one-time expense. Although we rarely complete trials, and will likely never need to diagram an intersection as it is displayed above, the organizational advantage you receive from using these applications may be well worth the purchase price. These applications have capabilities that far exceed trial presentation in a Courtroom. Family practice tends to be very paper heavy, particularly when there is a motion or Order to Show Cause including bank records, phone records, medical records, school records, etc. We are asked to refer to those exhibits on our feet in oral argument, which can result in long pauses, references to exhibit lists, and flipping through pages and pages of binders. Why not use a more efficient approach?

While organization for a motion is not the intended purpose of TrialPad®, by scanning in motion exhibits, tagging them in the file, and then having them on an iPad at counsel table, oral argument can be more fluid. Without this method of organization, counsel may be left to rifle through a binder and consult a two-page exhibit list before responding to a question or supplementing an argument. With a simple tap of the finger on the exhibit and swiping motion to the desired page of the document, responses in oral argument transition from fragmented to smooth, without any pause in argument.

Advise Your Client about Preservation of Electronic Evidence

“Millions of people with Internet access can disseminate information today in ways that were previously unimaginable.”134

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From the start of a matter, it is imperative the attorney advise his or her client as soon as possible of the obligation to preserve electronic data, as well as hard copy documents. Although we will later discuss spoliation sanctions and other ethical issues that may cause an attorney to lose sleep, it is vital to remember the obligation to preserve potentially relevant evidence. To comply with these obligations, we recommend that counsel educate their clients or prospective clients of the need to preserve electronically stored information as soon as possible. This must be raised to protect both your client and yourself.

Attorneys are obliged to instruct their clients to preserve all information that is reasonably related to foreseeable litigation by implementing what is commonly called a “litigation hold” to ensure the preservation of potentially relevant documents. This requires a party or a potential party to “identify potentially relevant sources of information, implement procedures to retain that information, and produce information responsive to discovery requests.” Even if your client does not have physical possession of potentially relevant documents, the preservation obligation also extends to third parties that maintain such documents under your client’s possession, custody or control. In Haskins, the District Court extended the duty to preserve and institute a litigation hold to independent title agents of First American Title Insurance Company who were contractually required to preserve information for First American upon its issuance of a preservation directive.

This preservation obviously requires a party to avoid destroying evidence, wiping all the data from a smart phone or a computer, erasing a video or allowing video evidence to be

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136 Id. (citing Zubulake v. UBS Warburg, L.L.C., 229 F.R.D. 422, 432-33 (S.D.N.Y. 2004)).
137 Id. at 13-16.
138 Id.
It applies to communications, such as text messages, e-mails, intra-office instant messages (IMs) and voice messages. IM and text message usage – both personally and at work – is expanding at a rapid rate, and IMs are starting to overtake text messages. In recent years, discovery disputes concerning text messages and IMs and – to a lesser extent – voice messages, have increased, and so have court decisions addressing whether there is a duty to preserve this data. This data does not just present a preservation problem for companies because it is ephemeral, but it also presents a discovery problem because its frequently personal and informal nature can result in highly-damaging discovery information. With respect to IMs, the data is also frequently stored with third-parties, and can present significant security and retention issues for a company.

143 Although the authors were unable to find a New Jersey state or federal case specifically supporting the proposition that relevant or potentially relevant IMs should be preserved (subject, of course, to the preservation and discovery standards outlined herein), the notion makes logical sense, and the following out-of-jurisdiction changes stand for that proposition: Saliga v. Chemtura Corp., No. 12-832 (D. Conn. Nov. 26, 2013) (“The plaintiff next complains that the defendant ‘intentionally failed to produce Instant Messaging documents that are known to exist.’ The motion to compel is granted. The defendant has no objection but stated both in its opposition and during oral argument that it does not retain instant messages and therefore has no responsive documents.”); UPMC v. City of Pittsburgh, No. 13-563 (W.D. Pa. Oct. 25, 2013) (“ESI means any electronically stored information, file or data including but not limited to… voice mails, instant messaging”); Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 177 n.4 (S.D.N.Y 2004) (“At least some Instant Messenger programs have the capability, like e-mail, of storing messages.”). But see Lakes Gas Co. v. Clark Oil Trading Co., 875 F. Supp. 2d 1289, 1311-12 (D. Kan. 2012) (refusing to grant sanctions where the loss of email and IMs at a time when litigation was imminent was inadvertent and the prejudice claim was largely speculative).
The preservation obligation also carries over to any Internet activity, including websites maintained or controlled\textsuperscript{145} by the client and their usage of any social media website.\textsuperscript{146} While it is always recommended that a litigation hold be quickly initiated and communicated through a letter directed to your client and the relevant information custodians,\textsuperscript{147} the preservation obligation continues after that moment. “A party’s discovery obligations do not end with the implementation of a litigation hold. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.”\textsuperscript{148}

Furthermore, while a client’s good faith adherence to its document retention policies used in the regular course of its business may provide some protection in avoiding spoliation sanctions\textsuperscript{149} or at least in decreasing the severity of the sanctions that may be imposed,\textsuperscript{150} we must all understand that blind adherence to such a policy is frequently a mistake. Rather, our


\textsuperscript{147} A custodian, or “record custodian” is defined as “[a]n individual responsible for the physical storage and protection of records throughout their retention period. In the context of electronic records, custodianship may not be a direct part of the records management function in all organizations. For example, some organizations may place this responsibility within their Information Technology Department, or they may assign responsibility for retaining and preserving records with individual employees. See Record Owner.” The Sedona Conference Glossary, supra note 21, at 45. A “record custodian” also incorporates definition of a “record owner,” which is defined as “[t]he subject matter expert on the contents of the record and responsible for the lifecycle management of the record. This may be, but is not necessarily, the author of the record. See Record Custodian.” Id.

\textsuperscript{148} Major Tours, 2009 U.S. Dist. LEXIS 97554, at *9 (citing Zubulake v. UBS Warburg, L.L.C., 229 F.R.D. 422, 432 (S.D.N.Y. 2004)).


\textsuperscript{150} State Nat’l Ins. Co. v. County of Camden, No. 08-5128, 2012 U.S. Dist. LEXIS 38504 (D.N.J. Mar. 21, 2012) (affirming Magistrate Judge’s decision to impose spoliation sanctions in the form of fees and costs – but not granting an adverse inference instruction – due to the failure to implement a timely litigation hold, the failure to disable an automatic email deletion program, and the failure to preserve copies of backup tapes).
clients still have an independent obligation to ensure that potentially relevant documents are not destroyed or made inaccessible. Thus, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.”

Of course, once a duty to preserve is triggered, it is important that counsel query his or her client as to the location of potentially relevant ESI and routine document retention policies so they may be suspended or addressed with your adversary and the Court at an early stage. If this information is not developed early on, then potentially relevant ESI may be spoliated, leaving both the client and counsel vulnerable to future spoliation sanctions. On the other hand, by exploring these issues at an early stage, you preserve your ability to raise them with your adversary and the Court, giving yourself and your client the option to consider potential cost-cutting or cost-sharing options if it appears that certain ESI is inaccessible, or the preservation and retrieval of it is unduly costly or burdensome.

The failure to abide by a routine document retention policy when a duty to preserve evidence has been triggered may also be considered by the court in deciding the appropriate spoliation sanctions to impose. Even if the failure to suspend routine document retention/destruction policies does not ultimately cause a court to impose spoliation sanctions, it can still lead to future data recovery expenses that are quite costly and could have been avoided through the proper implementation of a litigation hold.

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152 See Wachtel 239 F.R.D. at 385-88 (where outside counsel had the client’s employees search their own emails even though outside counsel was unaware of the client’s practice of putting e-mail on backup tapes 90 days after creation, “making it impossible for most employees to access the e-mails through a search of their own.” In addition, outside counsel was not aware that the client permitted its employees to delete e-mails within 30 days of creation or receipt.).
153 Id. at 387, 387 n.6.
154 Kounelis, 529 F. Supp. 2d at 519 n.5.
Oftentimes, it is possible to forensically image the system or necessary files\textsuperscript{156} for preservation early in the process, preserving the ESI as well as its metadata. This will most likely require the use of a third-party vendor or forensic service. Generally speaking, the courts allow the party to determine the method for good faith management, preservation and production of their electronic information.\textsuperscript{157} Of course, a client will want to know which technological investigations or expert opinions are likely applicable to their case, whom you recommend, and what it will cost them.

\textbf{The attorney and client have an obligation to preserve}

Remember, the duty of preservation arises when a party becomes aware of the possibility of litigation.\textsuperscript{158} Odds are, the possibility of litigation already started if they are meeting with an attorney. Please refer to the “Preservation Letters” section of the following chapter for additional information on the duty of preservation.

\textbf{Questioning the Client about ESI and Social Media}

No matter your area of law, you need to know your client. This includes their use of social media and other electronic mediums. Adequate preservation, collection, review, and

\textsuperscript{156} In this context, an “image” is defined as follows: “[t]o image a hard drive is to make an identical copy of the hard drive, including empty sectors. Also known as creating a ‘mirror image’ or ‘mirroring’ the drive. See Bit Stream Backup, Forensic Copy and Mirror Image.” The Sedona Conference Glossary, supra note 21 at 29. A “bit stream backup” is “[a] sector-by-sector/bit-by-bit copy of a hard drive. A Bit Stream Backup is an exact copy of a hard drive, preserving all latent data in addition to files and directory structures. Bit Stream Backup may be created using applications such as Encase, Snapback, and Ghost. See Forensic Copy.” A “forensic copy” is defined as: “[a]n exact copy of an entire physical storage media (hard drive, CD-ROM, DVD-ROM, tape, etc.), including all active and residual data and unallocated or slack space on the media. Forensic copies are often called ‘images’ or ‘imaged copies.’ See Bit Stream Backup and Mirror Image.” Id. at 23. A “mirror image” is defined as “[a] bit by bit copy of any storage media. Often used to copy the configuration of one computer to another computer or when creating a preservation copy. See Forensic Copy and Image.” Id. at 34.


\textsuperscript{158} Major Tours, 2009 U.S. Dist. LEXIS 68128, at *8 (quoting Zubulake, 220 F.R.D. at 218).
production of social media content may require specialized attention and cooperation.\(^{159}\) The same goes for your client’s other ESI. Obviously, there are different questions that need to be addressed with corporate clients rather than with individual clients.

Start simple. Focus on interviewing your client and any other individuals involved in the case who are within your client’s control, like relevant employees, custodians and IT personnel.

E-Mail: Find out what e-mail service or services they are using, if they have an e-mail server, what software they are utilizing to access their e-mail, policies they are utilizing, if any, to archive their e-mails, and how they determine when to empty their deleted e-mail bins. You should also ask whether anyone else has access to those e-mail systems, whether they use a third-party “cloud” webmail service (like Gmail or Yahoo), or whether e-mails are automatically loaded to a computer through a program such as Outlook, iMail or Lotus Notes. It is important to stress to clients the importance of understanding their individual e-mail system.

If your client is accessing their web-based e-mail from a shared computer, your client should be particularly careful. Family Courts have consistently held that there is no expectation of privacy on a shared computer, such as a computer located in a common area of a household where other individuals in the household have access to the computer system and the files are not password protected.\(^{160}\) Your client should be aware of whether their e-mails are automatically saved to the hard drive of a shared computer.

Attorneys should confirm whether their client has an email server, such as Microsoft® Exchange, which is “widely used by enterprises using Microsoft® infrastructure solutions. Among other things, Microsoft® Exchange manages email, shared calendars, and tasks.”\(^{161}\) Microsoft® Exchange 2007, 2010, 2013 all have varying degrees of retention hold or litigation hold functions that your client can institute to help satisfy not all, but some portions of its preservation obligations. Again, although this is a convenient way to help meet some of your clients’ preservation obligations, it is always recommended that you confer with your clients’ IT specialist in conjunction with a reputable E-Discovery vendor to ensure you are instituting a

\(^{159}\) The Sedona Conference: Primer on Social Media (2012), available at https://thesedonaconference.org/publication/Primer%20on%20Social%20Media


\(^{161}\) The Sedona Conference Glossary, supra note 21 at 21.
proper litigation hold and not causing the intentional or inadvertent spoliation of potentially relevant information.

Computers (including laptops): Find out how many they have; what they are utilized for; the operating system; make and model numbers; storage capacities; external hard drives; brands and versions of software, if applicable; whether it is owned by themselves or a company; whether it is used by others; if so, whom; if they are utilizing a backup system; and whether their computers have been formatted or cleaned of data. Additionally, find out the physical location of the computer and, if it is portable, the usual storage place for the computer. You should also ascertain whether your client has a specific computer (laptop or desktop) usage policy in place, if it’s written, what its terms are, and how and when they have been amended or modified.

Portable Data Storage: Besides internal hard drives in the computers addressed above, you are also to ascertain each employees’ portable storage media, such as flash drive, zip drive, thumb drive, external drive, CDs, DVDs, fileservers, etc.; whether the portable storage media is individually or company owned; the location of the portable storage media; and the usage of the portable storage media (i.e., was data transferred in any way to or from the device?). You should also ascertain whether your client has a specific portable data storage policy in place, if it’s written, what its terms are, and how and when the policy has been amended or modified.

Backups: Find out if there are using a backup system; if so, what type; if the backup is in the cloud, get the contract and contact information; if there is a hard backup (tape, server, external hard drive), determine the make and model, and determine its accessibility; preservation rules and policies in effect; whether the backup is indexed; whether and how often and the manner in which the backups are stored, purged, recycled and/or overwritten, if at all. You should also ascertain whether your client has a specific backup data policy in place, and if it’s written, find out its terms, and how and when the policy has been amended or modified.

Mobile Devices (Smart Phones/Tablets/PDA)s: Find out the make and model number; the service provider; software/operating system; which computer allows syncing of information with the device; tracking information; whether data is stored on the devices; whether device
data is also stored on shared drives that are more readily accessible; and GPS capabilities. You should also ascertain whether your client has a specific mobile device usage policy in place, and if it is written, what its terms are, and how and when the policy has been amended or modified.

Again, you should ascertain whether your client has a policy in place governing the usage of this software, what its terms are, and how and when the policy has been amended or modified.

Database Files and Usage: Determine if your client uses searchable data repositories, such as Oracle, SAP or even cloud-based “Software-As-A-Service” (SaaS) systems, and ascertain whether standard reports are prepared. By way of background, databases are normally unique and customized for a specific task or system owner. In addition to containing structured data (as opposed to unstructured data like e-mails, word processing documents or slide presentations), “[d]atabases contain: (1) multiple pieces of discrete information; (2) subdivided into data elements (also known as fields) or data records; and (3) stored in a common format and repository, such as a database or field-delimited data file.” Database systems combine data and software, with the most common scenario being a three-way combination of a database engine, a database application accessed by business users, and a database storage file that holds substantive information entered into the database (i.e., database field content). Since many attorneys (this one included) have a difficult time understanding the impact, preservation and production requirements associated with potentially relevant database information, in addition to familiarizing yourself with the sources identified in n. 106, it is highly recommended that you confer and address this issue with your client’s IT personnel and an E-Discovery expert in the event your client does use a database system. Again, you should ascertain whether your client has a policy in place governing the usage of its database(s), if it’s written, what its terms are, and how and when the policy has been amended or modified.


163 The Sedona Conference Database Principles, supra note 106 at 2.
Internet (non-social media): Find out if they have a website; if they have a blog or vlog; the service provider they utilize; their browsing software; when they last cleaned their internet cache; if they have bookmarks; and whether your client has a policy governing the usage of the Internet or maintenance of any such website, what its terms are, and how and when the policy has been amended or modified.

Internet (Social Media): Find out what social media sites they access; the social media sites on which they have profiles; social media sites that may contain photos, videos, and audio information depicting them or relevant data to the case; whether they have deleted any social media profiles and, if so, when and why; the best way to retrieve their social media data; and whether your client has a policy governing the usage of the Internet, what its terms are, and how and when the policy has been amended or modified. If your client is a business that maintains its own social media presence, you should ask the same questions concerning the usage of the business’ social media sites and also ascertain the identity of the individuals who have access to the company sites themselves.

Estate Planning in the Digital Age for Virtual Assets

There’s a new wrinkle in estate planning these days: planning for the disposition of virtual (or digital) assets. Most people understand the importance of having a will stating who will inherit their assets when the time comes. However, in today’s ever changing world with technology having people do more transactions over the Internet expanding your will to include who will receive access to your virtual assets is equally important. Consider this scenario: a business owner dies before addressing the disposition of the company’s digital assets. As a result, no one has the legal right or information necessary to access key parts of the business such as its website, online bank accounts, business e-mail accounts, customer lists or automatic debits which are used to pay vendors. The virtual assets of the business are in limbo, including several social media profiles and all the information (photos, documents, medical and financial information, etc.) all of which are password protected. The business in this situation may survive the owner’s death, but not without some disruption while access to online business accounts is sorted out and passwords are either figured out or reset. The family of the business owner will also have some hoops to jump through which could have been avoided with some planning.
Planning Tips for the Estate Planning Practitioner

The estate planning practitioner should be cognizant of digital assets and digital accounts and prepare accordingly. An initial estate planning questionnaire should include questions about the client’s digital assets. These digital assets can include personal assets stored on a computer or smart phone, digital pictures uploaded to a website, social media profiles, financial accounts or even virtual “money” in games such as World of Warcraft or Second Life. Individuals may have many different usernames and passwords for their accounts in order to protect their assets and to secure identities but this protection of personal information can wreak havoc on families upon incapacity or death. Because so much information is online you need your executor to have access to this information upon your death. Therefore, individuals need to develop an inventory of these assets, including usernames, passwords, and answers to “secret” questions.

Careful storage of the inventory document is essential. Giving a family member or a close friend this information while alive can lead to problems such as accusations of misappropriation of funds or the ability for someone to steal money. Therefore, a separate document with digital asset information should be safeguarded with the will or durable power of attorney.

A problem may also arise if the client does not actually own the digital asset but merely has a license to use that asset while alive. If a person has a license to use the asset but does not own the asset they will be unable to transfer the digital asset. Virtual assets such as music, movies, and books they have purchased in electronic form may not be transferrable since they are not owned but merely licensed to the user while “old school” CDs, DVDs, books, etc. can be transferred without difficulty. It has been reported that actor Bruce Willis wants to leave his large iTunes music collection to his children but that Apple’s user agreement prohibits him from doing so.

Digital assets and their use are routine in today’s society. There are many complications regarding planning for digital assets and there is a lack of guidance from the legislation, but all clients need to understand the ramifications of failing to do so. Estate planning attorneys need to comprehend that this area is new and still developing. Cases will arise regarding terms of service agreements and rights of beneficiaries. Until the courts and legislatures enact the necessary laws
to protect digital assets for the deceased, estate planners must be careful and diligent in planning for these easily overlooked assets.
CHAPTER 5: After Accepting Case

Managing the File Prior to Suit

Working with a Case Management System

Your file at your fingertips; a case management system provides the attorney instant access to the information necessary to work with a particular case file. Think of the system as providing the metadata of your case file: name of client; address; phone; e-mail; list of relatives; summary of case; summary of issues; access to the adversaries name, number, address (without having to yell to your staff); access to your last demand or discussions; all relevant dates organized (deposition scheduling, pleading filings, records requests, etc.); checklist of to-do items; docket #, Court Name; Judge’s Name; number, staff number; notes; etc.

The checklists allow attorneys to check on the assignments they provided to other attorneys, staff, and themselves. Most case management software also provides access and organization of your digital file folder in a view similar to the organization of hard copy files.

Most case management software programs are completely customizable and allow for report generation on top of immediate case information. They can compile lists that explain referring attorneys over the course of months or years. They can compile lists of active cases assigned in a particular area of law or to a particular attorney. Report generation also provides a way to protect against any statute dates that may sneak up on an attorney.

Most case management software programs will integrate with e-mail providers (Outlook) and provide a way to organize e-mails and preserve communications throughout a matter. This can be critical if a particular communication becomes contested.

Preservation Letters to Potential Adversaries and Other Third-Parties

Immediately following retention by your client, consider whether you should prepare a preservation letter that should be sent to all potential adversaries and anyone who could be in possession of relevant ESI. This includes any law enforcement agencies, any stores in the area where an incident occurred, phone companies, vendors, contractors, witnesses, etc. This is incredibly important because this type of evidence is frequently evanescent. Many types of
hardware containing ESI are programmed to erase automatically to save storage space if not specifically marked to be saved or downloaded to another storage medium.

It is a vital step that most attorneys have failed to implement. However, simply notifying your adversary of their obligation to maintain ESI as litigation has commenced will establish a “starting point” for future discovery. The content of a preservation letter will obviously change depending on the area of law and complexity of the issues of each case.

**Social Media Overview (Investigation)**

Social media may contain vast troves of information from communications to pictures. Just because information exists does not make it easily accessible. But this is not an excuse to neglect to look for such information. As discussed in the earlier chapter on social media, you can learn a lot about a person or corporation by browsing their public social media sites. Also, you may eventually get to peak behind the privacy settings if there is a relevant reason to do so. However, to start your analysis of social media in a discovery setting, it is important to remember the concerns of relevancy and information that reasonably appears calculated to lead to the discovery of admissible evidence. 164 Relevancy requires a “tendency in reason to prove or disprove any fact of consequence to the determination of the action.”165 Obviously, both

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164 N.J. Ct. R. 4:10-2(a); FED. R. CIV. P. 26(b).

165 N.J. Ct. R. 4:10-2; In federal court, FED. R. CIV. P. 26(b)(1) establishes a similar standard:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).
terms will apply to different things in different cases. If you don’t look, you should assume that your adversary will. It is also possible that the court\textsuperscript{166} will look and also the jurors.

Luckily, New Jersey Courts construe discovery liberally. This will be further explored later in the book. Yet, social media is considered by many non-lawyers to be private. Amazingly, internet communications, which would seem public communications by their sheer publication on a third-party machine, are continuously a battle to obtain. The area of the law is new and contradictory. For now, it truly depends on which Judge is handling which case and what attorneys are arguing for and against the production. Social media discovery is not a complicated process. People should not fear the information. Access to the information, may actually lead to the truth. Ok, so, I guess it may be something to fear. But isn’t that the same with any piece of relevant documentation? Whether the requested information is contained on a website, a social media hub, a physical document, or a group document; relevancy and the whether tending to lead to admissible evidence are the concerns.

Does this provide a litigant the unfettered ability to access information that is hidden behind privacy settings and passwords? No. “A party would not be permitted to examine, for example, the diary, or personal journal of a litigant, just to see if there’s something there that might lead to admissible evidence. There needs to be some preliminary showing of relevance before that kind of fishing expedition will be permitted.”\textsuperscript{167}

If you have a difficult adversary raising internet privacy arguments, you may have a response in law and in fact. Looking at fact, your pre-trial discovery investigation may provide you the information which almost required piercing any alleged internet privacy protection.

Discovery can lead to additional discovery. As with the review of most discovery, a smoking gun may not exist. But with social media, the smoking gun has become easier and easier to find.

\textbf{If you don’t look, you’ll never find anything}

\footnotesize{\textsuperscript{166} In Purvis v. Comm’r of Soc. Security, No. 09-5318, 2011 U.S. Dist. LEXIS 18175 at *19-20 n.4 (D.N.J. Feb. 23, 2011), the court wrote, “[a]lthough the Court remands the ALJ’s decision for a more detailed finding, it notes that in the course of its own research, it discovered one profile picture on what is believed to be the Plaintiff’s Facebook page where she appears to be smoking[…] If accurately depicted, Plaintiff’s credibility is justifiably suspect.”}

\footnotesize{\textsuperscript{167} Michael Warshaw, The Discovery of Social Networking: Production and Spoliation, (2012).}
Ethics of Social Media Investigation

When talking about social media, it is always important to look at potential ethical problems; some which may be thrust upon an attorney by their own client. There are difficult problems when a lawyer learns that the client has improperly gained access to an opposing party’s social media content or accounts. There are even more problems when an attorney or staff interacts with opposing parties.

Generally, a lawyer may not pose and falsely befriend someone to gain information for the purposes of litigation under N.J.R.P.C. 4.1 and N.J.R.P.C. 4.2. Guidance may be drawn from advisory opinions issues by our neighboring states, Pennsylvania and New York. The Philadelphia Bar Association Professional Guidance Committee issued an advisory opinion indicating that a lawyer may not direct a non-lawyer to falsely befriend a witness on a social media website for the purposes of investigation. The Committee, relying on N.J.R.P.C. 5.3 and 8.4, required full disclosure for the purpose of the communication. The Philadelphia Bar Association Professional Guidance Committee Advisory Opinion also concluded that an attorney may not induce the third-party to permit access by concealing facts. Therefore, the Philadelphia Bar Association has found that a lawyer violated N.J.R.P.C. 8.4 when the lawyer hires a 3rd party to go online and gain access to a person’s information and Facebook by asking to be their “friend.”

On the other hand, in 2007, the New York City Lawyers Committee on Professional Ethics issued Formal Opinion 737 finding that a non-government lawyer may hire an investigator to use dissemblance techniques to gather information relating to a good faith claim of a civil rights or intellectual property violation. The opinion found, similar to the Philadelphia opinion, that dissemblance techniques should not be used in any other fashion.

Two other New York ethics decisions from 2010 concluded that a lawyer could befriend a witness in the lawyer’s own name without disclosing the reasons for the request as long as

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169 Philadelphia Bar Assoc. Ethics Op. 2009-02 (which is a non-binding advisory opinion).
170 Available at http://www.nycla.org/siteFiles/Publications/Publications519_0.pdf
there was no deception involved.\textsuperscript{171} In addition, a New York ethics opinion found that as long as a lawyer does not engage in deception to obtain access to a social network, the lawyer may access a party’s public social media profiles to obtain evidence for use in pending litigation.

Unlike New York, the San Diego County Bar Association Legal Ethics Committee in 2011, concluded that an attorney’s duty not to deceive prohibits sending a friend request to a represented third parties without disclosing the purpose of the request.\textsuperscript{172} Note, as of 2011, in California, online impersonation of an actual person is a crime under the Penal Code.\textsuperscript{173}

Although there is no definitive case yet in New Jersey, it is obvious that there soon will be:

\begin{center}
\textbf{NEWS}
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\textbf{When 'friendning' is hostile}
N.J. Lawyers in trouble for allegedly urging paralegal to 'friend' plaintiff on Facebook
By Mary Pat Gallagher | Contact | All Articles
New Jersey Law Journal | September 6, 2012
\end{center}

When information is publicly available, a lawyer is entitled to obtain that information.\textsuperscript{174} In the opinion, the Bar Association reached the conclusion that, “[a] lawyer who represents a client in pending litigation and who has access to the Facebook or MySpace network used by another party in the litigation, may access and review the public social network pages of that party to search for potential impeachment material.” As long as a lawyer does not “friend” the other party or direct a 3\textsuperscript{rd} party to do so, accessing the social pages will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or

\begin{footnotes}
\textsuperscript{171} Comm. on Professional and Judicial Ethics, Op. 2010-2 (September 2010). \textit{available at} \url{http://www2.nycbar.org/Ethics/eth2010.htm}
\textsuperscript{173} CAL. PEN. CODE §§ 528-539, \textit{available at} \url{http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=528-539}
\textsuperscript{174} New York State Bar Assoc. Op. 843 (September 10, 2010).
\end{footnotes}
law), or Rule 5.3(B)1 (imposing responsibility on lawyers for unethical conduct by non-lawyers acting at their direction).

Again, as we have mentioned throughout this book, an attorney should not engage in investigations which may cause them to be a witness at trial. Should an attorney locate information on any website, including a public Facebook page, it would be prudent and responsible to bring an expert or other individual in to retrieve that information and be able to testify to the method by which it was obtained and the authenticity of the document presented.

Just as an attorney cannot “friend” someone to obtain access to their information, your client should not be creating false names or personas, or convincing other individuals to obtain electronic information on their behalf. Remember, your clients are emotional, they are angry, and they will need you to remind them of appropriate, ethical behavior. Therefore, if you intend to use any part of a social media posting, it is good practice to confirm the source of the information and to confirm the authenticity of the reproduction (print out, PDF, screen shot, etc.) with the individual who obtained the information. If your client simply provides you with a print out of a Facebook page, and the content is not public, you should be prepared to authenticate, confirm a chain of custody, and have the individual who obtained the information testify to the method by which they obtained that information. It is tempting to take the printouts from your client and attach it as an exhibit to a motion, but a prudent attorney will not only ask, but confirm how the information was obtained before using it in any Court proceeding.

For the family law practitioner, it is important to remember that your clients may be engaged in online activities that require creating a personal profile, such as use of professional networking and online dating websites. In doing so, they are creating public profiles and posting significant personal information about themselves which is easily discoverable. As with networking and dating in “real life”, clients may be tempted to exaggerate certain aspects of their personal life to attract employers, clients or suitors. While clients are welcome to explore new employment and social options, any representations they make about themselves or their business can haunt them throughout litigation. For instance, information regarding business representations (or misrepresentations), employment, travel habits, lifestyle, and custody can
become the subject of motions to compel, support motions, custody disputes, and proof of infidelity to name a few.

Family law practitioners need to be cognizant of other “meet up” websites as well, such as AshleyMadison.com, which is a website specifically geared toward adults who wish to engage in “no strings attached” extramarital activities. As with most activities in life, there are expenses that accompany services like the one mentioned above. Unlike other areas of law, there is a microscope placed on the personal spending habits of individuals engaged in family law matters. Online dating and meet up websites can be costly on a monthly basis, and use of marital funds to engage in extramarital affairs can be a significant cause for controversy. Another site to keep in mind for purposes of alimony or child custody is theknot.com, on which a bride-to-be can create a registry, keep track of their wedding budget, bridesmaids dresses, caterers, etc.

A lawyer cannot communicate with a person the lawyer knows to be represented without the consent of the represented party’s lawyer. The prohibition extends to any agents acting on the lawyer’s behalf. As a result, a lawyer should not “friend” someone who is represented by counsel via social media in order to obtain access to that person’s social network. Rather than “friend” the person, see what information is publicly available. Options such as accessing the person’s groups, communities, or fan sites might enable the attorney to ethically learn more information that is publicly available.

The person being investigated might be able to view who has researched them. For instance, LinkedIn has a feature that permits users to see who has viewed their profiles recently. Snooping while logged in under your own name may reveal your investigation activities.

The Oregon State Bar Association issued an opinion that concluded that publicly viewable information can be accessed by opposing counsel, but written communications (including friend requests) to represented parties are prohibited. The Oregon decision requires counsel to abide by Rule 4.2 in communicating with parties known to be represented by counsel. However, the opinion also permits counsel to rely upon publicly available information.

175 Model Rules of Prof’l Conduct R. 4.2.
Similarly, the San Diego County Bar Association Legal Ethics Committee concluded that ethical rules prohibit an attorney from sending friend requests to high-level executives at a corporation, which was a represented party under Rule 1.10.177

**New Jersey Facebook Cases**

So, are social media sites like Facebook being utilized in cases? Yes. And is it beneficial? Yes. Evidence derived from Facebook has been found in all types of litigated matters. Here are some examples from New Jersey’s State and District Court that may get an attorney thinking during the investigation stage of their matter:

*A.Z. & B.Z. v. John Doe*178 is an Appellate Division case about a parent trying to find the identity of an anonymous author of an e-mail, sent to the faculty advisor, which indicated that on Facebook there were posted photos of her underage child, who had been a member of the anti-alcohol group, Heroes and Cool Kids, breaking the law by engaging in consumption of alcohol. The Appellate Division felt it necessary, probably for future generations trying to grasp the concepts of today, to explain what Facebook was: “Facebook is a social networking Internet website on which users routinely post photographs of themselves.” John Doe’s certification in response was clever and important “[John Doe] had seen several other photographs of plaintiff on www.facebook.com, all of which showed plaintiff ‘holding and drinking alcoholic beverages’ [...] is obvious to anyone looking at these photos that plaintiff is consuming alcohol with her friends, and therefore, because of her age (under 21 years of age), is breaking the law.” Photos were attached to the certification showing Plaintiff’s child holding bottle of Corona Light beer to her mouth, twisting the cap on a bottle of Smirnoff Vodka, and holding a mixed drink in each hand. All photos had been uploaded to Facebook by Plaintiff or Plaintiff’s sister. The Appellate Division utilized these photographs to hold that “it [is] abundantly clear that if there was any doubt about the truth of Doe’s assertion that plaintiff was ‘breaking [her] contract[, and breaking the law,’ these additional photographs lay any such doubt to rest.” And since truth

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is a defense to defamation, a case that began with an e-mail ended because of photos posted on Facebook.

*Cruz v. Seton Hall University*\(^{179}\) was an odd case because it involved the posting on a Facebook profile that Plaintiff was homosexual and assigned a dorm room, at a religious college, with a heterosexual roommate. The battle started with room-transfer requests and uncomfortable roommates. Seton Hall actually attempted to resolve the issue and provided opportunities for new rooms which were declined. The suit involved discrimination and various other claims. Summary Judgment was granted in favor of Defendants. Although the final determination of the matter did not involve Facebook, it demonstrates how Facebook has made the facts of a person's life public.

*Ehling v. Monmouth-Ocean Hospital Service Corp.*,\(^{180}\) which will be delved into in more detail in subsequent chapters, is a case where Defendant was alleged to have forced an employee to gain access to Plaintiff’s Facebook page, viewed and copied Plaintiff’s postings, and reported a politically-charged posting regarding not providing treatment to a mass murderer that Plaintiff made. Plaintiff sought damages for invasion of privacy, violations of NJ’s wiretap law, and violation of the Stored Communication Act. There were two decisions by the court, one in 2012\(^\text{181}\), pre-discovery, and one in 2013\(^\text{182}\), post-discovery.

In 2012, Defendant had filed a Motion to Dismiss. The Court held that Plaintiff had stated a plausible claim for invasion of privacy, especially given the open-ended nature of the case law and that Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. Further, the Court stated “more importantly, however, reasonableness (and offensiveness) are highly fact-sensitive inquires. Therefore, matters will be decided on a case-by-case basis dependent on the facts. As such, these issues are not properly resolved on a motion to dismiss.” However, the Court held that a Facebook posting is not considered to be in


“electronic storage” as defined in the Wiretap Act, because it was posted on the website, to be reviewed by the poster’s “friends” and, thereby, is in post-transmission storage.\textsuperscript{183} The Wiretap Act required the collection to be in the course of transmission.

In 2013, after discovery, Defendant renewed its motion to dismiss. It was determined that Plaintiff had 300+ friends, her page was set to private, her coworker was a friend, the coworker took the screenshot without coercion from Defendant, and the coworker had given the screenshots to the Defendant voluntarily. The Court held that “non-public Facebook wall posts are covered by the Stored Communications Act.” But, because the coworker had access, the actions fell under the authorized user exception. Therefore, there was no violation. Next, the Court addressed the invasion of privacy claim and looked at the two factors: whether three was intentional intrusion and whether the intrusion would highly offend the party. Here, the coworker had access to the information and was not intruding and the fact that a party copied a posting if not highly offensive. It was a “violation of trust, but not a violation of privacy.”

In \textit{H.L.W. v. Dawson}\textsuperscript{184}, Defendant appealed from a Final Restraining Order restraining him from contacting Plaintiff or her children. Defendant had contacted her through her business’s Facebook page. The Trial Court, in issuing the F.R.O., referenced that Defendant had accessed Plaintiff’s Facebook page three times in the span of twenty-four hours. The Court felt that this, coupled with significant additional facts of a troubled relationship, constituted harassment. The Appellate Division affirmed.

\textit{In re Toppin}\textsuperscript{185} and \textit{In re Kaminsky}\textsuperscript{186}, both addressed in detail later in the book, demonstrate that jurors, inappropriately, accessed information on the internet during their service and deliberations.

\textit{J.M.M. v. A.P.}\textsuperscript{187} was a matter where Defendant was appealing the issuing of a Final Restraining Order. After the unraveling of a complex web of multiple sexual relationships and

\textsuperscript{183} Id.
\textsuperscript{186} In re Kaminsky, No Number in Original, 2012 N.J. Super Unpub. LEXIS 539 (Ch. Div. Mar. 12, 2012).
cheating, J.M.M. and T.P. decided to take A.P.’s clothes, set them on fire, take a photograph and post it on Facebook. A.P. then responded by hitting them both with a steel baseball bat. Needless to say, that escalated rather quickly. A.P. claimed self-defense. The trial court and the Appellate Division rejected the arguments and found assault by a preponderance of the evidence leading to affirming the issuance of a protective order.

*J.S. v. D.G.*188 is another appeal of a Final Restraining Order. Here, Facebook postings were utilized. Plaintiff elaborated that defendant had posted statement on Facebook asserting that she had multiple personalities and has the ability to create problems. Defendant admitted the Facebook posting. The trial judge found “defendant’s undisputed prior Facebook posting was a ‘reason for [plaintiff] to be alarmed’ and his following of plaintiff in his car was not stalking but was additional harassment, warranting the grant of a restraining order.” The Appellate Division, however, stated “though defendant’s Facebook posting was nothing to be proud of, the judge never explained how it objectively arose to the level of ‘alarming’ or ‘seriously annoying’ comments so as to be ‘extremely harassing’ and not just the ramblings of a disgruntled, potentially ex-boyfriend. We are satisfied the type of conduct testified to at trial is not of sufficient magnitude to constitute acts of violence but, rather, falls more into the category of ‘domestic contretemps,’ which does not warrant issuance of a restraining order.”

*Katiroll v. Kati Roll*189 is an amazing case regarding spoliation of Facebook information. The action was for a trademark infringement of a food called katirolls. Plaintiff filed a motion for spoliation sanctions for failing to preserve Facebook pages in their original state. Interestingly, it was not Defendant that removed the pages; it was Facebook. And Facebook had removed the pages because of Plaintiff’s own take-down request. The Court in Footnote 1 states “the fact that it was not *legally* improper for Plaintiff to serve this notice (as acknowledged in this Court’s prior opinion), does not undermine the fact that it was the primary and but-for cause of the spoliation.” Aside from this removal problem, parties to litigation are required to preserve litigation evidence. Plaintiff wanted Defendant to preserve his Facebook pages in their original state as PDFs prior to their being taken down. Further, Plaintiff wanted an

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inference of spoliation because Defendant changed his profile picture on Facebook from a picture displaying the infringing trade dress without preserving the evidence. Everyone agreed that the changing of the profile picture changes the picture associated with each and every post that user has made in the past. Defendant, however, argued that the page was public and Plaintiff could have printed it at any time.

The Court held that public websites are within the control of parties who own them and this was an attempt to “pass the buck” to Plaintiff to print that which Defendants are obliged to produce. The Court noted that change of a profile picture is a common occurrence and it was hardly surprising that a party would change it during the pendency of litigation. “It would not have been immediately clear that changing his profile picture would undermine discoverable evidence.” The Court found a solution: change the picture back to the infringing picture for a brief time so that Plaintiff may print the posts it deemed relevant. The photo was never destroyed. Also, it was determined that another Facebook page was created and not identified. The Court agreed that the presence should have been disclosed but it was found independently, created in order to comply with the Court’s previous preliminary injunction, and, therefore, the sanctions were inappropriate.

The Appellate Division also dealt with the issue of not preserving infringing images from a company’s website. The Court found that a spoliation inference was warranted, due to the fact that the Court determined it was “implausible” not to have any other electronic copies of the website’s pictures on a hard drive or e-mail, unless Defendant was able to produce an image of the portion of the website that included the infringing photographs within one week of the order.

*K.M. v. C.A.F.*190 is another appeal of an entry of a Final Restraining Order. In *K.M.*, the Defendant claimed ineffective assistance of counsel for failing to submit a Facebook posting by Plaintiff’s family indicating that this was an ongoing effort to bring down Defendant. The Court held that Defendant’s claim was not cognizable as it was a civil, not criminal case, and the issue was raised for the first time on appeal without a record to evaluate the claim. That being said, the Court rejected the claim because Defendant failed to make a prima facie showing of

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ineffective assistance. The matter also references an old favorite of social media, MySpace. Defendant had contacted Plaintiff’s daughter through her MySpace account. Although this is not an example the substantive use of Facebook, this matter demonstrates how clients can deem comments in Facebook to be vital to the presentation of a case; whether they are or not.

In Layshock v. Hermitage School District, a question was raised as to whether a school district could punish a student for conduct that occurred outside of the schoolhouse when the child developed a fake internet profile of the principle on MySpace. The school punished the student and his parents brought suit arguing the punishment transcended the child’s First Amendment right of expression. The matter actually had a tortured history with the district court granting summary judgment in favor of Plaintiff, the U.S. Court of Appeals affirming the decision, then granting a rehearing en banc, and finally affirming the district court’s holding that the school’s response transcended the protection of free expression. In the concurring opinion, Circuit Judge Jordan, joined by Circuit Judge Vanaskie, states, “[f]or better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.”

In Lloyd v. Shartle, a prisoner was challenging a disciplinary proceeding for using a contraband cell phone to communicate and maintain an unauthorized e-mail account. In the matter, circumstantial evidence was presented of the DHO seeing statements on Petitioner’s Facebook account saying “I got a new phone and I’m having problems getting it turned on. Long story! I should be back on tomorrow...”and “I called u twice from the prison phone but u didn’t answer ur phone. I’ll try to hit you tomorrow, ok? Do not say anything about a cell phone.” The petition for writ was dismissed and the punishment as upheld.

Without going into depth about Mycone v. Creative Nail, Facebook statements were utilized to demonstrate that complaints were made in the commercial advertising context and

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not in the context of communications with particular individuals. This was a patent infringement matter.

Purvis v. Commissioner of Social Security\textsuperscript{194} is a unique example of the Court looking at a Facebook page, on its own, in order to research an issue at hand. The question was whether the Plaintiff has been wrongfully denied Social Security benefits. The issue at hand was the Plaintiff’s asthma. The argument isn’t as interesting as a footnote contained within. Footnote #4 has become famous for its blunt statement on judicial activity: “Although the Court remands the ALJ’s decision for a more detailed finding, it noted that in the course of its own research, it discovered one profile picture on what is believed to be Plaintiff’s Facebook page where she appears to be smoking. Profile Pictures by Theresa Purvis, Facebook, [citation provided]. If accurately depicted, Plaintiff’s credibility is justifiably suspect.”

Spectrum Produce Distributing v. Fresh Marketing, Inc.\textsuperscript{195} provides a good lesson on billing and internet research through the use of a Footnote in the matter: “The Court notes counsel’s use of ‘online investigation’ as a descriptor of billed activity. ‘Online investigation’ can mean anything from a Google search or a check of Defendant’s Facebook page to the use of a professional research database. It is a phrase with all the specificity of ‘consulted a book.’ For the Court to be able to understand (and therefore find reasonable) the sorts of activity being billed, Counsel is encouraged in the future to provide a more detailed account of what resources the ‘online investigation’ utilized.”

In Too Much Media v. Hale,\textsuperscript{196} the Supreme Court addressed the New Jersey Shield Law within the context of an online defamation case. Defendant provided an online platform for people to post unfiltered comments about the porn industry. Defendant claimed that she was a reporter under the New Jersey Shield Law. The Court found that message boards were not covered. They leave open whether websites may be covered. But a forum is merely discussion based and not news based. The Court, in holding the protection to be unavailable, stated, “Any

of [the millions of bloggers who have no connection to traditional media], as well as anyone with a Facebook account, could try to assert the privilege.”

Y.A.B. v. A.C.B.\textsuperscript{197} was an appeal of the Family Part’s order vacating court-imposed restraints on parenting time. Plaintiff utilized photographs that Defendant had posted on Facebook showing him partying at a bar, holding a bottle of beer at a child’s birthday party, five days after their divorce. Defendant denied consuming alcohol, represented that he had been sober for a significant time period. He testified that he was at the bar but was not drinking alcohol. As for the photo of him with the beer, he testified that he was holding it for his girlfriend and not drinking it. The court, held in strong language, that the court was “satisfied that plaintiff’s entire filing in this matter was devoid of factual basis and was certainly not supported by evidence such that imminent harm was likely to the children.” The court also awarded Defendant counsel fees and costs. The Appellate Division upheld the trial court’s determination but remanded the matter for a more thorough analysis to support the counsel fee award.

How to Download Facebook Archived Data

Step 1: Goto http://www.facebook.com
Step 2: Click on the 📊 symbol on the right side of the page
Step 3: Select Settings
Step 4: Under General section, click on “Download a copy”
Step 5: Click on “Start My Archive”
Step 6: Click Okay and retrieve your e-mail
Step 7: Retrieve e-mail with link
Step 8: Reenter password & Search file folders and retrieve information

How to Download Google Archive Data

Step 1: Go to http://www.google.com/takeout
Step 2: Verify your password

Step 3: Choose what data you want archived & click “Create Archive”

Step 4: Click Download

Step 5: Reenter password, open file, and search folders

Using an API to gather social media metadata

An application programming interface (API) is a site’s coding that allows certain software to interact with its system of sharing digital signaling, authentication, and information. Software programs and online programs communicate with each other through APIs. It crafts a library of information for sharing content and data between sites and applications. Photos can be shared from Flickr to Facebook. A tweet can be shared through an API on Facebook. Facebook created its own API; creatively called The Facebook Platform. These APIs allow third-party developers to create their own applications and services that access data on the social media sites. To explain the prevalence of API integration, the New York Public Library released its own digital collection API to help search, process and find information.

The concept of API integration was not for preservation but integration. However, its formation allows for monitoring and preserving data with its social metadata intact. When thinking about social media metadata, it is important to think about the process of preservation. First, the question is how to save the data from the social media streams or pages before they are removed from existence. Next, the preserved data, when saved with an API, will include metadata enabling authentication and additional details about the data. Finally, the information must be provided in a readily usable format. Twitter for example moves fast and the stream is

198 https://developers.facebook.com/
199 http://www.nypl.org/blog/2013/04/04/announcing-nypl-digital-collections-api
constant. Therefore, do you want to setup a camera aimed at the computer to save the stream of posts? So, if the Twitter data grabbed by software utilizing the Twitter API, does the user want the data collected in real time for a specific timeframe? Should in only be triggered to record when referencing a particular subject matter?

As with all technological purchases, cost is a factor. Therefore, these record everything APIs have filters and pricing schedules. It is highly recommended that you discuss with your forensic technician what is reasonable for the particular case.

**Places to Collect Information**

**Computers, Tablets, & Cellphones**

A computer is a piece of hardware that stores and processes electronic data.

**Cloning a Cell Phone, Computer, Drive or Network Server (or portions thereof)**

First, do not do this yourself. Although anyone can clone a drive, an entire network or relevant portions of a network, it is beneficial to utilize an expert for this activity. This protects the attorney from becoming a witness. So, what is cloning or creating a mirror-image?

Disc cloning is the process of copying the contents of the drive or server (or portions thereof) to another disc or server. It can be accomplished by copying all the information directly from one drive to another or by creating an image file which is then written to the clone location. Although the word copy was just utilized, it is a standard copying function. Cloning is more in-depth. It involves the copying of everything: hidden files, metadata, in-use files, etc.

It is beneficial to make the new disc read-only. That way nothing is altered or deleted on the clone. Some experts suggest making two clones. One clone will be for review and the other clone utilized for preservation.

Why would a family attorney want to clone a hard drive? What could possibly exist on a common household computer? Well, as we learned from *White v. White*, there is no expectation of privacy on a common household computer located in a common area of the family home. In that case, an extramarital affair was uncovered because the husband was

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200 N.J.S.A. 2C:20-23(b) provides a much more complicated, but accurate, definition.

unknowingly storing his received e-mails in a non-password protected folder on the family computer. The Court determined that, if the data contained on a shared computer is not password protected, the individual who created that data does not have an expectation of privacy as to that information. Any information on a shared computer, including spreadsheets, pictures, media files, recordings, and other information are discoverable.

In addition to shared or family computers, Courts have been hesitant to declare that there is an expectation of privacy even when it comes to a home office, depending on the location in the home and whether household members had access to the home office.\textsuperscript{202} In \textit{State v. M.A.}, information contained on computers owned by the defendant’s employer was utilized by prosecutors to obtain a conviction against the defendant.\textsuperscript{203} There, the Appellate Division held that the defendant had no reasonable expectation of privacy in computers owned by his employer even though the employer did not have any type of ESI hardware or software policy, nor any internet or e-mail policy.

Depending on the facts of your case, the information stored in the metadata of a computer hard drive or shared network may prove invaluable at in trial.

\textbf{Is The Data Really Deleted?}

Although retrieving deleted information can be done by almost anyone, it is recommended that an expert investigator be utilized. An attorney should not place themselves in a position where they would become a witness. Using an expert to recover deleted data, allows for preservation and analysis coupled with potential testimony.\textsuperscript{204} Further, the utilization of an expert can allow for the cloning (mirror-image) of an adversaries hard drives or servers. It is useful to understand, however, how easy it is to locate deleted information if it has not been overwritten.

Electronic devices and operators of those devices delete files frequently. The deleted data can be actual user-created files, program-specific temporary files, web browser caches, log


files or other digitally stored information. Deleted files remain intact on the devices disc until it is overwritten in the course of activity.

Although the various operating systems function differently, when discussing the deletion and organization of electronic files, they are mostly the same. Every operating system provides a command for deleting files. On all of these systems, deleted files are not really erased. They may be recovered. Undelete is the process of restoring computer files which have been removed from a system by deletion. Most users are unaware that the deleted files remain accessible. This remains true on cell phones, tablets, computers, and any electronic systems.

When a file is deleted, it is essentially marked to be over-written. When a device needs additional space to save a new file it will overwrite the deleted information necessary to provide space for the active file. This can obviously result in the maintenance of unwanted data or the “smoking gun.” The deleted files can escape destruction for hours to years. The larger the disc space the higher the potential for recovery. As our computers, phones, and tablets become capable of larger amounts of information, the longer the information will remain in existence.

Think of it as a piece of recycling material. It holds its original information and shape until it is converted into something new. Although you have finished using the item, took it to the recycle bin, and the recycling truck removed it from your home and brought it to the recycling center. The item remains intact. It is essentially gone from your mind but not from reality. Until it is converted into something new, it is still that discarded item in its last used format.

As described above, undelete is not perfect. The sooner you attempt to recover the digital data the better. The longer the information remains delete, the better the possibility that the system needed to recycle the space holding that data.

**Passwords, Encryption, and Stenography**

The first thing you need to do to use a computer, tablet or smartphone is to log onto it. This seems easy enough, but most computers are equipped with a passwords login function which can range from feeble to ironclad. These can be worked around with brute force
programs or hardware. This pertains to the device or portions of the device that are encrypted. There is currently a split in Federal Appellate jurisdictions as to whether a criminal defendant’s production of a password to gain entry to a laptop computer is considered testimonial or not.\(^{205}\) This could arise even in a civil context, where discoverable materials are stored on hardware or on unknown website servers and a party is ordered to provide it. The penalty for which would be contempt of court, but the party may claim that he or she is unable to remember the password.

Compare the compulsion to reveal a password available only inside a person’s head with fingerprint readers, retinal scanners or voice-recognition, where access is available through bodily interaction. The difference is that although NJ cases permitting compulsion of physical exemplars such as breath samples, blood, handwriting, and DNA samples, none “have compelled defendants to divulge the location of incriminating physical evidence, or otherwise incriminate themselves by the mere act of responding to the question itself.”\(^{206}\) This would be similar to a compulsion to provide a key to gain access to a locked room. So whereas compelling the divulgence of information in your head to gain access to a digital data may be compulsion to testify, compelling the running of a fingertip over an access pad may not.

While requiring the exchange of passwords has not become common practice in New Jersey Courts, there have been several Family Courts in Connecticut and Pennsylvania which have required that passwords to Facebook and online dating websites be provided to opposing counsel for review of the content stored on those websites. In *Gallion v. Gallion*, a Connecticut Superior Court Case, the Court issued an Order, stating, “Counsel for each party shall exchange the password(s) of their client’s Facebook and dating website passwords. The parties themselves shall not be given the passwords of the other[...]. Neither party shall visit the website of the other’s social network and post messages purporting to be the other.”\(^{207}\) It appears that this is being considered as either a method of protection against spoliation or a

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method to exchange discovery which, depending on the use, could prove to be quite voluminous.

The Internet

The internet originated as a way for the military to communicate and share data with each other over large distances. Our Supreme Court has defined the internet as “a global network of computers that allows for the ‘sharing’ or ‘networking’ of information to and from remote locations. Users of the Internet can send electronic mail, share files, and explore or ‘surf’ the World Wide Web (‘Web’), a graphical computer-based info network. While surfing the Web, a user can visit and interact with sites maintained by businesses, educational institutions, governments, and individuals, which cover almost every conceivable topic.”²⁰⁸

Your internet connection runs through your internet service provider (ISP).²⁰⁹ The ISP provides internet access to either your home or office, usually by cable or telephone lines. The line ends usually with a coaxial cable sticking out of the wall. This is screwed into a modem. From here, a device such as a computer can access the internet feed through a wire or a wireless signal, if there is a wireless signal router attached to or include in the modem and the computer is equipped with a wireless card. So all of the machines connecting through this one hub will have the same IP address. This modem is what the IP address connects to. It is called your internet protocol (IP) address. You can test it yourself if you are curious at http://www.proxyway.com/cgi-bin/test.pl or https://www.arin.net/ (just click on the numbers at the top of the screen). Your ISP matches up your internet service with the physical address they have on file.

Any interaction with the internet through your IP address will be recorded in one way or another. This is why you should always password-protect your wireless internet signal. If you

²⁰⁹ Id. Although the New Jersey Constitution gives you a reasonable expectation of privacy in the subscriber information provided to you ISP, it is available to the State via a Grand Jury subpoena without notice to an individual under investigation. Under the United States Constitution, however, there is “no reasonable expectation of privacy [. . .] in an IP address, because that info is also conveyed to and, indeed, from third parties, including ISPs. ‘IP addresses are not merely passively conveyed through third party equipment, but rather are voluntarily turned over in order to direct the third party’s servers.’” United States v. Christie, 624 F.3d 558 (3d Cir. 2010).
notice your service slowing down right after your neighbor gets home every day, it could be because the neighbor is eating up the amount of activity available at once on your IP address. Because some devices automatically search for an open signal, this can happen without them even knowing it. However, it can become a problem if someone in within the signal’s range wants to use this for nefarious purposes such as downloading illegal material, accessing various computers on your network to take your personal identifier information or snoop at privileged client data.

In some cell phone systems, you are provided with a new IP address every time you access the internet through the cell phone provider. After one user’s internet access with that IP address is closed, it is routed and used by the next user. This means that a search warrant or subpoena would require specificity as to the time the access occurred and the phone number sought, otherwise, any person on that company’s network could have their internet activity provided without their knowledge and without probable cause.

**Browser History and Cookies**

A browser is a program that allows the user of a computer or properly equipped cell phone to literally “browse” through web pages, download or upload information, and otherwise view and interact with the series of tubes known as the internet. There are many different types of browsers, but there are a handful of mainly used. This typically depends on the operating system the user’s computer or cell phone uses. Opera, Internet Explorer, Mozilla Firefox, Netscape, and Google Chrome are some examples of browsers. They can be tweaked to the user’s preference, and have various strengths and weaknesses depending on those preferences and the operating system used.

Regardless of the browser, the history of what the user has searched for internet search history, websites visited, and data uploaded and downloaded. Depending on which browser you are using, it may be arranged differently, but it will most likely be in the “tools” or “internet” or “browsing” sections on the tool bar at the top of the screen when you are logged on to browser. Coincidentally, this is commonly where parental security options are found. This history can be viewed, altered, filtered, erased, or exported to another document. There are ways to operate without the browser recording this information (private viewing mode; sneak
mode, etc.), which keep this information from being saved. However, this does not mean that the ISP or sometimes the website itself does not have a record of what was done from your IP address. It means that your computer did not record it.

An internet “cache” (pronounced “cash”) is a system developed in the days of dial up, when it took a year and a day to download a whole page. A cache stores the website in your computer and displays it again when you visit the same website. Unless there had been changes to the site you are visiting, this saved, or cached, image will be the one displayed. Some websites are programmed to automatically install what are called “cookies” onto your browser’s memory. Some are for your convenience, so you don’t have to re-enter your user ID and password and every time you check your bank account, or so you won’t have to tell the weather forecast website where you are located. Some are for the website’s convenience in selling you things, whether you know it or not. Even if the cache or browser history could be considered innocuous, the entry of data and existence of cookie could prove more interaction with a website than was originally let on. For example, when someone claims that the website that comes up in a cache or browser history was an unwanted pop-up, the cookie may tell a different story.

A New York case, involving statutory interpretation, held that, since internet images were displayed on the screen and not knowingly stored in the cache, it warranted the reversal of two of the counts of child pornography. The New York legislature immediately amended the relevant law, but the opinion itself is a primer for the function of a cache and the issue of knowing possession of the cache’s contents. It reviews the splits in jurisdictions as to whether the defendant was aware that the cache file existed, and therefore knowingly possessed, or whether the display of an image is possession at all, particularly without knowledge that the cache image is saved. New Jersey state laws do not have any room to split such hairs: the mere viewing of child pornography “on the internet” is a non-Megan’s Law crime.

The Casey Anthony trial is one example of how all of these records can be used against a criminal defendant. Casey Anthony was tried for the murder of her infant daughter in Florida

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during the summer of 2011. Portions of the trial involved the testimony of a computer forensics expert who wrote and ran his own program on a computer seized from the defendant’s home which she shared with her parents. The computer’s hard drive showed that websites were searched relating to chloroform and “neck-breaking.” Following this very damning testimony regarding the number of times the websites were accessed, and for how long each was viewed, the State’s expert reevaluated and submitted a supplementary report indicating that the Defense was correct in its doubt of the level of interest and involvement Ms. Anthony had. After the trial, this computer was determined to have contained Google searches for “fool-proof suffocation”.

Proxy/Tor Servers

Even with an IP address, an investigator may not be able to determine where a person is if a proxy or tor server is being used. A proxy is essentially a dummy or fake server, which tells the website you are on that you are at an IP address different from your real one. Think of it as mailing an envelope to someone that contains another envelope and instructions to mail it off to a third party. That third party will not see what post office postmarked that second envelope. A proxy server is the intermediary mailing your envelopes.

However, this is not fool-proof, as we saw in United States v. Kernell, where the defendant posted screen shots of his illegal access to then-U.S. Vice Presidential candidate Sarah Palin’s personal email account. Kernell used a proxy server, but when taking screen shots of it, he included the proxy server’s website address in the address bar. So when the FBI matched up the proxy server to that information, that proxy server’s manager checked its logs and traced the real IP address used. He is currently in Federal prison.

This is similar to how computer crimes are traced by law enforcement. For example, “Craigslist Killer” Philip Markoff was located by tracking a phone number to an email address to the physical address of the IP address of the computer that set it up. This physical address belonged to Markoff. If an item is purchased or created online and an email is used, a computer is used. The physical address associated with that computer’s IP address can be found with a

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212 United States v. Kernell, 667 F. 3d 746 (6th Cir. 2012); see also Rules 1 and 2.
subpoena to the relevant internet service provider (ISP). Of course, an investigation into this may result in one or more proxies having been used and the trail left cold.

**Email**

Electronic mail (Email) is a method of sending messages in digital form from one computer or smart phone to another. There are two main kinds of email: Post Office Protocol (POP) and Instant Message Access Protocol (IMAP). POP email is sent and stored in the inbox on software that is installed on your computer and serves as the mail drop box. With POP email, there is no server, or by analogy, no post office. The sender just drops the letter off at your door step. There are still servers involved, but the emails are not necessarily stored on a server. IMAP email, on the other hand, is created, stored and only accessible through a third-party server like Hotmail, Yahoo, or Gmail. This is like a post office that holds on to all of your letters but lets you look at them whenever you like. A “server” is a data storage device with its information available by offsite computers. Although email can be forwarded to your POP account, a copy still sits on the third party server, potentially forever until you delete it.

Email may become a valid form of civil process service in the future. However, at least one judge has decided against permitting Facebook to effectuate service\(^\text{213}\). Courts have repeatedly held that there is an expectation of privacy when it comes to a person’s password protected e-mail, even if it is web-based and held by a third-party server. In *Stengart v. Loving Care Agency, Inc.*, the New Jersey Supreme Court held that an employee can reasonably expect that e-mail communications with his or her attorney on web-based, password protected e-mail will be private, even though that e-mail was accessed through a company-owned computer.\(^\text{214}\) The Court recognized, however, that this is a somewhat tricky matter: "In the past twenty years, businesses and private citizens alike have embraced the use of computers, electronic communication devices, the Internet, and e-mail. As those and other forms of technology evolve, the line separating business from personal activities can easily blur."\(^\text{215}\)


\(^{214}\) [Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (2010).]

\(^{215}\) [Id.]
In Stengart, the Court went as far as to hold that the attorney-client privilege cannot be pierced as to web-based, password protected e-mails between a client and his or her attorney even if an employer has a clear and unambiguous policy in place that governing computer and internet usage that states otherwise.\textsuperscript{216} However, in 2012, the Appellate Division held in an unpublished opinion that the attorney-client privilege does not protect e-mails between a client and his or her attorney when the e-mails are sent on an employer’s own e-mail system, as opposed to a web-based e-mail system.\textsuperscript{217} Notably, in Fazio v. Temporary Excellence, Inc., the employer did not have a computer usage or e-mail policy in place.\textsuperscript{218}

Yet, more recently, in a case venued in the Bergen County Superior Court Chancery Division, the Honorable Peter E. Doyne, A.J.S.C, held, in an unpublished opinion, that emails sent by employees to their attorney through their employer’s own internal e-mail system were privileged and not discoverable.\textsuperscript{219} Judge Doyne found that the employees had a reasonable expectation of privacy when using their employer’s email system to send personal communications because (i) they knew the employer had no policy regarding electronic communications, (ii) had knowledge of the computer systems because the son of one of the employees (this employee was also a minority owner) was responsible for the employer’s entire network, (iii) the employees were unaware of any monitoring of employee computers or emails; and (iv) no one normally monitored the network besides deleting emails from terminated employees to save space.

With these cases in mind, if a user accesses private e-mail on a computer, and the e-mails are downloaded onto the hard drive of the computer without being password protected, those e-mails may be discoverable. Moreover, the fact sensitive nature of the reasonable expectation of privacy test makes it very difficult to predict how an electronic communication that is considered privileged in one case would still be considered privileged in the next.

\textsuperscript{216} Id.
\textsuperscript{218} Id.
As for internal company e-mails, in a 2006 pre-Stengart case, the New Jersey District Court held that, when the party claiming the attorney-client privilege sold her business and remained as an employee, her pre-and-post-closing communications with her attorney were not protected because she used the business’ e-mail system and did not take steps to remove or segregate the e-mails she sought to protect. These actions, coupled with the language of the purchase agreement, amounted to a voluntary disclosure of the attorney-client privilege as to her pre-closing communications. Similarly, any privilege that attached to post-closing communications was waived because she knowingly utilized her e-mail on the employer’s network with knowledge that the company policy provided that defendant could search and monitor her e-mail communications at any time.220

Instant Messages

Instant message usage is expanding at a rapid rate. In fact, IMs are starting to overtake text messages. In recent years, discovery disputes concerning IMs have increased, and so have court decisions addressing whether there is a duty to preserve this data.221 When seeking to obtain or preserve IM data, the parties are likely to run into issues because or its ephemeral nature. The data is also frequently stored with third-parties, and can present significant security and retention issues.

This type of data also has the potential to be extremely valuable in discovery, as IM communications are frequently personal and informal. IM users may not be aware that their IMs are being monitored or preserved.

Voice Messages

Not all communications are memorialized in writing; some are transmitted orally, and may be the subject of witness testimony. Others may be recorded as voice messages, and may be the subject of proper discovery requests.222

221 See supra, n. 141
222 See supra, n. 142.
Since voice message preservation can be both difficult and costly, we recommend that this type of ESI be addressed at an early stage in a dispute. Although it depends on the case, it is not uncommon for parties to agree not to preserve, collect or produce voice messages.

**Audio/Visual Recording**

Audio/visual footage can be crucial to any presentation. This is because it emphasizes the credibility or incredibility of a participants’ testimony, provides a visual aid, and can save attorneys and the court time, energy, and money. If audiovisual recording sufficiently illustrates an incident in its entirety, it will limit witness testimony to authentication, impressions, beliefs, and other abstracts. Of course, in the absence of sound, there would still be testimony not only as to who said what, in what manner, and how loudly, but also what other ambient sounds coincided with illustrated actions, such as gun shots, car horns, dogs barking, doors slamming, toilets flushing, etc. Finally, sometimes only partial video footage is available. This can be due to a witness beginning to record footage during a relevant incident, where portions of activity occur just outside the statically-placed surveillance cameras views, or where one angle or portion of A/V footage has been destroyed.

Go into every case assuming that there is video surveillance footage that will be overwritten tomorrow. Most servers store video footage for only a certain amount of time until it is overwritten to make more room for the new data. Depending on the size of servers this is usually anywhere from 7-90 days. It is commonly 30-90 days for government surveillance, and as little as 24 hours for private surveillance.

**Private Footage**

Go to the scene and take a look around for surveillance cameras. Look for banks, ATM machines, anything that might have a camera; even think about home surveillance or nanny cameras. Investigators are not infallible and may have missed something. They are also not attorneys and do not know exactly how certain things could be used to impeach or bolster at trial. If you are provided with only three angles of camera footage, with no mention of the fourth which you know exists, it will need to be accounted for. Even if technical difficulty can
account for the lack of such footage, it is still fodder for cross-examination, sanctions, or possibly even dismissal.

**Government Footage**

Traffic cameras, highway cameras, toll cameras, bridge cameras, government property surveillance cameras, police dashcams/MVRs are all available. You just have to know where to look, who to ask, and how to ask. Recordings of 911 calls may be obtained through each county by Open Public Records Act request. These must be saved for a minimum of 31 days. A request form for NJ Department of Transportation for camera footage of the many highways is available. Be aware that this data is only saved for seven days, so a call and a fax should be in order in addition to a mailed copy.

**Photographs**

Remember that digital photographs taken with smart phones contain metadata, sometimes even including GPS coordinates. This is how Belizean authorities located eccentric software magnate and alleged murderer John McAfee. When McAfee was on the run in 2012, a journalist he was with took a picture posted it on the internet. Someone saw it on the internet, checked the metadata contained in the file, found the GPS coordinates, ran a search on one of

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223 Red light cameras are serviced by American Traffic Solutions in Jersey City, Linden, Rahway, Glassboro, Palisades Park, Roselle Park, Brick, Deptford, East Brunswick, East Windsor, Gloucester, Lawrence, Monroe, Piscataway, Pohatcong, Union, Wayne and Woodbridge, and by Redflex Traffic Systems in Newark, Edison, New Brunswick, Cherry Hill, Englewood Cliffs, Springfield, Gloucester and Stratford. This list is by no means intended to be exclusive or exhaustive. Contact the relevant local policing authority to ensure that the data is preserved. Revelations of bribery in the awarding of contracts to Redflex have raised questions as to their acceptability. Brick Township announced the end to its red light camera program in early February 2014.

224 A map of traffic cameras, separate and apart from the DOT highway cameras can be found at http://www.photoenforced.com/new-jersey.html#.UaoQZ0C1HYx


226 See N.J.S.A. 52:17C-1 and N.J.A.C. 17:24-2.4.

227 http://www.state.nj.us/transportation/business/videolog/form.shtm
the many websites available for triangulation such as Google Maps, and traced it back to a restaurant in Guatemala. McAfee was found soon after.

**Manipulation**

Photographs in digital form can be manipulated. This includes actual prints of negatives which were scanned into a digital format. This is commonly referred to as being “Photoshopped” (or simply “shopped”), after the powerful Adobe software of the same name. The disappearance of subjects in photos from Joseph Stalin’s U.S.S.R. were crude cut and paste jobs compared to what can be done today. There are actually websites which can detect changes made to digital pictures using what is called the Kee-Farid Algorithm, as well as those which can use the metadata to show you where else a photo can be found on the internet.

As it seems in most technological discussions, child pornography arises. In *Ashcroft v. Free Speech Coalition*, the U.S.S.C. struck down portions of the Child Pornography Prevention Act because it inhibited free speech by prohibiting artistic depictions of minors which would otherwise be considered child pornography. The Court’s reasoning was that since the purpose of criminalizing the possession of child pornography to curtail the market for it, hence curtail the actual assaults and further exploitation of children, this purpose would not be served by suppressing speech which did not result in the actual exploitation of children. The Court noted that artistic renderings of child pornography “records no crime and creates no victims by its production.”

Following *Ashcroft*, the NJ Appellate Division decided *State v. May*. May held that digitally manipulated images of people made to look like children, or digital creations were similarly not child pornography. This seemed to have left open what will happen when verifiably underage children are not physically abused, but their images manipulated to appear so. Any State or private criminal practitioner would be wise to retain the services of an expert even if it seems obvious that an image is not child pornography. This ensures that a jury will have

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228 [http://fotoforensics.com/](http://fotoforensics.com/)
231 Id. at 250.
something to hang their hat on, and if presented to the prosecuting authority early enough may result in a dismissal.

**Facial Recognition Software**

Although this can fall under photography and live imaging, this is as an appropriate place as any to mention facial recognition programs. This type of software uses algorithms to match measurements on different points of a face with the same data on stored photos in the attempt to match up the identity of the face viewed. However, what was once fodder for spy and sci-fi novels is now publicly available and going commercial. It is available for use in such places and for use at Open Source Biometric Recognition, as well as Google’s Picasa and Google Glass™, which though in its infant stages, is expected to put the internet and your cell phone in the corner of your eye via a specialized pair of glasses, while incorporating this technology to display who you are looking at, their personal information, your notes on them, etc. Though this technology is just beginning to scratch the surface, it will not be long before this is being used in personalized advertising, which will of course, have records to subpoena. A Google Glass app called NameTag is now available which uses facial recognition technology to run against a database of faces and provide the likely match with their publicly available information. This would include everything from social networks to sex offender websites. It seems the U.S. government is ramping up to have its own massive database completed very soon.

**Voiceprint Identification**

If a recording of a voice is a piece of key evidence, alleged to be a particular person, expert opinions are available to run a voiceprint analysis. The theory is that the physical acoustics inside a person’s head which create the sound of the voice and the way the different parts of the mouth are used to speak are unique to each person. Two recordings are compared,

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234 [http://www.google.com/glass/start/](http://www.google.com/glass/start/); see also [http://NameTag.ws](http://NameTag.ws)
and the results of frequencies are displayed on a spectrograph or analysis. Despite its acceptance in a handful of jurisdictions, it is not presently acceptable as evidence in NJ. However, this should not deter you from having such a comparison done if it could be beneficial to your case. The compulsion of this type of physical exemplar would likely be permitted being that there is no compulsion to make any statement or provide any information, only what the manifestation of sounds as they travel out of the mouth.

**Event Data Recorders**

Event Data Recorders (EDRs) are devices which are installed into a vehicle and record the data such as the accelerator and brake pedal position, velocity or force of impact, speed, engine RPMs, steering information, airbag deployment and whether the seat belt is connected. This is similar to a “black box” on an airplane. However, whereas the airplane black box records data continuously, EDRs record for a certain number of seconds within or following an “event”. So where an airplane would permit review of technical specifics at any point, such as whether an aircraft was within legally navigable airspace to justify a plain view exception to the warrant requirement, an EDR could not perform the same function and tell you whether a motor vehicle was speeding prior to being pulled over. That is, unless there is an “event”, such as impact, an extreme change in velocity, or anything else that would cause the airbags to deploy. When such an event occurs, the recording is then stopped from a 5-25 second loop prior to the event. They are now in many, if not most, motor vehicles on the road. EDRs are addressed only in one published Law Division opinion in NJ, but were more recently the subject of an unpublished Somerset County Law Division opinion in the well-publicized *State v. Locane*. In both vehicular manslaughter cases, the court held that the State had satisfied the *Frye* standard and

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237 For a list of vehicles with EDRs, download the most recent software version at [http://www.cdr-system.com/resources/coverage.html](http://www.cdr-system.com/resources/coverage.html) and click on the button on the top left with the two cars on it.
was permitted to introduce EDR evidence. Likewise, in federal court, one Magistrate Judge has already held that in the context of a products liability case, a car’s EDR storage unit was discoverable and ordered its production via a motion to compel.\(^{240}\)

This type of information can be incredibly useful in accident reconstruction, which can affect everything from criminal vehicular manslaughter and assault cases, to civil negligence, wrongful death and products liability cases. While on the topic of accident reconstruction, laser scanners are capable of creating perfectly reconstructed models of items and their surroundings by scanning the area from different angles and recombining them to form an interactive three-dimensional representation. The thing to remember is that there are no standards to determine reliability of the sensors, of the data, no standards by which experts or analysts are judged against, no authority with any policies or procedures for extraction or examination.

The National Highway Traffic Safety Administration (NHTSA) has been slowly extending the deadline to enforce its ruling mandating EDRs in all automobiles and light trucks. Previous NHTSA ruling doing the same was ultimately not put into effect because of the high number of percentage of vehicles on the road with them already. NHTSA considers the vehicle owner to be the owner of the information collected by the black box. Despite many vehicle manufacturers’ disagreement, U.S. Congress is pending a bill putting EDR data in the possession of the owner or lessee of the vehicle.

**Cell Phones**

Attorneys should understand that cellphone and tablet information can be as useful as it is dangerous. And privacy issues regarding information stored on these items are always scary and undeveloped in current case law. Wiretapping laws of New Jersey are strict when addressing a person’s use of a cell phone. Privacy issues regarding information stored on these items are always scary and undeveloped in current case law.

As with deleted items, it may be beneficial to retain an expert investigator to download and retrieve this information. Although software and hardware is readily available making discovering this information simple, it would be prudent to have a third-party retrieve the

information in case there is a need for testimony about the procedure and preservation on recovered information.

A practitioner alleviates many preservation concerns regarding the loss of mobile phone ESI, such as text messages, when he or she takes steps to preserve the data on a mobile phone by suspending data destruction policies and implementing a viable litigation hold.

Telephone communications used to run solely through a separate series of actual wires. Now, in addition to land lines, there are cell phones, which transmit the communications through the air over waves on the electromagnetic spectrum. Cell phone signals include not only phone calls, but internet connections. The cell phone itself contains the ability to store data files. This includes contact information for friends, family and business associates, documents. Many are equipped with photo and video cameras, as well as microphones to take pictures, videos, record sounds, and send them to another person immediately through text, email, etc. It is a brave new world.

Cellular phones send a signal across the air to a receptor site, or tower, which the cell phone company either owns or leases to a provider that services the cellular service the subscriber has signed on with. This tower then sends the signal to that service provider, then on to the intended recipient of the call or text. This signal can be jammed by radio-frequency interference inadvertently, or deliberately through an outside device. There can be multiple providers per tower. Since the signal from a cell phone can only go so far, cell phone towers are used to relay the information to other cell towers. The signal is then sent out by the cell tower to what is ultimately the other person on the call, the website visited, etc.  As noted

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241 See supra, n. 141.
242 “Brave New World” by Aldous Huxley.
by the screen capture above, these towers are everywhere. The signals can also be boosted, or amplified to cover a larger area.

Cell towers, or “base transceiver stations (BTS),” can send and receive information from one 360° sector, three sectors, or six sectors, emanating from its center. These can all vary in size, and the provider can choose on which sides to activate for service. Picture it as a pie. The “azimuth” is the center of the sector in question. So the azimuth or center of a 120° sector beam width would be 60°, etc. Just make sure you add up the sector’s beam widths to make sure you have the correct azimuth. The mid-point of the signal strength going out to send and receive at the center of the azimuth is called the “centroid.” This is commonly the longitude and latitude used when placing a cell phone on a map, not the precise location of the cell phone.

This is not to say that all cell tower signals are perfectly circular and uniform. There is still signal propagation, Base Station Almanac, and working range. Relevant to the location determination are a host of factors including weather, tower traffic, height of the tower, geography, topography, obstructions, indoors v. outdoors, foliage, strength of the signal, efficiency of the device in question, etc. When service is spotty due to something like cloud coverage or physical obstruction, what would appear to be a perfectly circular signal, becomes very asymmetrical. So records can give the illusion that they were in one place, where the signal would not have been able to reach where it is alleged that they were. In the absence of a signal, one cell tower may then “hand over” the signal where another tower’s overlapping signal takes

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over. If you are out of range or there is an obstruction, you hit a dead spot where no cell service is available, even if you are within the sector’s beam. This is also how you can continue to talk on your cell phone with a hands-free capability enacted: your signal goes from one tower to the next. Unfortunately, even when remaining still, various factors may change the signal strength and different surrounding towers will pick it up, or it may happen at random. So records can also give the illusion of movement around an area where none exists. All of these calculations and measurements are available in real time by the service provider “pinging”, or sending a signal to the phone, or through historical usage data, and can be used to determine roughly where a cell phone was. This information can be used to infer that the owner was in the same location as their cell phone. The determination of the exact location of a cell phone is therefore less than perfect, and is not the smoking gun under all circumstances.

Another way to determine location of a cell phone is through GPS data. Most cell phones are equipped with Global Positioning System (GPS) connections. GPS is a series of satellites orbiting the planet which triangulate the location of the receiving device on Earth, and match up the time when the location was received by the device. These are accurate between 10-50 feet, depending on a host of variables, similar to those used for cell phone service reception. This is the same system that you may have in your car, which displays a map and gives you directions from place to place. This is different from cell service location, because it is relying on satellites, not cell towers, though the data is available through the cell service provider.

The amount and type of information stored by cell service providers varies. As for substantive information stored on third party servers, text messages (SMS/MMS) content is rarely retained by cell phone service providers. Even if so, it for a very limited amount of

\[245\] Id.
\[246\] See United States v. Evans, 892 F. Supp. 2d 949 (N.D. Ill. 2013) where a Federal court permitted testimony regarding the technology and evidence for presentation to the jury, but denied the use of this to formulate an expert opinion as to the defendant’s location based on this evidence under the Daubert standard.
\[247\] http://www.gps.gov/systems/gps
The number of text messages generated every day is so high that it would cost prohibitive to store every message for even a limited amount of time to make it useful for anyone in the future. However, on the off chance that they are stored, they can be preserved. Voicemail or any other type of off-site, non-answering machine recorded messaging system is similar, but commonly stored for longer, in some cases perpetually if resaved prior to a scheduled automatic deletion. Unfortunately, iPhone to iPhone message data does not appear on any records, because it is transmitted through the iPhone’s manufacturer, Apple. BlackBerry Messenger functions in a similar way.

When requesting anything from a wireless service provider, know what you want and be as specific as possible. Some records you can get offline, but a more thorough inquiry is sometimes necessary. Of course, the first thing to do is to find out where to send your request. The second thing you do is either have the correct document drafted authorizing the service provider to release the records, whether this is a consent/records release form similar to HIPA, a wiretap warrant, or CDW. These requests can contain many things, including, but not limited to:

1) Subscriber information;
2) Invoices and payment history;
3) Dates of use;
4) Specific towers used;
5) Specific towers’ Base Station Almanac;
6) Type of communication sought (text, call, IP address or websites accessed, GPS)
   a. Call logs, including dates, times, numbers dialed in and out, length of call; connections and failed attempts;
   b. Text message data (dates, times and phone number);
   c. Text message content (the message itself: text, pictures, and video);
   d. Email header data;
   e. Email content;
   f. GPS data;
   g. Voicemail messages incoming;
   h. Voicemail outgoing message/ringback;
7) Translation code for the activity referred to;


249 Online services are available to assist in locating the service provider for a particular phone number, such as http://www.fonefinder.net/ and http://www.freephonetracer.com/
8) Transmission in both .PDF as well as a native or workable form for search or comparison purposes.

If the number or subscriber information is not known, data can be requested in the form of a “tower dump”, where all data going through a particular tower is provided in an attempt to narrow down what cell phones had been used in the area.\textsuperscript{250} However, the higher the population, cell phone traffic, and time of day requested, this can be counterproductive and a waste of resources. But this may become relevant if looking for a pattern of crimes committed by one person over a period of time.

\textit{Text Messages}

Text messages (Short Message Service “SMS”/ Multimedia Messaging Service “MMS”) are almost like an email, but instead sent from cell phone number to cell phone number through a cell service provider. This can include pictures, recordings, videos, etc. There are two technical problems with text messages. The first is that most cell phone service providers do not save the content of the text messages, and the few that do, save them for little more than a week. This causes authentication issues when a witness tries to show the text messages on the phone to finder of fact, which is usually a judge during a domestic violence hearing for a Final Restraining Order, to which the frequently pro se adversary does not know to object. The second problem with text messages (and really all incoming calls) is that they can be sent from a computer with fake information entered. This is called “spoofing”, and causes similar problems with authentication. There may be no way to prove that the number shown on the screen or even through data extraction is what it purports to be. Of course, a presumption of validity upon authentication that it appeared to be sent would need to be overcome by the adverse party, and if not, would be a question for the finder of fact.

The use of text messages has become significant in Family Law practice. A common example is the admission of text messages in a Domestic Violence trial as evidence of

\textsuperscript{250} This can be determined by using the following FCC search website: http://wireless2.fcc.gov/UlsApp/AsrSearch/asrRegistrationSearch.jsp; see also http://www.antennasearch.com/default.asp; http://www.cellreception.com/; http://www.t-mobiletowers.com/TowerSearch.aspx
harassment or terroristic threats.\textsuperscript{251} While the mere sending of several messages may appear to be harassment due to volume, having the content of text messages available can prove that the nature of the communication was appropriate rather than harassing in nature.\textsuperscript{252} In \textit{L.M.F. v. J.A.F.}, the Court held that, while the Defendant had send 18 text messages in a three-hour period, none of the messages were threatening or menacing in any way. In that case, the Court discusses the emotional nature of text message communication and how, due to the limitation on the number of characters in a text message, “texting can lead to . . . frustration and misuse.” Therefore, it should go without saying that clients should refrain from putting anything in a text message that they would not want read back to them on a witness stand.

\textit{Pre-Paid/Chirp/Pay-As-You-Go}

These are essentially cell phones without contracts. Some require minimal, if no, subscriber information, and are difficult to trace who to ask. These records are available, but you need to track them down and send spoliation letters and subpoenas to everybody. All of these phone numbers are run through an existing company’s network of phone numbers either by purchase or lease. The company you would contact depends on the type of phone. Using the North American Telephone Area Code and Local Exchange Prefix (NPA/NXX) data, you can determine some of the different types of associations.\textsuperscript{253}

\textit{Pagers/Beepers}

These are small, matchbox-sized devices that receive a limited-character numerical and/or text messages, usually with the intention that the receiving party be alerted to call the sender. The sender inputs a number they want the receiver to call, along with other numbers used for code. Today they are used primarily by medical and emergency personnel. But since the method of transmission is still the same, the data is still available.

\textsuperscript{253} Tracfone comes up as Verizon or T-Mobile or Cingular, Boost Mobile as Sprint or Nextel; Go Phone as AT&T, T-Mobile To Go as T-Mobile; MetroPCS as MetroPCS or Royal Street Communications, and Cricket as Cricket or Leap Wireless.
Collection and the New Jersey Wiretapping Act

If you haven’t noticed yet, one of the most important questions an attorney must ask is, “How did you get this information?” Particularly with audio and visual recordings, it is vital to ask first, “Were you a part of this conversation?” and second, “Did the other individual know you were recording?” The New Jersey Wiretapping Act was enacted to protect individuals from being recorded or monitored without their consent. It imposes criminal penalties for the interception or recording of private information which was obtained improperly.

Under N.J.S.A. 2A:156A-1 to -26, individuals are specifically proscribed from the taping of telephone conversations of others, including one’s spouse, without consent, when the recording spouse or other interceptor is not a party to the conversation. Why do you care? Not only would the evidence you are attempting to admit be inadmissible, but your client may be exposed to criminal liability. That being said, should your client be recording a conversation to which he or she is a party, they would not be in violation as their participation in the conversation does not count as an “interception” of information.

Of course, the New Jersey Wire Tapping Act does not apply only to audio or visual recordings. Again, portions of the Act apply to transmission of electronic information of any type. I strongly recommend developing a working knowledge of the definitions of the Act which explain the difference between electronic storage and post-transmission storage. Again, in White, the Court noted that the Act only protects communication in the course of transmission.254 The Court in Ehling, determined that a Facebook posting is not considered to be in “electronic storage” as defined in the Act, because it was “live” on the website to be reviewed by the poster’s “friends” and, thereby, is in post-transmission storage.255

Practitioners who are reviewing audio or visual recordings taken by a child should be aware of the “vicarious consent” exception to the Wiretap Act.256 Courts have held that a parent can consent on behalf of a child when the child’s conversation occurs in the consenting parent’s home. This should not be read as a blanket invitation for parents to record their

children’s conversations. The court in *D’Onofrio II v. D’Onofrio* specifically noted, “What is required is a good faith basis that it is objectively reasonable for believing that consent on behalf of the minor to taping is necessary and in the best interest of the child.”\(^{257}\) The requirements that there be a good faith basis and that the recording be in the best interest of the child must be significant to defeat the privacy assertions on behalf of the individual taped without consent.

Courts have also held that a parent may tape-record his or her own interview with a child-custody evaluator as long as the recording is unobtrusive.\(^{258}\) Courts will not, however, compel a parent to record a child’s interviews during custody evaluations.\(^{259}\)

**Invasion of Privacy and Tension with Duty to Monitor**

In New Jersey, the state of the law concerning a civil “invasion of privacy” cause of action is still quite fluid. This civil cause of action is far from settled. *Ehling v. Monmouth-Ocean Hospital Service Corp.*,\(^{260}\) which will be delved into in more detail in subsequent chapters, is a case where Defendant was alleged to have forced an employee to gain access to Plaintiff’s Facebook page, viewed and copied Plaintiff’s postings, and reported a politically-charged posting regarding not providing treatment to a mass murderer that Plaintiff made. Plaintiff sought damages for invasion of privacy, violations of New Jersey’s wiretap law, and violation of the Stored Communication Act. There were two decisions by the court; one in 2012\(^{261}\), pre-discovery, and one in 2013\(^{262}\), post-discovery.

In 2012, Defendant had filed a Motion to Dismiss. The Court held that Plaintiff had stated a plausible claim for invasion of privacy, especially given the open-ended nature of the case law and that Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. Further, the Court stated “more importantly, however, reasonableness

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(and offensiveness) are highly fact-sensitive inquiries. Therefore, matters will be decided on a case-by-case basis dependent on the facts. As such, these issues are not properly resolved on a motion to dismiss.” However, the Court held that a Facebook posting is not considered to be in “electronic storage” as defined in the Wiretap Act, because it was posted on the website, to be reviewed by the poster’s “friends” and, thereby, is in post-transmission storage.\footnote{Id.} The Wiretap Act required the collection to be in the course of transmission.

In 2013, after discovery, Defendant renewed its motion to dismiss. It was determined that Plaintiff had 300+ friends, her page was set to private, her coworker was a friend, the coworker took the screenshot without coercion from Defendant, and the coworker had given the screenshots to the Defendant voluntarily. The Court held that “non-public Facebook wall posts are covered by the Stored Communications Act.” But, because the coworker had access, the actions fell under the authorized user exception. Therefore, there was no violation. Next, the Court addressed the invasion of privacy claim and looked at the two factors: whether there was intentional intrusion and whether the intrusion would highly offend the party. Here, the coworker had access to the information and was not intruding and the fact that a party copied a posting if not highly offensive. It was a “violation of trust, but not a violation of privacy.”

There is an inherent tension between invading an individual’s privacy, on the one hand, and honoring a duty to monitor an employee’s use of a company’s IT system, on the other. This tension was best illustrated in the New Jersey Superior Court case of Doe v. XYC Corp., which was a civil case brought by a minor against an employer that stemmed from its employee’s usage of its internet, e-mail and computer systems in reviewing and eventually sharing child pornography.\footnote{Doe v. XYC Corp., 382 N.J. Super. 122 (App. Div. 2005).} The Appellate Division imposed upon the employer a duty to act/monitor/investigate/report when the employer’s internal IT monitoring policies provided it with actual or reasonably suspected knowledge that its employee was using his company computer and internet to view and distribute pornography and, possibly, child pornography. With the right set of facts, the case imposes upon an employer the duty to act when, through
the application of its internal IT policies, it has actual knowledge or reasonably suspects an employee is using its IT system improperly.

The takeaway from these cases is that one must always be aware of and take efforts to refrain from invading an individual’s privacy. Nonetheless, when an employer has knowledge (actual or imputed) of an employee’s improper use of its IT system contrary to its internal policies, and its internal policies give it the ability to monitor its employees’ activities and, if necessary, act to prevent harm to third parties, an employer is wise to address the situation rather than turning a blind eye.

Client Portals

Depending on the case, it may be a good idea to set up an online client portal. This will allow a client to access discovery materials or other items pertinent to their case. This can be done online either through your own website with individual password-protected access. Since this can take considerable time, effort and cost, with some creativity you can create a similar function with cloud-based third party applications such as Dropbox or Google Drive. There are case management systems that offer this type of service as well. The benefits are that it saves on postage, saves on time spent compressing files and sending multiple emails to send them, can save the client a trip to the office to review certain data like audio/visual footage, it the impresses the client, and permits almost immediate access to the material.

Technology to Solve Problems

As practitioners, we can easily get caught up on using technology as a sword or a shield. However, it is vital that we also acknowledge the useful methods in which technology can resolve disputes rather than instigating. This is particularly the case in family matters, where communication between parties is strained. The emotional issues that impact families can prevent people from communicating on even the most insignificant of issues. Using technology, such as text message or e-mail for a method of exclusive communication can be an answer. If the parties are unable to communicate directly, there are products available, such as Our Family Wizard\textsuperscript{265} which assist with communication. These products provide messaging, calendaring,\footnotesize{\textsuperscript{265} http://www.OurFamilyWizard.com}

\textsuperscript{265} http://www.OurFamilyWizard.com
document sharing and other helpful tools in an environment that is non-threatening. There are even options to give a child or Parent Coordinator access to monitor communication. When drafting messages, the website will review the text for “buzz” words which it may deem inappropriate and ask if the sender is “sure” they want to send the message. If clients are less likely to argue, a simple shared Google Calendar may do the trick.

Family lawyers should be encouraging parents to utilize their child’s school portals for information. Parents should be able to have a separate password and login which will provide them with any and all information regarding the child’s extracurricular activities, school trips, calendar, holidays, and other important information. It is no longer one parent’s obligation to inform the other about school issues. It is up to your clients to make themselves an active part of the child’s education by utilizing the technology available in schools.

While FaceTime or Skype may not be an appropriate substitute to parenting time, Courts are open to using technology as a problem solver. Under N.J.S.A. 9:2-2, children cannot be removed from the state without consent of the non-custodial parent or without a Court Order. The issue of removal tends to be the topic of significant motion practice in the family division and can be a hotbed for digital evidence to show the nature of the relationship between the parents and the child, the way the parents interact with one another, the lifestyle of the parents, or the social network of the child. While the issue of removal is the topic of significant case law, only recently has technology entered the conversation. Courts have begun to view technology as a way to bring parents and children closer together, despite physical distance. In Chen v. Heller, the Court considered Plaintiff’s offer for the children to have unlimited telephone, computer and video imaging access as a factor in their determination that she could relocate to Texas.\footnote{Chen v. Heller, 334 N.J. Super. 361 (App. Div. 2000).} In Mackinnon v. Mackinnon,\footnote{Mackinnon v. Mackinnon, 191 N.J. 240 (2007).} the Court agreed to allow the Plaintiff to relocate to Japan because, in addition to a healthy visitation schedule, the visitation plan included several methods of electronic communication between the father and the child. A careful consideration of the case law will demonstrate that the use of technology must be
coupled with significant visitation plans, but it is important for attorneys to note that Courts are considering the availability of technology as a factor in these types of case.

**Data Security: A Warning to all Clients (and their Attorneys)**

Before wrapping up this chapter, we would be remiss if we did not issue a brief warning to attorneys and their clients about the importance of incorporating reasonable data security measures into their IT infrastructure. There is no hotter topic these days than data security. From Target to Neiman Marcus to Cryptolocker to the Heartbleed bug to Wyndham Hotels to eBay, it seems as if a new IT security or data breach issue is in the news each day. In fact, 2013 was coined the “Year of the Mega Breach.”

The purpose of this section is not to engage in a thorough IT security analysis. Instead, we incorporate the IT security view from 10,000 feet and attempt to notify attorneys and their clients of these IT security issues so they can do their best to incorporate reasonable measures to ensure their IT systems do not become the subject of one of the data breaches that, in 2013, exposed more than 552 million customer identities. We also briefly analyze a few of the recent data security cases issued in New Jersey.

From a business security perspective, recommended IT security best practices include the following:

- Creating an efficient and effective team of internal IT champions and outside vendors.

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269 *Id.* It has been estimated that for each breached record, businesses currently spend an average of $201. *See the Ponemon Institute's “2014 Cost of Data Breach Study: Global Analysis,” available at [http://pdfserver.amlaw.com/cc/PonemonInstituteDataBreachStudy2014.pdf](http://pdfserver.amlaw.com/cc/PonemonInstituteDataBreachStudy2014.pdf)*

- Employing defense-in-depth strategies that emphasize multiple, overlapping and mutually supportive defense systems. This includes the deployment and regular updating of firewalls and gateway antivirus, intrusion detection or protection systems, website vulnerability with malpractice protection and web security gateway solutions throughout the network.
- Monitoring for network intrusion attempts and vulnerabilities.
- Understanding that antivirus protection on endpoints is not enough and comprehensive endpoint security product with additional layers of protection must be deployed and used.
- Securing your websites against attacks and malware infection.
- Protecting your private keys.
- Encrypting sensitive data.
- Ensuring all devices on company networks, especially mobile ones, have adequate security protections, and that the company has a workable minimum security profile for all bring-your-own devices (BYODs).
- Implementing a removable media policy that restricts and moderates the use of authorized and unauthorized devices like thumb drives and external hard drives that can introduce malware and facilitate data security breaches, both intentionally and unintentionally.
- Aggressively updating, patching and discontinuing outdated and insecure browsers, applications and browser plug-ins while keeping virus and intrusion prevention definitions updated. Also automate your patch deployment processes.
- Implementing and enforcing a strong and effective password policy.
- Making sure regular data backups are secure and available.
- Restricting and monitor email and email attachments.
- Developing and implementing effective incident response procedures and disaster recovery plans.
- Developing and implementing post-infection detection capabilities to identify infected systems.
- Educating users on basic security protocols, including email and social media.
- Limiting access to your shared network and restricting users’ ability to download software.
- Investigating and purchasing appropriate cyber security and liability insurance policies.\(^{271}\)

For those of you who seek additional written resources on data security issues, in February of 2014, the National Institute of Standards and Technology (NIST) released its highly anticipated framework to help guide companies through cybersecurity issues.\(^{272}\)

From a legal perspective, 2013 was also an interesting year in New Jersey for data security cases. The case that attracted the most attention was *FTC v. Wyndham Worldwide Corporation, et al.*, which is an enforcement action brought by the FTC under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). In this case, the FTC alleged the Wyndham defendants’ violated both the deception and unfairness prongs of Section 5(a) “in connection with [their] failure to maintain reasonable and appropriate data security for consumers’ sensitive personal information.”\(^{273}\) The FTC alleged that due to these failures, intruders gained unauthorized access on three separate occasions between April 2008 and January 2010 to the Wyndham defendants’ computer network and property management systems. District Judge Esther Salas denied the Wyndham defendants’ motion to dismiss, but limited her holding to the factual allegations of this case by stating she did “not give the FTC a blank check to sustain a lawsuit against every business that has been hacked. Instead, the Court denies a motion to dismiss given the allegations in this complaint – which must be taken as true at this stage[].”

\(^{271}\) As these data breach and IT security cases become more popular, courts are beginning to hold that general commercial liability policies do not cover cyberattacks or data breaches. *See* Zurich American Insurance Co. v. Sony Corp. of America et al, Index Number: 651982/2011 (N.Y. Sup. Ct. Feb. 21, 2014). In addition, insurance companies are in the process of updating their exclusions in an attempt to eliminate any data breach coverage from their commercial general liability policies.


Thus, Judge Salas limited her holding to the specific facts of the alleged IT security failures in the case before her. With respect to these security failures, the FTC alleged that the Wyndham defendants:

- Failed to employ commonly-used methods to require user IDs and passwords that are difficult for hackers to guess.
- Did not require the use of complex passwords for access to Wyndham-branded hotels’ property management systems and allowed the use of easily-guessed passwords, while the intruders attempted to compromise an administrator account on the Wyndham defendants’ network by guessing multiple IDs and passwords (a “brute force” attack).
- Permitted servers on the Wyndham network that had commonly-known default users IDs and passwords.
- Failed to adequately inventory computers connected to the network so the Wyndham defendants could appropriately manage the devices on the network and physically locate all devices to promptly determine that the network had been compromised.
- Failed to use readily available security measures like firewalls, which allowed the intruders to gain unfettered access to the systems.
- Permitted the storage of payment card information in clearly readable text.
- Failed to make sure the Wyndham-branded hotels implemented adequate security policies and procedures prior to connecting their local computer networks to the Wyndham network.
- Permitted Wyndham-branded hotels to connect insecure servers to the Wyndham networks, including servers that used outdated operating systems that could not receive security updates or patches to address known security vulnerabilities.
- Failed to monitor the network for malware that was used in a previous intrusion.
- Failed to restrict third-party access by restricting connections to specified IP addresses or granting temporary, limited access, as necessary.
• Failed to implement reasonable and appropriate security measures, which ultimately exposed consumers’ personal financial information to unauthorized access, collection and use.

This case is significant because it places businesses on notice that if they are regulated by the FTC, their IT security systems should be reasonably sufficient to protect their customers’ data. Otherwise, these businesses may find themselves on the receiving end of a FTC enforcement action, which often leads to other civil litigation. Indeed, in February of 2014, a Wyndham shareholder initiated a derivative civil lawsuit against some of Wyndham’s directors and officers, personally, as well as the company as a nominal defendant. The lawsuit is based on the same data breaches addressed in the FTC case, and alleges the company did not establish adequate IT security policies, allowed the use of old operating systems and condoned the use of stale security updates (more than three years stale); the complaint also alleges the defendants aggravated the company’s damages by failing to disclose the breaches until two-and-one-half years after they occurred.274

However, it appears that legal authority allowing consumers to sue for a company’s failure to secure their personal data is lagging behind, largely due to issues with standing. In December of 2013, another New Jersey federal decision was issued when Judge Noel Hillman granted a motion to dismiss a class action claim by a consumer that sought damages against a number of defendants for a data breach.275 In Polanco v. Omnicell, before the class was certified, Judge Hillman dismissed the data breach class action complaint due to the class plaintiff’s lack of standing. The essence of the judge’s decision is that the potential for injury is not enough to create constitutional standing. Thus, before a putative data breach class action can proceed to the class certification stage, the named plaintiffs must identify how they were injured as a result of the claimed data breach. Expenses claimed in anticipation of future harm are insufficient to confer standing. Rather, an injury-in-fact is needed. The opinion relies heavily upon the

reasoning of another data breach case, Reilly v. Ceridian Corporation, where the Third Circuit held:

    In this increasingly digitized world, a number of courts have had occasion to decide whether the “risk of future harm” posed by data security breaches confers standing on persons whose information may have been accessed. Most courts have held that such plaintiffs lack standing because the harm is too speculative. We agree with the holdings in those cases. Here, no evidence suggests that the data has been—or will ever be—misused. The present test is actuality, not hypothetical speculations concerning the possibility of future injury. Appellants' allegations of an increased risk of identity theft resulting from a security breach are therefore insufficient to secure standing.\(^ {276}\)

Cases like Omnicell and Reilly are bad for the plaintiffs’ class action bar, but great for their defense counterparts. They require actual injuries in order to maintain a suit for data breach. Their analysis of the standing issue limits the ability of a class plaintiff to bring a class action complaint. In addition, in cases where there is an actual injury, these cases will likely be used to limit the size of the class or to defeat a class certification motion.

Although this is the present state of the law, it is likely that new legislation is on its way. The Year of the Mega Breach is unlikely to be ignored. Therefore, it is our hope that the materials and case law analyzed in this chapter will alert attorneys (and their clients) throughout the state of the serious risks and potential liability imposed by sub-standard IT systems. No longer can we stick our heads in the sand and simply claim we are bad at technology and math. These are serious present-day issues that simply cannot be ignored.

\(^{276}\) Reilly v. Ceridian Corporation, 664 F.3d 38, 43 (3d Cir.2011)(citations and quotations omitted).
CHAPTER 6: The Criminal Element

The application of most ESI and technological issues in criminal practice differ from civil and chancery practice for many reasons. Prosecutors should be aware of technological issues because defense attorneys will make motions to suppress and cross-examine their investigators utilizing them. Defense attorneys should know because the basis for the search and seizure of evidence may hinge on the tech method used, and what else could have been done to properly investigate and create a reasonable doubt. Judges need to know because they will have to make the decision on novel issues without precedent.

One big difference is access to information. The State has more time and resources to investigate and obtain evidence against a defendant. Many third party holders of evidence are more likely to cooperate with law enforcement than defense investigations. The State can investigate without the defendant knowing it, such as with Grand Jury subpoenas, communications data warrants, or wiretap warrants. It can obtain information in ways a defendant cannot. Defendants are not permitted to wiretap without at least one party knowing, and cannot obtain wiretap warrants. State investigators may ethically deceive to get information, whereas defense investigators are prohibited. Law enforcement has all sorts of investigative gadgets that are unavailable to the general public.

Some tech issues rarely arise outside of a criminal case. Sometimes police-specific discoverable materials are relevant in civil cases, such as excessive force or worker’s compensation cases, but certain technology that is only available to police, is far more common for use in criminal litigation. Another example, audio headsets used for a defendant’s ability to listen in on sidebar conferences during jury selection and trial, factor into a defendant’s rights differently than in civil trials.277

The incentive and monetary factor can also be somewhat different. The State has the funds, investigators, and usually the hardware. Because private defense attorneys frequently bill at a flat rate, the defense has little monetary incentive or monetary ability to use every option to its advantage. Even when billing on an hourly basis, a defendant may not be able to

pay for an investigator or expert, pay to litigate the inclusion or suppression of evidence. A prosecutor and most of its law enforcement witnesses are salaried, and therefore have no monetary incentive to expend time.

In a family or civil case, a lawyer may be fined or sued for failing to advise a client to preserve evidence, and the party may be sanctioned or have their case dismissed for failure to preserve evidence. In criminal cases, the State’s failure to preserve frequently results in nothing more extreme than an adverse inference jury charge. This is determined by “(1) whether the evidence was material to the issues of guilt or punishment; (2) whether defendant was prejudiced by its destruction; and (3) whether the government had acted in bad faith when it destroyed it”. So many times, defense counsel is retained too late to do anything other than damage control.

One of the more harrowing and improvisational aspects of criminal practice in New Jersey and federal courts is that pre-trial depositions are only available under limited circumstances. This leaves the defense at a disadvantage. The key witness is frequently a law enforcement officer who will frequently defer to the report if they happen to return the call of a defense investigator. This leaves little to no ability to learn certain things unless a judge permits that line of questioning at a testimonial pre-trial hearing. If certain revelations occur during trial, it can cause delay, mistrial, or appellate reversal. Much of the time, a defense attorney has nothing to work with except a police report and a transcript of its regurgitation to the Grand Jury. The State has similar challenges when the defendant elects to testify. Up until that point a defendant is protected by their 5th Amendment right to remain silent, and unless they made a statement to law enforcement early in the case, the prosecutor will not know what they will say.

By the time a defendant is arrested, the State has had months, if not years, to investigate, execute search warrants and subpoenas, and analyze the data. Defense counsel is

278 See State v. W.B., 205 N.J. 588 (2011), holding that failure of police to preserve handwritten notes yields an adverse inference charge upon request; see also State v. Holup, 253 N.J. Super. 320 (App. Div. 1992), where a DWI was dismissed after the State failed to produce one of the foundational documents for the Alcotest.


then expected to have gathered the same type of information, with fewer resources, by the arraignment date.

Many times a criminal defendant or victim will be incarcerated. This poses challenges to the accessibility of ESI. Particularly, when defendants are arrested, their cell phone will be confiscated and inventoried with the rest of their property at the jail, where it will be kept until their transfer or release. This cell phone can be obtained and inspected, preferably by an investigator, after the inmate signs a property release for it. There are certain things that may be inaccessible without the client or witness present, such as a website which has been bookmarked, a password that has been saved into the computer’s automated sign-in, a distant cell phone that may contain photos and geo-tagging information, etc. And you can’t get to it. Most jails do not permit cell phones or laptops inside without special clearance.281

Finally, you may as well know now: child pornography comes up a lot in criminal technology discussions. This is because the possession of such an image is per se illegal; creation, storage, transmission, and receipt of such images frequently uses some type of technology; and because the effects of a plea or conviction are life-changing even after or without incarceration, the incentive to litigate and appeal is great. Certain sex offenders may be subject to a blanket or selective prohibition on the use of computers or the internet,282 or have their personal information posted on the internet.283

**Technological Crime**

New Jersey’s “hacking” laws are contained in the theft chapter of the criminal code.284 They span various activities related to digital data and computers including unauthorized access, unauthorized meddling with data itself, or unauthorized access and use to commit another

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281 *But see* State v. Butler, et al., Law Division, Middlesex County, (March 6, 2014), where the county must bear the cost of providing some type method for inmates to review voluminous discovery such as audio and visual surveillance in digital form, including an “E-reader” for inmates in administrative segregation.


283 N.J.S.A. 2C:7-12 to -19.

crime. Penalties range from fourth degree up to first degree depending on the amount of damage caused and people affected. The first degree includes a mandatory period of parole ineligibility. The public disclosure of data obtained by unauthorized means is a separate crime, and rises to a second degree if ordered under seal prior to the disclosure.  

The federal Computer Fraud and Abuse Act cover essentially the same ground.

Hidden throughout the statutes and case law are various issues involving tech that factor into criminal practice, but are not always obvious or known. For example, there are fines ranging from $250 to $2000 for the possession of child pornography, the distribution or exhibition of obscene material to a minor, or the use of a computer in a theft.

**File Sharing/Torrents/Peer-to-Peer**

Though there is a difference, file sharing, torrents, peer-to-peer software are all ways of transmitting and receiving digital data files over the internet by way of particular software on a user’s computer. Some of these companies have licensing agreements with organizations and individuals to distribute their products legitimately. These types of programs commonly arise in child pornography or pirated intellectual property.

File-sharing programs consist of one user making a file available to another user on the same network or program. The first user uploads a file. The second user downloads that file. This is where the entire file comes from. So if Mozart is mislabeled as Beethoven by the first user, you would hear the Mozart because the whole file would have come from that original source as a whole. Like making a copy of an audio cassette, or photocopying a picture.

A torrent program is different from a file-sharing program, in that torrent users are neither distributing nor receiving a complete file, but only a part of it from various possessors of the entire file to be reconfigured at the end. So rather than spend all day siphoning off resources from one source only to have it possibly fail or disconnect at the end, different users have a confirmed copy of the file you want. To stay with the Mozart example, a person seeking the file would receive different portions of it from each user making it available, and then the

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288 See N.J.S.A. 2C:24-4b(1) for definitions as they pertain to that Chapter.
computer rearranges it at the end. This is like 100 people all providing a different puzzle piece of a picture. In isolation, one puzzle piece is innocuous. It is only after combining them at the end that the finished product becomes illegal.

**Child Pornography**

In New Jersey, the presence of child pornography on a file-sharing program is also implicit knowledge of its distribution. There is a big difference between possessing and distributing child pornography. Primarily, possession does not have to result in sex offender registration, whereas distribution does. Making child porn available on a peer-to-peer system where you would send an entire file to another source has been found to be distribution. Distribution now contains a period of parole ineligibility if more than 25 images are involved. However, the “offer” as defined in file sharing systems was defined as “the act by which one person makes known to another that he or she may have for the taking an item possessed by the offeror”. Even if an item is downloaded and unwittingly remains on such a file sharing program or network, it is strict liability distribution or intent to distribute. There is not yet an opinion on the issue of torrents (piecemeal receipt/distribution) in this context, but if the “item” being “offer[ed]” is the total file, the fragmentation would not matter. Conversely, if only an innocuous or unusable portion of a file was obtained, possession of an image “depict[ing]” child pornography may be difficult to prove.

Every digital file has a “hash” value or tag imbedded in the metadata. It is a unique identifier of the file. Think of it as a file’s DNA code or fingerprint. If it is copied, it will contain the same hash value. If the content is changed in any way, such as if the image were cropped, or the brightness changed, then a new hash value has been created because it is a new file with new content. So if you know the hash value, you know what it contains. Law enforcement maintains a database of files containing child pornography recovered from previous criminal investigations. File sharing service traffic is frequently monitored for users distributing this type

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290 Id.
292 Lyons at 260.
293 N.J.S.A. 2C:24-4b.(5)(a)(iii).
of content. When they find a hash value that matches up with their records indicating that the file is child porn, warrants or subpoenas are drafted in order to get the ISP of the IP address to disclose the registered owner and physical address of where that file is. Another warrant is issued for the home, computer, and any other electronic data, and the IP address registrant receives a knock (or kick) on their door. For a detailed analysis as to the manner in which prosecutors are able to acquire IP address information and use it in prosecuting child pornography cases, *United States v. Christie* is an excellent read. Another interesting read is *United States v. Case*, involving allegations of an automated search program and FBI directives to mislead the court on search warrant affidavits.

**Pirating and ISP Letters**

Though not always criminally prosecuted, the downloading of a data file containing intellectual property without consent or compensation constitutes a copyright violation under Federal Law. Similar conduct also runs afoul of NJ criminal law.

The pornography industry has used illegal downloading as a sort of digital shakedown, where they will file the suit against numerous John Doe, then obtain leave of court to discovery each John Does’ IP address from his or her ISP, then contact each John Doe and offer to settle for a small amount so that individual can avoid being named in the suit (and having his or her name associated with pornography). Since many would rather not have their name attached to illegal activity, let alone illegal activity involving pornography, many pay a few thousand dollars to settle the case. In 2013, this issue was generating a large amount of federal activity.

A New Jersey federal court prohibited this type of suit recently, holding it was improper to join such a large number of defendants in a single lawsuit. However, the following week, a different New Jersey federal judge faced with a smaller amount of anonymous defendants (11)
came to a contrary conclusion and permitted it.\textsuperscript{299} District Court Judge Otis Wright in Central District of California referred four of the attorneys filing such suits to their respective licensing authorities, and to the prosecutor for investigation into criminal racketeering charges.\textsuperscript{300}

Rather than use such questionable tactics, internet service providers have agreed with the entertainment industry to use scare tactics as a deterrent to prevent illegal downloading of copyrighted materials. In certain circumstances, a letter is sent advising the owner of the IP address that the IP address has been used to download copyrighted material, and that continued use will result in termination of internet service. However, since the U.S. Supreme Court has held that aftermarket sale (read: “disposal”) of copyrighted material is permissible under federal law, the next logical question is what is permissible disposal.\textsuperscript{301} Though it is difficult to say that you can sell a book, but not give away a digital recording of a song, it is unlikely that the courts will eviscerate the protections afforded to innovators by permitting the widespread dispersal of digital items for free. Odds are that the relinquishing of all title or ability to reuse the item will be considered aftermarket sale, as opposed to the reproduction and dissemination of an item, which waters down the creator’s ability to charge for it.

This is as good a place as any to mention 3D printers, which use a layering technique to create a three-dimensional object. Like how an igloo is built. These can be used not only to print knock-off copyrighted materials, but to print a real gun that shoots real bullets. Although possession of a firearm is perfectly legal in a home, place of business\textsuperscript{302}, printing a per se illegal item such as an automatic firearm or slingshot (yes, possession of a slingshot is a felony) could result in a criminal charge. It’s not hard to imagine a law prohibiting the possession or transfer of the code which could be used to print such an item, but this would obviously conflict with First Amendment Free Speech rights.

\textsuperscript{302} N.J.S.A. 2C:39-6(e)
Theft

A website’s address is a piece of metaphysical real estate that can be worth millions, and it can be stolen. Sex sells. In fact, Sex.com recently sold for approximately $14 million. It was also stolen a few years back after a series of misrepresentations and fake faxes. Bitcoins are a form of digital currency that originated on the internet. Although it is still largely unregulated, these credits can be stolen or used for laundering, regardless of what degree it is prosecuted. Then there is identity theft, which is when someone gets ahold of your personal identifiers, pretends to be you, engages in various shenanigans that ruin your credit, get warrants issued for you, and essentially ruins your life.

The internet is also available to a new generation of scammers and con artists. These are the emails you get from someone whose uncle is having problems probating a multi-billion dollar estate and needs your help. For some reason, many are in Nigeria, but there are also groups from all over the world who use it to swindle people out of money using popular market websites. Although the general public should have these concerns, attorneys should be wary that these scammers prey on them, too. Anything where money is coming out of your trust account based on an arrangement you made with a client who contacted you by email from out of the country is a red flag. When a cashier’s check, or any check, comes in the mail, wait for a few days after it clears before writing your trust check. The bank will take the check and it will clear, but when they realize it is fraudulent, the money will be taken out of your trust account as reimbursement. Then you have a problem with the Office of Attorney Ethics. Similar scams involves online marketplaces such as Ebay.com or Amazon.com. An unwitting person will locate a car, boat, or motorcycle and work out the details of the auction or straight purchase (yes, without ever seeing it). They send their money to an escrow account that is really a local fraudulent “money mule” account, which transfers that money to a different, usually in a Byzantine country. Then the car, boat never materialize.

One way that thefts of movable property can be thwarted or solved is to install radio-frequency identification (RFID) chips containing specific data that can be used to keep track of

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303 Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003).
304 See People v. Kidde, 2014 WL 703514 (California Court of Appeals 2014)
and identify anything from inventory in a warehouse, to luggage, to a cat’s owner. This is “The Chip” you hear about from time to time that will be implanted in our body and carry all personal and medical information. There is actually one embedded in newer U.S. passports. The RFID tag can be used in conjunction or instead of the magnetic strips that you see on compact disks or more expensive items at retail stores. When you go through the exit, and the sensor can determine whether the alarm system has been deactivated by the clerk. If not, it then lets off blaring bells and whistles alerting the staff to the theft. This is thwarted by enterprising shoplifters by using what is called a “booster bag”. This is a large bag, commonly a clothing retail store bag, lined with aluminum foil, and papered over so that it is not as noticeable. The inside of this bag then becomes what is known as a Faraday cage, which is insulated from sending or receiving any radio-frequency signal. The shoplifter is then free to exit the store with merchandise which would otherwise alert the staff that it had not been cleared.

A different, more personal use, version of this is the Scottevest Blackout Pocket, is pencil-case shaped Faraday cage that that blocks out any electronic signals. It comes in three different strengths, ranging from blockage of RFID chip signals such as bank cards, key cards, or passports, to RFID, cell phone and GPS signal blockage, to special designs for law enforcement and government.

**Hidden Compartments**

It takes a bright person to create and install those after-market modifications to James Bond’s cars. However, if you have reason to believe that the car you are installing hidden compartments or license plate changers in is not James Bond’s, you run the risk of being charged with conspiracy to engage in whatever crime is being aided by your handiwork. These mods can get very intricate, including hydraulics activated by performing a combination of pressing different buttons such as door locks, windows, or sun roof. This extends to rooms or compartments in houses, too. But since these are arguably for security, it is not as easy to extend conspiracy or accomplice liability as it is with car compartments. While it may be reasonable for a jeweler to need to prevent anyone from finding an item being transported in a vehicle, it might be harder to explain if the jewels were stolen.
Laser Pointers

Yes, the use of a laser pointer can get you in trouble. Pointing one at a law enforcement officer in New Jersey is considered a third degree aggravated assault if a reasonable person would believe that it was used to assist the aim of a firearm. Pointing one at an aircraft can land you in Federal prison because of concern for the potential visual impairment of the pilot. Regardless of the degree of constitutionality, Ocean City, New Jersey, went so far as to ban the possession and sale of laser pointers entirely.

Medical Testing

More and more, you see various ways that defense attorneys try to use data obtained from medical testing of their client to mitigate or absolve wrongdoing by their client. In some cases, certain tests can allow for different sentences and consequences for individuals. For instance, a scan may keep certain offenders from receiving the death penalty they were going to receive. A combination of MRI and PET scans may have saved a defendant from death row. He was convicted of carjacking and two murders and sentenced to life without parole after the jury could not come to a unanimous decision on the death penalty. This type of brain scan presentation was given to the jury during the sentencing phase. These tests could be applied in insanity/diminished capacity defenses to show a disease, or defect in the brain, and how it could be used as a mitigating factor at sentencing.

Invasion of Privacy, Photographs and Recordings

Your phone is probably capable of taking pictures and videos. Now that cameras are so inexpensive and small, photos or videos of intimate areas or encounters are not infrequent. However, unlike a telephone conversation, the photographing or videotaping of another person whose “intimate parts are more exposed” without their consent is punishable under New Jersey law as invasion of privacy. There is no requirement that this occurs in a private place.

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305 N.J.S.A. 2C:12-1(b)(11).
307 OCEAN CITY, NJ, ORDINANCE NO.11-18.
308 http://www.wired.com/2013/12/murder-law-brain/
309 N.J.S.A. 2C:14-9(b).
common form of this is known as “upskirting”, in which a photograph is taken by a strategically placed cell phone camera. However, the law requires that the capture of such an image occur “under circumstances in which a reasonable person would not expect to be observed”. This would include an analysis similar to the “plain view” exception to the warrant requirement, including whether the viewer was in a legal vantage point. The statute also addresses video recordings of retail dressing rooms and correctional facilities under varying circumstances.

This statute is novel as it is one of only two in the nation which prohibit nonconsensual distribution of material created with the subject’s consent, also known as “revenge porn”. The non-consensual distribution of such material is also punishable by one degree higher, and does not merge with the initial recording for sentencing purposes. Sometimes this results simply in harassment charges, but also have the potential to morph into child pornography distribution charges if the parties involved are teenagers. However, what is more common is for websites to publish these pictures, and offer to remove them for a processing fee (read: extortion). There are various sites like these, and many have been shut down for the fraudulent angle, but many servers are outside of U.S. jurisdiction, and cannot be prosecuted directly. Free speech debates will obviously continue until the Supreme Court makes the definitive ruling.

**Cell Phone Offenses**

There are ways that your cell phone’s contents can be accessed by a third party at another location. This includes text message (MMS/SMS) content, call logs, and access that the microphone on your cell phone can be used to record the entire room’s activities, regardless of whether you are using it to make a call. There are programs that do this available on the internet, which, for obvious purposes will not be mentioned here. However, civil practitioners need to know about this so they can tell their clients not to do it with someone else’s phone, unless maybe an employer issued phone, or a child for whom they pay the cell phone bill which is registered under the parent’s name and with knowledge and consent of the other parent.

Incidentally, defense counsel should remind their incarcerated clients that the pre-recorded message telling them that the call is being recorded and monitored is true, and that

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311 N.J.S.A. 2C:14-9(c); N.J.S.A. 2C:14-9(h).
they should not talk about their case or any other illegal activity on the phone. Prosecutors
should remember to subpoena this information on cases where it may be worthwhile.

“Spoofing” is the use of an online service or piece of hardware to make it appear that a
telephone’s caller ID displays whatever number the caller wants it to. It’s really that simple. If
used for pranks it can be harmless, but it can be used for more nefarious purposes. Proper
identification and reliability standards must be used to ensure that accurate information is not
only being investigated and prosecuted, but also being introduced as evidence. This could be
used for nefarious purposes to harass or implicate innocent parties, and to hide illegal conduct.

Taking spoofing one step further is “cloning.” Here, a cell phone’s operational data is
duplicated and used in another piece of hardware. The cloned phone is then used as if it was
the original, and the cell phone service provider treats it the same way for billing purposes. This
activity is commonly more of a theft committed in order to avoid paying for cell phone service as
opposed to spoofing activity.

Unlocking/jail breaking/rooting is the manipulation of the cell phone service provider’s
operating system to access the phone’s coding in order to modify functions and operability. This
can include the ability to delete pre-installed programs that serve no function other than
advertising, to installing software and applications not sanctioned by the provider, to changing
the appearance and operations of the phone itself. There is currently federal legislation pending
to change copyright law to permit this practice, but this practice would seem to presently
violate computer crime laws.

Sexting is sending an intimate SMS (text) message containing a lewd or lascivious
message, photograph, or video. This is, of course, not per se illegal. However, if sent without at
least an implicit understanding that such content is appreciated by the receiver, harassment or
lewdness charges are a risk. If consensual, this may be helpful for relationships between
consenting adults, but could result in dire consequences for juveniles. Previously, a juvenile
could be considered a distributor of child pornography for sending such a picture or video, 312

requiring sex offender registration, and a host of problems that would otherwise ruin their life. However, New Jersey State law now permits juveniles to enter into a diversionary sentencing program. Amendments to N.J.S.A. 2A:4A-71.1(2) now provides for a diversionary program under certain circumstances when: “(1) the facts of the case involve the creation, exhibition or distribution of a photograph depicting nudity as defined in N.J.S.A. 2C:24-4 through the use of an electronic communication device, an interactive wireless communications device, or a computer; and (2) the creator and subject of the photograph are juveniles or were juveniles at the time of its making.”

The endangering the welfare of a child statute only applies to images of those under 16 years old in New Jersey.316 This applies, at the very least, to juveniles who take a picture of themselves, and possibly a juvenile who took a picture of another juvenile. The fact that it includes “juveniles at the time of the taking” could theoretically extend to those who distribute the same pictures as adults. Though the legislative goal of preventing the juvenile’s own exploitation would be moot, the goal of curtailing demand for the child pornography industry would not. This does not create an exception to N.J.S.A. 2C:24-4 because it is only juvenile court’s jurisdiction and thus becomes a diversion for such juvenile offenders. The statute also leaves no exception for the recipient of such material.

There are also phone apps that can be helpful in criminal practice. One app worth looking into is a police scanner app such as Scanner Radio. This gets particularly interesting during high tension incidents like the early morning chase of alleged Boston Marathon bombers. A GPS checker lets you choose from local bandwidths, by the number of live listeners, or by location of your choice. The app also offers the option to download recorded audio going back 30 days. This is an alternative to seeking records directly from the government through discovery, your officer, or an OPRA request.

Law Enforcement Technology

There are many tools of crime prevention and investigation that are primarily used by law enforcement, or that are unavailable or out of the price range of the general public.

Police Officer Cell Phone Records

Law enforcement officers do not hand their cell phones in with their civilian clothes at the station house. These can include text message data, text message content, pictures, calls logs, GPS data, etc. So when is it appropriate for law enforcement officers to disclose cell phone records? Many judges may be reluctant to compel this information unless it is a part of equipment owned and issued by their respective agency, which would bolster what is in the “custody and control” of the prosecutor.

The NJ standard for whether evidence must be turned over is whether it is relevant. Unless it is the relevant agency’s standard issue property, the State should object to the disclosure of such evidence, absent in camera review or limiting procedures to ensure that an officer’s otherwise personal communications are not disclosed. However, at the risk of creating an unchecked outlet for law enforcement to circumvent the discovery process, a judge faced with the issue of discovery relating to an officer’s personal cell phone data should take a number of factors into account in determining whether to order disclosure of a police officer’s cell phone data. If the policing authority owns or pays for the device, there should be little question as to whether the device is in the custody and control of the state. If the device is the officer’s personal property, the decision then requires further inquiry. Such considerations include: whether the officer should have anticipated that data being relevant evidence; who owns the device; if it is included as a tax write-off as a work expense; how often the officer carries the device while on duty; whether the relevant agency directs its officers to carry a cell phone while on duty or off duty; any policy by the relevant agency in place for use of cell phones while on or off duty; how frequently the phone is used for work purposes; whether the officer has an additional phone considered “personal” as opposed to a separate “work” phone; how frequently the officer uses the device in question for work purposes; whether anyone else uses the cell phone, for what purposes and how frequently; whether there were other means of communication available to the officer at the time which were not used. Finally, as to scope,
would disclosure of data be capable of limitation or redaction to a relevant time period, and if not, would an in camera review sufficiently address any inquiries. But it is not without guidance from at least one published opinion.

In State v. Ortiz, the New Mexico Supreme Court affirmed the dismissal of a criminal case following the State’s failure to comply with an Order to produce a police officer’s cell phone records when there was a noticeable gap in the officer’s dash-cam footage.\footnote{State v. Ortiz, 146 N.M. 873 (N.M. Ct. App. 2009).} The Defense showed that the evidence was “potentially material to his defense, given that they might contain information indicating why the officer stopped Defendant”;\footnote{Id. at 877.} but “(1) the phone records requested were for a very finite period of time; (2) if there was no recording of a phone conversation, it would be appropriate to produce the phone record; (3) if there existed a defense to the discovery of the records, such as the disclosure of a confidential informant, the State could file a motion to prohibit the discovery; and (4) if there were personal matters irrelevant to the case, the State could file a motion for an in camera review.” This was ordered without an evidentiary hearing and seemed like it would have been granted even without a showing that defense counsel knew a cell phone existed.


**Thermal Imaging**

The most logical place to start in law enforcement tech is Kyllo v. United States.\footnote{Kyllo v. United States, 533 U.S. 27 (2001)} This case is memorable for Justice Scalia’s concern for the dignity of the lady of the house in the face of a warrantless use of a thermal imaging sensor outside of a home. These devices sense heat,
This case is seminal in its holding that the reasonableness of the expectation of privacy in certain activities correlates with the public availability of the technology used to access the information.

**Lie Detectors**

Polygraph machine is the most commonly known lie detector. A subject sits in a chair and is hooked up to a machine which gauges breathing rate, heart rate, blood pressure, and skin conductivity. The subject is then read a series of questions designed to determine what his or her body does when lying, and then these results are applied to the remaining questions. There is a high percentage of accuracy, but disagreement among the science world as to the accuracy of the results as based on the testing mechanism. The USSC has found that polygraph is not reliable, but left it up to the States to determine whether to permit the tests results in their courts. There are other methods of lie detection, including a very expensive and impractical method of MRI reading brain activity for stimulation of areas known to recall artificial or actual memories. It is illegal for an NJ employer to mandate that an employee submit to a polygraph.

**Computer Aided Dispatch**

Computer Aided Dispatch or “CAD” systems are a digital record controlled and recorded by the dispatcher or point person at an organization where there are numerous off premises users. It was developed for and still used by taxi cabs, warehouses and trucking industries, but is also used by police. It shows the comments of the officer as entered into the system by the dispatcher, when they came over the radio, unit number assigned to the officer, the time of an event down to the second, the location of those on scene, phone numbers of callers, etc. CAD reports are sometimes more accurate than police reports, as they are contemporaneous, and

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322 Heat sensor imagery was also used in the capture of suspected Boston Marathon bomber, Dzhokar Tsarnaev, where law enforcement helicopters flew over the boat where it was suspected he was hiding to confirm the presence of the suspect. [http://www.nydailynews.com/news/national/thermal-imaging-aided-bomb-suspect-arrest-article-1.1322811](http://www.nydailynews.com/news/national/thermal-imaging-aided-bomb-suspect-arrest-article-1.1322811)

323 The Polygraph and Lie Detection (2003), Board on Behavioral, Cognitive, and Sensory Sciences (BBCSS), Committee on National Statistics (CNSTAT).


not edited by superior officers. In order to introduce information included in CAD reports, it is best to subpoena the dispatcher, both for technical description and substantive evidentiary testing. This author has had cases where the arresting officer knew a little about what was contained on the CAD, and one who testified that he never seen one before and could not identify it at all.

**Speed Detecting Devices**

There are essentially two kinds of speed detectors: radar and lidar. Both use the Doppler Effect to determine how fast an object is traveling. The instrument sends a signal out, the signal bounces off of an object, and then comes back to the transmitter. It measures the object’s speed based on the rate at which the waves are being sent back to it. Radar uses radio waves, while lidar uses light waves. Each requires its own calibration by a certified operator and is reliable within 1000-3000 feet depending on the model and type used.\(^{326}\) There are a number of these types of devices used by law enforcement in NJ, such as the LTI Marksman 20-20, Vascar, and K-55.\(^{327}\) The Stalker LIDAR, however, has not been found to be reliable in New Jersey.\(^{328}\)

**Automatic License Plate Reader**

Optical Character Recognition (OCR) can automatically read the license plate number on a vehicle. Many police vehicles are equipped with them now and can be pointed at vehicles even while driving. It connected to a State database and will provide the user with information on the vehicles registration and owner. The most important for our purposes is that it will show whether the car is registered and the driver holding a valid license. If not, a stop will occur. Since a citizen has no reasonable expectation of privacy in the contents of their license plate, this is, on its face, legal.\(^{329}\) Another issue that can arise is whether the license plate bears the same characters which the machine reads and processes. If the basis for a motor vehicle stop is the

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status of the registered owner’s license or a warrant, but the ALPR got the characters on the license plate wrong, this would be a basis for suppression in New Jersey State courts, 330 but not in Federal courts, 331 which recognizes the good faith exception to the warrant requirement.

One critique of this hardware’s use is how it gathers data as predictive of movements, or its potential to be used surreptitiously to invade the privacy interests of those frequenting locations which they would not like the world to know about.

**Mobile Video/Visual Recorder (MVR)**

This is a small video camera mounted on or in a motor vehicle. They can be set up to record at static intervals, when triggering incidents, such as an apparent impact, triggering of certain electrical switches such as lights or brakes, etc., and can be synced with microphones attached to the outside of the vehicle or the occupants. 332 Even though these are available to the public, they are most commonly used in police squad cars. Some agencies have them and some do not. NJ State Police are required to have their vehicles mounted with them and automatically activate when the overhead lights go on. These are also available to the public for a reasonable cost. However, it is more common to find them in police squad cars.

Although you would think that the storage space for these items would be located in the machine and at least stored at the stationhouse, but this is not always the case. Depending on each law enforcement organization’s policies and procedures, some may download it onto a local server at the close of their shift; some might have it stored at the county level and have no access to it. There is usually only one person on staff, who knows how everything works, and sometimes even they don’t know much more than where it’s stored. The prudent thing to do would be to call the relevant station house, confirm where everything is stored, and send a spoliation letter over to ensure that the data is saved, and request the policies and procedures for storage.

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Mobile Data Terminal (MDT)

A MDT is a laptop computer mounted inside a police vehicle, linking many or all of the foregoing items together. There are many different types of hardware and just as many different types of operating systems that run on them. They include links to nationwide databases, and depending on the bells and whistles, that can show the existence of arrest warrant, chat functions between units, photos of individuals, maps, GPS locations, motor vehicle operations such as turn signals, brake and acceleration data. The casual, and thus far not widespread, discovery use of these chat functions can yield anything from innocuous banter to evidence contradicting to what went into a police report.

There are various levels of production that these can yield. Below is an example of a good faith, albeit unsuccessful, discovery disclosure of MDT data. What was turned over is the source code of the transmission and data and of very little use when it comes to determining what it happened. What should be turned over is a digital image or other workable file in its native format, not unlike a DVD, that can be reviewed so we can see what the officers see.

DWI/DUI and the Alcotest

In the interests of brevity, this will not include a discussion of the now-historic Breathalyzer blood alcohol measurement machine. It will also leave the bulk of the discussion of the soon-to-be historic Alcotest and its application to the incredibly thorough and lengthy NJ

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333 As per the State’s response to defendant’s brief in support of Motion in Aide of Litigants’ Rights in State v. Chun, the warranty on the Alcotest 7110 MKIII–C expires in 2016.
Supreme Court opinion and Special Master’s Report on the reliability and admissibility of the Alcotest 7110 MKIII–C in *State v. Chun*. The *Chun* is exemplary of the thorough technological and scientific inquiries which must be made in order to determine how a piece of hardware or software works, and if it is reliable to prove what it purports to.

“The Alcotest uses both infrared (IR) technology and electric chemical (EC) oxidation in a fuel cell to measure breath alcohol concentration” to obtain two separate readings. The first chamber “uses infrared energy to calculate absorption of the energy by the alcohol concentrated” inside it. “The EC, or fuel cell technology, uses a catalyst to absorb alcohol and provide a second measurement of breath alcohol concentration from a small sample captured from the cuvette. In the EC chamber, voltage is applied to cause the catalytic reaction, which causes any alcohol that is present to oxidize. As that occurs, the oxidation process creates electricity, which is then measured to determine the amount of alcohol interacting with the fuel cell.”

“As a precondition for admissibility of the results of a breathalyzer, the State [is] required to establish that: (1) the device was in working order and had been inspected according to procedure; (2) the operator was certified; and (3) the test was administered according to official procedure.” The state must introduce a number of self-authenticating foundational documents into evidence in order for the Alcotest readings to be admissible into evidence.

Despite the holding in *Chun*, there is no way to truly check what other issues dwell inside the Alcotest. The manufacturer was not ordered to permit access to the source code, and is contracted with NJ to not sell the machine to any non-law enforcement entity. Thus there is no way to conduct a truly independent analysis of the Alcotest source code and software used.

The machines are recalibrated periodically, but there are occasionally errors. These errors can be used to determine whether the machine is functioning properly at the time of the test. The records of every test are downloaded periodically from each machine and stored in a

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335 Id. at 178.
336 Id.
337 Id. at 134.
338 Id. at 134–35, 153.
central database. These data downloads are now available online, though this data omits AIRs containing error messages, it does not offend the holding in *Chun*.340

There are a number of issues which can compromise the integrity and accuracy of the readings. These include radiofrequency interference by signals emitting from various devices such as police radios and cell phones, the failure to observe the subject for 20 minutes prior to testing to ensure that there has been no belching or vomiting which could regurgitate alcohol from the stomach into the mouth and taint the breath sample, the failure to use a fresh plastic mouthpiece for each time the subject gives a breath sample, the two-minute lockout between, etc.

Under certain circumstances, a conviction for DWI will result in the requirement that an ignition interlock device be installed into the vehicle.341 These are machines installed into a motor vehicle’s circuitry intended to measure the blood alcohol content of the driver through a tube that the breath is blown into. If the BAC is over a certain limit, then the motor vehicle either will not start, shut off, or will trigger all the lights flashing and the car horn honking until it is turned off. The company monitoring the data is either informed immediately and the court notified, or when the data is downloaded on a monthly basis at a central location. The user is required to pay to have it installed, uninstalled, and a monthly fee for the service. If a client operates a motor vehicle for an employer, their insurance company may have issues with it, assuming it is possible to install. They are also nearly impossible to install on motorcycles. The length of time, discretion of the court, and whether it will apply during the suspension itself as well as for a period after reinstatement of the license is determined by under the age of 21, BAC of .15 or greater on a first DWI, is a second or subsequent DWI.

**Cell Phone Tower Emulators**

A stingray is a device which intercepts cell phone signals by making the cell phones think it is a tower before sending it off to a real cell tower.342 Along with various tweaks that the cell service provider can add, this permits the user to obtain pen register/trap and trace type
information of devices that are active in a certain area, as well as triangulate a cell phone’s location, even while it is indoors by pinging it repeatedly. Made primarily by Harris Corp. in Florida, there are two versions: the StingRay made for driving around to narrow down the signal, and another handheld version for further narrowing it down. Also needed is the software to manage and interpret the information it receives. Because internet access on smart phones is routed through the cellular signal, internet browsing and can also be intercepted and even manipulated. These can also be used on a computer’s “air card,” which gathers received internet access through a cellular service provider instead of an internet service provider. The government has been reluctant to reveal anything about this technology, but was ultimately ordered to release documents under a FOIA request in a case related to United States v. Rigmaiden.343

Roving Bugs and Remote Activation

Similar to various issues where schools which have installed software on laptop computers distributed to students which permit remote camera activation to monitor students’ activities offsite344, your cell phone can be remotely activated and turned into a one-way speakerphone that transmits the sounds in the room round it. This can be done without your knowledge. It has been mentioned in very few published cases, but technological descriptions can be found in various U.S. government employee security briefings.345 This seems to be ineffective when the device’s battery has been removed, which cannot be done on an iPhone.

DNA/CODIS/AFIS

To stray briefly outside of digital gadgetry into science, deoxyribonucleic acid (DNA) is a protein chain in every cell that contains the genetic makeup of every living thing. Each human

343 http://epic.org/foia/fbi/stingray/#october2013documents
being has a particular set of DNA which distinguishes him or her from every single person. DNA can therefore be used to identify that person. Because DNA is left behind at most crime scenes, either through hair, saliva, blood, semen, sweat, it is used to locate suspects. One device used to analyze DNA evidence is the Combined DNA Index System (CODIS).\(^{346}\) CODIS is a database which contains DNA samples from past crimes and offenders and is used to link the individuals already in the system to crimes that have been committed. The DNA samples consist of body fluids, or hair usually. CODIS is used in order to link crimes together, allow officials to generate a suspect profile, and identify offenders in order to prosecute. Additionally, there is a National DNA Index System (NDIS) which is a part of the CODIS and contains the DNA profiles of federal, state, and local forensic laboratories that participate. All 50 states, as well as the District of Columbia, U.S. Army Criminal Investigation Laboratory, and Puerto Rico participate in the NDIS. All states require DNA sample be provided by all persons convicted of a felony/crime, and the U.S.S.C. has held that it is Constitutional to require a DNA sample upon arrest.\(^{347}\) Similar databases for fingerprints called and firearm striation and tool marks\(^{348}\).

**Constitutional Issues**

The Constitutional ramifications of technology in criminal practice could easily fill a book on its own. Because of the speculation required in the Sisyphean appellate process of deciding one tech issue as it becomes obsolete, this section serves as an extremely truncated guide to those issues.

**Custodial Interrogation and Driver Hearings**

N.J. Ct. R. 3:17 requires that custodial interrogation statements made in certain cases\(^{349}\) must be “electronically recorded” unless:


\(^{349}\) Murder, kidnapping, aggravated manslaughter, manslaughter, robbery, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact, second degree
(i) a statement made during a custodial interrogation is not recorded because electronic recording of the interrogation is not feasible, (ii) a spontaneous statement is made outside the course of an interrogation, (iii) a statement is made in response to questioning that is routinely asked during the processing of the arrest of the suspect, (iv) a statement is made during a custodial interrogation by a suspect who indicated, prior to making the statement, that he/she would participate in the interrogation only if it were not recorded; provided however, that the agreement to participate under that condition is itself recorded, (v) a statement is made during a custodial interrogation that is conducted out of state, (vi) a statement is given at a time when the accused is not a suspect for the crime to which that statement relates while the accused is being interrogated for a different crime that does not require recordation, (vii) the interrogation during which the statement is given occurs at a time when the interrogators have no knowledge that a crime for which recording is required has been committed.\textsuperscript{350}

Depending on the totality of the circumstances, the failure to electronically record ranges from suppression to an adverse inference jury charge.\textsuperscript{351} When these or any recordings of statements are available, they may not be perfect. If they are unintelligible, missing a portion, there are problems with the volume, or in you have a \textit{Driver} hearing. This is a New Jersey Rule of Evidence ("N.J.R.E.") \textsuperscript{104} hearing conducted outside the presence of the jury that tests the admissibility of such a recording. Admission under these circumstances requires a showing by the State of the identity of the speakers and that: 1) the device was capable of taking the conversation or statement; 2) its operator was competent; 3) the recording is authentic and correct; 4) no changes, additions or deletions have been made; and 5) the statements, if confessions, are voluntary.\textsuperscript{352} However, "if a tape is partially intelligible and has a probative value, it is admissible even though substantial portions thereof are inaudible."\textsuperscript{353} The

aggravated assault, aggravated arson, burglary, first or second degree drug crimes, any crime involving the possession or use of a firearm, or conspiracies or attempts to commit such crimes; N.J. Ct. R. 3:17(a).

\textsuperscript{350} N.J. Ct. R. 3:17(b).

\textsuperscript{351} N.J. Ct. R. 3:17(d) and), (e)


next question would be how this precedent is applicable to video recordings, or even scrambled
digital data with similar issues of clarity.

**Search and Seizure of Tethered Evidence**

Technological search and seizure can be broken down into two categories: tethered and
untethered. Tethered evidence relies heavily if not solely on interaction with a third party
intermediary. It is information or evidence which can only be accessed through the various
wavelengths and frequencies on the electromagnetic spectrum. That interaction can be
directly through guided transmission of information through wires, cables and fiber optics,
which go to and from a definite point. Or it can be through unguided transmission which is
broadcast out into the air and go everywhere. So whether it is cable TV or UHF, your cell phone
or your desktop’s email, it is all the same magic that brings information from point A to point B.

The most common will be cell phones and laptop/tablet computers. These two are
becoming synonymous in utility and in some cases, size. In many cases, the only difference
between the two is whether operation relies primarily on internet or phone signal. This is
blending more and more every day. Cell phones can now access the internet and create a new
IP address through their service provider over signals routed through their cell phone towers.
Laptops and tablets can access signals either through their internet provider by wire or wireless
signal, or they can access it through a telecommunications company the same way a cell phone
would connect on an “air card” that plugs into the computer.

**Reasonable Expectation of Privacy**

The biggest issue arising in criminal practice that does not arise in other areas is the
right to be free from unreasonable searches and seizures under the federal and state

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355 “The right of the people to be secure in their persons, houses, papers, and effects, against
unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable
cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the
persons or things to be seized.” U.S. CONST.amend. IV.
When any defendant’s data enters into the State’s possession, there should be an analysis of whether the defendant had a reasonable expectation of privacy in the data obtained, whether the action of the law enforcement official involved constituted a search and whether the confiscation constituted a seizure. When in doubt, the State should seek a warrant to ensure that any evidence seized will not be suppressed as fruit of the poisonous tree.

The determination on whether a search warrant is required is based on whether the person with the possessory interest has a reasonable expectation of privacy in the place to be searched or object to be seized. If so, then a warrant is required. Originating in Katz v. United States, the test to determine whether there is a REOP is twofold. “[F]irst, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?” This REOP determines whether you even have to address whether something was a “search” or a “seizure.” If no REOP, then no warrant is needed. If so, a warrant is required, or one of various exceptions to it.

A reasonable expectation of privacy cannot be easily determined by common sense as it would in any other situation. What that individual, similarly situated, would have expected about the privacy of their data. Under these circumstances must include a balancing of age, upbringing, socioeconomic status, whether someone grew up with a cell phone, in a household with a computer, etc. REOP in tech issues all apply to specific education and exposure to the issues inherent to the technology, not the standard of knowledge of an attorney who has written a book on it. Obviously, the level of privacy a middle-aged Amish woman would expect when sending her first email from the Lancaster County Library is not reasonably comparable to 17 year-old George Hotz, the first jail breaker of iPhone.

This would also apply to whether there is a reasonable expectation of privacy from data obtained through the unauthorized use of another’s computer, another’s phone or another’s wireless internet signal. Also relevant is whether the computer used was a work computer,
whether there was an expectation that others would be using it, such as household member’s, the public, whether there is a particular password or log in or other facts that make the data specific to the individual.

It has been held that there is no reasonable expectation of privacy in information voluntarily conveyed to third parties. In Smith v. Maryland, the Supreme Court found that (1) pen registers [for telephone numbers dialed], unlike the listening device used in Katz, do not acquire the contents of the communication; and (2) a telephone user cannot have a reasonable expectation of privacy in the numbers dialed because they must “convey” phone numbers to the telephone company to complete a call. Similarly, the Court in United States v. Miller held that there was no privacy interest in banking records because the defendant had assumed the risk of disclosure by not keeping the transactions to himself.

However, the New Jersey Constitution grants higher protections and maintains a higher expectation of privacy in third party disclosure. For example, the Court found in State v. McAllister that there is a reasonable expectation of privacy in bank records. It is further complicated by the fact that New Jersey courts require a warrant to obtain pen register data and bank records.

In the coming years, the courts must determine is how to apply Katz, Smith, Miller, and their progeny to cell phone signals, text messages, cell phone calls, cell phone web browsing, at home web browsing, wireless internet signals, global positioning location data, cloud storage, and social networking sites. This is easier said than done because the cases that we have to

360 Smith, 442 U.S. at 742.
361 Miller, 425 U.S. 435.
363 Id. at 30-33.
work with did not have these issues in mind. Expectations have changed in general since Katz, Smith and Miller. Many employees, children and spouses are expected to be accessible by cell phone at all times. The difference between Smith and Miller is that your computer and cell phone connections are always connected. In fact, it would be questionable and likely presented as knowledge of guilt if they were not.

Cell phones are the other common device capable of supplying untethered evidence, but they involve more than just files and internet use. They are mobile devices made for conversations between people in different places, both in the home, the car, and on the street. They can send and receive written text messages, visual and video messages, can access the internet, send and receive email over that internet, possibly through third party servers for the phone and the website. The best characterization of the law’s application to this new way of living was described by Justice Sonya Sotomayor in her concurrence in United States v. Jones.³⁶⁵

GPS Tracking and Cell Phone Pinging

Earlier in this book, you learned about GPS, the network of satellites that are used to give geographic coordinates to a device a user is receiving a triangulated signal on. There are three ways to retrieve information about another person’s location using this method. The first is to put your own GPS tracking device where you want to track, and monitor its movements. The second is to gain access to the information on a device that the target already keeps on them voluntarily, such as a GPS assistance device used in motor vehicles, such a Tomtom, OnStar, Lojack, EDR, or cell phone with the GPS access activated. In addition to the GPS system of satellites, the transmission from a cell phone received by surrounding cell phone towers can be used to roughly triangulate a location. Placing a GPS tracker on a person or their vehicle is different than accessing their cell phone signal. On one hand, the user is voluntarily making themselves perpetually locatable. On the other hand, the ability to be located is not the product of police activity, but what is now nearly a function of everyday life.

Knotts involved police installing a closed-circuit tracking device, which was permitted under the Fourth Amendment. “A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”

Most recently, in United States v. Jones, the U.S.S.C. unanimously held that the Government’s attachment of the GPS device to a vehicle constitutes a search under the Fourth Amendment based on a trespass theory. However, it did not indicate whether a warrant was required or not. The concurring opinions and their respective joining Justices provided insight into the how the future of technological search and seizure issues will be addressed. Particular attention should be paid to Justice Sotomayor’s concurrence, as it sets the stage for the future of the legal dialogue on the role technology plays in our lives.

Though pre-dating Jones, compare this to Villanova v. Innovative Investigations, Inc., where the N.J. Appellate Division held that that the lack of reasonable expectation of privacy on public roadways from Knotts defeats a civil claim for invasion of privacy when a GPS tracker was placed by a wife in her husband’s car. A split 3rd Circuit panel held in United States v. Katzin that the attachment of a GPS tracking device to a motor vehicle requires a warrant and cannot be excused by good faith.

As for the GPS data obtained through a citizen-owned device, such as a smart phone, the law is murkier. To differentiate from other third party cases, GPS, if not being used to receive information, is a signal perpetually sending to a digital network, as opposed to a single voluntary communication. The bank records in is similarly different because that was decided prior to online banking, not that it would make much of a difference. However, the bank records case makes historical GPS information more likely to be disclosed. Because GPS data can be used in real-time, the next issue is where there is an expectation of privacy in a location. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area

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accessible to the public, may be constitutionally protected.” However, when GPS data is obtained or a device is pinged, there is no way of knowing whether the location will be one which is public or private. Law enforcement pinging blindly could lead to the determination that you are in a dwelling.

The New Jersey Supreme Court held, in State v. Earls, that a warrant is required to obtain cell phone location data. On remand, the court found that there were no exigent circumstances. Multilateration of radio signals via cellphone towers (cell-site) and GPS (handset based) are the methods most commonly used to determine a suspect's general location on public roadways or other places in which there is no legitimate expectation of privacy. But what are those general locations? With the technology that has developed over the last few years, the lines have blurred as to what spaces are personal and which are general. We are constantly providing information about ourselves through our cellphones. From where we go to the doctor, where we most often eat, who our friends are, and now even where we are currently located. Thus, the very location of our phones can provide a lot of personal information that may very well impede on our constitutional rights. This was the case in Earls, as the defendant was located in his motel room. It is worth noting that the New Jersey Wiretapping and Electronic Surveillance Control Act requires a warrant or other limited exception before disclosing “location information for a subscriber’s or customer’s mobile wireless communications device”.

Also worth a look is United States v. Skinner, a split 6th Circuit opinion held that there is no expectation of privacy in the GPS signal on a cell phone.

A very important case is *Kyllo v. U.S.* The USSC held in *Kyllo* that a thermal imaging device was a search requiring probable cause because it revealed too much information about what was going on inside the home and the technology was not readily available to the general public. “When the government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” In *State v. Reid*, the New Jersey Supreme Court held that there is a reasonable expectation of privacy in internet service provider subscriber information. However, this is overcome with a Grand Jury subpoena.

In *United States v. Stanley*, the Pennsylvania District Court gave a methodical description of how the internet makes its way to your computer. In doing so, it held there is no reasonable expectation of privacy when using another’s IP address or wireless internet feed. A recent case out of the Arizona District Court addressed many of the issues of both cell phone signals and internet access is *United States v. Rigmaiden*. Mr. Rigmaiden was accessing the internet via a wireless internet cell phone signal air card. Since his computer was attached to the internet through a cell phone signal, it could be intercepted by a stingray (see supra), which it was. Investigators even managed to remotely manipulate this card and essentially change how his computer access the internet. The problem with *Rigmaiden* and *Stanley* are that they address privacy interests in signals obtained through tainted or illegitimate means: Mr. Rigmaiden was involved in various means of identity theft and use of aliases in schemes to defraud, while Mr. Stanley was using a wireless internet signal that was not his own.

*Stanley* has been affirmed by Third Circuit Court of Appeals.

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377 *Id.* at 40.
379 *Id.*
Search and Seizure of Untethered Evidence

If all potential internet, phone, GPS signal access were cut off, what would remain is what is untethered evidence. The files stored on cell phones, computers, storage devices, digital cameras are all that would be available. It is information that has no bearing on what can be accessed by the outside world through any portion of the electromagnetic spectrum, and has no third party involvement. The difference between a computer and a cell phone is blurring. The amount of information that can be stored on a cell phone and the level of interaction with the world outside of simple telephony systems strengthens the argument that a cell phone is a computer. In fact, this is what the 7th Circuit Court of Appeals held in *United States v. Flores-Lopez*.383

Warrants for digital files pursuant to a will inevitably lead to a discussion of the plain view doctrine. Search warrants must describe with particularity the places to be searched and the things to be seized.384 But there must be a balance. “On the one hand, it is clear that because criminals can – and often do – hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required... On the other hand [...] granting the Government *cart blanche* to search *every* file on the hard drive impermissibly transforms a limited search into a general one.”385

Guidance on plain view in search of electronic data has been given to us in the form of the *Comprehensive Drug Testing* decisions. In *Comprehensive Drug Testing*, an en banc decision...

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383 *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir. 2012).
384 U.S. CONST.amend.IV.
appellate panel cited factors helpful to judges signing warrants to properly balance out the interests of the State and the interests of the individual: “1) Magistrate judges should insist that the government waive reliance upon the plain view doctrine in digital evidence cases; 2) Segregation and redaction of electronic data must be done either by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, the government must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant; 3) Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora; 4) The government’s search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents; 5) The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.”

It would also be wise for the State to draft, and for defense counsel to request, any policies and procedures for the extraction of such files.

Suspicionless searches of laptop and tablet computers have become part of international travel. On-site inspection physical inspection of items is still permitted without any level of suspicion when entering the United States. Most recently, the 9th Circuit District Appellate Court held en banc in United States v. Cotterman, that reasonable suspicion is required to seize and search the contents to otherwise encrypted data. In Cotterman, the defendant’s screening yielded a prior conviction for possession of child pornography. His computer was taken off-site for searching for days while he went home. Eventually the encryption was cracked and child pornography was found. The issue was how long it could be kept in attempts to get to the data inside before it became an unreasonable seizure. The time restraint would be a balancing test of the reasonableness of the type of crime, level of suspicion, the ability of authorities to check the hardware against the length of time and degree of

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386 Comprehensive Drug Testing, Inc., 621 F.3d at 1180 (citations omitted).
387 United States v. Arnold, 523 F.3d 941 (9th Cir. 2008); see also United States v. Ickes, 393 F.3d 501 (4th Cir. 2005).
388 United States v. Cotterman, 709 F.3d 952 (9th Cir. 2011) (en banc).
intrusion of the deprivation of the item. A heavily modified and hacked piece of obscure hardware that is rarely used must be considered against a very common, simple and unmodified item that is used on a daily basis. Although only persuasive outside the 9th Circuit, this case is still relevant in New Jersey as justification for searches at international airports, beaches and ports of call.

Presently, under Arizona v. Gant, a warrantless search incident to arrest is permissible to ensure officer safety, prevent the suspect from destroying evidence, or to seek evidence which the officer has probable cause to believe is in the area. Though Gant’s facts involved a motor vehicle, the same rationale for such a search would apply incident to the arrest of a suspect inside the home, a motor vehicle, or on the street. However, in New Jersey, searches incident to arrest are limited to the person only, and separate warrant or exception are needed for a further search of a suspect’s car, and presumably data storage device.

Whether the contents of a cell phone or computer within the grabbing area of a suspect may be searched upon their arrest was recently decided in United States v. Wurie and Riley v. California. Riley and Wurie, held that the search of a cell phone’s contents requires a warrant in general, and is specifically not included within the scope of a search incident to arrest. It is the first time that a United States Supreme Court opinion has contained the phrase, "There’s an app for that".

Chief Justice Roberts wrote for a unanimous Court in deciding two cases where information stored inside a cell phone was accessed by law enforcement during an arrest. In applying the Chimel factors of officer safety and preservation of evidence, the Court held that during an arrest 1) the data inside a cell phone poses no danger of physical harm to a police officer; 2) not only is the data is not necessarily evanescent evidence because remote triggers to destroy it can be prevented by turning it off and extracting data from inside a Faraday cage, but a cell phone is much more than a regular container. Unlike a wallet or a pack of cigarettes, it is likely to contain historical information about nearly everything a person does in their life,

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including "photographs, picture messages, text messages, internet browsing history, a calendar, a thousand entry phone book, and so on." At 18. As expected, Justice Sotomayor's concurrence, in United States v. Jones, was cited. "[O]f course, exigent circumstances would apply where there was an immediate danger that evidence would actually be destroyed, to pursue a fleeing suspect, or to assist persons who are seriously injured or threatened with imminent injury.

Practically speaking, this type of search isn't usually mentioned in police reports even if it does yield useful information, and it certainly won't be mentioned in them now. But if it is ever unclear how law enforcement made the leap to a piece of evidence and a cell phone's involvement pops up on the radar, it should be teased out in a motion to suppress or a check the cell phone's user history. Many cell phones can tell you what was accessed and when. So if a cell phone's activity log shows use after a defendant was taken into custody, there is an issue. And from the remand of Riley, it looks like this is at least pipeline retroactive. So check it against cases you have pending now.

Whether this extends to other digital storage devices remains to be seen, but as the Court noted, cell phones are now essentially computers that can make phone calls. So USB or backup drives laptop, desktop or tablet computers will probably be afforded just as much protection, even without phone call capability. The case held some significant and memorable quotes: "[M]odern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy;" comparing the data in a cell phone found in a person's pocket to any other physical evidence is "like saying a ride on horseback is materially indistinguishable from a flight to the moon;" "We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future;" "It is the person who is not carrying a cell phone, with all it contains, who is the exception;" "[T]he Founders did not fight a revolution to gain the right to government agency protocols;" and "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for Americans 'the privacies of life' [citation omitted]. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."
A device with the capabilities of storing a world of information which may add up to the bulk of a person’s life on their cell phone or laptop stands above a bag or a pack of cigarettes in terms of what law enforcement may find, and where it may lead under the plain view doctrine. In any event, if a cell phone is not seized or searched incident to arrest, then it should not be seized or searched without a warrant. Prosecutors should ensure that their investigators and local officers are logging in any cell phones recovered during an arrest as evidence, and not personal property, so long as it may contain relevant evidence of the crime charged.

Finally, the application of exigent circumstances will surely be a major exception to technological evidence. Risk of destruction of evidence in tech circumstances would depend on knowledge that a timed overwrite or destruction program was embedded into the device’s programming, or the ability of the owner to trigger it remotely, which can depend on the device.

Encryption of passwords or data also raises questions of what can be forced out of a person’s mind. Can the divulging of a password in order for law enforcement to access otherwise inaccessible information be prevented through the assertion of the Fifth Amendment right against self-incrimination? Though there are a few cases percolating, the court in United States v. Jeffrey Feldman, held that there is such protection for those who are ordered to decrypt their computers or programs.

Wiretaps

Recording a phone call is legal in New Jersey as long as one party is aware of it. This is not the case in some states, such as New York. What is undetermined is when the recording party is in a state which permits it, but the other party is in a state which does not. Depending

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on the state, the analysis could be made via suppression, conflict of laws, or federal pre-
emption.\textsuperscript{397} The New Jersey Wiretapping and Electronic Surveillance Control Act\textsuperscript{398} and Federal Wire Interception and Interception of Oral Communications Act\textsuperscript{399} permit the real-time electronic interception and/or recording of oral communications. It is frequently used by law enforcement during the course of investigations into criminal activity. Procedurally, an affidavit written by a law enforcement officer qualified in electronic surveillance\textsuperscript{400} and authorized by the Attorney General, county prosecutor or their designee\textsuperscript{401} is submitted to the respective vicinage’s designated wiretap judge\textsuperscript{402}. The judge must be satisfied that there is probable cause\textsuperscript{403} to believe that one of a particular list of crimes\textsuperscript{404} has, is, or will be committed, and that normal investigative procedures would be or have been too dangerous.\textsuperscript{405} The judge then issues an order permitting the interception and recording of the content of phone calls, text messages, or emails as they occur in real time. This Order is good for up to 20 or 30 days, depending on the type of case,\textsuperscript{406} and may be renewed or extended for periods of up to 10 or 30 days, again depending on the type of case.\textsuperscript{407} Once that occurs, the officers then begin the process of getting the wiretap setup.

There are a few methods that can be used to intercept live communications, whether it be a landline, cell phone, or even email. A phone company is sent a copy and they set up parts on their end to assist the listening post’s interception. Law enforcement does not necessarily need the cooperation of a phone company to intercept. A landline phone is connected by a set of four wires that are routed off the phone company and out to wherever the call is going. The installation of a device to receive and record communications need only be installed by hooking

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{397} Carol M. Bast, \textit{Conflict of Law and Surreptitious Taping of Telephone Conversations, NY LAW SCHOOL L. REV. Vol. 54} \url{http://www2.cohpa.ucf.edu/crim.jus/doc/LawReview54.1_Bast.pdf}
\item \textsuperscript{398} N.J.S.A. 2A:156A-1, et seq.
\item \textsuperscript{399} 18 U.S.C. §2510, et seq.
\item \textsuperscript{400} N.J.S.A. 2A:156A-9(b).
\item \textsuperscript{401} N.J.S.A. 2A:156A-8.
\item \textsuperscript{402} N.J.S.A. 2A:156A-2(i); N.J. Ct. R. 3:5-6; see also NJ AOC Directive #4-00 May 11, 2000 “Wiretap Guidelines”, \url{http://www.judiciary.state.nj.us/directive/criminal/dir_4_00.pdf}
\item \textsuperscript{403} N.J.S.A. 2A:156A-10(b).
\item \textsuperscript{404} N.J.S.A. 2A:156A-8.
\item \textsuperscript{405} N.J.S.A. 2A:156A-9(c)(6).
\item \textsuperscript{406} N.J.S.A. 2A:156A-12(f).
\item \textsuperscript{407} N.J.S.A. 2A:156A-12(g).
\end{itemize}
\end{footnotesize}
up the wires outside the phone’s location so that the electrical signal goes to the device in addition to the actual phone. The recording of these “sessions”, are made digitally on a voice-activated device to cut down on storage space of dead air. A mobile recording device called a “bug” can also be installed where a conversation is expected to take place. These emit a signal to an offsite, but nearby, recorder. Without a landline, the signal itself must be intercepted. As mentioned earlier, this can be done by a “stingray” device, which tricks the user’s phone or air card into thinking that it is a cell phone tower while recording the data and sending it on its way to an actual cell tower. While this can all be done by law enforcement officers themselves, the more prudent thing to do is to engage the assistance of the user’s telecommunications company, such as Verizon or AT&T. Because telecommunications companies and internet service providers receive requests from all over the country, it is safer for them to apply the tougher Federal Standard.

Throughout all of this, a law enforcement agent must minimize the type of content to that which is and ensuring that any recognized evidentiary privileges are not violated. Most recently, in State v. Ates, the Court addressed the issue interception of calls made to and from phones located outside of New Jersey, while the “listening post” remained inside New Jersey. The Court held that the statute’s requirement that “interception” occur in New Jersey was not offended, and that constitutional concerns were not offended due to a large number of nationwide opinions holding similarly, and the difficulty such a prohibition would cause the State. However, Ates’ application to text messages may be markedly different, as they are routed and collected before provision to law enforcement. Thus, the “interception” point would be outside of New Jersey.

A Communications Data Warrant is similar to a wiretap, but is not subject to the wiretap requirements because it applies to retrieval of information stored on a third party server after the fact, as opposed to live, real-time interception of communications. This means that there

is no minimization requirement or time limit. The technical setup and monitoring are less stringent and rely on the storage and retrieval capabilities of the telecommunications company or website, rather than the setup and monitoring of the wiretap. However, like wiretaps, there are certain judges designated to handle them by the Chief Justice.\footnote{http://www.judiciary.state.nj.us/notices/2013/n130731b.pdf} Records available include name, address, local and long distance connection records, records of session times and durations, length of service and types of service utilized, telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; means and source of payment for such service, including any credit card or bank account number; and text or email message content. Because CDWs are not limited solely to law enforcement like a wiretap is, there is nothing keeping a defendant from making an application to the appropriate judge for a CDW on such information as a police officer or victim’s cell phone records. What is required is a showing that “specific and articulable facts showing that there are reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic communication service or remote computing service or communication common carrier is relevant and material to an ongoing criminal investigation.”\footnote{N.J.S.A. 2C:156A-29(e)}

**Federal Statutes: CALEA/SCAA/ECPA/FISA/PRISM/NSA**

Though not always applicable in New Jersey state courts, a practitioner should be aware of a handful of federal statutes which address some of the foregoing issues, some which create search and seizure abilities and powers that are exclusive to federal authorities. The Communications Assistance for Law Enforcement Act mandates cooperation from telecommunication companies when law enforcement plans to execute a wiretap warrant.\footnote{47 U.S.C. §§ 1001-1010.} The cooperation involves giving law enforcement access to the systems and facilities necessary to track the communication of one subscriber without infringing on the privacy of another subscriber. It has recently become an issue and Congress is being asked to not only enforce it,
but give it teeth. Apparently many telecoms are not assisting in the way the law mandates due to impossibility, incredibly expensive, or privacy issues.

Although it was in the works prior to the 9/11 attacks, the PATRIOT Act was passed a little over a month thereafter. It applied changes to a host of federal laws on intelligence issues. This included, among others, changes to the Electronic Communications Privacy Act (ECPA), and the Foreign Intelligence Surveillance Act (FISA). Among them was the expansion of the definition of pen register to include not just numbers dialed out from a telephone landline, but to internet communications as well.

Included within the PATRIOT Act was an expansion of National Security Letters. These are quasi-administrative subpoena demand letters for records which the FBI, CIA, and DoD may issue, and until 2011, without judicial oversight or the ability of the recipient to disclose its receipt to anyone. Various courts have voiced their concerns with the gag order provision which prevents a recipient from disclosing receipt or contesting a NSL. One court has recently held that the gag order portion is unconstitutional.

The ECPA addressed trap and trace practices. A pen register is an electronic device which intercepts telephone numbers being dialed from a particular phone number. Trap and trace is the reverse process of intercepting which numbers are coming to a particular phone number. The statute states that the court shall issue an Order permitting the installation of a trap and trace or pen register device “anywhere within the United States, if the court finds that the attorney for the Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.” The level of suspicion required to determine what “is relevant” is the subject of disagreement.

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418 In re National Security Letter, 930 F.Supp.2d 1064 (N.D.Cal. March 14, 2013). As of this writing the Order’s implementation has been stayed to permit the State to appeal.
419 See also Smith v. Maryland, 442 U.S. 735, 742 (1979).
Included within the ECPA was the Stored Communications Act,\(^ {421}\) which among other things, permits law enforcement to obtain emails stored on third party server for more than 180 days without a warrant.\(^ {422}\) The act was drafted in 1986, when card catalogues were more common than computers and ESI storage capabilities presumed that anything over 6 months old would be deleted to make room for new data. At least one court in the Sixth Circuit has found that a person has a reasonable expectation of privacy in email stored on a third party server or ISP.\(^ {423}\) The court found that the provision of the SCA permitting warrantless searches and seizures of email and stored data over 180 days old was unconstitutional and violated the 4\(^ {th}\) Amendment. The court likened the ISP to a post office or telephone company: all serve as intermediaries for communication between two parties, but the electronic data is treated differently for no discernible reason. This is similar to the NJ standard, which does not consider information in possession of third party holders to waive a reasonable expectation of privacy, as opposed to the federal standard, which does.

FISA permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of "individuals who are not 'United States persons' and are reasonably believed to be located outside the United States."\(^ {424}\) It lowers the evidentiary showing needed to obtain a surveillance warrant with regard to foreign intelligence gathering and American citizens suspected of espionage.\(^ {425}\) Warrants obtained under this act are heard in one particular court, by one particular judge, and can be made retroactively after the surveillance has been made. These courts are not open to the public, and have been the subject of controversy due to their secretive nature. The odds of coming across a piece of evidence obtained pursuant to this law in discovery disclosure are almost nonexistent. The government did not disclose or even acknowledge that FISA was used

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\(^ {421}\) 18 U.S.C. §§ 2701-12.
\(^ {422}\) 18 U.S.C. § 2703.
\(^ {423}\) United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).
to obtain evidence in a criminal investigation until May 9, 2013, when it was ordered to do so in *United States v. Qazi*.426

As of this writing, Chelsea Manning has been sentenced to 35 years for providing military operations information to WikiLeaks, Julian Assange is still a permanent resident of the Ecuadorian embassy in London following his operation of WikiLeaks and sexual assault investigation, Edward Snowden is still in Russia hiding out after his release of documents indicating the US government’s warrantless spying and data collection capabilities. Every day more is revealed about surveillance activity the US government has been engaged in for the past few years. With the amount of information and above-the-fold intrigue arising on a regular basis, this author can only imagine what may have been revealed as of publication.

**Databases and Online Search Tools**

In general, there are a large number of databases and internet search engines available to find helpful information for criminal cases. The green on black DOS screen you see the clerk using in criminal courtrooms is the Promis Gavel System. Promis Gavel is the NJ Superior Court’s Criminal Part database. It contains tracking information only for matters sent up to Superior Court from Municipal Court and tracks them until they are disposed of or remanded. Each vicinage has public access terminals found in or near the Criminal Case Management office. The Prosecutors’ Offices and the Public Defender’s Office have full access to PG. The public online version427 is unfortunately limited to cases which have resulted in felony/criminal convictions. Online you cannot find cases disposed of as disorderly persons offenses, remanded to Municipal or Family Court, or dismissed. PG does not contain traffic or nonindictable charges unless they are connected to indictable matters.

Municipal Courts run on two separate databases: nonindictable criminal and traffic. The Automated Complaint System (ACS) generates complaints, tracks warrants, bail payments, and interacts with the MVC database.428 The Automated Traffic System (ATS) serves a similar

426 United States v. Qazi, No. 0:12-cr-60298-RNS (S.D. Fla. May 6, 2013); see also Clapper, 133 S. Ct. 1138.
427 [https://njcourts.judiciary.state.nj.us/web15z/ExternalPGPA/](https://njcourts.judiciary.state.nj.us/web15z/ExternalPGPA/)
428 [http://www.judiciary.state.nj.us/ito/acs.htm](http://www.judiciary.state.nj.us/ito/acs.htm)
function, but for motor vehicle summonses exclusively. These two systems do not interact. This is why when you call a Municipal Court Administrator’s Office, your inquiries are routed to either criminal or traffic. However, there are rumors circulating about the forthcoming Municipal Automated Complaint System, which combines both traffic and criminal at the Municipal Court level.

There are many websites that can help determine where your client, witness or co-defendant is or has been. These websites include Vinelink.com, Immigration and Customs Enforcement holding, other states’ jails/prisons, New Jersey county jail websites, New Jersey state prison inmates, federal inmates, sex offender data, the New Jersey Promis Gavel System, military personnel, which all assist criminal practitioners in representing or prosecuting defendants.

Prosecutors and police have various database tools that assist in prosecutions which are mostly unavailable to defense attorneys. These include NCIC, CODIS, AFIS, QED databases and software, MNI, Law Enforcement Online, search.org, BEAST evidence-tracking,

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429 [http://www.judiciary.state.nj.us/ito/ats.htm](http://www.judiciary.state.nj.us/ito/ats.htm)
430 [https://locator.ice.gov/odls/homePage.do](https://locator.ice.gov/odls/homePage.do)
431 Bergen [http://www.bcsd.us/pages/inmate%20lookup.aspx](http://www.bcsd.us/pages/inmate%20lookup.aspx);
Burlington: [http://www.co.burlington.nj.us/pages/JL/InmateSearch.aspx](http://www.co.burlington.nj.us/pages/JL/InmateSearch.aspx);
Cape May: [http://www.cmcsheriff.net/CMC%20JAIL%20INMATES.htm](http://www.cmcsheriff.net/CMC%20JAIL%20INMATES.htm);
Hunterdon: [http://www.co.hunterdon.nj.us/911/jail/inmates.html](http://www.co.hunterdon.nj.us/911/jail/inmates.html);
Ocean: [http://omse.co.ocean.nj.us:8082/IML](http://omse.co.ocean.nj.us:8082/IML);
Passaic: [http://65.51.122.207/ArchonixXJailPublic/Default.aspx](http://65.51.122.207/ArchonixXJailPublic/Default.aspx);
432 [https://www6.state.nj.us/DOC_Inmate/inmatefinder?i=1](https://www6.state.nj.us/DOC_Inmate/inmatefinder?i=1) Offender information is only available for one year after expiration of their maximum sentence date or their mandatory parole supervision date, if applicable. Offenders sentenced to Community Supervision for Life or Parole Supervision for Life will not be removed.
433 [http://www.bop.gov/iloc2/Locatelnmate.jsp](http://www.bop.gov/iloc2/Locatelnmate.jsp)
435 [https://njcourts.judiciary.state.nj.us/web10/ExternalPGPA/CaptchaServlet](https://njcourts.judiciary.state.nj.us/web10/ExternalPGPA/CaptchaServlet)
436 [https://www.dmdc.osd.mil/appj/scra/welcome.xhtml](https://www.dmdc.osd.mil/appj/scra/welcome.xhtml)
437 National Crime Information Center
438 Combined DNA Index System
439 Automated Fingerprint Identification System
440 Master Name Index
and desktop access to Promis Gavel. Prosecutors may run driver abstracts as well statewide and nationwide criminal case histories.

Also of interest is the New Jersey Attorney General’s Office websites storing its Guidelines and Directives, respectively. You can be notified by email when Guidelines and Directives are added to the site by sending an email requesting it to agupdate@njdcj.org.\footnote{http://www.nj.gov/lps/dcj/agguide.htm; http://www.nj.gov/lps/dcj/directiv.htm} A similar mechanism for receiving updates on New Jersey legislative action is also available.\footnote{http://www.njleg.state.nj.us/bills/BillsSubscriptionLogin.asp}

On the New Jersey State Judiciary’s website, an attorney can locate the Automated Model Criminal Jury Charges System.\footnote{http://www.judiciary.state.nj.us/criminal/amcjcs/index.htm} This offers the ability to automatically enter the appropriate gender specific language throughout the document, delete or include the footnotes to the model charge, and arrange the order of the charges to fit the appropriate circumstance. It is a very powerful and time-saving tool for attorneys and court staff during trial prep. At

\begin{figure}
\centering
\includegraphics[width=\textwidth]{amcjcs.png}
\caption{Automated Model Criminal Jury Charges System}
\end{figure}
present, it only seems to function correctly when using Internet Explorer’s web browser, but not Firefox, Opera or Chrome. And, of course, the entirety of the New Jersey statutes, including Title 2C are available online.\footnote{http://law.justia.com/codes/new-jersey/2013/title-2c/}
CHAPTER 7: Obtaining Digital Data

This chapter focuses on the rules, law, and the development of strategies for dealing with e-discovery from the time that you first learn of a prospective case, the initiation of that case, all the way through the resolution of the case and the continuing obligations of you and your client after the case has been fully decided or otherwise resolved. A practitioner’s lack of knowledge about e-discovery or the present state of technology can lead to contested legal issues on the limits of available and discoverable ESI, methods of collection and production, spoliation, and cost. Therefore, the goal is to educate attorneys on these technological discovery issues.

Obviously, without knowledge of the requisite definitions that must be utilized when referencing technology, one lacks the foundation to begin dealing with e-discovery. That is why this book’s beginning chapter is an introduction to technological terms. Here, we expand on those definitions and analyze them in a legal setting. We incorporate them into preservation obligations that you are ethically required to communicate (and follow-up on) with your client, as well as rules of thumb for propounding and answering discovery demands, the limits of available discovery, proportionality, dealing with production deficiencies, spoliation claims, cost-shifting, third-party discovery and other pertinent issues.

“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.” \(^{445}\) However, there are limitations on production, such as burden, cost, privilege, harassment, and other factors. The key term to remember in this arena is: Proportionality. All of the steps you take in a case, with respect to discovery, should be proportional to the element of risk in the case, either monetary or one’s liberty interests.

Case law regarding technology and e-discovery lags behind while the technology advances quickly at an exponential rate. However, we are not left to guess. The courts have provided significant guidance, applying traditional discovery rules to technological advances. This much is clear; the law is moving towards full acceptance and encouragement of the use of electronic discovery. The courts have recently updated the New Jersey Court Rules and

addressed many e-discovery issues. This includes criminal, civil, and family court rules. There are also some out-of-state cases that delve into the future of New Jersey case law. In addition, the Federal Rules of Civil Procedure are currently being amended, largely to address concerns regarding e-discovery and ESI. The purpose of this chapter is to help navigate this ever-changing environment.

Additionally, this chapter delves into social media in discovery requests. Social media is addressed throughout this book. We started with marketing, pre-trial investigation, and preservation. Now, we will discuss how to seek out information contained on social media sites through discovery requests and how to argue against unbridled investigation into a client’s social media presence. We know that discovery must be relevant and a request seeking relevant information must be reasonably calculated to lead to the discovery of admissible evidence. Although, in theory, a request for social media information seems reasonably calculated to lead to relevant information, it is often limited due to the confusing privacy issues in the public space. Sites have created several layers of privacy through settings, publications, and “friending." Therefore, many personal and confidential communications are made on a seemingly public network. But should a person reasonably expect those communications to remain private?

**Discovery Requests for ESI and the Discovery Process**

You can neither request nor utilize that which you cannot comprehend. In today’s world, attorney needs to have a working familiarity with ESI: how to preserve it, collect it, process it, review it, produce it and, ultimately, use it to enhance the client’s case. United States Senior District Judge Michael M. Baylson recently underscored the importance of ESI when, in ruling upon a motion to compel, he prefaced his opinion by stating: "Ignoring the capabilities which ESI allows the parties to search for and produce factual information in a case of this nature is like pretending businesses still communicate by smoke signals[.]

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Therefore, as attorneys, we must understand the different types of technology utilized in the world in order to leverage it to our clients’ advantage. Obviously, we understand the concept of electronic documents. However, we cannot forget proprietary document extensions, network backups, cloud backups and hosting solutions, external drives, cookies, cache, encrypted data, and party or third-party Groupware and/or databases. An attorney needs to know the potential sources of electronic discovery and when they need to ask for someone’s assistance, such as an expert, in dealing with that information.

Before delving into the law and court rules, it is always easiest to attempt to establish a discovery plan with your adversary prior to issuing discovery requests. If you do not ask, you may never receive. Further, it may prevent later battles if you have a stipulated agreement regarding the preservation and production of ESI. That being said, the rules regarding what is discoverable are fairly liberal: that which is relevant and not privileged or is reasonably calculated to lead to the discovery of admissible evidence.448

**Relevant Discovery Court Rules**

**Civil**

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.449 It does not matter if the information sought will be inadmissible at trial as long as the request is reasonably calculated to lead to the discovery of admissible evidence.450 So, how does this relate to technology? The rules of procedure provide that discovery should be broad and not limited, and have been amended to

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Note, however, that the Judicial Conference’s Committee on Rules of Practice and Procedure recently approved a revised package of amendments to the Federal Rules of Civil Procedure that were recommended by its Advisory Committee on Rules of Civil Procedure in a May 2, 2014 report. One of these proposals seeks to amend the scope of allowable federal discovery, as set forth in Fed. R. Civ. P. 26(b)(1), by emphasizing that discovery must be both relevant and proportional to the needs of the case. See [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf) at 64-70. These amendments, however, have yet to take effect, and in all likelihood will neither be finalized nor promulgated until late in 2015.
prepare for current and future technology. N.J.Ct.R. 4:10-2(a) and F.R.C.P. 34(a)(1)(A) state that
discovery specifically includes “electronically stored information.” Therefore, any party may
serve a request for the production or inspection and copying of ESI. 451 They permit discovery as
to the existence, description, nature, custody, condition and location of any ESI. 452 Further, this
information may be obtained subject to subpoena (or notice in lieu of subpoena). 453

We have addressed the possibility of sanctions and adverse inferences for destroyed
ESI; however, it is important to mention that absent exceptional circumstances, the 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. 454

N.J.Ct.R. 4:10-2(f) and F.R.C.P. 26(b)(2)(B) state that an adversary need not provide
discovery of ESI from sources that the party identifies as not reasonably accessible because of
undue burden or cost. The burden of obtaining this preclusionary relief, however, falls on the
party from whom discovery is sought. Even when a party is successful in demonstrating
burden, the court may still order production if the requesting party establishes good cause. As
a compromise, the court may limit the production utilizing N.J.Ct.R. 4:10-2-(g) or F.R.C.P.
26(b)(2)(B) and (b)(2)(C). The court may also seek to allocate, between the parties, the costs of
production.

In New Jersey Superior Court cases assigned to Track I, II, and III, the designated pretrial
judge may sua sponte or on a party’s request conduct a case management conference to
address issues relating to discovery of electronically stored information. 455 The conference may

453 N.J. Ct. R. 1:9-2; FED. R. CIV. P. 45(a)(1)(A)(iii) and (a)(1)(C) and (D).
454 N.J. Ct. R. 4:23-6; FED. R. CIV. P. 37(e). For a more detailed analysis as to the role of routine
document retention and destruction policies, and why destruction policies should be suspended when a
preservation obligation exists, see Raising Preservation of Electronic Evidence, supra.

In addition, the proposed amendments to the federal rules, as presently configured, will modify
the FED. R. CIV. P. 37(e) sanctions analysis. For more information on the proposed amendments to the
federal rules, see
result in an order establishing provisions for the exchange of ESI, including agreements on claims of privilege.\textsuperscript{456}

With respect to federal litigation in New Jersey, ESI is addressed at an early stage of litigation, and is governed largely by Local Rule 26.1, analyzed below.

**Satisfying Your Obligations under Local Rule 26.1**

New Jersey’s Federal District Court is unique in that it has adopted its own Local Rule 26.1 that codifies the parties’ meet-and-confer obligations under F.R.C.P. 26(f) and governs their preparation of a joint discovery plan and initial disclosures. Specifically, the Local Rule emphasizes the need to address the preservation and production of ESI at an early stage.

Before addressing the contents of Local Rule 26.1, it is worth noting that the Rule embodies the principle enunciated by Chief Judge Garrett E. Brown (Ret.) – that “attorneys in this jurisdiction are expected to conduct themselves with professionalism, to creatively find solutions to common problems, and to cooperate with each other. . . . [D]espite the animosity between their clients, attorneys before this Court are expected to confer in good faith prior to bringing issues before the Court.”\textsuperscript{457} Magistrate Judge Hughes echoed the same sentiment in 2002, before Local Rule 26.1 was promulgated, when he expressed his “hope and expectation that the full and meaningful utilization of tools permitted by the Federal Rules of Criminal and Civil Procedure, particularly Rule 26(f) in civil cases, will obviate future problems of fair and economical discovery cost allocation in the production and use of electronic information.”\textsuperscript{458}

Local Rule 26.1 embodies these sentiments of professionalism and cooperation. Procedurally, it requires the parties to meet and confer at least 21 days before the initial scheduling conference, generate their proposed joint discovery plan and deliver it to the Magistrate Judge 14 days after the initial meeting (or 7 days before the initial conference).\textsuperscript{459} The proposed joint discovery plan must address any changes to the timing, form or requirements of F.R.C.P. 26(a) initial mandatory disclosures; the date on which disclosures will

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\textsuperscript{456} Id.
\textsuperscript{458} In re Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437 (D.N.J. 2002).
\textsuperscript{459} Local Rule 26.1(b)(2).
The Local Rule requires the parties to consider a litany of substantive issues pertaining to digital and computer-based information. This includes an obligation to investigate with the client and disclose, prior to a F.R.C.P. 26(f) meet-and-confer, the clients’ information management systems, including: computer-based and other digital systems to comprehend the manner in which information is stored and how it can be retrieved; files, including currently maintained computer files and historical, archival backup and legacy computer files; and to identify “a person or persons with knowledge about the client’s information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.” The Local Rule also imposes a duty to notify the opposing party as soon as possible as to the categories of anticipated digital or computer-based information which may be sought, along with a duty to supplement a request for such information as soon as possible upon receipt of new information relating to digital evidence.

During the meet-and-confer process, the parties are also to “attempt to agree on computer-based and other digital discovery matters, including”: (a) preservation and production of digital information, as well as procedures regarding inadvertent production of privileged information and whether any restoration of deleted information may be necessary, including whether back up or historical legacy data is within the scope of discovery and the media, format

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460 Local Rule 26.1(b)(2)(a)-(k)
461 Local Rule 26.1(d)(1).
462 Local Rule 26.1(d)(2).
and procedures for producing digital information; (b) who will bear the costs of preservation, production and restoration (if needed) of any digital discovery.  

Therefore, any practitioner involved in a federal case in New Jersey is required to address ESI, ESI requests and ESI governance at any early stage. Even if a practitioner is litigating his or her case in New Jersey Superior Court, it is highly recommended that he or she follow the outline of Local Rule 26.1 to help avoid unwelcome surprises along the way.

**Criminal & Municipal Court**

In *Brady v. Maryland*, the Supreme Court held that a defendant’s right to due process mandates that the State provide the defense with all potentially exculpatory evidence. A defendant (and State) shall be permitted to inspect and copy relevant material. The rule was amended, in 2013, to include “electronically stored information and any other data or data compilations stored in any medium from which information can be obtained and translated. . . . into reasonably useful form.” The discovery includes any exculpatory information and material. Rarely utilized Court Rules permitting depositions in Criminal and Municipal matters were amended allowing electronically stored information to be produced at a deposition when the witness is likely to be unable to testify because of death or physical or mental incapacity.

In many New Jersey counties, audio recordings of grand jury and court room proceedings are available to defense counsel through the so-called “Blue Man.” Remember that this system is merely marking what would be included as “on the record” while it constantly records.

Both parties must provide the other with a list of the discovery materials provided. This includes any electronic data, and if spanning multiple disks, on which disk each item can be located. If items have not been provided, they must provide what it is and why it has not been

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463 Local Rule 26.1(d)(3)(a)-(b)
turned over. Defense counsel is supposed to turn over “discoverable materials” along with a list of materials at least 7 days prior to arraignment, or with an explanation of why they have not been supplied. The remainder of the defense obligation is essentially the same as the State’s.\textsuperscript{470}

As long as defense counsel gets a letter of representation out prior to pre-arraignment conference, the State has to get discovery over to defense counsel within 3 days of receipt of the discovery demand.\textsuperscript{471} Though this demand now must include defense counsel’s preference for transmission by email or snail mail, the state has the discretion.\textsuperscript{472} Assuming printing the discovery costs out at less than the postage, a preference for email would be advised. This would also cut down on time spent scanning items for those who do so.

Discovery now includes all of the following items: “books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form.”\textsuperscript{473} This change is essentially the same throughout the Rules, including depositions when appropriate, as well as criminal chapter and municipal chapter pertaining to defense and prosecutor.

Defense attorneys may now request discovery in email form when entering their appearance, which does not require discovery costs.\textsuperscript{474} Parties may provide discovery pursuant through the use of CD, DVD, e-mail, internet or other electronic means, as long as it is in .pdf format (files that would open in Adobe Acrobat).\textsuperscript{475}

All non-scannable information must be “provided in an open, publicly available (non-proprietary) format that is compatible with any standard operating computer. If discovery is not provided in a .pdf or open, publicly available format, the transmitting party shall include a self-extracting computer program that will enable the recipient to access and view the files that

\textsuperscript{470} N.J. Ct. R. 3:13-3(b)(2).
\textsuperscript{471} N.J. Ct. R. 3:13-3(b)(1).
\textsuperscript{472} N.J. Ct. R. 3:13-3(b)(3).
\textsuperscript{475} N.J. Ct. R. 3:13-3(d).
have been provided. Upon motion of the recipient, and for good cause shown, the court shall order that discovery be provided in the format in which the transmitting party originally received it.\footnote{476} Remember that not all programs are compatible with all computer operating systems. Some programs that are designed on and/or for Apple, Microsoft, Linux, or Android machines may not run on one another. This is frequently an issue in shoplifting cases, where the number of software is nearly as varied as the number of stores.

“In all cases in which an Alcotest device is used, any Alcotest data shall, upon request, be provided for any Alcotest 7110 relevant to a particular defendant’s case in a readable digital database format generally available to consumers in the open market.”\footnote{477} The Alcotest blood alcohol breath machine data contains more columns than the commonly used Microsoft Excel is capable of displaying. Quattro Pro from Corel WordPerfect is one program which displays all fields.

The cost for discovery materials is now $0.05 per letter size page or smaller and $0.07 per legal size page or larger, emailed and faxes electronic records and non-printed material are free, but data discs will be at cost (these are usually $0.10-$1.00).\footnote{478} However, if the actual cost of materials and supplies exceeds those rates, the prosecutor can charge a reasonable amount.\footnote{479}

“Whenever the nature, format, manner of collation, or volume of discovery embodied in the form of printed matter to be copied is such that the discovery cannot be reproduced by ordinary document copying equipment in ordinary business size, or is such that it would involve an extraordinary expenditure of time and effort to copy, the prosecutor may charge, in addition to the actual copying costs, a special service charge that shall be reasonable and shall be based on the actual direct costs of providing the copy or copies. [. . .] [D]efense counsel shall have the opportunity to review and object to the charge prior to it being incurred.”\footnote{480}
“If defense counsel requests an electronic record: (1) in a medium or format not routinely used by the prosecutor: (2) not routinely developed or maintained by the prosecutor: or (3) requiring a substantial amount of manipulation or programming of information technology, the prosecutor may charge, in addition to the actual cost of duplication, a special charge that shall be reasonable and shall be based on (1) the cost of any extensive use of information technology, or (2) the labor cost of personnel providing the service that is actually incurred by the prosecutor or attributable to the prosecutor for the programming, clerical, and supervisory assistance required, or (3) both. [. . .] [D]efense counsel shall have the opportunity to review and object to the charge prior to it being incurred.”481

Criminal practice is moving away from paper discovery to electronic discovery transmission. Federal Courts have been leading the way on this. Paper discovery costs money in postage, data can be compressed (shrunk) and then emailed. For larger data sets, physical methods such as discs or entire external drives like a USB (thumb) drive, or a wallet sized external drive as long as it can be hooked up to the source. This includes iPods, Kindles, etc. There is currently a pending NJ Court Rule regarding the development and implementation of an online filing system similar to the Federal Pacer system. The Judiciary Electronic Filing System (JEFIS) has been in use by the Special Civil Part and Foreclosure Actions in Chancery.482

The way to obtain all of this evidence is to send the relevant prosecuting agency a demand for discovery. Much depends on the language presented. Otherwise, the recipient may not be able to determine exactly what is requested. Because not everyone involved in the discovery disclosure process has read this book, you might want the demand to contain a description of exactly what you are referring to. As a prosecutor, when you receive a discovery demand that reads like stereo instructions, pick up the phone and ask. It reveals ignorance, but it’s easier than having to reveal this ignorance in court or respond to a motion to compel discovery.

Even worse, if the language is correct, and it is not turned over, you run the risk of a judge denying the demand because it wasn’t asked for to begin with (despite that the state is

482 http://www.judiciary.state.nj.us/jefis/
supposed to turn it over anyway). For example, if there is a motor vehicle stop, a defense attorney would want to request all data they would reasonably expect to be created during the stop, and even things that may not. Also, the discovery request should be crafted so that even things such as police cell phones and interagency emails are requested, in the event that they exist. You always run the risk of a judge characterizing a legitimate request as a fishing expedition because it is not specific or because you cannot adequately explain what it is you are looking for. In reality, all discovery demands are fishing expeditions. If the defense knew of and could prove every single thing that occurred outside of what the client knew, there would be no need for discovery. I have seen MVRs and CAD reports that were substantially contrary to what is in a police report, but I could not have expected the inconsistency.

Some of the tech-related items a defense attorney should request include mail, police cell phone records including service provider, model of phone, text messages, call logs, and voicemails, and audio transmission over the police radio. Computer Aided Dispatch reports between certain times on certain days, or even pertaining to certain geographic locations, or types of events if appropriate.

Another type of discovery demand item is Mobile Data Terminal or Mobile Video Recorder information. This should include a specific request for the name and version of the hardware and software used; data from the day pertaining to the incident involving the defendant up to and including at least one hour following the final processing; global positioning data; “chat” function transmissions; and database searches from the unit.

Assuming that the state makes all good faith inquiries and disclosures, there still may be times when confirmation of the data’s lack of existence is appropriate and helpful during the course of litigation. To ensure that you receive a reply from someone who has the technical expertise in the hardware, request that if none of the foregoing exists, that this person reply in writing with a proffer indicating same from the Chief of Police or an employee assigned by the Chief of Police to oversee the operational use of and coordinate maintenance of MDTs, media duplication, storage and retrieval, and procedures, as well as records pertaining to the installation of all MDT systems, and if the unavailability is based on mechanical issues relating
to the device itself, all repair records/logs pertaining to the MDT from the squad car in question prior to and subsequent to the stop.

Finally, there is the sticky issue of discovery disclosure in general. In NJ State Courts, the prosecutor must turn over all relevant evidence, be it exculpatory or inculpatory.\textsuperscript{483} Case law on defense disclosure is more complicated. Obviously, defense counsel should not turn over inculpatory material.\textsuperscript{484} But the cases addressing the issue of defense disclosure indicate that the defense is required to disclose discoverable material only when they intend to use it at trial.\textsuperscript{485}

\textit{Family}

N.J. Ct. R. 5:5-1 allows interrogatories and notice to produce under N.J. Ct. R. 4:17 and 4:18 which provides for the production of ESI.

N.J. Ct. R. 5:7-4(g) permits the use of electronic signatures for the purposes of Child Support Orders, establishing that electronic signatures are constituted as original signatures, and requiring that any person giving an electronic signature be made aware of the significance of an electronic signature.

N.J. Ct. R. 5:7A(b) permits for the issuance of a Temporary Restraining Order by Electronic Communication, allowing sworn oral testimony of an applicant who is not physically present.

\textit{Discovery Subpoena}

N.J. Ct. R. 1:9-2 and F.R.C.P. 45 (a)(1)(A)(iii) and (a)(1)(C) and (D) make electronically stored information subject to subpoena or notice in lieu of subpoena.

\textsuperscript{484} A Hudson County judge recently ruled that text messages between an absconding defendant and his attorney may not be subject to a state subpoena: http://www.hudnutlaw.com/blog/2013/05/15/hudnut-law-and-the-association-of-criminal-defense-attorneys-team-up/
Interrogatories

Interrogatories may be directed to identify written communications, the method of communication and the form in which these communications are stored. Once identified, the contents of the document can be obtained through a notice to produce. The more specifically electronically stored documents can be identified, the more likely it is that they will be obtained through discovery.

Requests for Production and Form of Production

Any party may serve a request for the production, inspection, copying, testing, or sampling of “electronically stored information and any other data or data compilations stored in any medium from which information can be obtained and translated . . . into reasonably usable form.” The request for ESI may specify the form or forms in which the material is to be produced. If it does not, the responding party need only produce the information in a form in which it is ordinarily maintained or is reasonably useable. This means that, if you do not request a particular form of ESI, and your adversary then produces it in a reasonably useable form, your adversary need not then provide it in another form.

The Federal Rules of Civil Procedure are similar, but specifically require that the request describe with reasonable particularity each item or category of items to be inspected. As in New Jersey Superior Court, the responding party must produce documents as they are kept in the usual course of business and, if a form is not specified, they must be produced in a form in which they are ordinarily maintained or in a reasonably usable form. In federal court, just as in New Jersey Superior Court, a practitioner must be careful about the manner in which he or she requests ESI, since a party need not produce the same ESI in more than one form.

Therefore, if you neglect to specify the manner of production and your adversary produces e-mails in hard copy format or in PDF format by using OCR, and you are dissatisfied.

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with the production your ability to object to the manner of production will be much more limited. Further, if the information is provided in a form that only can be accessed with proprietary software, then the adversary will most likely need to provide a copy of the software along with the e-discovery. On the other hand, an adversary is not required to provide documentation or technical support when providing ESI. An attorney receiving such information may be forced to seek third-party assistance in interpreting and understanding the provided data. Accordingly, a request for ESI should identify a specific manner of production, and should be tailored to the specific facts of the case to avoid the appearance of a fishing expedition.

The broader the request, the easier the objection.

In federal court, if the requesting party is not satisfied with the form used by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must confer under F.R.C.P. 37(a)(2)(B) in an effort to resolve the dispute. If a court is forced to resolve the dispute, “the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in [the] rule...”

In addition, a party upon whom a request is served may object to a request on the grounds of accessibility of ESI. The rule anticipates that such an objection will most likely result in the requesting party moving for an order of dismissal, suppression, or an order to compel. Therefore, the burden falls on the objecting party to raise privilege, undue burden or expense. However, even if a party is successful in satisfying this burden, the court may still order production if the requesting party establishes good cause. As a compromise, the court may limit the production utilizing N.J. Ct. R. 4:10-2 (g) or F.R.C.P. 26 (b)(2)(C).

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493 See Committee Note, 2006 Amendment, FED. R. CIV. P. 34(b).
496 N.J. Ct. R. 4:10-2(e),(f); FED. R. CIV. P. 26(2)(B).
In the class action case of *In re Domestic Drywall Antitrust Litigation*, the plaintiffs were compelled to provide a pretrial statement setting forth the facts they were relying upon to support their allegations. In issuing this ruling, Judge Baylson relied heavily on the plaintiffs’ ESI discovery capabilities and their “felicitous access” to ESI. The court justified its order by acknowledging plaintiffs’ relatively low burden of using their ESI tools to manage and search through their information. 497 Judge Baylson explained:

Although ESI is often condemned as overly expensive and unproductive, there are some cases in which its benefits vastly outweigh its costs. This case is likely such a case. The issues are important, the financial stakes of both discovery and damages are high, and there are important reasons of public policy justifying broad discovery in antitrust cases, regardless of the result. Some of the landmark antitrust cases of the last 50 years have resulted in changes in normative corporate behavior. Given contemporary tools of discovery, ESI plays an important part, and must be considered in ruling on discovery disputes. In this case, the agreement of counsel for 1,100 search terms and the millions of documents produced as a result can only be reviewed, and the relevant information efficiently extracted, by the use of computer-based programs. There is no question that the availability of ESI has promoted a beneficial improvement in the productivity of lawyers.

Although much ink and more dollars have been spent bemoaning the excesses and expenses of ESI in the post-computer litigation world, this is a case where the parties can benefit from ESI. For example, Plaintiffs can easily use ESI tools to match dates and places of trade meeting with names of attendees. The availability of this technology is often improved by third-party vendors, who have their own sophisticated and proprietary methodologies for helping litigants deal with ESI, perhaps at greater cost, but also at greater efficiency and with more beneficial results. Vendors of ESI services have become an important part of the litigation landscape. 498


498 *Id.* at 5 (footnote omitted).
Accordingly, the proliferation of ESI in pre-trial discovery and its ability to alleviate discovery burdens are now being used to justify the production of information at an earlier stage in litigation than ever before.

**Metadata Requests**

In the District of New Jersey, our courts recognize the general principle that “the producing party ordinarily must take into account the need for metadata to make otherwise unintelligible documents understandable” and further acknowledged that courts have generally ordered the production of metadata when it is sought by the requesting party in the initial F.R.C.P. 34 document request and the producing party has not yet produced documents in any form. Thus, pursuant to F.R.C.P. 34, “a party may request the form of production as metadata. ‘The responding party must then either produce ESI in the form specified or object.’” When the responding party objects, it is required to state the forms or forms it intends to use for its production of ESI. If the requesting party further objects and requests an alternative form, the parties must meet and confer to try and resolve the dispute before filing a motion to compel.

However, the ability to obtain metadata is not unlimited. If the requesting party does not object to a metadata-less production within a reasonable period of time, then it has likely waived its right to obtain the metadata it initially requested. “Reasonableness is the touchstone principle, as it is with most discovery obligations. The simple holding here is that it

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501 Id. at 425-26.
was unreasonable to wait eight months [to raise the issue of metadata] after which production was virtually complete.”

The *Edgewood* case also stands for the principle that, when a party has a complaint concerning the other party’s ESI and document collection process, the complaining party is obligated to promptly raise the issue. Otherwise, a subsequent collection and production is unduly burdensome under F.R.C.P. 26(b)(2)(C)(i). The case also embodies the principle that, when complaining about a deficient production, “a conclusory allegation premised on nefarious suspicion” alone is insufficient; rather, the complaining party must make a colorable showing of purposeful or negligent withholding of documents.

There is a dearth of reported case law in New Jersey Superior Court concerning the manner in which documents should be produced, and how metadata or other types of ESI should be requested. Nonetheless, in an unpublished opinion in the context of a mass tort case that avoided federal multi-district litigation (MDL) due to the forum defendant rule, the Bergen County Law Division rejected the New Jersey plaintiffs’ attempt to reject the production the defendants had already made pursuant to the MDL protocol and instead attempted to compel the defendants to produce their ESI in its native format. The court rejected the plaintiffs’ attempt relying on N.J.Ct.R. 4:18-1(b)(2)(B) and (C), and held that the defendants’ MDL production was sufficient because it was “reasonably usable” in that it was already word-searchable and included metadata. The court further reasoned that “[t]o permit or otherwise order a format unique to New Jersey would cause an undue hardship on the Defendants, including an expense of almost $1,000,000.00, additional logistical hurdles, the slowing down of document production and most notably, the Defendants would be required to produce the approximately ten million pages of documents in different formats.”

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502 *Id.* at 425.
503 *Id.* at 427. In so holding, the District Court also acknowledged Principle 6 of the Sedona Conference Best Practices Commentary - “[a]bsent agreement, a [responding] party has the presumption, under Sedona Principle 6, that it is in the best position to choose an appropriate method of searching and culling data.”
504 *Id.* at 427-28.
506 *Id.*
Cost Concerns: Litigants Beware

Although discovery is broad and ESI usage is becoming a regular part of modern legal practice, its scope is neither unbridled nor unlimited. The process of preserving, collecting, reviewing, producing and analyzing is costly. Therefore, its benefits must be carefully weighed against its costs.

With these cost concerns in mind, all practitioners would be wise to heed the District Court’s warning in the case of *I-Med Pharma, Inc. v. Biomatrix, Inc.*, which highlights the dangers of carelessness and inattention in e-discovery.\(^{507}\) There, the District Court affirmed the Magistrate Judge’s order excusing the plaintiff from an obligation (incurred by stipulation) to conduct a privilege review of 95 million pages of documents that were identified by key word search in unallocated ESI space. Even though the plaintiff stipulated that it would allow its networks and systems to be searched for responsive information, the District Court relieved it of this burden after acknowledging the enormous expense and diminished likelihood that the material would contain non-duplicative evidence.\(^{508}\)

Privilege, Work Product, Waiver, F.R.E. 502 and Clawback Agreements

E-discovery may, at times, entail the preservation, collection, processing and production of thousands if not millions of pages of documents. Whenever one deals with mass productions like these, there are always concerns about inadvertently producing documents that are privileged or constitute protected work. Accordingly, we strongly recommend that practitioners negotiate protective orders and stipulations governing what will happen when information is inadvertently produced, and who may see and review certain categories of information.

Both N.J.Ct.R. 4:10-2(e)(a) and F.R.C.P. 26(b)(5)(A) require parties to produce privilege logs when they are withholding relevant documents on the basis of privilege or work product.\(^{509}\)

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\(^{508}\) *Id.* at *14 (“While courts should not casually discard agreements between the parties, nor should they abrogate their duty to balance both burden and the likelihood of uncovering relevant evidence merely because a party made an improvident agreement.”).

In an effort to reduce time and costs, courts are now recommending that parties be creative in addressing and preparing their privilege logs. It is recommended that the parties meet and confer so they may establish how they will address the inadvertent production of documents and ESI and limit the number of documents that must be indexed or logged by using categories to organize the information, by using detailed logs only when necessary, or by incorporating appropriate statistical sampling procedures through TAR. The parties may also agree not to log post-litigation communications, or, with respect to e-mail chains, to attempt to agree on limiting procedures that both sides will use.

With respect to an overview of how to address inadvertent production, both N.J.Ct.R. 4:10-2(e)(2) and F.R.C.P. 26(b)(5)(B) lay out the procedure to be followed pending resolution of a claim that a document containing privileged information was inadvertently produced. Notably, there is no definitive standard in New Jersey Superior Court concerning when privilege or work product has been waived. Therefore, a New Jersey state court practitioner is wise to address the standard that should be applied in considering whether waiver has occurred. In this context, the approach outlined in New Jersey District Court provides some guidance.

The parties should discuss whether they would like to incorporate either an inadvertent waiver provision, as contemplated in the Federal Rules of Evidence ("F.R.E.") by F.R.E. 502(b), or a “claw-back” agreement that is enforceable by way of court order entered sua sponte or by

privilege log so the court can perform a document-by-document review to determine whether the attorney-client or work product privileges apply.


If privileged materials have been inadvertently produced, New Jersey courts have followed three approaches to determine if the release resulted in a waiver of the privilege. See Kinsella v. NYT Television, 370 N.J. Super. 311, 316-18 (App. Div. 2004) (outlining the three approaches but finding only that waiver of materials protected by the Shield Law must be “knowing and voluntary”); see also Pressler & Verniero, Current N.J. Rules of Court, Comment 6 to N.J. Ct. R. 4:10-2 (2014 ed.).

“[C]lawback’ agreements essentially 'undo' a document production” and “involve[] the return of documents without waiver irrespective of the care taken by the disclosing party.” United States v.
As for inadvertent waiver, F.R.E. 502(b) establishes a three-part test providing that inadvertent disclosure does not result in waiver when (1) the disclosure is inadvertent, (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following F.R.C.P. 26(b)(5)(B). This is essentially the same approach that the District of New Jersey established in 1996 under Ciba-Geigy.

Clawback provisions entered under F.R.E. 502(d) allow for greater cost savings in this arena and allow attorneys to breathe easier. Nonetheless, when the parties choose to be governed by the inadvertent waiver provisions of F.R.E. 502(b), it is important when dealing with ESI to be very careful in ensuring that he or she took reasonable steps to prevent disclosure and also to rectify the error. If not, Courts are not shy in holding that the privilege or protection has been waived.

In addition, in seeking to establish that a privileged or protected document was inadvertently produced, a party is wise to make a specific and fact-based showing of privilege and satisfaction of all elements of F.R.E. 502. General allegations are insufficient.

Although we do not recommend that you rely upon the court to save you from your mistakes, there are exceptional circumstances where it may do so.


FED. R. EVID. 502(d) provides that a “federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.”


Id. at *13 (citing Ciba-Geigy Corp. v. Sandoz, Ltd., 916 F. Supp. 404 (D.N.J. 1996)).


Id.

Id. at 430-31 (“The application of F.R.E. 502 was designed to be flexible. . . . It is rare that a Court will not find that a waiver occurred in an instance where a party presents only minimal evidence that it exercised reasonable precautions to prevent a waiver. This is one of those rare occurrences.”)
In the corporate context, privilege is waived with respect to communications between high level corporate executives and in-house counsel when information is generally disseminated to a broad range of employees generally described as "management." Thus, if you are claiming that the information transmitted to such employees was privileged or protected, you are required to supply specific information about those “management” individuals to ensure the claimed privilege or protection has not been waived.\(^{520}\)

Practitioners should also note that privileged and confidential information is generally waived when documents are produced to a governmental agency during a governmental investigation, even when done pursuant to a confidentiality or non-waiver agreement.\(^{521}\)

Generally, litigation hold letters are considered to be privileged. However, when spoliation occurs, they may be discoverable.\(^{522}\)

For an analysis as to when privilege is waived when individuals are using their work computers to communicate with their attorneys, see Chapter 5, *supra*, Places to Collect ESI, E-mail.

### Identification of “Not Reasonably Accessible” Sources of ESI and Cost-Shifting

Both N.J.Ct.R. 4:10-2(f) and F.R.C.P. 26(b)(2)(B) provide that parties need not produce ESI from sources that are identified as not being reasonably accessible because of undue burden or cost. However, when a motion to compel is filed, the burden is on the party making this claim to prove it. Even once that showing is made, a court, after considering the limitations of the proportionality rule codified in N.J.Ct.R. 4:10-2(g) and F.R.C.P. 26(b)(2)(C), may still order discovery from inaccessible sources if the requesting party establishes good cause. In so doing, the court may specify conditions for the discovery, including cost shifting.\(^{523}\)

As a practice pointer, parties must understand that the production of ESI from sources that are not reasonably accessible is a different issue than the preservation of the same ESI.


\(^{523}\) *See* N.J. Ct. R. 4:10-2(f)-(g); Fed. R. Civ. P. 26(b)(2)(C).
Accordingly, absent agreement of the parties, a party is not relieved from preserving unreasonably accessible ESI. This reinforces the principle codified in Local Rule 26.1 - that it is always best to raise the issues of preservation, inaccessibility, undue burden or undue cost early on. By promptly exploring these issues, you preserve your ability to raise them with your adversary and the Court, giving yourself and your client the option to consider potential cost-cutting or even cost-sharing options if it appears that certain ESI is duplicative, unnecessary, inaccessible or its preservation and retrieval is unduly costly or burdensome.\(^{524}\) If you reach an agreement as to the manner in which inaccessible ESI will be preserved, collected or produced, it should be codified in a consent stipulation entered by the court.

In showing that ESI is inaccessible, a party must first satisfy its burden in demonstrating that the requested discovery is not reasonably accessible. Notably, backup data is generally classified as inaccessible because it is not readily usable and must be restored through a tedious and costly process.\(^{525}\) In *Major Tours*, the responding party sufficiently demonstrated to the Magistrate Judge that the restoration and harvesting of e-mails sought by the plaintiff on back-up tapes would cost $1.5 million.

Even if the responding party has demonstrated that the ESI is inaccessible, the information may still be produced if the requesting party establishes good cause to require the responding party to sustain significant discovery burdens and costs. Accordingly, factors that must be considered are:

1. the specificity of the discovery request;
2. the quantity of information available from other and more easily accessed source;
3. the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
4. the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
5. predictions as to the importance and usefulness of further information;
6. the importance of the issues at stake in the litigation; and
7. the


parties’ resources.\textsuperscript{526}

A party has gone a long way towards establishing the lack of good cause when it details the search, retrieval and collection methods it has already conducted in the case and can logically assert that vast amounts of relevant information have already been produced. This, coupled with the inaccessibility of the ESI at issue, helps a Court to conclude that the inaccessible ESI is likely duplicative and will not further the issues in the case.

In \textit{EISAI, Inc. v. Sanofi-Aventis U.S., LLC}, the defendants resisted the plaintiff’s attempt to produce discovery from over 200 additional custodians, successfully demonstrating that the discovery requests were unreasonable and overly burdensome.\textsuperscript{527} The defendants established that, if granted, the plaintiff’s discovery request would require them to partake in an additional 140,000 hours of manpower costing roughly $15 million – an amount that exceeded the expected value of the plaintiff’s claim. Defendants also relied upon the numerous documents already in the plaintiff’s possession, maintaining that any additional discovery would be redundant.

After acknowledging that “the purpose of the rule of proportionality is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry,” the federal court held that the plaintiff’s requests were cumulative or duplicative, with the burden outweighing the potential benefit. The court also found that the plaintiff failed to adequately support its assertion that the additional discovery would yield relevant information or lead to the discovery of admissible evidence.\textsuperscript{528} However, the court did reserve an ability to consider additional discovery requests on a case-by-case basis if the plaintiff was able to identify specific

\textsuperscript{526} Major Tours, 2009 U.S. Dist. LEXIS 97554, at *9 (quoting Advisory Committee Notes to \textit{FED. R. CIV. P. 26(b)(2)(B)}).


\textsuperscript{528} \textit{Id.} at *22-31
custodians for whom discovery was sought by articulating “a particularized need for such discovery. . . .”

As for cost shifting, there is a general presumption that the responding party must bear the expense of complying with discovery requests. Therefore, the responding party again has the burden of proof on a motion for cost shifting. When looking at the burden in terms of expense, it would be worthwhile to read Rowe v. William Morris Agency. Judge James C. Francis IV writes, “[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to discovery . . . .[D]iscovery expenses frequently escalate when information is stored in electronic form.” In 2002, he noted that nearly one-third of all electronically stored data is never printed out; it is logical to believe that this one-third has significantly increased since 2002. As noted in Rowe, a court, under the federal rules, may protect the responding party from undue expense by shifting some or all of the costs of production to the requesting party. The Rowe decision crafts eight factors to be considered when determining whether cost-shifting is appropriate:

1. the specificity of the discovery requests;
2. the likelihood of discovering critical information;
3. the availability of such information from other sources;
4. the purposes for which the responding party maintains the requested data;
5. the relative benefit to the parties of obtaining the information;
6. the total cost associated with production;
7. the relative ability of each party to control costs and its incentive to do so; and
8. the resources available to each party.

Another major e-discovery case, Zubulake v. USB Warburg, addressed the issue of cost shifting was appropriate. As addressed in the inaccessibility analysis concerning Major Tours above, the court’s analysis focused on where the electronically stored information was

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529 Id. at *31. The Court also granted the plaintiff’s application to compel the defendants to produce discovery from 3 custodians who were previously identified by the plaintiff. Id. at *32.
531 Id.
533 FED. R. CIV. P. 26 (c).
stored and how difficult it would be to access. The court applied a type of proportionality test based off of the Rowe factors:

1. Extent to which the request is specifically tailored to discovery relevant information;
2. Availability of such information from other sources;
3. Total cost of production, compared to the amount in controversy;
4. Total cost of production;
5. Relative ability of each party to control costs and its incentive to do so;
6. Importance of the issues at stake in the litigation;
7. Relative benefits to the parties of obtaining the information.

In Major Tours, the Court applied these factors, exercised its discretion and entered a protective order shifting some of the costs, concluding that the plaintiff “should share the cost of searching defendants’ backup tapes.” The Major Tours decision was then affirmed by the District Court, which held that a protective order under F.R.C.P. 26(b)(2)(B) may be granted even when the evidence is inaccessible because of that party’s failure to institute a litigation hold. This decision is further analyzed in the spoliation sanctions section of this book, infra.

In Juster Acquisition Co., the producing party was unable to satisfy the burden of showing that the ESI was inaccessible. In addition to applying the seven Zubulake II cost-shifting factors, Juster also incorporates Zubulake II’s definition of accessible electronic data as “active, online data, near-line data, and offline storage/archives.” Juster also adopted the Zubulake II definition of inaccessible data – backup tapes and other “erased, fragmented or damaged data” that is not readily usable and must be restored, de-fragmented or reconstructed.

In Boeynams v. LA Fitness Int’l, LLC, the Eastern District of Pennsylvania chimed in on the issue of cost-shifting in the context of a potential class action case where the defendant had already spent significant resources in producing voluminous documents. District Judge Baylson acknowledged the immense economic pressure a class action would place on the defendant, as well as the asymmetrical nature of discovery in the case. Judge Baylson then

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536 Major Tours, 2009 U.S. Dist. LEXIS 97554 at *17-21.
applied the seven Zubulake I factors and stated that “[s]hifting the burdens of discovery, both for ESI and paper discovery, is no longer rare.” Accordingly, the plaintiff was ordered to pay for the costs associated with its additional discovery requests.

As for social media requests, it is important to know the arguments for and against production. N.J.Ct.R. 4:10-2 and F.R.C.P. 26 allow a Court to limit the scope of discovery, and requests that amount to “little more than a fishing expedition” should be denied.540 A party against whom discovery is sought may file a motion for a protective order to protect against annoyance, embarrassment, oppression, or undue burden or expense.541 Several district court cases have held that certain social media requests contain voluminous personal information that has nothing to do with the litigation at hand and, therefore, have limited the requests.542 A party’s discovery rights are not unlimited and requests can be considered too brood.543 Courts will also look at whether the discloser has the potential to embarrass and humiliate non-party witnesses.544

The Sedona Conference®, the working group on electronic document retention and production, has crafted Principles that have been followed in our courts. These principles were updated in January 2013:

1. The burdens and costs of preserving potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.
2. Discovery should generally be obtained from the most convenient, least burdensome and least expensive sources.
3. Undue burden, expense, or delay resulting from a party’s action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

6. Technologies to reduce cost and burden should be considered in the proportionality analysis.\textsuperscript{545}

\textbf{28 U.S.C. § 1920(4) and Awarding E-Discovery Costs to a Prevailing Party}

In recent years, an issue has arisen concerning whether e-discovery costs are taxable to the losing party under 28 U.S.C. 1920(4). In 2012, the Third Circuit held that the only costs that are taxable are the costs for native file conversion to an agreed-upon production format.\textsuperscript{546} “The costs of conversion to an agreed-upon production format are taxable as the functionable equivalent of ‘making copies.’” All other activity, such as searching, culling and deduplication, extracting metadata and creating native file databases, are not taxable.\textsuperscript{547} In 2013, the Fourth Circuit and the Southern District of Illinois applied the same logic with respect to taxable e-discovery costs.\textsuperscript{548} In 2014, the Eastern District of Michigan applied the same logic when it held that only $25.48 out of $65,652.94 in e-discovery costs were taxable.\textsuperscript{549}

Yet, there are other jurisdictions that have interpreted 28 U.S.C. 1920(4) more broadly to allow for the recovery of more substantive e-discovery expenses.\textsuperscript{550}

\textsuperscript{545} The Sedona Conference Principles of Proportionality, (January 2013). All of their publications are able to be found and downloaded at \url{http://www.thesedonaconference.org}


\textsuperscript{547} \textit{Id}. at 171 n.11.


\textsuperscript{550} CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376, 1380-81 (N.D. Ga. 2009) (taxing e-discovery vendor’s fees because the “services are certainly necessary in the electronic age”), vacated on other grounds, 654 F.3d 1353 (Fed. Cir. 2011), Klayman v. Freedom’s Watch, Inc., No. 07-22433, 2008 WL 4194881 (S.D. Fla. Sept. 12, 2008) (allowing prevailing party to tax the actual costs of creating a litigation database and trial presentation evidence and holding these costs are taxable when “necessary due to the extreme complexity of the case and the organization of documents”).
Motion for a Protective Order

Many of the issues addressed in Chapter 7 constitute grounds for seeking a protective order: the production of privileged materials; issues concerning inaccessible ESI or unduly costly or burdensome retrieval of ESI; an improper, overbroad or unduly burdensome third-party subpoena; and questions and issues that arise concerning the use of TAR, predictive coding and the process of ESI collection and retrieval. We also quickly mentioned that it may be necessary to seek a protective order in response to a request to produce social media information.\(^{551}\)

A protective order can protect the exchange of information when there is a potential for annoyance, embarrassment, oppression or undue burden or expense.\(^{552}\) Orders limiting discovery are also appropriate where the demand is burdensome and to some extent illogical.\(^{553}\) It should be noted that when representing a client, a lawyer is prohibited from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.\(^{554}\)

A protective order may also be useful to protect innocent third-parties.\(^{555}\) Further, an attorney may also wish to move for a protective order based on privilege. The most common privilege is attorney-client.\(^{556}\)

Whether ESI Search Terminology and Seed Sets are Privileged

As the use of ESI in discovery has become more widely accepted, issues arise as to whether ESI search terminology and seed sets used to produce responsive discovery are privileged, and therefore protected from disclosure. The notion that such information constitutes attorney-client or work product privilege may, at times, find itself at odds with the cooperative and transparent spirit embodied within our discovery rules. This tension is worth acknowledging to ensure practitioners are aware of the scope of issues that may arise in ESI

\(^{552}\) N.J. Ct. R. 4:10-3; FED. R. CIV. P. 26 (c).
\(^{554}\) N.J. RULES OF PROF'L CONDUCT R. 4.4(a).
\(^{556}\) See Ch. 7, supra, Privilege, Work Product, Waiver, FED. R. EVID. 502 and Clawback Agreements, as well as Ch. 5, supra, Places to Collection Information, E-mails.
discovery disputes. This also raises the question of whether, on the one hand, search terminology and seed sets are simple collections of words and groups of electronically-stored documents, or, on the other, they reflect the mental impressions of an attorney because they illustrate his or her perception of the facts of a case.

Although we are unaware of any New Jersey case, federal or otherwise, that addresses this issue, our analysis begins with a 2010 opinion issued by a federal court in the Eastern District of Pennsylvania. In *Romero v. Allstate Insurance*, the court developed a middle ground between cooperation/transparency and protected work product when it ordered the parties to come to an agreement on search terms, custodians, date ranges and “any other essential details about the search methodology they intend to implement for the production of [ESI.]”557 The court believed this process would eliminate duplicative discovery and help ensure the searches would be narrowly focused to the core issues in the case. The court held that this cooperative process did require the disclosure of work product because it addressed facts and did not reflect counsel’s thought processes. The court did, however, preclude the plaintiff from obtaining “a retrospective view of the searches [the] Defendants ha[d] already conducted during the course of discovery over the past eight-and-a-half years[,]” The court held that “[t]o require [the] Defendants to compile a list of all search terms, custodians, and other methods of searching used in the past would result in an undue burden on [the] Defendants that is not justified by any potential benefit to [the] Plaintiffs.”

In *Formfactor v. Microprobe*, a federal court in the Northern District of California was confronted with a situation in which the plaintiff did not comply with portions of a prior discovery order. As a result, the plaintiff was ordered to turn over search terms used to conduct an ESI search. Referencing *Romero* for support, the court held that “[s]uch information is not subject to any work product protection because it goes to the underlying facts of what documents are responsive to [the] defendants’ document request, rather than the thought processes of [the] plaintiff’s counsel.” The court held that the defendants’ substantial need for the information was apparent, explaining there was “simply no way to determine whether [the]

557 Romero, *supra*, No. 01-3894.
Plaintiff did an adequate search without production of the search terms used.”558 The moral of this case is that a court is more likely to compel the production of search terminology or seed sets if a party neglects to comply with a court-ordered production process.

Also in California federal court, in Apple v. Samsung, the Northern District of California ordered third-party Google to comply with Apple’s request that Google disclose its search terminology and the custodians from which Google collected ESI even though Google was not a party to the case.559 Apple wanted to know how Google “created the universe from which it produced documents” to “evaluate the adequacy of Google’s search,” and, if necessary, then pursue other courses of action to obtain responsive discovery. The court relied on Formfactor in holding that the requested search terminology was not work product, and invoked the principles of transparency and cooperation embodied in our civil discovery rules to hold that Google’s third-party status did not confer any additional protection on Google that could prevent it from complying with Apple’s discovery demands.

A federal court in the District of Nebraska chimed in on this issue in September of 2011 when it ordered the defendant to disclose the search terms it used to comply with one of the plaintiffs’ requests for emails and other ESI in American Home Assurance Company v. Greater Omaha Packing Company, Inc. This disclosure was based largely on a suspect initial production of the defendant, in which it produced a very minimal amount of emails – only 25; this scant production caused the plaintiff to argue a “lack of diligence” and seek to compel the production of emails it believed were being withheld. The defendant argued its ESI search and collection was complete and that it had produced every responsive document. It also made a technical argument, stating that, prior to 2011, it had no central server to store its emails. Although the judge denied the motion to compel, finding the defendant could not produce information that did not exist, the judge did order the defendant to share the sources of information it reviewed

and the search terms it used to collect and produce relevant ESI. In so ruling, the court also noted that the plaintiff refused to supply the defendant with any additional search terms. The takeaway from this case is that, unless the case is truly “smaller” in terms of issues, money or policy interests, the scant production of 25 emails is likely to raise some eyebrows.

Courts, however, do not always order the disclosure of search terms and seed sets. In August of 2013, a federal court in the Northern District of Indiana held that a party need not identify which documents it produced that were a part of its seed set nor turn over those documents it did not produce because it identified them as irrelevant. In this multi-district federal litigation, the plaintiffs’ steering committee asked the defendant, Biomet, to produce the seed set of documents it used to form its predictive coding algorithm, claiming that, without the seed set, it could not know what had already been searched and therefore could not effectively propose additional worthwhile search terms. The court held this reached “well beyond the scope of any permissible discovery by seeking irrelevant or privileged documents used to tell the algorithm what not to find.” In the court’s opinion, the committee’s request exceeded the scope of discoverable information under F.R.C.P. 26(b)(1) because it “want[ed] to know, not whether a document exists or where it is, but rather how Biomet used certain documents before disclosing them.” Nonetheless, the court was troubled by Biomet’s refusal to explain the manner in which it would be harmed by disclosing the produced documents that were part of its seed set, acknowledging that this position fell far below the levels of cooperation endorsed by the Sedona Conference. The court believed its lack of discretion constrained it from ordering Biomet to disclose the documents, but still “urge[d] Biomet to re-think its refusal.”

More recently, in *Progressive Casualty Insurance Company v. Delaney*, a federal court in the District of Nevada ordered the plaintiff to produce the complete results of the documents returned when it employed stipulated search terminology. Prior to the court’s order, the

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parties, by way of stipulation, agreed to apply search terms to a number of documents for the purpose of narrowing them down; then, the plaintiff was to either produce all non-privileged documents retrieved without manually reviewing them or to manually review and produce the narrowed results.

By applying the search terms to the initial 1.8 million documents, they were narrowed to 565,000. However, the plaintiff abandoned the procedure memorialized in the stipulation and, without seeking to amend or modify it, began to use predictive coding technology to identify relevant documents and alleviate the costs and burdens associated with a manual review. Invoking the clawback provision the parties included in their stipulation, the judge ordered the plaintiff to produce the entire 565,000 documents, but also gave the plaintiff the opportunity to apply privilege filters and withhold documents identified as more likely privileged, and then serve a series of privilege logs on the defendant thereafter. To avoid a situation like this, a practitioner is best served to make every reasonable effort to get the ESI protocol right the first time. If, however, it becomes apparent that the protocol must be modified, then the parties are best served by cooperating or seeking judicial assistance rather than unilaterally adopting a new procedure.

Protective Orders and Claims of Overbreadth

In regards to a motion for a protective order due to an overly broad ESI request, it is important look at the nature and scope of the request at issue. A great example is the recent New Jersey federal decision, Juster Acquisition v. North Hudson Sewerage Authority. There, the request for production specified sixty-seven search terms. The Court stated that “several of the sixty-seven terms appear, at first blush, to be somewhat broad. However, [the party seeking the discovery] points out that it has [already] complied with [the objecting party’s] request to


search approximately one hundred terms.” The Court further held that the search terms were not unreasonable, cumulative or duplicative. Another point raised by the Court was that the moving party was required under the Federal Rules to certify that the movant had, in good faith, conferred with the other party in an effort to resolve the dispute.

More recently, a New Jersey federal decision was issued regarding ESI discovery that granted a protective order. In *Koninklijke Philips v. Hunt Control Systems*, the court entered a protective order that prevented the defendant, Hunt, from taking a 30(b)(6) deposition that sought information concerning Philips’ ESI search methodology. Hunt was dissatisfied with Philips’ custodian-based ESI approach, and therefore sought a 30(b)(6) deposition on IT issues to discover whether Philips, was using the appropriate search tools for ESI discovery. Notably, Philips’ IT infrastructure incorporated cloud computing that enhanced its abilities to cull through emails and other ESI, and Hunt sought to compel Philips to use those abilities in responding to its discovery. Although the deposition itself would not have been overly-burdensome, the court granted Philips’ motion for a protective order, finding that (i) Philips adequately represented that its approach to conducting and gathering ESI was reasonable; (ii) Hunt raised ESI issues that were speculative and suggestive in nature and failed to show that Philips’ ESI production was materially deficient; and (iii) another method of ESI production would be duplicative and inefficient. In granting the protective order, the court acknowledged it was reluctant to open the door to more (and likely unproductive) discovery with no apparent end in sight when there was no need to place in jeopardy all of the ESI already conducted in the case.

Criminal practitioners for both the State and the defense have *Rule 3:13-3(f)* to rely on when seeking to keep certain things from their adversary. Upon good cause shown in an ex parte written statement to the presiding judge, the statement itself will be sealed and the discovery and inspection of the relevant information be “denied, restricted or deferred.” This

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564 *Id.* at *7.
565 *Id.* at 8; *FED. R. CIV. P. 26(c)(1).
567 *N.J. Ct. R. 3:13-3(f).*
is commonly used by the State if there is a concern for the safety of witnesses or informants, but can also be extended to digital information, should the need arise.

**Child Pornography**

As you would expect, child pornography is not readily distributed to criminal defense counsel in discovery. This was addressed in *State v. Scoles*. Defense counsel must first request the materials, then on the record demonstrate the ability to comply with the terms of a protective order “designed to secure the computer images from intentional and unintentional dissemination beyond those individuals authorized by the court to make use of the material.” This order should include at the very least that

a. the materials are not to be copied, reproduced, distributed, disseminated, electronically stored and/or electronically uploaded or downloaded, or used for any purpose other than the prosecution or defense of the underlying action; b. the defense use a dedicated computer, which is not connected to the Internet, a network, or a printer, to view the materials, and the computer must be locked and secured when not in use; c. The images and other data should be conveyed to, from, and among defense counsel and defense experts by hand-to-hand deliver . . . ; d. Anyone viewing the material on behalf of the defense should be furnished with a copy of the order and will be subject to its terms; e. Agreements between defense counsel and their experts should include a provision certifying that the expert acknowledges the terms of the protective order; f. The defendant shall not be permitted to view the materials outside the presence of defense counsel; and g. At the conclusion of the matter, the parties should agree upon specific procedures to ensure that the materials are completely and irretrievably deleted from any computers on which the materials were viewed.

Otherwise, the materials will only be available to defense counsel at the prosecutor’s office, within a reasonable amount of time from a request to view. As per *Scoles*, more than a 48 hour wait is unreasonable.

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**Motions in the Family Part**

The Family Part is saturated with Motion practice. Some form of electronic evidence is attached to almost every motion in the Family Part. While a client can certainly authenticate e-mails he or she has sent or received, it is rare for a Judge to question the authenticity of Exhibits attached to a Motion. It is your job to thoroughly examine all of the supporting documentation and to confirm with your client whether it is appropriate to challenge the authenticity of those offerings. Whether you are trying to admit a text message to demonstrate harassment in a Domestic Violence case, a Facebook photo in an Order to Show Cause for a change in residential custody, or a Facebook “check-in” at a restaurant for a *pendente lite* support motion, practitioners need to be prepared to explain to the Judge how a client obtained those documents and whether they can be authenticated.

It would be an exercise in futility to address all of the possible scenarios in which digital evidence may be useful to a family law attorney in Motion practice. However, it is important for Family attorneys to understand the importance of knowing exactly how your client obtained every document, e-mail, or text message being used before the Court. In certain circumstances, it may be beneficial to have a client certify to their personal knowledge of a text message record which has been printed.

A useful way to authenticate a digital document obtained during the Discovery phase is by propounding requests for admissions. For example, a simple admission confirming the authentication of text message or e-mail records can save a significant amount of time. Alternatively, you can hire an expert utilize an extraction device to assess all of the cell phone data. The expert can then testify to the authenticity of that record and present those records to the Court. However, that avenue can be expensive. Many attorneys will have their client “screen shot” and print copies of a text message conversations. Without the full record of sent and received messages, this method of authenticity is simply not sufficient. Assuming you have sent a litigation hold letter, neither party should have deleted any messages pertaining to the litigation. You can use your client’s record of the text messages contained on his or her phone to draft a request for admissions regarding the content of the text messages. Should the
opposing party be unwilling to stipulate to the content of the text message conversations, then you will know that hiring an expert is necessary for obtaining and presenting that evidence.

In a Domestic Violence trial, there is no right to discovery, so a request for admissions would be impossible. The simplest way to admit a text message record is to have the text messages printed out and ask that your client authenticate the text messages on the record by stating their telephone number and the opposing party’s telephone number, and their personal knowledge of the conversation. They should also testify to the authenticity of the reproduction and that no changes have been made to the text messages. For each text message, have your client confirm the time it was sent or received, and the content of that message. Should there be an objection, your client should be prepared to produce the telephone, and ask that the telephone itself be “deemed marked” for the purposes of authenticating the print out and text message. Of course, if your adversary attempts to do this, an objection for failure to authenticate is warranted.

**TAR, Predictive Coding and Search, Collection and Production Methodologies**

As we previously discussed in Chapter 1, TAR (like keyword search terms or fuzzy search terms, latent semantic indexing, categorizing, concept clustering or predictive coding) – when used properly – can assist an attorney in leveraging costs and dramatically narrowing the scope of potentially relevant documents. Not only does TAR assist in the production and review of ESI, but it can also help with the search and collection process. This is another area in which it behooves the parties to cooperate and agree on search and collection methodologies before discovery begins. By so doing, the parties are likely to reduce cost and delay, as well as conserve judicial resources.

When deciding whether to use any form of TAR, a number of issues should be considered, such as:

- Whether your case is the appropriate size for the software you intend to use;
- The number of documents that need to be reviewed by attorneys;
- Methods of categorizing documents reviewed by attorneys and processed by the TAR model you establish;
- Whether you will collaborate with opposing counsel;
The level of transparency you want your TAR discovery process (and your adversary’s) to incorporate
- If you decide to use predictive coding, the manner in which the predictive coding software will be trained;
- The manner in which you will statistically validate your (and your adversary’s) TAR process;
- Your familiarity with your rates of precision and recall;
- The distinctions between responsive and non-responsive documents;
- The nature of the data that will be encountered in your case, whether it contains electronic text (which is essential for predictive coding and the use of search terms) and whether such data is suitable for the type of TAR you plan to adopt;
- Whether you plan to use TAR to identify confidential, privileged or other sensitive documents, and how you plan to use it to identify those documents;
- Whether you need to plan for a rolling production process; and
- The identities of the individuals who will serve as:
  - your TAR professional or leader; and
  - the various roles on your TAR discovery team, including who you will use to train your TAR software.

This requires a practitioner to not just consider the above issues, which are largely internal, but to also communicate with your adversary, discuss and – we hope – eventually agree upon (i) date ranges for the preservation, collection and production of responsive information, (ii) identification of the custodians whose ESI and hard copy documents will be preserved, collected, processed and produced, (iii) data sources for ESI and (iv) establishing reasonable parameters governing each parties’ use of TAR, the anticipated level of cooperation and transparency and the parties’ statistical validation methodologies. In this arena, significant cost savings can be realized by the parties if they agree to use TAR, especially when there are tens of thousands – if not millions – of electronically-stored documents at issue. These agreements amongst counsel should be memorialized in stipulations, consent orders and/or joint discovery plans, where possible.
A word to the wise – even when using simple TAR for search and collection purposes, like keyword review, it is worth establishing reasonable limitations on the key words and deciding how the key words will (or will not) be shared, as well as incorporating mandatory statistical sampling, so the documents the searches return are not vastly over-inclusive or under-inclusive. Likewise, through cooperation and working with one another in establishing reasonable search and collection limitations – even in the keyword context – the parties better serve their case, their clients and the court’s time.

In the federal case of *DCG Systems, Inc. v. Checkpoint Techs, L.L.C.*, the attorneys, the court and the parties were well-served by raising the issue of discovery proportionality early on in the case. The defendant sought to modify the Model Order on E-Discovery in patent cases, which places limitations on email by establishing a set number of custodians and search terms “to address the imbalance of benefit and burden resulting from email production in most cases.” Although the defendant was not seeking to alter the custodian and search term limitations, the plaintiff was opposed to the imposition of these limitations. The court rejected the plaintiff’s arguments, noting that if the order imposed “unique or particularly undue constraints as a result of the limitations,” the plaintiff still was “free, under the Model Order, to seek relief from the court.”

*Da Silva Moore* is the first case approving the use of predictive coding. In *Da Silva Moore*, the parties had no issue with the use of predictive coding; rather, they disagreed on procedures that were used by defense counsel to implement the process. The case is particularly important because it approves the use of predictive coding and also places the legal world on notice that, when using predictive coding and other TAR, judges, your clients and your adversaries will want to know what you did, and why and how that process sufficiently discharged your clients’ discovery obligations, including whether the process “produced responsive documents with a reasonably high recall and high precision.”

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571 *Id.* at 184 (*quoting Search Forward, supra* note 39 at 25, 29).
The case also warns of issues concerning the inefficiencies of key word searches in retrieving responsive documents, as well as the tendency of counsel to refuse to cooperate by imposing unilateral search terms on their own document search, collection and retrieval process. The case, like many others, underscores the necessity of cooperation amongst counsel and evaluating considerations of transparency throughout the discovery process.

Most importantly, in Da Silva, Judge Peck identified the purported “gold standard” of manual review as a misconception: “while some lawyers still consider manual review to be the ‘gold standard,’ that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review.” With this issue of accuracy in mind, it is worth including Magistrate Judge Facciola’s famous quotation pertaining to issues that counsel confront when engaging in strict keyword searches without the assistance of other TAR:

Whether search terms or “keywords” will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.

As aptly stated by Judge Facciola, the imposition of a strict keyword search without the use of a TAR expert, without an understanding of your case and without any additional usage of TAR or sampling procedures can lead to very inaccurate, inefficient and potentially disheartening results.

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This warning concerning keyword searches has been echoed in other matters. In the federal case of *In re Seroquel Prods. Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007), the judge warned that “while key word searching is a recognized method to winnow relevant documents from large repositories . . . . [c]ommon sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.” 575 Thus, it is acknowledged that “[t]he only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents.” 576

Like *I-Med Pharma* from our own federal district, 577 the case of *In re Nat’l Ass’n of Music Merchs., Musical Instruments & Equip. Antitrust Litig.* is another example of how the discovery train can go off the track when search terms go awry. 578 In this case, the defendants initially asked the plaintiffs to provide them with search terms to run against their ESI prior to responding to the plaintiffs’ discovery requests. The plaintiffs initially resisted the defendants’ attempt to meet and confer, alleging they did not yet know what was relevant in the case. The plaintiffs then failed to raise any objections or concerns regarding the defendants’ proposed search terms that were communicated by letter to the plaintiffs, which were supposed to include names that would identify intra-defendant communications. After the defendants document review began, the plaintiffs later contacted the defendants and the parties agreed the search terms would be expanded.

After the defendants’ production, the plaintiffs argued the search did not capture the “agreed-upon universe” of defendants’ ESI due to the defendants’ failure to include their own commonly-used abbreviations and acronyms. Therefore, the plaintiffs sought to compel the defendants to provide ESI after including all of its abbreviations and acronyms in its search terminology. By this time, the defendants had already invested significant time and money in reviewing their initial production, and the new search would require an additional heavy investment of time and money in reviewing a number of new documents.

575 244 F.R.D. 650, 662 (M.D. Fla. 2007),
In denying the plaintiffs’ request, the court acknowledged they had a sufficient opportunity – indeed, two opportunities – to obtain discovery of abbreviations and acronyms, yet failed to do so. Accordingly, it found that the burden and expense of the additional search outweighed any likely benefit. In so doing, the court acknowledged the need for “transparent discussion among counsel of the search terminology and subsequent agreement on the search method.”\textsuperscript{579}

\textit{Global Aerospace, Inc. v. Landow Aviation, L.P.} is known as the first state court case approving the use of predictive coding.\textsuperscript{580} To our knowledge, it also represents the first case where predicting coding was allowed over a party’s objection. Virginia Circuit Court Judge James Chamblin approved the defendant-producing party’s use of predictive coding over the objection of the plaintiff-requesting party. The defendant had filed a motion requesting that predictive coding be ordered or, in the alternative, costs be shifted if the defendant was required to conduct a manual review. In response, the plaintiff argued that predictive coding was not as effective as human review. The court granted the motion and ordered the use of predictive coding. However, it was granted without prejudice, leaving the door open for the plaintiff to challenge “the completeness of the contents of the production and the ongoing use of predictive coding.”

In \textit{EORHB, Inc. v. HOA Holdings, L.L.C.}, the Delaware Chancery Court \textit{sua sponte} endorsed the use of predictive coding without either party specifically requesting it. The judge \textit{sua sponte} ordered the parties to show cause as to why predictive coding should not be used in the case, and also recommended the use of joint depositories for ESI purposes.\textsuperscript{581}

\textit{Chura v. Delmar Gardens of Lenexa, Inc.} was an employment discrimination action in which the plaintiffs moved to compel the defendant to search and produce ESI, alleging that in similar large-scale corporate employment lawsuits, typical productions included investigatory emails of the type that were not produced by the defendants.\textsuperscript{582} In response, the defendant

\textsuperscript{579} Id. at *17-24.
pointed to the plaintiff’s failure to identify specific emails that allegedly were not produced, claiming it could not produce emails that did not exist. The court found the defendant’s lack of investigatory e-mails to be “questionable,” and therefore ordered an evidentiary hearing to address the defendant’s methods in preserving and searching for ESI in response to the plaintiff’s discovery demands. In addition, although the parties stipulated that the defendant would provide ESI in its native format (unless unduly burdensome), none was produced, causing the court to further scrutinize the defendant’s production. The case also stands for the principle that a party is required to obtain any responsive documents in the possession of third-parties – here, IT administrators – over whom it exercises authority and control with respect to documents and ESI.

*Kleen Products, L.L.C. v. Packaging Corp. of America* embodies principle 6 of the Sedona Conference Best Practices, which allows responding parties to choose their own procedures, methodologies and technologies in compiling and producing discovery in response to adversaries’ requests. Here, although the defendants had already spent thousands of hours reviewing and producing more than 1 million documents, the plaintiff criticized their use of keywords, domain filtering and email threading. As a substitute, the plaintiff asked that the defendants be ordered to use concept-based analytics and predictive coding. After two full days of hearing, including expert witness testimony, the plaintiff later withdrew the demand and agreed to meet-and-confer on search methodology later in time if required. Although the parties were able to reach agreements as to a number of issues, this case still underscores the need for transparency and cooperative communication at an early stage, before traveling too far down one discovery path.

In the next case, *Gabriel Technologies v. Qualcomm Inc.*, the District Court of the Southern District of California imposed significant sanctions upon the plaintiffs as a result of the plaintiffs’ meritless and “objectively baseless” patent claims that caused the defendants’ to

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583 See in Chapter 4, *supra*, Initial Client Conference, Raising Preservation of Electronic Information at n. 126.
respond to the lawsuit and engage in significant discovery searching, collection and processing efforts. The sanctions totaled over $12 million and included more than $2.8 million for TAR, predictive coding costs and attorney’s fees. In levying these sanctions, the District Court also relied upon the plaintiffs’ own email references to their “utter lack of a case” and their inability to identify the alleged patent inventors.

In the case of In re: Biomet, a MDL vened in the Northern District of Indiana, the defendant, without consultation with the plaintiffs’ MDL Steering Committee, began to search, collection and produce massive amounts of documents. The court held that the defendant satisfied its discovery obligations under F.R.C.P. 26(b) and 34(b)(2) when it conducted keyword searches for search and collection purposes prior to predictive coding, rather than just engaging in predictive coding. Notably, at the time of the Court’s ruling, the defendant had already produced 2.5 million documents, although the plaintiffs’ Steering Committee alleged that the defendant’s production should have been closer to 10 million documents. The defendant used keyword culling to reduce 19.5 million documents to 3.9 million documents, and after deduplication the defendant was left with 2.5 million documents and attachments. The defendant then used statistical sampling to confirm the reliability of its production. The whole process cost over $1 million and the defendant expected that number to eventually rise to between $2 million and $3.25 million. The defendant also invited the plaintiffs’ Steering Committee to suggest additional search terms and offered to produce the rest of the non-privileged documents so the Steering Committee could verify that Biomet was producing relevant documents, but the Steering Committee declined.

In denying the plaintiffs’ request, the Judge heavily relied upon Principle 6 of the Sedona Conference – enabling the defendant to choose the methodologies through which it would search, collect and produce its own ESI – and also assumed that the defendant would remain open to meeting and conferring on additional reasonably-targeted search terms and would produce the non-privileged docs included in its statistical sample.

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Third-Party Subpoena Practice

As with other issues concerning ESI, the parties are best served if they raise the issue of potential third-party discovery early on in the litigation by notifying the judge, opposing counsel and third-parties. As a matter of practice, it is also recommended that counsel ensure preservation letters are sent to third-parties as early as possible. This will assist in clarifying a third-party’s duty to preserve relevant or potentially relevant evidence until such time that an appropriate subpoena can be served.

Courts normally apply a more stringent standard as to allowable discovery when they are considering a party’s entitlement to information from non-parties. Therefore, a party is also best served if his or her third-party subpoena is narrowly tailored to request relevant information and ESI from non-parties. It is also recommended that the serving party take significant efforts to minimize the burdens on the non-party concerning administrative compliance efforts, if at all possible, and to possibly assume some or all of the costs associated with production. Soon after serving a subpoena, the party seeking the information should also make it a point to follow-up promptly with the non-party to flesh out any issues that may arise.

From the perspective of the third-party that has been served with a subpoena seeking ESI, the first step is to meet with your IT professionals and document retention, managing or administrative personnel. The purpose of this is to understand the nature of your compliance burden in responding to the subpoena and to put the necessary steps in place that will ensure prompt compliance. Next, reach out to the party who has served the subpoena to flesh out potential issues, and raise specific objections, if necessary, including a request for cost shifting.

If you believe that the subpoena is unlikely to retrieve any relevant or potentially relevant documents, then consider suggesting a reliable method of sampling that will assist you in proving your position.

In Berrie v. Berrie, the Chancery Division of the Superior Court of New Jersey established a five-factor test for a court to consider when evaluating a request for third-party discovery:

1) the interest of the proposed deponent in the outcome of the litigation;
2) the necessity or importance of the information sought in relation to the main case;
3) the ease of supplying the information requested;
4) the significance of the rights or interests which the nonparty seeks to protect by limiting disclosure; and
5) the availability of a less burdensome means of accomplishing

“[R]easonableness is . . . to be tested in terms of the demandant’s use of routine pretrial discovery, by way of depositions and interrogatories. The point is that the subpoena duces tecum should not be used as a substitute for such discovery[.]”\textsuperscript{587} Furthermore, where “the subject of the subpoena is electronically stored material, reasonableness should be determined by discoverability pursuant to the terms, conditions and limitations of R. 4:10-2.”\textsuperscript{588} In considering this claim, the Court should “take into account the availability of the information from other sources.”\textsuperscript{589} Accordingly, if the requested information is likely to be obtained through party discovery, then a non-party subpoena may not be the recommended approach.

In addition, a party may also move for a timely protective order when responding to a subpoena. A trial judge “has the discretion to take whatever steps necessary to protect . . . confidential documents, while still permitting . . . the right of discovery.”\textsuperscript{590} The protective order should be molded to prevent undue harm to the party who might otherwise be forced to reveal proprietary information.\textsuperscript{591}

In the federal case of \textit{Leibholz v. Hariri}, the plaintiff sought a critical piece of discovery from a third-party – an allegedly fabricated letters that the defendant relied upon to release itself from a business relationship with the plaintiff.\textsuperscript{592} When the third-party could not locate hard copies of the letter, the plaintiff sought an F.R.C.P. 30(b)(6) deposition for the third-party’s employees’ responsible for maintaining electronic copies of files, as well as a deposition of one of its top-level officers. The third-party moved to quash the subpoena,\textsuperscript{593} maintaining that the deposition would amount to “overdiscovery” in violation of F.R.C.P. 26(b)(2). The third-party also

\textsuperscript{588} Id.
\textsuperscript{589} Id. at Comment 7 on N.J. Ct. R. 4:10-2.
\textsuperscript{591} Id. at 315 (citing Martin, 179 N.J. Super. at 327).
\textsuperscript{592} Leibholz v. Hariri, No. 05-5148, 2008 U.S. Dist. LEXIS 49725 (D.N.J. June 30, 2008)
\textsuperscript{593} Id.
contended that the hard drives in question had been erased and offered certifications from one of its own employees stipulating that it did not possess the hard copies of the documents in question.

The judge acknowledged that “[a] motion to quash is similar to a motion for a protective order that discovery not be had under F.R.C.P. 26(c).” Therefore, in deciding whether to grant or deny a motion to quash, a Court may consider the conditions and factors specified in F.R.C.P. 26(c). Ultimately, the judge denied the motion to quash in part and ordered the deposition of the third-party’s officer, citing the broad range of allowable discovery and finding it would not be unduly burdensome. The court also ordered the third-party to produce a 30(b)(6) witness who could testify as to the maintenance of ESI files, as well as backup procedures and retention policies. The period of discovery was also chronologically limited pursuant to F.R.C.P. 26(b)(2)(c). In ruling in this manner, the court acknowledged that “the discovery sought is of large importance [and] . . . could potentially resolve the issue of the . . . letter’s authenticity.” The court also granted a protective order with respect to certain categories of documents sought by the plaintiff in its subpoena, ordering the parties to meet and confer.

In a companion opinion and order decided the same day, the plaintiff sought to depose third-parties who filed motions to quash on the grounds that they did not have any discoverable information about the case. Although the court was concerned about the number of subpoenas issued to non-party individuals, all of whom had no knowledge of Plaintiff or his claims, the Court let the subpoenas stand because of the broad scope of discovery and liberal standards imposed by the rules. The discovery appeared reasonably calculated to lead to the discovery of admissible evidence and the burden did not outweigh the benefit.

In In re Application of Emmanuel N. Lazaridis, the court granted a motion to quash a third-party subpoena that was overly-broad, unduly burdensome and was too great and intrusive. Specifically, the subpoena did not include any time limitation or a specific limit as to the general

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594 Id.
595 Id.
596 Id.
postings it was requesting for a non-profit organization’s server and website. Without these limitations, the court honed in on the time and/or cost that would be required to retrieve the information, particularly in light of the cumulative nature of the request, since the information was publically available on the organization’s website. In addition, there were serious First Amendment and privacy issues due to the organization’s privacy policy and its users’ expectation of privacy in posting on the internet. The court also found that the party serving the subpoena failed to show a compelling need to obtain the requested information.

In *McCabe v. Ernst & Young, L.L.P.*, the court laid out the strict procedures that must be followed when a party reserves the ability to be reimbursed for its costs in responding to a third-party subpoena. The court recommended that non-parties’ motion for attorneys’ fees and other costs incurred in appearing for depositions and responding to subpoenas be denied, since, contrary to F.R.C.P. 45, non-parties failed to object to subpoenas or condition compliance on reimbursement by including an accurate or anticipated bill of costs. In addition, to preserve the right to object to a subpoena, a party must make sure that within 14 days after service, it files an objection or conditions compliance upon reimbursement of expenses. If the third-party makes such an objection, then, pursuant to F.R.C.P. 45(c)(2)(B), the party serving the subpoena is not entitled to inspect and copy the materials, and will be forced to seek an order compelling document production. If production is compelled, the court must protect a non-party from significant production expenses. Absent an order or a consent stipulation, a non-party bears its own production expenses.

More recently, in the federal case of *Maximum Human Performance, LLC v. Sigma-tau HealthScience, LLC*, partial cost-shifting of third-party subpoena costs was ordered when the defendant sought to produce a large amount of ESI from non-party Vitaquest International concerning Vitaquest’s role in manufacturing a fitness/dietary supplement that was similar to the supplement manufactured by the plaintiff that was at issue in the litigation. Vitaquest timely objected to the defendant’s third-party subpoena within the 14-day window, but initially claimed only that the subpoena was overbroad, unduly burdensome and sought proprietary materials.

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Counsel for the two companies then conferred to attempt to resolve their discovery disputes. Vitaquest then amended its objection to include the cost of harvesting and producing ESI outside the 14-day objection window. The parties continued to confer, but then reached an impasse, causing the defendant to file a motion to compel. Vitaquest cross-moved for a protective order seeking to shift costs and attorneys’ fees associated with complying with the subpoena.

In resolving the motions, the judge granted the motion to compel, ordering Vitaquest to begin a rolling production and to hire an ESI vendor to search the key words Vitaquest agreed upon with the defendant. Although Vitaquest had a long-standing relationship with the plaintiff and was capable of financing the ESI costs, the judge also ordered the defendant to reimburse Vitaquest for one-third of its vendor costs associated with ESI harvesting. In so doing, the judge found that Vitaquest sufficiently preserved its objection to the defendant’s subpoena by making its initial objection during the 14-day window, even though its amended objection to the ESI costs was raised outside of that time period. The judge did, however, deny Vitaquest’s request for counsel fees.

In California federal court, in Apple v. Samsung, the Northern District of California ordered third-party Google to comply with Apple’s request for Google’s search terminology and the custodians from which Google collected ESI even though Google was not a party to the case. The court held that Google’s third-party status did not confer any additional protection on Google that could prevent it from complying with Apple’s discovery demands.

The Northern District of California’s reasoning was largely based on the federal case of DeGeer v. Gillis, decided by United States Magistrate Judge Nan R. Nolan of the Northern District of Illinois. DeGeer involved a continued discovery dispute between the defendants and a third-party they served with a subpoena. The third party refused to turn over its search terminology and data custodians, and the defendants refused to offer new terms for the third party to consider. Judge Nolan engaged in a thoughtful analysis of issues surrounding the disclosure of search terminology, ESI custodian identification and cost-shifting, as well as cooperation and transparency in the context of ESI discovery with third parties. Judge Nolan


granted the defendants’ motion to compel additional third party discovery on the condition that the defendants split the costs associated with the third party’s future ESI production. She further ordered counsel to confer in person for the purpose of establishing reasonable limits on the scope of certain key data custodians and to agree on a narrow list of search terms and date ranges. In so doing, she highlighted the “importance of candid, meaningful discussion of ESI at the outset of the case, including discovery of ESI from non-parties.” She also commented that, after service of the subpoena and prior to the ESI searches, the parties should have collaborated on the use of search terms and the data custodians to be searched, and placed counsel on notice that, going forward, they were required to “genuinely confer in good faith and make reasonable efforts to work together and compromise on discovery issues whenever possible.”

The availability of predictive coding and other TAR may also affect a judge’s analysis of the relative burden placed on a non-party in responding to a subpoena. For instance, in March of 2013, two federal judges in the Southern District of New York relied in part on the availability of predictive coding in rejecting a non-party’s burdensomeness objection to a subpoena.

The case of Robotic Parking Systems, Inc. v. City of Hoboken is an interesting third-party subpoena case that exemplifies the need to raise issues concerning the collection and production of third-party ESI at an early point in the case. There, the court granted a third-party intervenor’s motion for a protective order where the plaintiff – who was the intervenor’s direct competitor – sought access to the defendants’ operating computers possibly containing the intervenor’s trade secrets. Although the court did enter a protective confidentiality order, it denied the intervenor’s request to prevent access entirely, where the access was necessary for the plaintiff’s case to show that its proprietary information were being improperly used by the

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603 Id. at 930-31.


defendants. In addition, the court found there was no showing of irrelevance or burden, and that and the intervenor’s concerns were “too speculative to warrant non-disclosure.”

As for the remaining practical E-Discovery issues, the court ordered parties to split the cost of software needed for the defendant to view forensic images produced by the plaintiff where the plaintiff sought to use the images at trial and the defendant had no way to view the production otherwise. In so doing, the court noted the parties failed to satisfy their meet and confer obligations with respect to these issues. The court also gave the parties an alternative option of letting the them meet with the plaintiff’s expert to review a computer formatted with the plaintiff’s software and then let the defendants (with their expert) review the computer for a day on their own.

The New Jersey Superior Court Chancery Division was confronted with similar issues in the case of *F&M Expressions, Inc. v. O’Connell.* In addition to demonstrating the difficulties encountered in modern day society in attempting to distinguish between personal ESI and company-related ESI, this case also is an example of how late-raised ESI issues tend to spiral out of control. Specifically, the plaintiff mirror imaged the defendants’ business and personal computers. Upon its review, the plaintiff found damaging e-mails between the defendants and third-parties. Since the plaintiff already had access to the third-parties’ work computers and emails, and where the third-parties had already searched their home computers for relevant e-mails, the court, citing privacy concerns, denied the plaintiff’s request for direct access to the third-parties’ home computers for inspection and application of keyword searches.

**Motions to Quash Subpoena to ISP or Website for Subscriber ID**

We have already addressed this issue in the context of subpoenas sent by plaintiffs in copyright infringement actions seeking to identify numerous John or Jane Doe defendants, known to the plaintiffs through their IP addresses only, for the claimed purpose of litigation against them. However, in most of these cases, once the plaintiffs obtain the identities of the unknown defendants, the settle the case for an amount of money roughly equal to the amount

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it would cost to hire an attorney and move to quash the subpoena. See Chapter 6, supra, Technological Crime, Pirating and ISP Letters. Most cases languish, are dismissed voluntarily or by court order, or – on rare occasions – result in default judgments. Few, if any, are actually litigated. 607

In New Jersey Superior Court, judges are also confronted with cases in which the plaintiffs sue unidentified defendants, known by their IP address only or username only, and then serve subpoenas upon ISPs or specific websites to learn the identity of a person who sent an anonymous e-mail or made an anonymous posting that was allegedly defamatory.

The seminal case in this context is *Dendrite International, Inc. v. John Doe, No. 3*. There, an anonymous person posted defamatory statements on an Internet message board. 608 The Appellate Division determined that, in order to divulge the identity of the speaker, the Plaintiff must satisfy a four-part test that will ensure he or she provides sufficient information to demonstrate that his or her cause of action could withstand a motion to dismiss for failure to state a claim, supported by prima facie evidence to support each element of such cause of action, and establish, through a balancing test, that the necessity for the disclosure of the anonymous defendant’s identity outweighs the defendant’s First Amendment right of anonymous free speech. Therefore, in *Dendrite*, the Appellate Division imposed a considerable barrier to discovering the identity of a person who anonymously posts defamatory material on the Internet.

In 2013, in *Warren Hospital v. Does*, the Appellate Division distinguished a set of defamatory facts from *Dendrite*, finding that the postings and utterances at issue were sufficiently defamatory and tortious to justify the disclosure of identifying information for anonymous defendants. 609 In addition, in unlike *Dendrite*, the defamatory conduct of the unknown defendants did not involve anonymous postings on Internet message board. According to the Appellate Division, the defendants’ conduct “electronically was no different than if they had had broken into the hospital and spray painted their messages on the hospital's

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walls." Thus, the court applied the *Dendrite* factors in a less rigorous manner. It ultimately held that the trial judge erred in quashing the subpoena the plaintiff sent to Verizon to obtain the unknown defendants’ identities.

For a court to allow a subpoena to an ISP or a website to stand, the plaintiff must be able to point to facts that demonstrate a prima facie cause of action against the anonymous defendant. In *A.Z. v. John Doe*, an unpublished opinion, the Appellate Division affirmed an order quashing a subpoena seeking information related to an anonymous e-mail on the grounds that the plaintiff failed to establish a prima facie case of defamation.\(^\text{610}\) Likewise, in *Juzwiak v. Doe*, the Appellate Division reversed a trial court order denying an anonymous defendant’s motion to quash a subpoena because the plaintiff could not establish a prima facie case of intentional infliction of emotional distress.\(^\text{611}\) In 2014, in an unpublished opinion, the Appellate Division reversed the trial court, reinforcing the principle that a trial judge must apply the *Dendrite* four-part test in a detailed and fact-specific manner before ordering a website or an ISP to turn over any identifying information about an anonymous defendant.\(^\text{612}\)

**Social Media Issues**

Case law is continuing to develop relating to the necessity to provide social media discovery and information. The case law has been trending the discoverability of social media. The courts have been critical of those that voluntarily engage in social media communications. It is important to remember that social media takes place on a 3rd party server and not on the user’s computer. Therefore, everything the user inputs is within the possession of a third party, and may be subject to disclosure requirements. For instance, New Jersey cases have allowed the production of a minor’s online postings because they were relevant to understanding the causes of the minor’s eating disorders, biological or emotional and the information provided included entries from Facebook and MySpace.\(^\text{613}\)

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Ehling v. Monmouth-Ocean Hospital Service Corp.,\textsuperscript{614} which will be delved into in more detail in subsequent chapters, is a case where Defendant was alleged to have forced an employee to gain access to Plaintiff’s Facebook page, viewed and copied Plaintiff’s postings, and reported a politically-charged posting regarding not providing treatment to a mass murderer that Plaintiff made. Plaintiff sought damages for invasion of privacy, violations of NJ’s wiretap law, and violation of the Stored Communication Act. There were two decision by the court, one in 2012,\textsuperscript{615} pre-discovery, and one in 2013,\textsuperscript{616} post-discovery.

In 2012, Defendant had filed a Motion to Dismiss. The Court held that Plaintiff had stated a plausible claim for invasion of privacy, especially given the open-ended nature of the case law and that Plaintiff may have had a reasonable expectation that her Facebook posting would remain private, considering that she actively took steps to protect her Facebook page from public viewing. Further, has been allowed for the Court stated “more importantly, however, reasonableness (and offensiveness) are highly fact-sensitive inquires. Therefore, matters will be decided on a case-by-case basis dependent on the facts. As such, these issues are not properly resolved on a motion to dismiss.” However, the Court held that a Facebook posting is not considered to be in “electronic storage” as defined in the Wiretap Act, because it was posted on the website, to be reviewed by the poster’s “friends” and, thereby, is in post-transmission storage.\textsuperscript{617} The Wiretap Act required the collection to be in the course of transmission.\textsuperscript{618}

In 2013, after discovery, Defendant renewed its motion to dismiss. It was determined that Plaintiff had 300+ friends, her page was set to private, her coworker was a friend, the coworker took the screenshot without coercion from Defendant, and the coworker had given the screenshots to the Defendant voluntarily. The Court held that “non-public Facebook wall posts are covered by the Stored Communications Act.” But, because the coworker had access, the actions fell under the authorized user exception. Therefore, there was no violation. Next,

\textsuperscript{614} Ehling v. Monmouth-Ocean Hospital Serv. Corp., 872 F. Supp. 2d 369 (D.N.J. 2012)
\textsuperscript{617} Id.
the Court addressed the invasion of privacy claim and looked at the two factors: whether three was intentional intrusion and whether the intrusion would highly offend the party. Here, the coworker had access to the information and was not intruding and the fact that a party copied a posting if not highly offensive. It was a “violation of trust, but not a violation of privacy.”

At least one court in Pennsylvania has ordered a civil plaintiff to turn over Facebook login information to the opposing party.\textsuperscript{619} There, the court found that there is no expectation of privacy on social networking sites, that the data was not protected by the Stored Communications Act, and the request by the defendant was not overbroad.

A New Jersey District Court recently held in \textit{Gatto v. United Air Lines, Inc.} that the deletion of a Facebook account and failure to reactivate was spoliation of evidence and granted an adverse inference charge.\textsuperscript{620} By way of background in the \textit{Gatto} case, the Plaintiff was a ground operation supervisor for Jet Blue Airways Corporation. The incident occurred during Plaintiff’s employment. Plaintiff alleged he was unloading baggage from an aircraft utilizing a set of stairs which crashed into him causing significant injuries, including a torn rotator cuff, torn medial meniscus and back injuries. Plaintiff alleged that these injuries left him permanently disabled. Plaintiff further alleged that he was unable to work and had been out of work since July of 2008. During discovery, Defendants sought information related to Plaintiff’s damages and his social activities. A request for documents included information related to social media accounts maintained by Plaintiff as well as his online business activities, such as his eBay account. Defendant Allied joined in United’s discovery requests. Plaintiff provided signed authorizations for the release of information from the social media sites and other online services, such as Pay Pal and eBay. However, the Plaintiff did not include an authorization for the release of records from Facebook. The parties held an in-person settlement conference, before the Magistrate Judge; who ordered that the Plaintiff execute an authorization for the release of documents and information from Facebook. Instead, Plaintiff agreed to change his account password to Allied United so that Defendants could access the information.

\textsuperscript{619}Largent v. Reed, No. 2009-1823 (Pa. C.P. Franklin Nov. 8, 2011).
Plaintiff alleged that, at the settlement conference, Defendants agreed that there would not be any unauthorized access to the Plaintiff’s Facebook account online. The Defendants disagreed as to whether these assurances had been provided. Plaintiff had changed his password and, thereafter, counsel for United printed portions of the Plaintiff’s Facebook page. A few days later, Plaintiff’s counsel asked Defense counsel whether Plaintiff’s account had been accessed by defense counsel because Plaintiff had received an alert from Facebook that his account had been accessed from an unfamiliar IP address. Counsel confirmed that the Facebook account had been accessed and that Plaintiff’s authorization had also been sent to Facebook with a subpoena.

Facebook did not respond to the subpoena because it objected to providing certain information related to Plaintiff’s account because of its obligations under the Federal Stored Communications Act. Facebook’s response was that Plaintiff should download the entire contents of his account as an alternative to obtaining the information. Plaintiff agreed to provide the information to Defendants by downloading it. In the meantime, Plaintiff had deactivated his account. Plaintiff claims he did so because his account had been accessed twice by an unknown IP address. Although counsel for United requested that Plaintiff reactivate the account, the request was made after 14 days which meant the Facebook account was no longer in existence and could not be retrieved based upon Facebook’s policies.

Based upon Plaintiff’s actions the trial court found that spoliation of evidence occurred. Spoliation occurs when a party fails to “preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”

In requesting an adverse inference for spoliation of evidence, there is a four-factor test that must be satisfied. As addressed in the Spoliation section, infra, there is an intra-district split in our federal district regarding the appropriate manner in which the second factor (actual suppression) should be applied. The factors are as follows: 1) the evidence was within the party’s control; 2) there was an actual suppression or withholding of evidence; 3) the evidence

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621 Gatto at *8 (citing Mosaid Technologies vs. Samsung Elecs., 348 F. Supp. 2d 332, 335 (D.N.J. 2004) (internal quotations in original)).
was destroyed or withheld was relevant to the claims or defenses; and 4) it was reasonably foreseeable that the evidence would be discoverable. 622

The Court in Gatto found that the deletion of Plaintiff’s Facebook account satisfied the first, third and fourth factors. On the second factor, however, the Court found that there was an actual suppression and relied upon Mosaid, 623 in finding that “[s]o long as the evidence is relevant, the ‘offending parties culpability is largely irrelevant,’ as it cannot be denied that the opposing party has been prejudiced.” The Court found that, even if here, Plaintiff did not intend to permanently deprive the Defendants of the information associated with the Facebook account, it was undisputed that Plaintiff intentionally deactivated the account; which caused the evidence to no longer be available. As a result, the Court found that the inference, to the jury, was appropriate to remedy any damage to the Defendants. However, attorney’s fees were not warranted because “[p]laintiff’s destruction of evidence does not appear to be motivated by fraudulent purposes or diversionary tactics, and the loss of evidence will not cause unnecessary delay.”

Despite this ruling, New Jersey’s state courts have not tackled this issue in any published opinions. 624 The decision makes it unclear what an attorney might do to meet his or her ethical obligations in retaining this information. As long as a party does not disable the account and the information upon it is no longer accessible, than it appears that an attorney can meet ethical obligations so as not to spoil evidence. However, alternatives exist as to how that preservation of information could occur. The attorneys could download the party’s account at the commencement of the litigation. Alternatively, and this should be a last resort, a password could be provided. The important issue is to preserve the information.

Under the ESI rules, these issues should be addressed at the beginning of litigation. Information obtained by removing it from a hard drive maintains the Metadata. However,

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624 However, for an unpublished Appellate Division opinion addressing spoliation (though not in the context of social media), see Goldmark v. Mellina, No. A-5918-10T2 2012, N.J. Super. Unpub. LEXIS 1396 (App. Div. June 18, 2012), which is addressed in the Spoliation section, infra.
because social media data can be accessed at multiple different computers, it is difficult to pinpoint or limit the scope of the request to one computer as certain information might not be included. Alternatively, if a party was to download the account at the commencement of litigation then the other party would be deprived of certain Metadata which would include when certain pictures might have been taken versus when they were posted on the website. This is key information when attempting to utilize it at trial. A reasonable recommendation on preservation appears the best way to proceed.

In a case at odds with the conclusion in Gatto v. United Airlines, the District Court of California found messages that had been sent on Facebook and MySpace to be considered private and not discoverable in a civil lawsuit; the District Court also held that wall postings may fall into the same category depending on a user’s privacy settings. If the Plaintiff’s wall is set to “everyone,” then the communications would have to be turned over. But if the Plaintiff restricts access, than the status updates are considered private as email. However, at odds with the California ruling, the New York Supreme Court came to the conclusion that “[t]o deny Defendant an opportunity to access these sites would not only go against a liberal discovery policies favoring pre-trial disclosure, but would condone Plaintiff’s attempt to hide relevant information behind self-regulated privacy settings.”

The third party issue raises another question. Is the social media content in the party’s possession, custody or control thus creating a legal obligation to identify and preserve it? The courts are closing in on the determination that “control” is still in the hands of the user. It should be noted that the user may not have the ability to preserve or access all information or social media metadata from a site once a post has occurred. Some social media sites, as shown above with Facebook and Google+, allow the user to have the control of its content by providing access to downloading an archive of activity. One New Jersey District Court held that

Defendants had reason to believe [they would] be hauled into Court, and at worst, the website was destroyed after this lawsuit had been filed. They were thus required to maintain the website . . . deleting [online] files can constitute spoliation of

evidence . . . this Court sees no reason to treat websites differently than other electronic files. Where, as here, Defendant’s had control over the content posted on its website, then it follows a *fortiori* that is had the power to delete such content . . . . [it would] be irrelevant if the website was maintained on a third party server . . . Defendant had the *ultimate* authority, and thus control, to add, delete, or modify the website’s content.628

The Court, therefore, imposed an adverse inference for the destruction of the information requested.

In *Pietrylo v. Hillstone Restaurant Group*, the District Court affirmed a jury’s determination that an employer was guilty of a violation of the federal Stored Communications Act and New Jersey’s parallel electronic surveillance statute, 18 U.S.C. 2701 - 11 and N.J.S.A. 2A:156A-27, because the employer used its employees to access password-protected Myspace pages without authorization.629 Although only minimal damages were awarded, the case advises that any attempt to obtain access to password-protected social media would be unwise absent reliable evidence that an employee is violating company policies or is engaged in activity that is causing serious damage to the employer’s interests.630 In addition, when there is the potential for serious damage, an employer is best served by following a clearly defined company policy of seeking authorization to access a social media site directly from the employee involved. In the event the employer does receive access from the employee, then the employer will want to establish through the use of documentary evidence that the access was willingly given.

August, 20, 2013, marked the final saga of the *Ehling* case when the defendants’ summary judgment motion was granted.631 Notably, the federal court held that non-public Facebook posts, i.e., those that are configured to be private, are actually covered under the federal Stored Communications Act because they are (1) electronic communications, (2) transmitted via an electronic communication service, (3) in electronic storage, and (4) not

630 See *The Sedona Conference: Primer on Social Media*, supra note 113, p. 25.
accessible to the general public. “Because [the] Plaintiff . . . chose privacy settings that limited access to her Facebook wall to only her Facebook friends, the Court [found] that Plaintiff’s Facebook wall posts are covered by the SCA.” Although the posts were covered under the Act, the judge nonetheless applied the “authorized user” exception developed in Pietrylo to hold there was no violation of the Act, or of plaintiff’s Facebook privacy, when the Facebook posts were accessed.632 The evidence established that the plaintiff’s Facebook posts were given to the defendant’s management without any type of coercion or pressure, and that the plaintiff’s friend voluntarily took screenshots of the plaintiff’s Facebook page and either emailed those screenshots to management or printed them out; the information was completely unsolicited.

In disposing of the Ehling plaintiff’s invasion of privacy claim, the court similarly held the plaintiff failed to show there was an intentional intrusion by any of the defendants, since the plaintiff “voluntarily gave information to her Facebook friend, and her Facebook friend voluntarily gave that information to someone else. This may have been a violation of trust, but it was not a violation of privacy.”633 In distinguishing this type of voluntary access from those cases that involve an intentional intrusion, the judge explained “the evidence does not show that [the] Defendants obtained access to [the] Plaintiff’s Facebook page by, say, logging into her account, logging into another employee’s account, or asking another employee to log into Facebook.”

Thus, although the defendants in Ehling were ultimately found not liable, the case is highly significant because it is one of the first cases to hold that non-public social media posts fall within the scope of the federal Stored Communications Act and, if accessed improperly, may support a violation of the Act, as well as an invasion of privacy claim. Although Ehling appears to condone an employer’s viewing and use of an employee’s social media postings when they are brought to the employer voluntarily by a co-employee, the case still highlights the potential liability an employer may face for improperly accessing an employee’s social media. Thus,

632 “The authorized user exception applies where (1) access to the communication was ‘authorized,’ (2) ‘by a user of that service,’ (3) ‘with respect to a communication . . . intended for that user.’ Access is not authorized if the ‘purported authorization’ was coerced or provided under pressure.’ In this case, all three elements of the authorized user exception are present.” Id. at * 10-11 (quoting 18 U.S.C. § 2701(c)(2) and Pietrylo, supra, at *3).

633 Id. at *16 (citation omitted).
before developing any type of a formal social media policy or accessing an employee’s social media, an employer would be well-served to think twice and seek guidance from his or her attorney.

As discussed before, ESI, social media, and any other document is subject to the threshold issue of whether the information is relevant.\(^{634}\) If it is relevant, it is likely discoverable and may need to be preserved. As stated in Zubulake, a party is “under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.”\(^{635}\) Relevance will obviously be determined on a case-by-case basis. It appears courts are against pure fishing expeditions and require a preliminary showing of relevance before ordering broad social media discovery. With that, it also appears that the need for social media data relevant to a matter outweighs any privacy concerns. The party seeking the discovery should balance this information and make a request that is limited to the quest for relevant information. This request is preferably drafted as narrowly and specifically as possible.

Relevance will be very case sensitive. A family court permitted a father, during a custody battle, to use the mother’s MySpace postings to demonstrate bisexuality, pagan tendencies, and drug use.\(^{636}\) The Dexter Court held that no person would have a reasonable expectation of privacy where they took the affirmative act of posting their own writing on MySpace, making it available to anyone with a computer and opening it up to public eye. This is another example of people tending to share information freely on social media. Social media is successful on the providing of personal information and people have become used to living their lives online without editorial review of publication.

In the near future, how to collect and preserve the information and when to access and preserve it are questions that the Courts will have to answer. Presently, the Court’s guidance is unclear. The problems arise because of the vast amount of social media sites available and the fact that each one is unique in its terms, conditions and usage. Is a screen-grab enough? Is an

archive download sufficient? Is the continued maintenance enough? Does a forensic investigation and collection firm have to be retained?

It may be best, when referring to social media information, for the parties to agree that relevant social media subject to discovery should be preserved and provided while the remaining sensitive and private information remains protected due to annoyance, embarrassment, or oppression. Consent orders may be beneficial to accomplish this task.

**Depositions**

An audiovisual recording of a deposition may be made for discovery purposes or for use at trial. The person requesting the videotaped deposition must serve notice of the deposition not less than 10 days prior to the deposition date and advise that the deposition is to be audiovisually recorded. Further, if the videotaped deposition is of an expert, then the deponent’s expert report must be served on all parties at least 30 days prior to the deposition notice. Under N.J.Ct.R. 4:36-3(c), if an adjournment of a trial date is required based upon expert witness unavailability, for a second time, without exceptional circumstances, the party producing the expert shall be required to take a *de bene esse* deposition of their expert. Although this rule exists, it requires that the trial adjournments be due to expert unavailability. Under N.J.Ct.R. 4:36-3, adjournments for any other reason would not force the *de bene* deposition.

A written transcript of the testimony is still required. Immediately following the conclusion of the deposition, the person making the audiovisual recording shall deliver the audiovisual recording to the officer taking or directing the deposition, who shall mark it as an exhibit to the deposition, if feasible. The person making the audiovisual recording shall, if feasible, provide a copy of the recording to all parties present and, if it is not possible at the conclusion of the deposition, then the recording shall be promptly furnished.

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640 N.J. Ct. R. 4:36-3(c).
A video deposition need not take place in person. Videoconferencing of an out-of-state witness is the considered production of the witness.\textsuperscript{642} In \textit{Haynes}, the Court realized, way back in 1998, that telephone conferencing, telephone motions, and videotaped testimony had become routine in New Jersey as a cost and time saving accommodation to attorneys, litigants and the court. This is particularly convenient for criminal defendants incarcerated in far-off jurisdictions, and has arisen in Post-Conviction Relief cases where the defendant had been deported due to a guilty plea and seeks to testify from his country of origin.\textsuperscript{643}

Unfortunately, trial dates have a tendency not be real dates and experts require more and more money to reserve their availability on a particular day. These two problems have led to the necessity of videotaped \textit{de bene esse} depositions. While this is convenient, it is clearly more impacting to have your expert appear in person. But in order to be fair to all available options for technology and the courts, it should be noted that N.J.Ct.R. 4:14-9 permits the deposition of a witness to be videotaped in advance of trial for use at trial. Although any witness’ testimony may be preserved for presentation at trial through this Rule, due to the cost of this procedure, most often the depositions involve expert testimony.

Many experts actually prefer to be recorded. The experts may request to be videotaped because of time commitments or fear of testimony in front of a jury. Although the concept of a \textit{de bene esse} deposition is taken provisionally for use if the witness is unavailable at the time of trial, N.J.Ct.R. 4:14-9 permits the videotaped deposition of a treating physician or expert witness to be used at the time of trial whether or not the witness is available to testify.\textsuperscript{644} The taking of an audiovisual recorded deposition of a treating physician or expert witness shall not preclude the party taking the deposition from producing the witness at trial.\textsuperscript{645}

Since, in New Jersey, the opinion of an expert, as opposed to testimony as to facts perceived, may not ordinarily be compelled against the wishes of the expert\textsuperscript{646} and as a matter of policy, an expert’s deposition taken pursuant to N.J.Ct.R. 4:14-9 should not be substantively

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\textsuperscript{643} State v. Santos, 210 N.J. 129 (2012).
\textsuperscript{644} N.J. Ct. R. 4:14-9(e).
\textsuperscript{645} Id.
\end{flushright}
usable by an adversary over objection. In explaining the Appellate Division’s position, Judge Cohen states, “Rule 4:14-9 is a valuable innovation whose use should be encouraged. It is cheaper for litigants, more convenient for experts, and more efficient for the court to permit a party to present a videotaped deposition if the party elects to do so. It would discourage the use of the device if an expert’s deposition could be used substantively by the other side.” “Rule 4:14-9(e) does not say the deposition of an expert taken for use at trial has to be used but only that it ‘may be used.’”

Other than cost and not being in person, there is another trouble that can come in utilizing the *de bene esse* deposition of an expert. If the attorney determines that, at the time of trial, the expert is going to testify live then the adversary may utilize the recorded testimony to impeach the witness during cross-examination. Further, if the *de bene esse* testimony is inconsistent with trial testimony, then it is admissible as substantive evidence. Another troubling part of the decision is that the court stated, “if an expert witness is not produced at trial and the N.J.Ct.R. 4:14-9(e) deposition is not offered, an adversary party would ordinarily be entitled to the benefit of an adverse inference.” The Appellate Division determines the availability of the adverse inference because the testimony would be available to the party but not the adversary, production of the party would be natural, and the opinion testimony would usually not be cumulative or inferior to other evidence.

It is important to remember that all evidential objections must be made during the course of the deposition and the party making the objection shall, within 45 days after the completion of the deposition, file a motion for rulings thereon. Attorneys should not expect a discovery objection made at a *de bene esse* deposition to remain viable at trial if there was a fair opportunity in the intervening time to move for a ruling on the objection.

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648 Id.
649 Id.
650 Id.
651 Id.
Remember, the use of a *de bene esse* deposition is not limited to expert witnesses, but may be used for anyone that may be unavailable for trial. If you do not expect a witness will be available at trial, it is highly recommended that a *de bene esse* deposition be taken. Using the audiovisual deposition allows for a better presentation to the jury than a stand-alone reading of the transcript. It will provide a chance for the jury to see non-verbal cues and to understand the person testifying.

Currently, there are no limitations on the type of video camera or how many video cameras are used. If trial testimony is taking place, it may be beneficial to use at least two cameras so that the jury can first see the lawyer questioning the witness and then the witness answering the questions. An attorney may want to set it up as a picture within a picture; the attorney in a small video box on bottom portion of the screen with a larger video of the testifying expert on the remaining portions. Also, it would be beneficial to have independent microphones attached to the witnesses in order to make sure that the witness and questioner are able to be heard and understood. Unfortunately, all of this will be conditioned on the amount of money available.

For historical reference, in 1976, *Blumberg v. Dornbusch*654 determined that videotaping a deposition was allowed. “Videotape is neither new nor can it be considered an experimental electronic novelty.” “[Our Court Rules do] not prohibit innovative procedures so long as the basic protection provided for all parties is preserved.”655

In criminal practice, unlike some jurisdictions, New Jersey and federal courts do not permit pre-trial depositions as of right. They are only available under limited circumstances.656

It is important to remember that technology is useful during depositions aside from the recording and memorializing of the event. Technology can be used to create live exhibits. Instead of handing the witness a paper and a red pen to mark on the document, have the witness mark the digital copy and create a fluid and powerful piece of evidence to be referenced, marked, and remarked. The Note Taking tools discussed earlier in the book provide great tools to draft outlines. It is also useful to make checklists of particular issues that need to

655 Id.
be addressed so that you are confident each one was touched upon. Some outlining apps are Cloud Outliner®, OmniOutliner®, or The Deponent®.

The days of yellow highlighters to paper are becoming numbered. Depositions are now being provided as E-Transcripts. These documents can be loaded into different software for review and markup. The iPad App most utilized for this purpose is TranscriptPad. If you have a PC, you can utilize Trial Director’s Transcript Manager to accomplish the same task. It allows for the issue coding of depositions. The issue codes are user defined and color coded.

These codes will allow the user to markup the depositions. Further, the marks can then be utilized to create deposition clips and deposition abstracts. It will save hours of review, typing and retrieval. If you do not have review software to mark the document, simply save the file as a PDF and utilize a PDF reader/writer to review the matter.

Upon reviewing a party’s ESI and document production, it is worth considering whether you intend to serve a deposition notice on that party to question their records custodian pursuant to N.J.Ct.R. 4:14-2 or F.R.C.P. 30(b)(6). These depositions afford you the opportunity to confirm your adversaries’ ESI and document retention procedures and the procedure they formulated and then implemented to search, collect, process, and produce their discovery.

These depositions can be particularly helpful in cases where you have already encountered issues regarding your adversary’s production or if you believe the production is incomplete or otherwise deficient.

**Spoliation**

From the start of a matter, it is imperative to be cognizant of your client’s obligation to preserve electronic data. Since there is little published case law in New Jersey Superior Court
concerning spoliation of ESI, this book focuses primarily upon New Jersey federal cases. New Jersey federal courts acknowledge their authority to impose sanctions pursuant to the Federal Rules of Civil Procedure, as well as their “inherent authority.” Thus, the strictures of F.R.C.P. 37 are not always stringently followed.\textsuperscript{657}

Spoliation of evidence is the destruction or alteration of information (physical or electronic) which may be used as evidence in pending or reasonably foreseeable litigation. As we previously acknowledged, while a client’s good faith adherence to its document retention policies used in the regular course of its business may provide some protection in avoiding spoliation sanctions\textsuperscript{658} or at least in decreasing the severity of the sanctions that may be imposed,\textsuperscript{659} we must all understand that blind adherence to such a policy is frequently a mistake. Rather, our clients still have an independent obligation to ensure that potentially relevant documents are not destroyed or made inaccessible. Thus, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.”\textsuperscript{660}

Once a duty to preserve is triggered, it is important that counsel query his or her client as to the location of potentially relevant ESI and routine document retention policies so they


\textsuperscript{659} State Nat’l Ins. Co. v. County of Camden, No. 08-5128, 2012 U.S. Dist. LEXIS 38504 (D.N.J. Mar. 21, 2012) (affirming Magistrate Judge’s decision to impose spoliation sanctions in the form of fees and costs – but not granting an adverse inference instruction – due to the failure to implement a timely litigation hold, the failure to disable an automatic email deletion program, and the failure to preserve copies of backup tapes).

\textsuperscript{660} Major Tours, Inc. v. Colorel, No. 05-3091, 2009 U.S. Dist. LEXIS 68128, at *8 (quoting Zubulake v. UBS Warburg, L.L.C., 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).
may be suspended or addressed with your adversary and the court at an early stage. If this information is not developed early on, then it is possible that a party will fail to institute the necessary litigation hold, allowing the spoliation of potentially relevant documents and leaving both the client and counsel vulnerable to future spoliation sanctions.\footnote{See Wachtel v. Guardian Life Ins. Co., 239 F.R.D. 376, 385-88 (D.N.J. 2006), where outside counsel had the client’s employee search their own emails even though outside counsel was unaware of the client’s practice of putting e-mail on backup tapes 90 days after creation, “making it impossible for most employees to access the e-mails through a search of their own.” \textit{Id.} at 385. In addition, outside counsel was not aware that the client permitted its employees to delete e-mails within 30 days of creation or receipt. \textit{Id}.}

In addition to initiating a litigation hold, counsel is required to continue to monitor discovery and the preservation and collection of documents as the case continues. If this does not occur and relevant or potentially relevant documents are spoliated, it is possible that sanctions may be imposed.\footnote{N.V.E., Inc. v. Palmeroni, No. 06-5455, 2011 U.S. Dist. LEXIS 107600 (D.N.J. Sept. 21, 2011).}

It is well-settled that where the loss of relevant evidence is due to bad faith and causes prejudice to a party, sanctions in the form of attorney’s fees and costs, fines, an adverse inference jury instruction, the preclusion of evidence and, in exceptional cases, default judgments and dismissal of claims, are likely to be imposed. In addition, a separate cause of action for negligence or fraudulent concealment of evidence may also provide a remedy.

As discussed below, the application of spoliation sanctions is murkier when the evidence at issue has been spoliated due only to neglect or carelessness.\footnote{This issue is addressed in the proposed amendment to \textit{Fed. R. Civ. P. 37(e)}. See infra, section of Proposed Amendment to \textit{Fed. R. Civ. P. 37(e)}.} Courts take different approaches on a case-by-case basis. Thus, as a practice pointer, even the negligent spoliation of relevant evidence should be avoided whenever possible; or a practitioner should enter into a stipulation providing that certain data that is largely inaccessible, unduly burdensome to collect, duplicative or largely irrelevant (or all of these), need not be preserved.

Spoliation sanctions serve 3 functions: remedial, punitive and deterrent. They punish the spoliator while leveling the playing field for the prejudiced party and also warn other
litigants that spoliation will not be tolerated. In determining the specific sanctions that are warranted, courts consider:

1. the spoliating party’s degree of fault;
2. the degree of prejudice suffered by the opposing party; and
3. whether a lesser sanction will avoid substantial unfairness to the opposing party and, if the spoliating party is seriously at fault, will deter similar conduct by others in the future.

“In order to establish prejudice, the party seeking spoliation sanctions must ‘come forward with plausible, concrete suggestions as to what the missing evidence might have been’ and must show that its ‘ability to prepare effectively a full and complete trial strategy’ has been impeded.” If a party fails to specifically demonstrate prejudice, then there is a good chance that spoliation sanctions will be denied.

The two spoliation sanctions that are most frequently applied are the imposition of attorney’s fees and costs and the adverse inference jury instruction. It is our opinion that, when confronted with situations in which the spoliated evidence was not caused by a party’s intentional actions or bad faith, courts – after seriously considering the degree of prejudice to the non-spoliating party – should, wherever possible, refrain from granting adverse inferences and focus more on fleshing out the reasons why the spoliation occurred, compelling the production of evidence or similar evidence, allowing additional discovery, or awarding attorney’s fees and costs or fines. Nonetheless, since spoliation sanctions are applied on a

668 Along these lines, an insightful spoliation analysis is set forth in Chin v. Port Authority of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012). There, the Second Circuit affirmed the denied a motion for spoliation sanctions in the form of an adverse inference because the lost evidence was essentially cumulative. In so doing, the Second Circuit. Id. at 145. The Second Circuit rejected the “notion that a failure to institute a ‘litigation hold’ constitutes gross negligence per se,” rather than simple negligence, and instead
case-by-case basis, this suggestion is not universally followed. Courts are more than willing to apply the adverse inference instruction in cases where evidence was spoliated only due to negligence or carelessness.669

“The spoliation inference is an adverse inference that permits a jury to infer that destroyed evidence might or would have been unfavorable to the position of the offending party.”670 Mosaid establishes a four-party adverse inference test that must be satisfied for the sanction to be imposed:

(1) the evidence in question was in the party’s control;
(2) there was actual suppression or withholding of evidence;
(3) the evidence was relevant to claims or defenses; and
(4) it was reasonably foreseeable that the evidence would later be discoverable.671

The first factor is self-explanatory; within its scope are not just documents within the direct control of the spoliating party, but also those within its general possession, custody or control. It is worth noting that, for a spoliation claim to stand, the party pursuing the claim must be able to demonstrate that the spoliated evidence actually existed.672

With respect to the second factor, as reflected in Mosaid, negligent destruction of evidence is sufficient, at times, to establish an adverse inference instruction. Since the application of this intent element varies on a case-by-case basis, it is, in this author’s opinion, the most inconsistently applied factor of the adverse inference test. Therefore, the “actual

advocated that “the ‘better approach is to consider [this] as one factor’ in the determination of whether discovery sanctions should issue.” Id. at 161-62.

669 Gatto v. United Air Lines, Inc., No. 10-1090, 2013 U.S. Dis. LEXIS 41909 (D.N.J. Mar. 25, 2013) is particularly perplexing in that the court allowed an adverse inference for spoliation, yet held that an award of attorney’s fees was not warranted because “[p]laintiff’s destruction of evidence does not appear to be motivated by fraudulent purposes or diversionary tactics, and the loss of evidence will not cause unnecessary delay.” But see Kavalek, 2011 U.S. Dist. LEXIS 147335 (denying spoliation sanctions due to the absence of evidence of fraud or bad faith and where the court did not find sufficient evidence of prejudice).


671 Mosaid, 348 F. Supp. 2d at 336.

suppression” element serves as a potential pitfall for the weary practitioner who is reluctant to address ESI issues head on with his or her client.

As acknowledged by Chief Judge Brown, Ret., there is a split in the Third Circuit regarding the level of culpability that is necessary to establish “actual suppression.”\textsuperscript{673} For that reason, Judge Brown reasoned that that best rule regarding culpability focuses on the amount of prejudice to an opposing party. Thus, he reasoned that "[w]here there is substantial prejudice to the opposing party, negligence may be sufficient to warrant a spoliation inference. Where there is minimal prejudice to the opposing party, intentional conduct is required." However, this type of reasoning is not universally applied in spoliation cases.

As for the third factor, typically, where the culpability of the offending party is less than intentional or knowing and is not in bad faith, and we are evaluating a situation in which the destruction or withholding was caused by “negligence, gross negligence or even recklessness,” then the party seeking the spoliation inference is required to “establish not only that the destroyed or withheld evidence is probative under F.R.E. 401, but also ‘must adduce sufficient evidence from which a reasonable trier of fact could infer that the . . . evidence would have been of the nature alleged by the party affected by its destruction.’”\textsuperscript{674} "As part of the burden of demonstrating the relevance of requested documentation, the party seeking discovery must be able to identify, with some specificity, the documents being sought, or the information contained therein."\textsuperscript{675} This means that the party offended by the destruction “must make a sufficient showing from which a fact finder could reasonably determine that the destroyed or withheld evidence would have been favorable to the movant.”\textsuperscript{676}


\textsuperscript{675} Wong v. Thomas, No. 05-2588, 2008 U.S. Dist. LEXIS 71246 (D.N.J. September 10, 2008).

\textsuperscript{676} In Medeva, the court denied a spoliation motion, in part, where sufficient documents were maintained pursuant to a document retention policy and where the opposing party failed to sufficiently allege its trial strategy was impeded. The court, however, granted the motion as the spoliating party’s
The fourth factor is also self-explanatory, requiring only an assessment of the timing of the spoliation and the nature of the evidence that was allegedly spoliated.

The knowledge of preservation regarding social media is best exemplified by the $542,000 sanction applied to a Virginia Plaintiff’s attorney that allowed his client to remove information from his Facebook account.\textsuperscript{677} If an adversary has intentionally hidden or destroyed evidence necessary to a party’s cause of action, the party seeking that evidence is entitled to the adverse inference that the evidence would be unfavorable to the party responsible for the evidence, may amend the complaint to add fraudulent concealment, or may seek discovery sanctions.\textsuperscript{678}

In the case of \textit{Goldmark v. Mellina}, the New Jersey Appellate Division weighed in on spoliation issues in an unpublished opinion.\textsuperscript{679} There, the court imposed $5,502.50 in sanctions for counsel’s failure to preserve critical privileged information. Citing N.J.R.P.C. 3.4(a) and N.J.Ct.R. 4:10-2(e)(1), the court held that, upon identifying privileged information or perhaps sooner, counsel had an obligation to preserve those documents (emails) pending the court’s further direction, especially where, as here, they were highly relevant. This case helps illustrate the inherent tension involved in privilege assertions and preservation obligations. You cannot claim privilege as to a communication, implying it was clearly relevant to the litigation, yet also claim that ESI generated or maintained at or around (or after) that time are not relevant because litigation was not foreseeable. Thus, when counsel asserts privilege over certain communications that occurred at a period of time, yet fails to preserve other relevant

\textsuperscript{677} Lester v. Allied Concrete Co., No. 08-150, 2011 WL 9688369, (Va. Cir. Ct. 2011), rev’d on other grounds 285 Va. 295 (Va. 2013) (attorney was sanctioned $542,000 and the client was sanctioned $180,000).


information or evidence that was concurrently or subsequently generated or maintained, courts are inclined to impose spoliation sanctions.\(^{680}\)

If parties want to avoid spoliation sanctions, they are also best served by not violating court orders requiring them to preserve and produce documentation. This is a sure-fire way for both you and your client to be placed in a very uncomfortable position.\(^{681}\)

In addition, if a party wishes to pursue spoliation sanctions, they are required to raise and preserve the issue through appropriate ESI demands, deficiency allegations and motion practice.\(^{682}\)

In New Jersey federal court, it is also of note that courts have refused to impose a bright line rule preventing a party from invoking F.R.C.P. 26(b)(2)(B) when that party’s negligence is responsible for the inaccessibility of the data due to the failure to institute an appropriate litigation hold.

This is essentially the same in NJ criminal context for law enforcement. One aberration in criminal jurisprudence involves DWI discovery.\(^{683}\) In State v. Holup, the court held that the non-disclosure of certain foundational documents for the Alcotest blood alcohol breath machine was grounds for dismissal of a DWI case in Municipal Court. Another is the adverse inference charge that the Court in NJ permitted in State v. W.B. when law enforcement officers destroyed handwritten notes made contemporaneously with an investigation.\(^{684}\) In United States v. Suarez, the court applied the civil analysis of spoliation and adverse inferences, set forth above,


in the criminal context, and impose an adverse inference against the State due to its failure to preserve highly relevant and potentially exculpatory text messages.685

**Proposed Amendment to Fed. R. Civ. P. 37(e)**

The Judicial Conference’s Committee on Rules of Practice and Procedure recently approved a revised package of amendments to the Federal Rules of Civil Procedure that were recommended by its Advisory Committee on Rules of Civil Procedure in a May 2, 2014 report. One of these proposals seeks to adopt a new Fed. R. Civ. P. 37(e).686 This amendment, however, has yet to take effect, and in all likelihood will neither be finalized nor promulgated until late in 2015. Nonetheless, since it appears that the substance of the new rule 37(e) has been settled, practitioners should be aware of the changes that the new rule is likely to bring.

Under the new 37(e), a breach of the duty to preserve occurs when a party fails to take “reasonable steps” to preserve ESI after the duty has been triggered. The analysis of whether the duty has been triggered is governed by case law. The purpose of the amendment is to incentivize reasonable behavior, acknowledge that “perfection” in preservation is difficult to achieve, reject a strict liability approach and make a substantial spoliation remedy more difficult to obtain when the level of culpability is negligence.

The rule applies only if the lost ESI cannot be restored or replaced through additional discovery. This means courts should assess the availability of other sources that would contain information similar to the lost ESI and engage in other case management procedures before ordering any “measure” authorized under subsection 1 or 2 the new rule.

Under subsection 1 of the new rule, once a court finds that another party has been prejudiced by the loss of ESI, it can order “measures no greater than necessary to cure the prejudice.” This gives the court broad discretion to order an appropriate and proportional remedy in the event another party has been prejudiced by the lost ESI. Under subsection 1, the court need not engage in a culpability assessment as a prerequisite for ordering measures.

However, the Committee Note stresses that subsection 1 does not authorize the more substantial measures limited by subsection 2 of the rule unless the court “makes a finding that the party acted with an intent to deprive another party of the information’s use in litigation.”

Under subsection 2 of the new rule, upon “finding that the party acted with the intent to deprive another party of the information’s use in litigation,” the court may: (i) presume that the lost information was unfavorable to the party; (ii) instruct the jury that it may or must presume the information was unfavorable to the party; or (iii) dismiss the action and enter default judgment.

Public Records

Of course, the State need not always have to be an adversary. The U.S. Freedom of Information Act (FOIA)\(^{687}\) and N.J. Open Public Records Act (OPRA)\(^{688}\) ensure government transparency and the availability and access to copies of government-held information\(^{689}\). This can range from 911 calls (only saved for 31 days) various reports. Printed pages are $0.5-0.7 and for the most part, every other medium is the actual cost. There are various cases where costs are calculated at a higher rate, but email and fax transmissions are exempt from costs entirely. There also is an interactive web page available for OPRA requests which guide you through a series of drop down menus to generate the form and have it emailed to the pertinent government agency and returned according to your preference\(^{690}\). If you have any doubt about where to send a particular request, pick up the phone and start calling wherever you think might have it. Eventually you will get to the right person. The techies are usually more than happy to assist another live human being with anything, really.

\(^{687}\) 5 U.S.C. § 552.

\(^{688}\) N.J.S.A. 47:1A, et seq.; see Chapter 5 Supra

\(^{689}\) Although the Judiciary does not fall within the purview of the Open Public Records Act, the October 14, 2012, Supplement to Administrative Office of the Courts Directive # 15-05 indicates that because “the Judiciary has historically adopted a fee schedule consistent with that of OPRA”, the “Supreme Court has decided to adopt a fee structure for copies of Judiciary records that mirrors the copy fees provided in the Open Public Records Act [], as recently amended.”

\(^{690}\) [https://www16.state.nj.us/NJ_OPRA/department.jsp](https://www16.state.nj.us/NJ_OPRA/department.jsp)
Investigators, Victims, Witnesses and Police

In a civil context, Plaintiffs have been Ordered to disclose a facebook.com login information. In criminal context, since the complaining victim is one step removed from the Prosecutor’s independent decision-making, it is unlikely that similar practices will follow. But an investigator should be sent out to speak with whoever it is believed to possess the ESI. Even if the individual or entity refuses to produce a copy of the data or hardware, the confirmation of its existence may be used to pave the way to an Order to produce.

Experts

Even though after having read this book you will be capable of launching missiles from your cell phone, you should still not extract any of the data yourself unless you want to be a witness at the trial. Take yourself out of the equation and chain of custody by having the party in possession send the hardware or the image copy to the expert.

Experts are sometimes critical for developing the programs or models that can be used during trial. For example, accident reconstruction experts can use their knowledge of physics to determine the speed, acceleration, braking, and location of a vehicle in an accident. Similarly, a structural fire has so many moving parts that an expert can run the particulars on a computer program to better understand the origin, cause, and progression of a fire. This can be effective during an insurance or wrongful death case, as well as criminal arson cases. However, these models are not perfect, and have not been determined to be admissible in any published New Jersey decision. In fact, a New York court has held it did not permit it as expert evidence.691

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CHAPTER 8: Working with Digital Evidence

Proper creation, organization and presentation of evidence is important to the success of a matter. Many practitioners rely on trial consultants, trial staff, and evidence stores to produce demonstrative aids, day-in-the-life videos, accident reconstructions, and digital models. Some attorneys rely on vendors to provide court room technology support and services. All of these are great options if the financial ability exists. However, these are tools and not necessities to the success of the matter. It is important to remember that there are many ways to show the same piece of evidence. A lawyer must be comfortable with the evidence in order to present the best case. Sometimes comfort is derived by the avoidance of technology. We will not be discussing presentation without technology but it is important to remember that this option is always available.

Many pieces of evidence can be organized with trial presentation software, timeline software, or slide-show presentation software. These three are the means to present digital evidence. They work with the digital information that you have crafted in advance of the trial. Trial presentation software does provide the ability to make demonstrative evidence out of the digital evidence gathered throughout the case. But these three rely on the input of the user and the organization of the digital file folder.

In order to create certain demonstrative aides, it may be useful to have photo editing software, audio editing software, and video editing software. These items allow for the best presentation of information. Remember: do not utilize the editing software to falsify or substantially edit the evidence. These tools allow for the better presentation of the item itself. Any changes must be told to the court, judge, and adversary. Those changes must be to demonstrate a portion of the original digital file in a manner that helps to explain the original document, image, or video. It may help focus the jury on a portion of the image to assist the witness in explaining the evidence. Editing software is not for manipulation but for proper explanation. Chapter 10 will have a substantive discussion about digital evidence presentation, in the courtroom that will delve into the case law and evidence rules relating to the uses of these products.
A computers’ ability to organize and present documents, graphics, and videos has given rise to numerous litigation support programming and presentation software. Some programs allow the trial lawyers to have at their fingertips their entire file, make it possible to retrieve any document in seconds and search the contents therein. With this new technology, you can create a plethora of demonstrative and visual aids that can be presented in numerous ways: Tables, Charts, Graphs, Models, Demonstrations, Reconstructions, Animations, Magnification, Video Depositions, and Slide Show Presentations.

Computer Technology and Litigation Support Systems are not required in every case and they should not be utilized in every case. Every case is fact sensitive and certain files do not require the use of a technological presentation. Additionally, time, effort, and monetary factors may preclude you from utilizing the technology. And if used improperly, technology has the ability to detract attention from the main argument. While technology may not be appropriate in every instance, it can be of tremendous assistance in the correct instance. I feel that technology can assist us in providing the jurors with a visual interpretation of testimony about an event, a location, an object, a procedure, complicated terminology, or a document. As stated previously, it can be utilized for the purpose of reinforcing the evidence testified to by the witnesses in the courtroom. It helps us organize the presentation of voluminous facts and helps us present a summary of the admitted evidence. Since evidence has to be presented by witnesses, it rarely follows a chronological or systematic format. The use of technology allows us to reorganize the evidence for better understanding and storytelling.

**Computer-Generated Animations, Recreations, and Models**

Many forms of digital evidence can be created by the attorney with the assistance of experts, witnesses, and technical support. However, animations should solely be the creation of those with the technical expertise to testify about its creation. Computer-generated animations, models, re-creations, etc. are powerful pieces of demonstrative evidence. They have grown to portray three dimensional versions of accident scenes, building layouts, and blueprints. The evidence has a strong capability of influence over the jurors and, therefore, should be admitted with the proper foundation. It is necessary to demonstrate the evidentiary reliability and authentic. Each piece of computer-generated evidence will require its own
unique foundation. Some will be as simple as having an expert testify that the animation fairly and accurately depicts the medical procedure. Whereas, some may be as difficult as to require the technical foundation for the re-creation of an accident scene and its variables to prevent objection of prejudice substantially outweighing probative value.

It will be necessary when utilizing such information to be prepared to have a witness testify to the proper foundation. As with all demonstrative aids, the computer-generated evidence will only be admissible where it is relevant, not duplicative, and will facilitate the jury in understanding testimony or evidence. Therefore, the witness should testify that they are familiar with the computer-generated demonstrative evidence, that they can provide the foundation of their knowledge of the evidence, they can testify to its accurateness and fairness in creation, and state that the evidence will assist the jury in understanding testimony.

The most difficult form of computer-generated evidence is a re-creation. A re-creation or simulation differs from animations because it requires scientific principles, mathematic equations, variables, and normally depicts the perception/testimony of what occurred at the time of the subject in question. A re-creation may contain a survey of the scene (land, roadway, buildings, lighting, etc.), models of other evidence (cars, trucks, people, etc.), and an analysis of the timing of the event (speed of cars, distances travelled, gravity, etc.). Since there are obvious reliability issues in the creation, the assumptions made and manner formulated must be testified to. This may be accomplished in a Rule 104 hearing or during trial. Any computer-generated re-creation should be provided to the other side in advance of trial. Re-creations cost a significant amount of money and it may cause a strong disagreement with your own client if it is precluded from use during trial for failure to make the evidence accessible to your adversary.

Admissibility of re-creation will remain, as with all demonstrative aids, within the area of judicial discretion. See Chapter 10 for more detail on case law and admissibility.

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693 N.J. R. EVID. 104.
In *Macaluso v. Pleskin*, the Appellate Division reaffirmed the need to have a witness authenticate a piece of demonstrative evidence. A party played a video animation regarding soft tissue that was produced by a technical medical animation corporation and not the testifying witness. This would have been fine but the expert had never seen the animation, did not utilize it in explaining his testimony, and did not make any comments regarding it. Further, the animation was narrated by someone other than the testifying doctor and the speaker. Therefore, the narrator was unable to be cross-examined and testifying without being placed under oath. It is important to think about admissibility of evidence before presenting the evidence. Otherwise, you may be retrying the case due to a mistrial for the improper presentation or otherwise admissible evidence.

In *Persley v. New Jersey Transit Bus*, a video was presented to the jury of a computer-generated simulation of the accident. The recreation was done at the testifying expert’s direction, he explained the procedure, and described the information utilized in its creation. The Appellate Division held that the video was properly admitted and that admissibility of evidence concerning a reconstruction of a particular event would turn on whether the reconstruction sufficiently duplicated the original event. The video was authenticated, the process of its creation explained, it conformed to the evidence surrounding the subject accident, and it was shown in real-time (not in slow motion). This is a great example of the way to present a simulation.

On the other side, *Suanez v. Egeland* is the perfect example of what not to do when trying to get demonstrative aids admitted during a trial. In *Suanez*, the party did not turn over the video recreation, the recreation was slowed down to highlight the party’s arguments and no foundation was laid. Aside from that, the Court held that it was still inadmissible as prejudicial and unfair. The Court explained its frustration with not fully disclosing the available evidence. The Appellate Division stressed that the rules of discovery were designed to insure that the outcome of litigation shall depend on the merits of the facts rather than on the craftiness of the

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696 Persley, 357 N.J. Super. 1.
697 Suanez, 330 N.J. Super. 190.
parties or the guile of their counsel. “[A]n adversary should not be confronted with a videotape for the first time on the day of trial. Without prior notice and time to prepare, an attorney is ill equipped to meaningfully test the validity of the scenes depicted on the tape.” Remember the rules: Hide and be denied, lay a proper foundation before presentation, and if you can’t say it, you can’t display it.

Computer-generated re-creations mimic the law for experimental re-creations. In *Crispin v. Volkswagenwek*, the trial court excluded defendant’s offer of video recreation on the basis that the studies were performed under entirely different circumstances. The Appellate Division agreed that the issue fell within the domain of the trial court’s discretion and found no error in excluding the evidence. The videotape reconstruction held too many variables and, therefore, was not an accurate reconstruction. There was a wide variety in the weight of the test vehicles and the actual vehicle. Therefore the trial court excluded the evidence for its failure to demonstrate probative value.

**Audio, Video, and Photographic Software & Evidence**

If photographic, audio, or video evidence is provided in a hard copy form, it should be immediately transfer it onto a computer for viewing purposes. The digital copy can be reviewed, reproduced, edited, cut, or annotated without fear of damaging the original. There are numerous photographic, audio and video editing software programs that can be purchased for these tasks. Some editing software is freeware and, therefore, does not come with a cost. Audio and video discovery is more frequently being created and provided in digital form. Some computer programs allow you the opportunity to take snapshots of certain individual frames and present them in a speed that explains step-by-step actions (Be cognizant that an adversary may object to unfair prejudice for the altering of the video speed).

698 *Id.*


Audio cassettes have been deemed obsolete by the creation of CDs and digital audio. Cassette tapes had an amazing ability to shoot a long strand of black tape throughout a room, the casing could crack with a little pressure, and it has become almost impossible to find a cassette player that won’t damage the original spool. The CD has begun to fall victim to the same problems: scratching, skipping, etc. Therefore, a digital copy provides safety in preservation and presentation.

When all video, audio, and photographic evidence is stored in electronic format, it helps limit the amount of differing equipment that needs to be brought to the courtroom, removes the fear a damaged original, and allows to never have to worry about finding he portion of the original to show, thereby postponing the trial and frustrating the court and jurors. Most video recording, audio recordings, and wiretap transcripts are provided to counsel in digital form. It is important to remember that your computer’s built in speakers may be insufficient to correctly provide the volume necessary for the entire court to hear the presentation.

Modern audio and video software allow for easy and proper presentation of specific portions of audio and video files.
Cameras that necessitate film are rapidly being replaced by high-quality digital cameras. Digital cameras can utilize different memory cards that can be removed from the camera and placed into a compatible television screen for presentation purposes. Also, most cameras can be directly connected to a television for viewing of its photographic content by a USB (Universal Serial Bus) cord or AV (audio/video) cable. Further, as discussed previously, the digital file holds metadata that relates to the photograph and may provide foundational information. Since digital cameras have begun to surpass film photography, the presentation of the image is meant to be displayed in the true, original, digital format. A printed photograph would not be the technical original document. New Jersey’s Evidence Rules ("N.J.R.E.") are ahead of most states in the acceptance of printed versions of digital creations. N.J.R.E. 1001 states that any printout or other output readable by sight, shown to reflect the digitally stored data accurately is deemed an “original.”

Slideshow Presentation Software

Many people are familiar with the PowerPoint slide-show presentation software. PowerPoint has been around since May 22, 1990. But there are many other slideshow programs available. Several of them are compatible with the iPad, a tool that has been quickly been invading the courtroom.

| Powerpoint | Keynote | SlideShark | OpenOffice Impress | LibreOffice Presentation |

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702 N.J. R. EVID. 1001(c). Original. An “original” of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An “original” of a photograph includes the negative or any print therefrom. If data are stored by means of a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

If presenting with an iPad, it is recommended that the user utilize the larger and more powerful desktop version of their favorite slideshow program and transfer the creations to Keynote or Slideshark for a more fluid presentation. If you are utilizing a laptop, then any of the slideshow programs will be fine. Find what works best for you. It is imperative that the user be comfortable with the software.

How can a presentation program assist in case presentation? Well, the best answer is consistency and organization. Some people are not comfortable with the slightly more complex trial presentation software; which will be addressed in a later section. Slideshow presentations are not built for on the fly editing and changing. Although some animations and annotations are available within the program, the slideshow is largely static. In a trial setting, it is recommended that the user avoid sound effects and distracting slide transitions.

One could craft an entire book on the proper uses of PowerPoint. We, however, are only alerting you to its existence and its potential benefits to trial work. The most common use is for presenting lists and organizing an outline for opening or closing.

Slides are as powerful as the user wishes to make them.

Good Tech Takes Time to Prepare
PowerPoint ® is a powerful tool for persuasion through presentation. Originally released on May 22, 1990, it has grown to provide many tools to amplify a speaker’s message. Unfortunately, most people think the software has remained the same. This incorrect understanding is only perpetuated by the poor presentations we suffer through at each and every presentation; a boring bullet point slide followed by another boring bullet point slide. We should not be subjected to these continually ineffective sessions forcing us into a sitting sleep. Instead, we should be entranced by the message; one that is interwoven with visual aids.

Proper creation, organization and presentation of evidence are important to the success of a matter. Many practitioners rely on trial consultants, trial staff, and evidence stores to produce demonstrative aids, day-in-the-life videos, accident reconstructions, and digital models. Some attorneys rely on vendors to provide court room technology support and services. All of these are great options if the financial ability exists. However, these are tools and not necessities to the success of the matter. It is important to remember that there are many ways to show the same piece of evidence. The key is that a lawyer must be comfortable with the technological presentation of his or her evidence in order to present the best case. PowerPoint is a fantastic tool to accomplish the task.

Since PowerPoint 2010, the user can find video editing tools, photo editing tools, graphic design tools, animation tools, internet publishing tools and of course the well-known slide-show presentation tools. The program provides the means to create original demonstrative aids and deliver a compelling presentation.

It is difficult to tell someone not to proceed in the way that they have observed thousand before them act. But we can overcome this with a few simple redirections. First, it is important to remember that Bullet Points are only bad if you clutter them with wording. Keep it simple. The presenter should not fill a slide with a lengthy paragraph of information. This is what handouts are for. Further, it will place your audience into a state of sleep. Worse still, a presenter can read exactly what is on the novel of a slide! This will cause the audience to ignore the speaker. This is not to say that words and slides cannot be effectively combined. They should be! However, it should be done effectively.
Simple can go a long way to emphasizing the message. But don’t forget that the slide must combine with the words that you are saying. The slides and speech should coordinate. It is vital for the jurors (or an audience) to retain information about the trial (or presentation). In order for them to understand and retain the information, it must be presented to them in a powerful and persuasive manner. It can be presented through testimony/speech (hearing), through evidence/slides (seeing), or a combination of the two (seeing and hearing).

**Trial Presentation Software**

The next logical step from the slideshow presentation is to the utilizing of a Trial Presentation Software. The software can be installed on a portable computer and help in the presentation of your case. I utilize the Trial Director software. However, there are numerous other fantastic brands of trial presentation software; such as: Summation iBlaze, Sanction, CaseSoft, Concordance, Trial Pro, Exhibit View, Trial Max, and Visionary. All of these programs currently offer a free trial period. It is important to feel comfortable with the program you choose to utilize during your trial. If you are an iPad user, there are several trial apps available:

![Trial Apps](https://via.placeholder.com/150)

Some of the iPad applications are free and others cost varying amounts. Again, it is important for the user to be comfortable with whatever trial presentation software is chosen.

Presentation software allows the user to present and organize any and all digital content with the click of a finger or a quick keystroke. The attorney will be able to mark exhibits without damaging the original, callout portions of documents, draw over images, and compare evidence side by side. Most of the programs allow the user to utilize a barcode scanner. The software will assign a bar code to all of the exhibits. You can print out the list and have it at the

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counsel table. During your questioning, a quick scan of the barcode will immediately jump you
to the item you are referencing and display it on the chosen monitor. This process allows you
to be able to roll with the sudden changes that take place at trial. If you are uncomfortable with
a barcode scanner, the user can set a specific alphanumeric code for quick retrieval of the file:
“John Smith’s Deposition page 25” would be JSD25.

Tablets are laptops that allow the user to write on the screen. They are fantastic for
annotating and note taking. Also, the screen is flat on your counsel table and cannot be seen by
wandering eyes. This allows for you to proceed with your activities without fear of having your
information compromised. The touch-screen component allows your portable tablet to work
similarly to the intelligent displays. If you set the tablet up to wirelessly connect to the projector
or display monitor, you can hand the tablet to your witness to make markings that will appear
before the jury.

When you are working with one particular piece of evidence, there are techniques you
can use to emphasize testimony and focus the jurors’ attention. A “call-out” is an extremely
useful tool. It provides the ability to focus on a specific portion of a document and zoom-in for
demonstrative purposes. It would be an incorrect belief to expect a juror to read an entire page
when it is displayed on a projected screen. The “call-out” feature allows you to zoom in on
portions of the document to allow for better clarity and focus juror attention. The biggest
bonus is that the jurors will be able to read and absorb the information in the “call-out.”
A “call out” allows the juror to see the portion of the document being highlighted through
testimony by the witness or argument of the attorney.

You can enhance the “call-outs” by utilizing different annotation tools. Some common
annotation devices are an arrow marker, a highlighter, a straight line, a circle/ellipse tool, a
rectangle/square tool, a freehand tool, text boxes, eraser, a stamp (allows X marks, File
numbers, exhibit marks, etc...), and a Sticker Set (usually a numbering system).
Different trial presentation software use different toolbars. It is imperative that the operator of the presentation is familiar with the tools and the expected testimony. It is useful to determine the information in advance of presentation. Attorneys should think about which annotation tools and display options will best reinforce the information being explained to the jury. It is possible that, in certain circumstances, a laser-pointer can be more useful than the annotation tools.

The presentation options are limited only by the attorney working with the matter and the time to create them. The more technologically savvy the attorney, the quicker the creation of the presentation.

Trial presentation software does not limit the attorney to one document at a time or one particular callout at a time. It allows the user to “call-out” different portions of the same document for comparison.

Remember to leave the “call-out” on the screen long enough for the jurors and the judge to read. A “call-out” can appear to hide the words in-between the highlighted portions. You do not want to appear as though you are hiding something. Sometimes, it will be beneficial
to print a hard-copy of the “call-out” created during the trial for reference later (other witness testimony or summation) or for entrance as a new piece of evidence to hand to the jury during deliberations.

Be comfortable with your technology before using it.

How to display an iPad in the Courtroom

There are a couple of ways to present with an iPad.

Wired Display:
Technology in Briefs

“In many cases involving technical, scientific, or financial matters, illustrations in briefs provide a valuable supplement to the written word.”705 In *Kumho Tire Co. Ltd. v. Carmichael*, the U.S. Supreme Court used a black and white illustration in the text of its opinion to supplement its explanation of the facts in the case.706

The benefits of including such graphics fall back on the old saying; a picture is worth a thousand words. And since we are limited in the amount of words in a brief, adding a thousand through a picture would be quite beneficial. For example: it would be difficult to describe how to read an X-Ray in order to demonstrate the presence of a RB-1 needle next to the Plaintiff’s heart during a motion for summary judgment without actually showing the image and explaining the location. It would be easy to add the following image to the brief:

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706 *Id.* (citing *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999)).
By placing the image directly in the brief, the Court does not have to continually flip from the brief to the attached exhibit. It saves the reader time and does not distract from the point being made on the page.

The future of digital briefs was addressed by the Federal Judicial Center in *Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial* where it explained the providing of digital format briefs. They cited two cases that had addressed the submissions of such a briefing style. A digital format brief can contain the full text of every case cited, full transcripts, all exhibits including video clips, PowerPoint slideshows, and other illustrative aids in full motion or color. Although this was published in 2001, it has not become the norm. Technology moves slowly in the legal world and we are just starting to see the potential legal benefits to its use.

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CHAPTER 9: The Jury

When thinking about the jury, it is important to remember technology. Technology can be used to learn about jurors, protect against information disseminated by jurors, and keep track of juror reactions. The following will address the ways that the internet and software applications provide a thorough way to screen potential jurors.

Jury Selection

The list of the general panel of petit jurors “shall” be made available 10 days prior to the date fixed for trial. This provides an opportunity to research and organize information about the potential jurors that may sit on your panel. Attorneys may want to search social media sites, internet information, registration information, etc... to learn about their potential jurors. Further, they may enlist the assistance of a jury monitoring group to research the general information for them. This information can be cultivated and focused on what is of importance to the trial attorney. The jury reports are run in as little as 60 minutes by these services and does a thorough background check including voting history, political contributions, etc.

Depending on the trial, it may be beneficial to see the Jury List in advance of the trial date. Unfortunately, this list contains all jurors called for service and not the individual panels that will be brought to your courtroom. It may be a difficult endeavor to research and organize all the information available for the entire list. Additionally, any person that has tried a case in the State of New Jersey should know that a trial date is rarely a date certain. Therefore, an adjournment would cause the need to repeat this exhausting endeavor. In a case with potential for significant jail time for your client, a case with civil ramifications that could bankrupt your client or leave them without medical coverage, or one that has a predetermined date certain trial listing, the Rule may become a useful tool.

Even if you do not wish to gain access to the entire list, you are able to get a copy of your particular jury pool on the first day on trial. You can arrive early at the courthouse and immediately ask for the list of jurors in your pool. Next, you can utilize a portable scanner to make a digital copy of the more definitive list. There are too many scanners available to provide a detailed list. It is

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709 N.J. Ct. R. 1:8-5.
recommend that you visit your local electronics store and find the scanner that is right for you and that will not clutter your counsel table. Once you have the digital copy of the list, you can e-mail the file back to your staff, another attorney in your office, or to a pay service that reviews jurors.

It is not necessary to immediately complete the jury search on even the limited panel; the jurors can be researched individually as they enter the box and answer questions. In *Carino v. Muenzen*, the Court stated, “[t]hat [counsel] had the foresight to bring his laptop computer to court, and defense did not, simply cannot serve as a basis for judicial intervention in the name of ‘fairness’ or maintaining ‘a level playing field.’ The playing field was, in fact, already level because internet access was open to both counsel, even if only one of them chose to utilize it.”

Jury selection has changed. An attorney has the ability to search the internet and research information about the jurors as they are being placed into the jury box. And they should.

Similar to New Jersey, the New York City Bar Association has reached a similar conclusion in formal opinion 2012-2, jury research and social media. “Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the results of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a jurors website or to obtain information, in third parties working for the benefit of or on behalf of an attorney must comport with all of the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of the jurors’ social media activities, the lawyer must reveal the improper conduct to the Court.” This opinion provides a perfect overview of the proper way to conduct juror research. A different way to accomplish this is using an app for Google Glass called NameTag, which uses facial recognition technology to run against a database of faces and provide the likely match with their publicly available information.

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711 [http://NameTag.ws](http://NameTag.ws); see also [http://www.google.com/glass/start/](http://www.google.com/glass/start/)
The American Bar Association Standing Committee on Ethics and Professional Responsibility recently issued a Formal Opinion in accord with the New Jersey and New York positions.\textsuperscript{712} This opinion provides a more detailed analysis of the scope of a lawyer’s permission to review a juror’s internet presence than the New Jersey Appellate Division opinion. In the formal opinion, the ABA finds that a lawyer may not directly communicate with the juror or seek any information that the juror has not made public because it would violate R.P.C. 3.5(b) that prohibits ex parte communication with a juror. However, the opinion specifies that if a juror becomes aware that the lawyer is reviewing the juror’s publicly available internet presence, it is not a violation of R.P.C. 3.5(b). The opinion further obligates a lawyer that learns of criminal or fraudulent misconduct of that juror to take reasonable remedial measures, which could include disclosing the information to the tribunal.

The ABA opinion stresses the importance of using social media to uncover potential bias or prejudice in a juror. The opinion balances this need against the principle that jurors should not be approached on an ex parte basis by lawyers, litigants, or their agents. The ABA opinion further cites the New York City opinion cited in the previous paragraph for the proposition that “the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.”\textsuperscript{713}

**Monitoring the Jury’s Reaction During Trial**

There are a number of tablet/iPad applications that allow attorneys to monitor the jurors’ emotional responses during the trial. The applications (such as iJuror and JuryTracker) allow an attorney to mark when a juror writes something, gives a non-verbal cue, or loses focus. This provides an opportunity later to focus summation or the remainder of the trial. These tools are obviously easier used when there are multiple members of the firm trying the case. It may be beneficial to ask in voir dire what social networking activities the jurors actively utilize.


\textsuperscript{713}Id. at p. 2, n. 3 (quoting Association of the Bar of the City of N.Y. Comm. on Prof’l Ethics, Formal Op., 2012-2.)
The Internet and Jurors

“Independent research conducted by jurors is not an issue left unexplored. Indeed, this has been a longstanding problem, and, with the advent of the internet, the problem has seemingly escalated.” Jurors have always had sufficient resources to satisfy curiosity; dictionaries, road maps, visiting scenes, going to the library, and talking to people they know. The ease of locating improper information is the problem with internet access for jurors. It is important to understand and address juror misconduct. New Jersey has attempted to ensure that each juror acts responsibly and amended the model jury instruction to include:

You must not investigate, research, review or seek out information about the issues in the case, either specifically or generally, the parties, the attorneys or the witnesses, either in traditional formats such as newspapers, books, advertisements, television, radio broadcasts, magazines, through any research or inquiry on the Internet, in any blog, or any other computer, phone, text device, smart phone, tablet or any other device. You must also not attempt to communicate with others about the case or even about general subject matters raised during this case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, MySpace, personal electronic and media devices or other forms of wireless communication. You must not go on the Internet, participate in, or review any websites, Internet chat rooms or blogs, and you must not seek out photographs, documents, or information of any kind that in any way relate to this case. This prohibition includes any inquiry, search or investigation into the facts of the case, the identities of the parties, the identities of the attorneys or the court personnel, news articles or reports, legal research, research regarding general subject matters discussed during this case, or even to look up in a dictionary or on-line a definition of a word or legal phrase that has been used at trial, either by the witness, an attorney, or the Court, that you do not understand. It is the job of this Court to ensure that you are provided with all of the

information that you are permitted to have in order to decide this case.\textsuperscript{716}

This is a problem and has led to at least one finding of Contempt.\textsuperscript{717}

The jury system is an imperfect system. In 1670, two men named William Penn and William Mead were tried for sedition after leading a prayer service on London Street. The presiding judge, Sir Samuel Starling, became incensed when the jury returned a not guilty verdict. Judge Starling, who was also London’s Lord Mayor, imprisoned all of the jurors and stated “you shall be locked up without meat, drink, fire and tobacco. We will have a verdict by the help of God or you shall starve for it.”\textsuperscript{718} The story of Lord Starling demonstrates that, historically, the pressures on a tainted jury are caused by external factors. With the commonality of technology available at the tip of every juror’s fingertips in their smartphones, iPads and tablets, external sources have silently invaded the jury box. In New Jersey, the threat has been not only from the use of cell phones in the courtroom but jurors using technology outside the courtroom as well.

In\textit{ In re Toppin}, the Honorable Peter E. Doyne, A.J.S.C. the court ruled on an order to show cause as to why\textsuperscript{719} a juror should not be held in contempt of court for violating multiple orders of the Honorable Edward A. Jerejiam, J.S.C., to refrain from conducting internet research on issues involved in a criminal trial. The juror had utilized Wikipedia to research the criminal standards that were applicable such as beyond a reasonable doubt. He printed these materials and shared them with his fellow jurors. As a result of the juror’s misconduct and due to various other reasons a mistrial had to be declared in the criminal trial. The court noted that the mistrial would have had to have been declared based upon the juror’s misconduct because, under State

\textsuperscript{716}New Jersey Model Civil Jury Charge 1.11C. A similar charge is now included in Model Criminal Jury Charge Non 2C No. 14

\textsuperscript{717}In\textit{ re Kaminsky}, No Number in Original, 2012 N.J.Super Unpub. LEXIS 539 (Ch. Div. Mar. 12, 2012).

\textsuperscript{718}The Trial of William Penn and William Mead at the Old Bailey, 1670, by William Penn, William Mead, England and Vales. Court of Oyer and Terminer and Gaol Delivery (London and Middlesex); a free copy of the matter is available at http://books.google.com/books?id=swEzAAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

\textsuperscript{719}In\textit{ re Toppin}, 2011 N.J. Super Unpub. LEXIS 2573 (Bergen Cty. Co. Oct. 11, 2011)
v. Hightower\textsuperscript{220} and N.J. Ct. R. 1:8-2(d)\textsuperscript{221}, a mistrial should be declared instead of a substitution of the juror when one of the jurors brought in extrinsic material related to the case and that the problem was not created by personal reasons of the juror but rather the jurors inability to meet the standard required for jury service.

Judge Doyne, in his opinion regarding the juror’s misconduct, found, “The jury is the fulcrum upon which the American justice system operates. Jurors act as the voice and conscious of their community.” Judge Doyne’s opinion noted that, “With the advent of the internet, the problem [of juror misconduct] has seemingly escalated.”\textsuperscript{222}

Judge Doyne continued to note the effects of juror misconduct on the trial. He found, “[j]uror misconduct can result in substantial and unnecessary expense which must be borne by the litigants, their attorneys, the court system, and the public at large.” The Court found that punishment of a juror who has violated jury instructions is rare. But that New Jersey permits a civil sanction for “civil” contempt; usually not to exceed $50.00.\textsuperscript{223} Judge Doyne also noted that a jail sentence could be imposed.

The opinion states that certain judges have taken a preempted step to avoiding juror misconduct. For instance, a San Diego Superior Court Judge adopted a policy requiring jurors to certify that they will not use the internet or other media to conduct research.\textsuperscript{224} The decision further noted other preventative measures that courts have taken to prevent juror misconduct such as confiscating smart phones or iPods. The Court even quoted a New York Times article indicating that “[t]here appears to be no official tally of cases disrupted by internet research, but with the increasing adoption of web technology in cell phones, the numbers are sure to grow. Some courts are beginning to restrict the use of cell phones by jurors within the court house,

\textsuperscript{221} N.J. Ct. R. 1:8-2.
\textsuperscript{222} Toppin, 2011 N.J. Super. Unpub. LEXIS 2573 (\textit{citing} Daniel William Bell, \textit{Juror Misconduct and the Internet}, 38 \textit{Am. J. Crim. L}. 81 (2010)).
\textsuperscript{223} N.J.S.A. 2A:10-5.
even confiscating them during the day, the majority to do not...and computer use at home, of course, is not restricted unless a jury is sequestered.”

Judge Doyne also noted that New Jersey Supreme Court Model Criminal Jury Charge Committee urged that each jury that is sworn be instructed “Do not do any research on the internet...[D]o not use internet maps or Google Earth or any other programmer device to search for or view any place discussed in the testimony. Also do not research any information about the case, the law, or again – the people involved...Additionally, do not read any news stories or articles, in print, on the internet, or in any blog about the case.” Michigan has adopted a similar rule regarding instructing against the use of any electronic devices in connection with the trial or during deliberations. Further, an Oregon judge warned jurors not to read information about the case or use smart phones either in the courthouse or at home to conduct research relating to the file.

One solution to juror misconduct is requiring the judge to request that the jurors send an email, text, or tweet to their friends and family that they are sequestered as a juror and indicating that they cannot have any communication about the trial and that they should not be texted or emailed unless there is an emergency. In addition, a voicemail message could be left on the jurors’ voicemail.

In holding a juror in contempt, a court must find that the juror brought materials into the room, the act was contemptuous, and the act was performed willfully and contumaciously with a complete disregard for the court’s instructions and authority. The evidence must be beyond a reasonable doubt. The court ultimately found that “there is not enough evidence to find beyond a reasonable doubt, [the juror] possessed the requisite intent to be held in contempt of court.” While the juror disobeyed the court’s orders, because the research was not


726 MICH. CRIM. R. 2.511.


related to the case, there was doubt whether or not the juror believed he was disobeying the court’s orders. Despite this holding, Judge Doyne urged the Supreme Court Committee on model criminal jury charges to make clear that jurors may not research anything.

A year later, Judge Doyne was forced to deal with the same issue and the result was significantly different. In *Kaminsky*730 a juror, the foreperson, violated multiple orders of Honorable James J. Guida, J.S.C. by conducting independent research of issues involved in a criminal trial. In this matter, the judge at the onset of the matter warned against independent research and, specifically, stated, at the end of each trial day, that the jury was not permitted to use the internet to obtain any information pertaining to the case. However, the juror Googled the punishment for the specific case he was involved in and discussed his findings with the other jurors on panel. Instead of merely reciting N.J.S.A. 2A:10-2, the general contempt statute, Judge Doyne specifically quoted, with emphasis, “[d]isobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of court” may be punished for contempt.731 The Court states the difference between civil contempt and criminal contempt; criminal contempt differs from civil contempt in that the court, rather than a litigant, institutes the action and the harm was public, rather than private.732 The court stated that “the contumacious act was committed in his role as a juror and occasioned public, rather than private, harm. Consequently, the nature of [the juror’s] contempt is criminal, rather than civil.”733 The maximum punishment was described as six months’ imprisonment or a fine of $1,000 or both.

The Court found that the juror willfully conducted independent research and did so knowingly the Court had prohibited such conduct. “When a juror conducts his own research, the parties are deprived of this opportunity, contrary to our elementary notions of fairness.”734 The Court fined the juror $500.

734 *Id.*
Whether we see more cases of contempt based on the ease of third-party communication or not, the fact is that jurors live in a world of instant communication and information is, unfortunately, becoming increasingly difficult to limit to the courtroom.

In another case, a lawyer was suspended for forty-five days for disobeying a judge while the lawyer served as a juror. The lawyer blogged about the trial. The court reversed the criminal conviction and also suspended the lawyer. The lawyer responded to the ethics investigators with the following: Despite being instructed not to discuss the case “orally or in writing,” the lawyer stated: “Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial.” The attorney posted unflattering descriptions of both the judge and the defendant.

A New York Internet safety attorney prescribed five methods for avoiding social media affecting a fair trial:

- Probe jurors during voir dire on Facebook and Twitter use.
- Establish frequency of use and a juror’s ability to refrain from using social networking tools during trial.
- Monitor juror Facebook and Twitter activity during trial. Tools like Social Mention allow you to search blogs, microblogs, networks, videos and much more. This engine also allows you to create alerts for your search terms that you can have e-mailed to you daily.
- Ask the trial judge to remind jurors that they may come forward to report a fellow juror’s misconduct. The judge should also remind jurors about the fines and other potential consequences for failing to follow the court's ban on communicating with others about the case.
- Warn jurors before and after every jury break about the court's ban on communicating with others about the case during trial, including the use of Facebook, Twitter and other web-based tools.
- Explain the logic behind the presumption of juror prejudice. Jurors today may be more receptive to complying with court-ordered bans on communicating with others during trial if they understand the logic behind the ban.\footnote{Valetk, Harry A., “Facebooking in Court: Coping With Socially Networked Jurors”, Law.com, available at: \url{http://www.law.com/jsp/article.jsp?id=1202473157232&src=EMC}.}

\footnote{Wilson on Discipline, 2008 Cal. LEXIS 14880 (Cal. Dec. 24, 2008).}
Recently Courts have seen a rise in jurors using social media during the trial to discuss the case or to post commentary about jury service. For instance, the Arkansas Supreme Court overturned a murder conviction because a juror tweeted about the juror service.\(^{737}\) The case involved a man who was alleged to have committed a homicide after a robbery. The trial judge gave the specific instruction not to use Twitter during the case. A juror failed to abide by those instructions. The defendant was convicted and the Circuit Court denied the motion for a new trial. The juror was asked during the case, by the judge, whether or not he was using Twitter. Although the tweets were not specific to the case, the Supreme Court of Arkansas found that the combination of a juror sleeping and a second juror tweeting constituted juror misconduct and thus reversed and remanded for a new trial.

One of the juror’s tweets was, “Choices to be made. Hearts to be broken. We each define the great line.” The Court asked the juror about the tweets and the juror confessed to tweeting. The juror stated that he did not discuss any of the case on Twitter. During the colloquy with the judge, the juror said that his tweet meant that the decision that the jury would make had significant repercussions for the defendant and others involved. The Court, at that time, refused to strike the juror despite defense counsel’s argument that the juror flagrantly disregarded the Court’s instructions. The juror continued to tweet about the trial. He tweeted, “If its wisdom we seek...we should run to the strong tower.” Another tweet was, “It’s over.” The tweet saying its over was posted at 3:45p.m. even though the jury did not announce they reached a verdict until 4:35p.m. The Court, prior to opening statements, had instructed the jury “When you’re back in the jury room, its fine with me to use your cell phone if you need to call home or call business. Just remember; never discuss this case over your cell phone. And don’t Twitter about this case. That did happen down in Washington County and almost had a, $15 Million law verdict overturned. So don’t Twitter, don’t use your cell phones to talk to anybody about this case other than perhaps the length of the case or something like that.” Supreme Court relied upon the Third Circuit’s decision in United States v. Fumo,\(^{738}\) noting that, if anything, the risk of such prejudicial

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communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given the universe of individuals who are able to see and respond to it, on Facebook or a blog is significantly larger. *Fumo*, of the 3rd Circuit, had denied the defendant’s motion for a new trial, finding that the juror’s statements were vague and were “harmless ramblings” and not sufficient proof of juror misconduct to prejudice a defendant.

To prevent and/or monitor for juror misconduct, the following steps could be taken in a trial:

- The judge could advise jurors that their social media accounts may be monitored;
- Cell phone use during trial could be limited;
- Jurors could be asked to report if they observe juror misconduct;
- Wifi access could be monitored; or
- A model jury instruction such as the following that was recommended in 2009 by the Court Administration and Case Management Committee of the Judicial Conference of the United States:

  *I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. . . . I expect you will inform me as soon as you become aware of another juror’s violation of these instructions.*

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CHAPTER 10: Courtroom Presentation

Overview

“[T]echnology is in the court and is likely to stay there,” wrote Honorable Howard T. Markey.\textsuperscript{740} This bold statement about the progression of technology and the courts, made over 36 years ago, stands true. Admissibility battles are becoming less about technology entering the courtroom and more about whether, in the presentation of our cases, technology is being utilized fairly, accurately, and within the rules of evidence. U.S. Magistrate Judge Hughes expanded on Judge Markey’s concept by stating, “the wave of the future clearly lies in the use of electronic technology in discovery and courtroom presentation.”\textsuperscript{741}

Chief Justice Stuart Rabner has focused on the need for the judicial embrace of technological advancements: “As advances in modern technology make their way into the courtroom, the Judiciary – like the rest of society – must adapt.”\textsuperscript{742} On May 16, 2014, Justice Rabner, in his State of the Judiciary speech, delivered a plea for appreciation of the importance of technological embrace and understanding, not just in presentation, but in operation: “Another critical focus of the Judiciary in recent years has been to use technology to make the courts more efficient, accessible, and user-friendly. I can’t overstate how vital that is to our future.”

Clients, jurors and the judiciary are expecting technological presentations. Are you prepared to meet their expectations? The expectation is not for entertainment purposes. It is for learning. Jurors need to understand, in a small amount of time, that which the attorneys and clients have lived with for years. And their understanding is vital to the administration of justice. Further, their ability to understand must be combined with the ability to retain. What good is a juror who, once in the deliberation room, cannot remember your arguments or the facts? The first step to having jurors understand and retain information is to present the information. It can be presented through testimony (hearing), through evidence (seeing), or a combination of the two (seeing and hearing).

\textsuperscript{741} Fanelli v. Centenary College, 211 F.R.D. 268 (D.N.J. 2002).
\textsuperscript{742} State v. Miller, 205 N.J. 109 (2011).
The Weiss-McGrath study is a misconception with several powerful learning points. The first learning point from the study is that does not exist; or does not exist in the way the general public believes it does. Go ahead, Google it. You will see that it is a jury research study on the retention ability of jurors published by McGraw-Hill. If you were to search further, it would be found that the study does not exist. It has been incorrectly referenced by articles and book from powerful publishers, the ABA, Thomson Reuters, and various law reviews. Most recent references to Weiss-McGrath cite to the ABA article and not the non-existent original study. First lessons are not to trust a footnote, that repetition can create false beliefs, and that it is hard to disprove that which is presented by trusted source.

So, does it have some basis in truth? It may. The oft-quoted statements attributed to the Weiss-McGrath study came from a textbook, published in 1963 and authored by Weiss and McGrath, designed to discuss oral communication for engineers, scientists and technical personnel. Oddly, the authors of the publication were not the conductors of the study but were merely citing the information from another study, the McHugh report. A great read into the search behind the study was conducted by Pepper Hedden, a law librarian. To confuse matters further, the study may have actually been a presentation and handout. The 1956 presentation was cited in the 1968 publication by the U.S. Department of Health, Education &

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745 Francis J. McHugh, Graphic Presentations, Technifax Corporation, Holyoke, Mass. 1856;

746 Pepper Hedden, Research Challenge & Cautionary Tale, LLAGNY Law Lines, Vol. 34, No. 3 (p.27) (Spring 2011)

Welfare Office of Education released by the National Institute of Mental Health. So, the rabbit hole continues in a search for the data behind the information.

So what is so important about the study? The study allegedly compared retention of information in three formats: oral, visual, and combined orally and visually. After 3 hours, the combined presentation group had the best retention by over 10%. However, after 72 hours (more like the length of an expedited or short trial), the oral group only retained 10% of the information and the visual group was only slightly above at 20% retention. Amazingly, the group presented to utilizing a combination of oral and visual had a 65% retention rate after 72 hours. Powerful percentages to further the building of multimedia learning.

The percentages are nice, but the concept if more important. Everyone agrees that it is easier to retain what you see and hear rather than what you only see or only hear. It is this combination that triggers interaction and understanding. Interestingly, OSHA utilized similar numbers and a similar chart in its recent publication on effective presentations with visual aids748:

OSHA stated that “[t]he studies. . . reveal interesting statistics that support these findings:

a) In many studies, experimental psychologists and educators have found that retention of information three days after a meeting or other event is six times greater when information is presented by visual and oral means than when he information if presented by the spoken work alone.

b) Studies by educational researchers suggest that approximately 83% of human learning occurs visually, and the remaining 17% through the other senses – 11% through hearing, 3.5% though smell, 1% through taste, and 1.5% through touch.

c) The studies suggest that three days after an event, people retain 10% of what they heard from an oral presentation, 35% from a visual presentation, and 65% from a visual and oral presentation.749

OSHA and the Weiss-McGrath Study demonstrate that retention is amplified by a combination of verbal and visual information. And that this concept is so accepted by the masses that arguments are merely explained by past studies without definitive proof provides for those alleged studies. So, what can we learn? We learn that people believe this fact is true because it makes sense. Technology presentations, combining verbal and visual information, can assist the lawyer by maintaining the interest of the jurors. As a demonstration of an even more basic benefit, the trial can move smoother, faster, and in a more interesting fashion. Think of every great CLE you have attended or every great lecturer; they find a way to captivate while presenting.

There is a balancing act that comes with technology; a delicate difference exists between utilizing technology as a tool and letting technology act as a distraction. The use of technology should complement your lawyering and not detract from it.

In the *Cognitive Theory of Multimedia Learning*, Richard E. Mayer explained, “[p]eople learn more deeply from words and pictures than from words alone... However, simply adding pictures to words does not guarantee an improvement in learning—that is, all multimedia presentations are not equally effective.”750 He delved into the learner's processing of

749 Id.
information and found that "[m]ultimedia messages that are designed in light of how the human mind works are more likely to lead to meaningful learning than those that are not."

After knowing how a well-designed multimedia presentation can provide listener retention, it is easy to grasp how technology can be amplify a litigator’s position from the opening statement through the closing argument. Therefore, technology should be thought of as another arrow in your quiver.

Before beginning the in-depth analysis of the nature of presentation in the courtroom, it is worth noting that the trial attorney must decide whether they can handle the technology portion of their trial on their own or if they need to bring in assistance. In many cases, even if the attorney knows how to work the technological presentation, it may be worthwhile having someone assist. Obviously, cost will creep into this determination. But distraction from the case must be another consideration. Also, the presenting attorney must be ready for glitches in the technology; with hard copy backups, boards, or even another computer.

It is important to plan for your presentation as early as possible. Determine how you want to present your evidence at trial, how much money it will cost to present the matter in the best matter, how you will deal with an adversary and court if objections arise to your presentation or evidence, what equipment you want to use, what is the courtroom layout, where would be the best place for your technology, will audio equipment be necessary, should there be a separate monitor for the judge and adversary, should you bring additional tech assistance, and what are your backups.
Case law demonstrates that visual aids are permitted, within reason, at trial. The trial court, however, enjoys wide latitude in their admittance and display. The trial court will be given great deference, by the reviewing courts, when there is a challenge about a ruling on admissibility and whether the demonstrative aid will be received into evidence. Therefore, the practitioner must be able to demonstrate that the underlying evidence is relevant and authentic, that the demonstrative evidence with aid the jury in understanding the underlying evidence, and that the display of such demonstrative evidence would not mislead the jurors.

Physical Courtroom Concerns

Advocacy is the art of persuasion. And persuasive communication is as much non-verbal as it is verbal. Some examples of non-verbal advocacy that occurs during oral advocacy are vocal inflections, appearance, physical location during questioning or argument, facial expressions, courtroom decorum, and other human displays. As discussed above, the most persuasive arguments utilize a combination of verbal and visual presentation. An officer that verbally describes the crime scene can be assisted by a blow-up photograph of the actual scene. An expert’s explanation of a complex surgical procedure would benefit from a story board or video animation. However, a presentation will not work if it can’t be seen.

When displaying your digital presentation, it is important to take into account the setup of the courtroom. Your equipment should not overpower the jurors or the judge. The presentation surface must be in a position that is viewable for the judge, the jury, the witness, and maybe your adversary. Further, attorneys should be aware if the presentation can be seen without the lights being dimmed. It would be quite unwise to foster an environment that will make the jurors fall asleep.

As another consideration, attorneys should verify that any possible audio equipment will be sufficiently loud enough to allow for everyone in courtroom to hear the presentation. Historically, courtrooms can have difficult acoustics. It also may be beneficial, in certain circumstances, to provide headphones for the judge, jury, and adversary.

Probably the most critical part of a technological presentation is the availability of power. Attorneys must be cognizant of power outlets, cord placement, light switches, and fixed courtroom electronic equipment. As a caution, the cords and wires may transform into tripping
hazards. Many courts, therefore, require the attorney to utilize a roll of tape to secure any loose wires.

In order to know the best layout for the courtroom, visit it before the trial date. If this is not possible, call the courtroom staff to see if the Judge has a preference for digital-display placement. If you will not be informed of the trial judge prior to your arrival, the attorney will have to be confident enough to move quickly in accessing the room. Remember, the court staff usually knows the best way to present in their courtroom.

When mapping the courtroom, there are some things an attorney should keep in their mind: size of displays, placement, operation, power outlets, potential distraction, setup timing, potential objections, and convenience of court.

Prior to leaving for courthouse, an attorney may want to create a checklist of necessary hardware. Otherwise, they may be without a power cord and unable to present any digital evidence.

When utilizing technological presentations, it is imperative to remember juror impact. The impact of an enlarged photograph of a gun used in an attempted murder trial will be dwarfed by the presence of the actual gun placed directly in front of the jurors. It is one thing to hear about a gun, another to see a picture of it, and another to physically examine it. Just because you can utilize technology does not mean you should. That being said, a small photograph depicting the damage to a car passed around a jury box will not provide the same message as a blown-up version projected on a screen. The larger projection can be seen by all of the jurors at the same time whereas the smaller photograph must be looked at by each individual in turn. The jurors may feel rushed to pass the smaller photograph to the next juror. And by the time the last juror views the photograph, the first juror may have forgotten what they observed. The larger projection will save substantial time and give the jurors the ability to observe at their own pace. And the larger presentation may actually be a more accurate portrayal. Further, witness can utilize the larger projected version to enhance the oral testimony.
The old statement stands true: a picture is worth a thousand words. And in the context of multimedia presentations, a picture coupled with words creates a memory.

Too many images, however, can draw the jurors’ attention from the attorney and have it permanently fixated to the screen. Know technology’s limitations and know your technological limitations. Technology should supplement, not substitute, your presentation. Substance is provided by the attorney. Emphasis is provided by the presentation.

As previously discussed, images can be displayed to the jury through projectors, televisions, video monitors, overhead projectors, or blow-ups. There are significant advantages when utilizing presentation software upon those displays. The software allows for enlargements, enhancements, and emphasis. The programs allow, without altering the original image, the ability to focus on specific portions of a document and image. Presentation software allows the testifying witness, in real time before the jury, the ability to mark a digital duplication of a photograph and create a new exhibit. This new image may, with supporting foundation, be saved, printed and entered into evidence. This can be done to documents, charts, diagrams, models, videos, images, transcripts, animations, or any other electronic document imaginable. It is important to examine every item that might be presented to determine how to utilize technology to your fullest advantage; providing the highest impact and best visibility. An additional bonus to utilizing trial presentation software is its ability to speed the presentation of evidence by removing the fumbling and misplacement of evidence which annoys jurors and judges.

Software needs to be run on hardware. So, it is important to think about how you interconnect the hardware and utilize the courtroom. A large amount of wires, cords, screens, projectors, computers, and additional equipment may actually scare a jury or judge and may result in the inability to properly present. Attorneys should not monopolize the room with technology. They should bring technology into the courtroom without disrupting the purpose of justice.

Operation is impossible for some non-tech attorneys. Many lawyers understand the necessity to utilize technology, yet are unable or refuse to learn how to operate it. Some attorneys solve this problem by bring an associate familiar with the case and technology to
second-chair the trial and operate the equipment. Other attorneys bring a paralegal or hire a
trial-presentation vendor. By utilizing a second individual, an attorney is provided the additional
freedom of movement during the trial and has someone capable of fixing any potential
 technological glitches.

Jurors have become accustomed to large-screen presentations through movies and high
definition televisions. Most jurors have lived through the amazing digital-display advancements.
Even in the field of video games, jurors have seen technology progress from Pong to virtual
reality.\textsuperscript{752}

Beyond presentation, Jurors have expect technological use in the courtroom. In fact,
the success of modern investigative television and legal drama shows have made technology the
expectation instead of the exception. With technological advances in cell phones, videogames,
and tablets, jurors have been able to utilize technology in their everyday lives. Technology has
become the norm. The “C.S.I. effect” has made many jurors expect to see professionally-
designed graphics, highly-detailed animations, and exciting story-telling presentations.
Obviously, this can act as a benefit and a hindrance.

\textbf{Remember:} It is no longer high tech, it is what jurors expect.

It is important to remember that technological presentations are not always about
visual presentation. Audio presentation should not be forgotten. The audio, therefore, needs
to be clear without deafening the jury and judge. Due to the acoustics of each courtroom, the
audio volume should be tested each morning to verify the sound is loud enough and clear
each. Audio cassettes have been deemed obsolete, or at least collector’s items, by the
creation of CDs and digital audio players. Also, cassette tapes had an amazing ability to shoot a
long strand of black tape throughout a room, the casing could crack with a little pressure, and it
has become almost impossible to find a cassette player that won’t damage the original spool.
Sooner than later, the CD will fall victim to the same problems: scratching, skipping, etc.
Therefore, it is preferred for the presenting attorney to utilize a digital copy on a computer or
portable audio player. By presenting through these devises, the amount of differing equipment

\footnote{\textsuperscript{752} Pong, released in 1972, was an Atari ping-pong or table tennis game consisting of a square
two-dimensional white ball and two two-dimensional rectangular white paddles on a black screen with a
dashed line symbolizing the net.}
that needs to be brought to the courtroom is limited; the fear of skipping audio is removed; and
the necessity to hit a rewind button an locate the exact portion to be played is forgotten.

If an attorney is worried about dealing with digital audio or video, it is reassuring to
know that modern audio and video software allow for easy and proper presentation of specific
portions of files.\textsuperscript{753}

As for visual presentation, cameras that necessitate film are rapidly being replaced by
high-quality digital cameras. Digital cameras can utilize different memory cards that can be
removed from the camera and placed into a compatible television screen, projector, or
computing device for presentation purposes. Also, most cameras can be directly connected to a
television for viewing of its photographic content by a USB (Universal Serial Bus) cord or AV
(audio/video) cable. Although these options are available, it is preferred for the transfer of
digital recordings, in advance of trial, onto a computer for presentation. This allows for the
attorney to be able to label, organize, annotate, display, and navigate the information in a
manner that they feel will best advocate their view of the evidence and make retrieval
expedited. Further, the digital presentation will allow for the demonstration of the metadata, if
necessary, that is associated with the transferred data.

Since digital cameras have surpassed film photography, the presentation of an image, in
its true and original format, would need to be a digital display. Although a printed photograph
would be an original under our evidence rules, a printed photograph would not be the

\textsuperscript{753} Audacity is free open-source audio editing software; which can be found at
http://audacity.sourceforge.net
dictionary-defined original document. In New Jersey, any printout or other output readable by sight, shown to reflect the digitally stored data accurately is deemed an “original.”\textsuperscript{754}

As with the digital camera, the world prefers the collection of video by digital video recorders. These cameras are capable of extreme clarity in many different formats. Some commercially-available cameras record in 3D. The use of 3D presentations, in the courtroom, are in line with the normal progression towards the future. As with audio and digital presentation, digital video presentation can be beneficial because of the ability to pick the specific materials to be shown without the frustration of timing the videotape or risking damage to the original video recording. Video editing software is available to assist in creating necessary clips from what could be hours-long recordings of video.

Another overlooked piece of technology is a portable digital scanner. It can become an attorney’s best friend. Obviously, a document can only be digitally displayed when there is a digital version available. Most of your trial documents would have been scanned and added to your digital file, as discussed in previous chapters, and, therefore to work with trial-presentation software, would not necessitate rescanning. The benefits of a scanned file are immeasurable. But why should an attorney have a portable digital scanner for the courtroom? First, a physical piece of evidence may be produced, in the courtroom, by a witness, adversary, or just sheer

\textsuperscript{754} N.J. R. EVID. 1001(c): “Original. An ‘original’ of a writing is the writing itself or any counterpart intended by the person or persons executing or issuing it to have the same effect. An “original” of a photograph includes the negative or any print therefrom. If data are stored by means of a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’”
unknown luck. Second, the case’s specific jury panel list is usually only published the day of the trial. The general panel of petit jurors is available at least ten days before the fixed trial date.\textsuperscript{755} But this list is often too large to review and tends to have limited value. Once the case’s specific jury panel list is provided, the attorney can scan the list and e-mail it to staff, another attorney, or a third-party service to review the jurors for any potential conflicts or damaging details. It should be noted that technology and juror selection is addressed, in more detail, within Chapter 9.

Additionally, a digital scanner allows an attorney to scan notes, questions, documents, and any later collected data. Scanners do not have to be large and clunky. In fact, there are some available, such as the Magic Wand\textsuperscript{756}, which require very little space. The Magic Wand takes up 10.1” x 1” x 1.2”.

\textbf{Courtroom Technology Top 10 Rules}

1. If you can say it, you can display it; if you can’t say it, you can’t display it.\textsuperscript{757}
2. Lay a foundation before presentation\textsuperscript{758};
3. Hide and be denied\textsuperscript{759};
4. If your tech doesn’t work, don’t go berserk (have a backup plan. Jurors expect technology to fail at times, so stay calm and have an alternative way to present the same information);
5. Courtroom staff will know the best way to show (ask those that frequent the courtroom where the best location is to display your presentation to the jury or judge);
6. Know the relevant cases or your preparation may be wasted (if you do not know the applicable case law, you may not be able to educate the court on the admissibility of the work you have completed);
7. Have a run through so you know what to do (practice, practice, practice);
8. Make a checklist or your tech will be useless (power cords, batteries, bulbs, extension wires, duct tape, etc.);
9. Organize, so you can deal with any surprise; and

\textsuperscript{755} N.J. Ct. R. 1:8-5 provides that the list of the general panel of petit jurors shall be made available by the clerk of the court to any party requesting the same at least 10 days prior to the date fixed for trial.
\textsuperscript{756} \url{http://www.vupointsolutions.com}
10. Don’t distract or the jurors will miss the facts (use technology as a tool and not as a distraction).

**Demonstrative Aids & Illustrative Evidence**

Illustrative and demonstrative aids have long been a part of courtroom presentations. Their purpose is to explain the testimony and enhance the audience’s ability to comprehend the information being presented. New Jersey has a long-standing tradition of allowing attorneys to introduce demonstrative evidence when it aids the jury or court in understanding the relevant aspects of their case. It has been held that “[t]here is nothing inherently improper with the use of demonstrative or illustrative evidence.” In fact, New Jersey courts have been allowing its use for the past century. Obviously, aids do not replace evidence. “Documents are still admitted in evidence. But jurors learn what they mean through illustrative aids.” In fact, the utilization of demonstrative aids may be one of the most powerful ways an attorney can deliver information to a jury. It must, however, be done fairly. It should seem simple. But many, as you will see below, have failed.

*What you cannot say, you cannot display.*

Failure is normally the result of an attorney’s attempt to utilize improper presentations with limited probative value coupled with high prejudicial impact. These improper attempts have resulted in the requirement of trial court oversight of demonstrative and illustrative aids.

As discussed, demonstrative evidence has been part of the American trial process for over a century.

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761 State v. Smith, 68 N.J.L. 609 (1903); “Maps, which are not original evidence, may be admitted and used only as illustrative of evidence otherwise offered and duly admitted.”
New Jersey State Courts and District Courts have acknowledged that the use of visual aids or demonstrative evidence, as well as presentation software assisting in their use, is widespread and continuing to grow. One of the largest problems, with demonstrative evidence and illustrative aids, is the lack of a formal definition and interchangeability of terms.\(^{766}\) Luckily, in 2004, the New Jersey judiciary provided a definition of demonstrative evidence that appears to have been accepted. Further, it finally connected three substitutable terms: demonstrative, visual, and illustrative. The Appellate Division, by combining previous holdings, set forth that “[d]emonstrative or illustrative evidence may be any evidence that replicates the actual physical evidence, or demonstrates some matter material to the case, or illustrates certain aspects of an expert’s opinion. It is in the nature of a visual aid—`a model, diagram or chart used by a witness to illustrate his or her testimony and facilitate jury understanding.’”\(^ {767}\) It should be noted, that, although this definition appears to only address the use of such aids by a witness, history has demonstrated their allowed use by an attorney presenting arguments to the jury. “[A]nything which counsel has the right to argue as a legitimate interpretation of or inference from the evidence he is free, within the discretionary control of the trial court, to write upon the blackboard.”\(^ {768}\)

Trial courts enjoy wide latitude in admitting or rejecting replicas, illustrations and demonstrations and in controlling the manner of presentation and whether or not particular items are merely exhibited in court or actually received in evidence.\(^ {769}\) The trial courts control not only the admission of these types of evidence, but also the form and limits of its presentation.\(^ {770}\) The admissibility of such evidence turns on whether the evidence sufficiently duplicated the original event or information it is explaining.\(^ {771}\) Tangible or real evidence may be admitted into evidence subject to the usual rules of relevancy, materiality, and competency.


\(^{767}\) Rodd, 373 N.J. Super. at 164.

\(^{768}\) Cross, 60 N.J. Super at 75.

\(^{769}\) Rodd, 373 N.J. Super. 154.

\(^{770}\) Id.

\(^{771}\) Id.
Evidence Rule 102, both Federal and State, invites judges to allow new forms of displays that help develop better juror understanding of the evidence and move trial along more efficiently.\footnote{772 Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial, Federal Judicial Center (2001); N.J. R. EVID. 102; FED. R. EVID. 102.} Further, it is clear that, in exercising their discretion, judges shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.\footnote{773 Effective Use of Courtroom Technology: A Judge’s Guide to Pretrial and Trial, Federal Judicial Center (2001); N.J. R. EVID. 611; FED. R. EVID. 611.}

Attorneys need to remember that demonstrative or illustrative evidence cannot stand alone; it is utilized to replicate actual physical evidence, demonstrate some matter material to the case, or illustrate certain aspects of an expert’s opinion.\footnote{774 Rodd, 373 N.J. Super. 154.} In simpler terms, the evidence must be relevant and authenticated.\footnote{775 N.J. R. EVID. 401; N.J. R. EVID. 901.} These determinations on admissibility will turn on whether the evidence sufficiently replicates whatever it is designed to illustrate.\footnote{776 Persley v. New Jersey Transit, 357 N.J. Super. 1 (App. Div. 2003).} The illustration can provide explanation, specification and argument.\footnote{777 Cross, 60 N.J.Super. 73.}

It is vitally important to verify that your potential evidence is beneficial and allow the admitting witness to verify its usefulness and accuracy. Objections, which will be addressed in the next subpart, will surely be voiced when an item does not enhance an aspect of the original evidence or testimony. Therefore, it is recommended that attorneys prepare and review, with the person whom will utilize the display, all potential demonstrative evidence.

If the attorney wishes to mark the evidence and provide it to the jury, it is highly recommended a hard copy version be produced. Remember, it is in the court’s discretion whether or not particular illustrative items are merely exhibited in court or actually received in evidence.

Once an attorney has determined that demonstrative aids will be utilized, she should practice retrieving the evidence and working with it ahead of trial. The smooth use of
technology is vital to the success of demonstrative and illustrative aids. And it would be a disaster if the wrong document or piece of evidence touched the screen and caused a mistrial.

In order to understand technological use of demonstrative evidence, it is useful, through case law in New Jersey, to look at the history of its use.

Back in 1903, in *State v. Smith*, the Court of Errors and Appeals of New Jersey held that “[m]aps, which are not original evidence, may be admitted and used only as illustrative evidence otherwise offered and duly admitted.” The Court explained that, “such information possesses no evidential force, but may be used to illustrate the evidence, and its force as illustrative must depend on the credit given by the jury to the evidence of persons who testify to their knowledge of the situation of such things, and to their having correctly pointed out their positions.” So, very early on, it was explained that presentations are assisted by the utilization of demonstrative or illustrative aids, without the necessary evidential standing to exist on their own, in order to assist the jurors in understanding witness testimony. This will become the foundation for demonstrative evidence. When reading *State v. Smith*, it is easy to contemplate today’s use of Google Maps, MapQuest, and other mapping sites on the internet to enhance or explain a witness’s testimony.

Testimony and utilization are requirements. The demonstrative aids, as will be shown through later cases, are unable to be testimonial themselves; oddly, with today’s technology you will read, in clear violation of this century old case, that demonstrative aids have physically narrated themselves.

In the 1933 case of *State v. Fine*, objections were raised regarding the cumulative, relevant, and prejudicial nature of photographs depicting the deceased. In addition, the objecting attorney challenged their use under the Best Evidence Rule. The objecting party believed that the photographs were secondary evidence and not the Best Evidence because it was non-verbal testimony. As shown in *State v. Smith*, it is the non-testimonial nature of aids that actually makes them admissible. That said, a photograph is evidential and testimonial; it only requires a foundation to be set through “verificat[ion] by testimony as correctly depicting

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the originals they portray.” So, these objections were intriguing and led the court to hold that the photographs needed to be relevant, material and authenticated. If the testimony verified their accuracy, as it did in Fine, then they should be admitted.

It should be noted that our modern evidence rules define a photograph as “still photographs, X-ray films, video tapes, motion pictures and similar forms of reproduced likenesses.” The reasoning behind the current definition will become clearly evident as we continue through the case law on admissibility.

In 1934, the Court of Errors and Appeals of New Jersey decided Schnoor v. Palisades Realty and Amusement Co. The issue in question involved a diagram and model of the sky ride created by a testifying expert in order to illustrate his testimony about how the injury occurred and how it might have been prevented. The Court held that “[t]he allowance of the use of a model to illustrate testimony rests in the sound discretion of the trial court, and will not be disturbed where it appears that there has been no abuse of discretion.” The holding describes the power the trial court holds in determining whether demonstrative evidence can or cannot be used to aid the court and jury. In reviewing the decision, the Court reviewed photographs of the model. They pointed out that the model “was not exact but helpful as an illustration of the way in which the device operated.” This rule stands true today. The probative value of the aid will depend on whether the aid helps illustrate the testimonial evidence.

In 1960, Cross v. Lamb ended the blackboard battles. Prior to that time, attorneys and the courts were fighting about the utilization, by attorneys and witnesses, of blackboards. Blackboards were pure demonstrative aids; with the markings being created live by the testifying witness or the attorney during argument. The concerns from the objecting practitioner were that it allowed counsel to utilize the blackboard to supplement facts, distort testimony, and all in a highly prejudicial manner. As the model in Schnoor, the blackboard in Cross was photographed for appeal.

In Cross, the court explained that “Blackboards are frequently used by trial counsel for three purposes: explanation, specification and argument, and sometimes one or more of these

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780 N.J. R. Evid. 1001(b).
781 Schnoor, 112 N.J.L. 506.
in combination.” The practice was finally accepted and “subject to the discretionary supervision of the trial court.” The blackboards, today, have graduated to interactive white boards and touch-screen monitors. But the premise has remained the same: Tools utilized by the attorney, witness, or court to aid the jury in understanding the evidence, argument, and law are admissible when done properly under the supervision of the trial court. A key caution is provided for attorneys utilizing demonstrative aids was crafted in Cross: “anything which counsel has the right to argue as a legitimate interpretation of or inference from the evidence he is free, within the discretionary control of the trial court, to write upon the blackboard. Conversely, what counsel may not argue, he may not write on the board.” In other terms, what you can say can be displayed and what you can’t say can’t be displayed.

Now that photographs, models and blackboards were welcomed into the courtroom, the question progressed to the admissibility of video presentations.

In Balian v. General Motors, motion pictures of scientific experiments were brought into the courtroom. Three concepts were addressed: admissibility of motion pictures; admissibility of evidence of experiments; and the admissibility of motion pictures of experiments. Although often overlooked, the court begins its analysis by stating, “[i]t is well settled that relevant motion pictures are generally admissible if properly authenticated.” They discuss steps ordinarily required for authentication: (1) evidence as the circumstances surrounding the taking of the film, (2) the manner and circumstances surrounding the development of the film, (3) evidence in regard to the projection of the film, and (4) testimony by a person present at the time the motion pictures were taken that the pictures accurately depicted the events as he/she saw them when they occurred.

The motion picture must be a fair depiction of relevant facts and its probative value not offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues on collateral matters. Since the video was merely a recording of an experiment, the admissibility of evidence concerning experiments are within the area of judicial discretion, and the determination of whether it was conducted under conditions and circumstances similar to those actually existing in the case, the battle was not on the visual

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depiction of the experiment but on the creation shown therein. The court stated, “[w]e perceive no inherent objection to the admissibility of motion pictures of an experiment. Such evidence, in our opinion, is entirely proper when relevant and its probative value is not offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters.” These objections and the balancing process will be addressed in more detail in the next subsection.

Following Balian, in Schiavo v. Owens-Corning Fiberglas Corp., the Appellate Division allowed a videotape depicting a day in the life the decedent three weeks before his death. The case was the first to specifically address the admissibility of a day-in-the-life tape. The purpose of the video was to aid the jury because it could uniquely demonstrate the nature and extent of the decedent’s injuries. The objection was that it was cumulative, misleading, and prejudicial. The court explained that “while there is no New Jersey case specifically authorizing a ‘day in the life’ tape, such tapes have been permitted once the trial judge has examined the content to determine whether it is relevant ad probative and is an accurate representation of the impact of the injuries upon the subject’s day-to-day activities.” So, the test, outlined in the cases above, continues with the admissibility of day-in-the-life tapes. The Appellate Division held that such tapes are permitted because they are relevant to aid the jury by “uniquely demonstrate[ing] the nature and extent of decedent’s injuries.”

In Macaluso v. Pleskin, the Appellate Division properly applied, to the playing of a video animation, the need to have a witness authenticate a piece of demonstrative evidence. Plaintiff had played a video animation regarding soft tissue injuries, produced by a technical medical animation corporation, with no assistance from a testifying witness. In fact, the testifying expert had never seen the animation and did not make any comments regarding it during his testimony. Not one witness used the video to illustrate testimony and facilitate jury understanding. It did not enhance nor explain any of the evidence elicited from the witnesses. Further, the animation was narrated by someone other than the testifying doctor. The narrator, therefore, was unable to be cross-examined and was testifying without being placed under oath.

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Therefore, the visual aid was not a visual aid. It was testimony and evidence from a witness that could not be cross-examined. “It is clear that the video tape played for the jury was testimonial in nature and that its contents were susceptible of being accepted by the jury as substantive evidence.”

Macaluso is a great example of what not to do when attempting to utilize an aid. And it is an important reminder to think about the rules on admissibility and use of demonstrative aids before presenting the evidence. Otherwise, the presenting attorney may be retrying the case due to a mistrial for the improper presentation or otherwise admissible evidence.

At the end of Macaluso, there was an often-overlooked example of what to do when attempting to utilize an aid. Plaintiff’s expert utilized computerized images of two sets of Plaintiff’s x-rays and a normal cervical spine. The doctor utilized the images to explain the findings in Plaintiff’s x-rays by comparing the films to a normal spine. Also, the computerized images were taken at the direction of the expert and he testified that the images were a fair and accurate depiction of the x-rays he had taken. A foundation was set, the testimony was enhanced by the aid’s use, and the images were accurate portrayals. “Where x-rays which were taken at [the expert’s] direction and for his use, an adequate foundation is laid for the admission of the x-rays even if the physician was not the person who took them. We see no reason not to extend that rule to computerized images of such x-rays.”

In Persley v. New Jersey Transit Bus, a video was presented to the jury of a computer-generated simulation of the subject accident. The recreation was done at Defendant’s testifying expert’s direction, he explained the procedure, and described the information utilized in its creation. Plaintiff objected and thoroughly attacked the validity of the animation on cross-examination. Plaintiff had expert agree that “because [expert] was not a biomechanical engineer, he could not say, nor was the animation intended to depict, the force with which plaintiff’s head struck the seat in front of him. Nolte further acknowledged that, if the various factors he used in his calculations, such as speed of the bus, were not accurate, the video would not be an accurate representation of the movement of plaintiff’s body.” The video was a four-second animation shown in real time and in slow motion over the course of sixteen seconds.

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The objection was voiced by defendant saying it failed to recreate all the variables and prejudiced the jury with one impression of the accident. The trial court allowed its use.

The Appellate Division utilized the standard set earlier in *Balian*. A motion picture of a reconstruction of a particular event may be admitted into evidence when relevant and where its probative value is not offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters. The Appellate Division, in *Persley*, held that the video was properly admitted and that admissibility of evidence concerning a reconstruction of a particular event would turn on whether the reconstruction sufficiently duplicated the original event. In this matter, the video conformed with “nearly all of the evidence surrounding the subject accident.” The video was authenticated, the process of its creation was explained, it did not incorporate a testimonial component like in *Balian*, and it “nearly” conformed to the evidence surrounding the subject accident. This is a great example of the way to present an expert simulation.

On the other side, *Suanez v. Egeland* is the perfect example of what not to do when trying to get demonstrative aids admitted during a trial. In *Suanez*, the defendant did not turn over the video recreation in discovery, the recreation was slowed down to highlight the party’s arguments, no foundation was laid, and the judge failed to instruct the jury that the tape was not substantive evidence. Further, the Appellate Division highlighted that there were too many differences between the crash test depicted on the tape and the actual accident. *Suanez* held that the video was inadmissible as prejudicial and unfair. *Persley* allowed the use of a 16-second slow-motion clip, whereas the Appellate Division in *Suanez* stated “extreme slow motion gives the impression of much less movement and thus less impact than would be the case if the video was at normal speed.” Accepting the natural progression of video evidence, the court cautions “although tape technology may now be commonplace, the cautionary comments of Justice Clifford in *Jenkins v. Rainner* remain as valid today as they were almost twenty-five years ago: ‘[t]he camera itself may be an instrument of deception, capable of being misused with respect to distances, lighting, camera angles, speed, editing and splicing, and chronology.’”

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In Jenkins, Justice Clifford explains “[i]t is no more unlikely that a defendant may resort to chicanery in fabricating motion pictures of one alleged to be the plaintiff than it is that a plaintiff may indeed be a faker.” The frustration held by the Court, in Jenkins, was the delay in turning the video over to the adversary. Which leads to another strong point that can be learned, from Suarez, about fairness in presentation: if you try to hide, you will be denied. The Appellate Division explained its clear frustration with defendant for not fully disclosing the available evidence: “the tape was not provided to plaintiff on discovery although it certainly should have been.” The Appellate Division stressed that the rules of discovery were designed to insure that the outcome of litigation shall depend on the merits of the facts rather than on the craftiness of the parties or the guile of their counsel. “Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts... [A]n adversary should not be confronted with a videotape for the first time on the day of trial. Without prior notice and time to prepare, an attorney is ill equipped to meaningfully test the validity of the scenes depicted on the tape.”

Hide and be denied.
If you can’t say it, you can’t display it.

As demonstrated, use of demonstrative, illustrative or real evidence requires authentication, relevancy, and a review of potential prejudice. Once admissible, the question moves to appropriate presentation in the courtroom.

The seminal case, on the use of electronic display, is Rodd v. Raritan. It is impressive to think that Rodd was decided ten years ago and remains the leading decision on digital presentation. It is most likely, as with all the cases we just reviewed, because the premise on admissibility and use of demonstrative evidence remains unchanged; the technology merely progresses.

789 Id.
790 N.J. R. Evid. 901.
791 N.J. R. Evid. 401.
792 N.J. R. Evid. 403.
In *Rodd*, Plaintiff showed a digital view of a mammogram. Normally, this would not be a problem. Several issues, however, accompanied and complicated the display. Plaintiff digitally scanned printed-film mammograms into a computer and produced “super-magnified images, which were projected onto a six-foot by eight-foot screen.” The magnification was up to 150 times the size of the original films. And Plaintiff never advised Defendant that the magnified images were created or they were anticipating utilizing them at trial. Further, Plaintiff’s attorney offered the magnified version under the guise that they would “aid the jury in explaining the malignancy in a mammogram.” Yet, the images were actually utilized by the attorney to imply that Defendant actually saw the films at that magnitude. In his opening, counsel projected the magnified images and actually stated, “[i]t was cancer, clear as a bell.”

The testifying witnesses failed to authenticate the enhanced images; they failed to state that the reproduced imagery being presented fairly and accurately represented the original mammogram imaging. In fact, contrary to an accurate portrayal, there was testimony that the size had a tendency to distort instead of clarify the imaging. “The admissibility of [demonstrative] evidence turns, in part, on whether it ‘sufficiently duplicates the original event.’” Additionally, the trial court never gave the jury a limiting instruction as to the magnified images use. The Appellate Division held that “in the absence of a limiting instruction, such imagery is clearly capable of influencing a jury, of generating confusion over the appropriate standard of care, and thus, unduly prejudicing the defendant.”

Rodd does not alter, and in fact it reinforces, the historical fact that the purpose of a visual aid is to be a model, diagram, or chart utilized by a witness to illustrate testimony and facilitate jury understanding. Nor does *Rodd* shy away from their use: “Demonstrative or illustrative evidence may be evidence that replicates the actual physical evidence, or demonstrates some matter material to the case, or illustrated certain aspects of an expert’s opinion.” But the Appellate Division clearly voiced its frustration with the presenting party’s improper use and purported use of the aid, failure to notice defense counsel of the use of technology, and the failure to lay a complete foundation for its introduction.

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794 *Id.* at 168.
795 *Id.* at 169.
The Appellate Division recapped the law on demonstrative evidence: “Not only must such evidence be authenticated, N.J.R.E. 901, and relevant, N.J.R.E. 401, its probative value must not be offset by undue prejudice, unfair surprise, undue consumption of trial time, or possible confusion of issues due to the introduction of collateral matters.”

Further the court explained, “[I]n our view, the use of a computer-generated exhibit requires a more detailed foundation than that for just photographs or photo enlargements. The later ‘must be proved to be faithful representations of subject at the time in question’... Considering the reliability problems arising from computer-generates exhibits and the process by which they are created, there must be ‘testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer... what is required is testimony from a witness who possesses sufficient knowledge of the technology used to create the exhibits.”

Due to the growth of electronic health records and electronic films, it will be interesting to see how the court moves in the future. It may be similar to the videotape progression seen from Balian to Suanez. As video and photographs went from fearful to commonplace, it is anticipated that digital presentation will become the norm. Our evidence rules suggest that this will be true: N.J. R. Evid. 1001(b) includes x-ray films in the definition of photograph; N.J. R. Evid. 1001(c) allows that if data is stored by means of a computer or similar device then any output readable by sight, shown to reflect the data accurately is an original; and N.J. R. Evid. 1001(d) allows for enlargements and reductions by mechanical or electronic re-recording which accurately reproduces the original.

Although an unpublished case, Estate of DeGironimo v. Agress must be addressed. DiGeronimo an Appellate Division case which applied the holdings, regarding digital presentations, set forth in Rodd. Aside from its intriguing and eye-opening statements about the Appellate Divisions’ thoughts on expert availability and “firm trial dates,” it provides

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796 Id. at 165-166.
797 Id. at 169.
799 In DeGironimo, the Appellate Division demonstrated their belief on how trial practice proceeds, “in July 2012, the court set October 9, 2012, as ‘the firm trial date.’ In doing so, the court
warnings, to trial counsel, about restrictions caused by the wide latitude granted to the trial judge. As with Rodd, the case involved a failure to detect, resulting in growth of cancer, which lead to the death of the Plaintiff. Rodd focused on counsel’s utilization of technology and demonstrative presentation at trial. And DeGironimo dealt with the same questions, albeit during a de bene esse deposition recorded to be shown at trial.

In DeGironimo, Plaintiff’s expert was having his de bene esse deposition taken because of his potential unavailability at trial. During the testimony, the doctor was going to utilize a 40-inch television to display the electronic films and explain the findings. Defense counsel objected to the use of the television monitor because “the proposed display was unfairly prejudicial because it was much later than the images would have been viewed when defendants interpreted them.” The court was reached, on the telephone, and determined that Rodd applied to the recording of the testimony and, therefore, required, during the deposition, the images to be shown on a 15-inch computer laptop screen. This becomes odd because the videotape recording makes a video recording of a video presentation. The video of the laptop will then be played on a screen at trial. Counsel wished to display, to the jury, the deposition on a 40-inch television. This led to the next decision by the trial judge: “The judge suggested playing the deposition at trial on a television monitor similar in size to the laptop monitor.” Yes, due to the utilization of the imaging, which were PACS system (DICOM) films, the court determined that the jury must watch the entire deposition on a 15-inch screen, the size of the monitor on which the Defendant had observed the film. Plaintiff’s attorney had conceded that the defendants had viewed the images on computer-sized monitor screens when then read

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800 It should be noted that by zooming in on the laptop’s display the recording will change colors and cause the distortion the court was worried about in Rodd when the display was enhanced from print film and blown up 150 times. The better approach to maintain the presentation would have been a direct line into the camera to preserve the original display. This was not addressed in the matter but is being presented as an author’s thought.

801 PACS is a Picture archiving and communication system for use with a DICOM viewer to allow electronic review of films. This system was created with the evolving healthcare technology and actually replaces film. Therefore, the original image is an electronic image and not a hardcopy film.
them. There was no testimony on the computer’s ability to zoom, enhance, and work with the PACS imaging.\textsuperscript{802}

As an attorney, it is important to understand that the trial court has great latitude in allowing or rejecting demonstrative evidence and visual aids. Be prepared to argue the probative value, lay the proper foundation, and always be fair about disclosure of technology.

In federal case law, \textit{United States v. Blackwell}, provides an analysis of the law on admissibility of demonstrative charts.\textsuperscript{803} In \textit{Blackwell}, District Judge Lechner explained that compilations of charts used to summarize or organize properly admissible evidence or testimony are separate than the original pieces of evidence. Charts that summarize documents and testimony, already admitted into evidence, may be admissible as demonstrative evidence under Rule 611.\textsuperscript{804} Rule 1006 governed substantive evidence.\textsuperscript{805} Federal case law demonstrates that, as with New Jersey case law, the use of demonstrative charts to aid the jury’s comprehension is well within the court’s discretion.\textsuperscript{806} Judge Lechner states that “when Rule 611 charts are used, however, it is required the charts be accompanied by an instruction from the court which informs the jury of the summary’s purpose and that it does not constitute evidence.”\textsuperscript{807} When the evidence is sufficiently voluminous and complicated, as in \textit{Blackwell}, the use of summary charts is justified.

Once the demonstrative aid is utilized, the question changes to whether it can be provided to the jury during deliberations. The Courts have determined that the trial Judge has the power to admit visual aid and demonstrative evidence to the jury.\textsuperscript{808} If a visual aid is provided, it is necessary for the court to give a proper instruction on their limited use of the item or documents.\textsuperscript{809}

\textsuperscript{802} The PACS system’s original images allow for zooming, labeling, and enhancements.
\textsuperscript{804} Fed. R. Evid. 611(a).
\textsuperscript{805} Fed. R. Evid. 1006.
\textsuperscript{806} \textit{Blackwell}, 954 F. Supp. at 972.
\textsuperscript{807} \textit{Id. (citing United States v. Possick, 849 F.2d 332 (8th Cir. 1988))}.
\textsuperscript{809} Ibid.
Objections to Technological Presentation of Evidence

Objection is a powerful word. It can stop testimony, make evidence disappear, and remove arguments. But the thing about objections is that they can only stop those things that are improper under our rules. So, if you play fair and follow the rules, the word loses its teeth. Objection is constantly shouted when anything technical enters the courtroom. And it is understandable because people fear what they don’t understand and hate what they can’t conquer. But we can conquer it. We can embrace and utilize it. For knowledge is power.

Although a laptop and a projector can turn any old-fashioned courtroom presentation into a high-tech courtroom experience, it does not immediately educate yourself, your adversary or the court on the admissibility of its use. It can be difficult to explain new technology to old-fashioned legal minds. Therefore, use of electronically-displayed evidence raises evidentiary objections out of fear and confusion. Some are valid and some are invalid. Therefore, it is useful to be prepared, in advance, in order to defray any of potential objections and concerns.

In the previous section, we learned the case law regarding the standard admissibility requirements for authentication and relevancy. We have seen failures and successes with attempted use of demonstrative evidence and visual aids. And learned that all evidence requires foundational building blocks: demonstrative, visual, or physical.

All digital evidence, as with any piece of evidence, presents the possibility of alteration or fabrication. The accusation of potential alteration is frequently raised by adversaries when digital evidence is presented. The best way to deal with this accusation is to set a foundation before presentation and to know the ever-changing case law in the area of courtroom

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810 Oft-quoted saying usually attributed to author Andrew Smith or the rapper Nas. However, the majority of the saying has been found in literature for centuries. In Scene III of the Tragedy of Macbeth, written around 1606, William Shakespeare stated, “From what we fear, yet know not what we fear.” Reverend John Flavel wrote in 1740, “Ignorance of men generates our Fears of Men; we fear them, because we do not know them.”

811 “As knowledge is power, so is ignorance imbecility, which is not unfrequently as dangerous and detrimental as determined vice.” An Ethical Treatise on the Passions, founded on the Principles investigated in the Philosophical Treatise. T. Cogan, M.D., Vol. IV, April 1808.

812 N.J. R. EVID. 401; N.J. R. EVID. 901.
But the basic premise of defense is simple, authentication through witness testimony of the accuracy of the portrayed document; they will testify that the projected presentation, in fact, accurately demonstrates what it purports to show. Before delving into the objections on alterations, we should start with the mere digital representation of the original; i.e. the Best Evidence Rule objection.

N.J. R. Evid. 1002,\textsuperscript{814} usually referred to as the Best Evidence Rule, requires the original writing or photograph to prove the content therein. Therefore, attorneys sometimes object to presentations that recreate or replicate the original in another form, even if only for presentation and illustrative purpose. Due to the amending of our New Jersey Rules of Evidence, the Best Evidence objection has become obsolete in the technological display of evidence.

In today’s world, a digital display of a photograph may, in fact, be the original presentation of the photograph as required by the Best Evidence Rule.\textsuperscript{815} Since camera phones, digital camera, digital video cameras, and digital audio recorders provide a digital file as the original, it would seem silly to argue that the hard copy version of the same was the Best Evidence. An original is defined as “the writing itself or any counterpart intended by the person or person executing or issuing it to have the same effect... If data are stored by means of a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original’.”\textsuperscript{816} A projection of the digital file would be such a readable-by-sight output.

Further, a duplicate is defined as “a counterpart produced... by means of photography, including enlargement and reductions, or by mechanical or electronic re-recording... or by other equivalent technique which accurately reproduces the original.” A duplicate is admissible to the same extent as an original unless it is not authentic or is unfair to admit the duplicate in lieu of

\textsuperscript{813}See Chapter 10: Subsection: Demonstrative Aids and Illustrative Evidence: Admissibility.
\textsuperscript{814}N.J. R. Evid. 1002.
\textsuperscript{815}N.J. R. Evid. 1001.
\textsuperscript{816}N.J. R. Evid. 1001.
the original.\textsuperscript{817} N.J. R. Evid. 1003 provides that a duplicate is generally the equivalent of the original document for purposes of admissibility.\textsuperscript{818}

If the challenge is made, the attorney can remedy the situation by a simple additional question to the witness: Does the image being displayed on the screen fairly and accurately depict Exhibit P-1?\textsuperscript{819}

Once a sufficient foundation is laid for the document, an electronic display can be shown to the jury. The enlargement should not require further exhibit numbering or qualification because it is merely a display of the original piece of evidence. It may require marking, in evidence, a flash drive, CD, or DVD containing the digital electronic file.

Another objection raised is completeness. Completeness is normally raised when presenting zoomed, enhanced or cropped images and documents.\textsuperscript{820} Cropping cuts out parts of an image without changing the content of the portion of the image that remains. Cropping has always been possible during an enlargement process. But digital photography makes this very easy to accomplish. Although there is nothing inherently unfair about cropping, it does raise the objection of completeness. Parts of a document may be deleted, photos may be cropped, and digital video may have parts excised. Therefore, an attorney should always mark the original image, present the original document and be prepared to present the original piece of evidence, in its entirety, at the Court or adversary’s request. Remember that the cropped or called-out image is supposed to be used to aid the jury in understanding a portion of the original document. It should never be used to hide something from the jury.

In order to deal with this objection, the attorney should, when available, use the “call out” feature. This usually protects against the cropping/completeness argument because the original document is displayed in its entirety prior to the callout taking place. This feature will show the entire image and then enhance a portion of the document for the jury. Also, most callouts can be scrolled along a document and not damage the original presentation. If the attorney is presenting with a slide-show type presentation, it is important to maintain a perfect

\begin{footnotesize}
\textsuperscript{817} N.J. R. Evid. 1003.
\textsuperscript{819} N.J. R. Evid. 1001 - 1008.
\textsuperscript{820} N.J. R. Evid. 106; FED. R. EVID. 106.
\end{footnotesize}
duplicate of the entire image in a separate slide. In case the original needs to be referenced due to an objection, the slide will become valuable.

Scientific Evidence concerns can be raised regarding recreations or animations. The case law is addressed in the previous section. However, we will address it briefly here. The scientific objection is irrelevant to most demonstrative evidence; but it is applicable if the demonstrative evidence is offered for substantive scientific evidence such as a re-creation. If the adversary can convince the court that *Daubert*\(^\text{821}\) and *Frye*\(^\text{822}\) are raised by the inputting of underlying data and the validity of the scientific concepts inherent in the computer software’s programming and the accuracy of the end product, you may need to call the creator of the animation or recreation in order to validate the process. An example of this questioning is available under the Direct Examination section below. The testifying witness should be able to explain the procedure for creating the re-enactment, the scientific principals and assumptions taken in the creation, and explain any potential inconsistencies with the original facts. Further, the evidence always be turned over in advance of the trial date and dealt with in a N.J. R. Evid. 104 setting, if necessary.\(^\text{823}\) Expert testimony is unnecessary when an instrument of “common knowledge” is employed to examine evidence before the court.\(^\text{824}\) In 1999, 93% of all information created was generated in digital form.\(^\text{825}\) If that was true in 1999, imagine what the percentage is today.

Obviously, the most prevalent objection, in limiting the use of courtroom technology, is unfair prejudice.\(^\text{826}\) Unfair prejudice can be enhanced if the presenter of information uses evidence inappropriately, zooming incorrectly, resizing images, reshaping the scene, altering the speed of video presentation, emphasizing colors, distorting facts, causing unnecessary delay, or

\(^\text{822}\) *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
\(^\text{823}\) N.J. R. Evid. 104.
\(^\text{824}\) *Boland v. Dolan*, 140 N.J. 174 (1995); allowing the jury to utilize a magnifying glass to examine a photograph.
\(^\text{826}\) N.J. R. Evid. 403.
misleading the jury. A perfect example of the Court’s requirement of fairness, in the use of demonstrative aids, is Rodd v. Raritan Radiologic Associates. Rodd is reviewed, in detail, within the previous subsection wherein we delved into the inappropriateness of presentation. However, the main point needs to be continuously referenced; if you cannot say it, then you cannot display it.

N.J. R. Evid. 403 permits the exclusion of otherwise admissible evidence if the probative value is substantially outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury. It also permits the court to exclude relevant evidence when the presentation will result in undue delay, waste of time, or needless presentation of cumulative evidence. Electronically presented and produced evidence may raise this objection when high-quality animations appear too similar to real-life depictions and the jury may give unfair weight to the animation. It seems odd that anyone would argue that a digital presentation would delay the trial. But it becomes a valid point if your technology crashes or you are unable to utilize it with sufficient efficiency.

As Rodd explained, if you can say it, then you can put it in your presentation; if you can show it in court, then you can put it in your presentation; and if it is admissible as an exhibit, then you can present it in an electronic presentation.

In order to avoid objections, try to avoid utilizing color to emphasize a fact, having words move or morph, and try to avoid enhancing sounds (sounds that are not evidence in the case used for the purpose of emphasizing a point on the screen). Additionally, utilizing these tools may turn the jury against the attorney.

Argumentative is another commonly utilized objection. An adversary may object to labeling of a document within the presentation: text treatments, colors, motion, sound, positioning, speed, repetition, etc. The audio tracks may be objected to as non-testimonial argument. Argument can be in wording or in the design of graphics. An improper example would be, during an opening, while referencing the defense’s expert doctor and simultaneously depicting a picture of a gun with the word ‘hired’ above it.

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828 N.J. R. Evid. 611.
The Argumentative objection is usually followed by objections of Hearsay, Leading, or Assumes Facts Not in Evidence. If your presentation is presented prior to testimony, an objection may be raised as to hearsay or leading: Hearsay because it will allegedly hold information which the witness plans to testify to in advance of the actual testimony; Leading can be raised because the presentation itself contains an answer which has not yet been provided.

**Lay a foundation before presentation.**

If the testifying expert prepared the slides and determined their content, the leading objection should be overruled. If the purpose of the slides is to clarify and organize the testimony, as a transition, the leading argument may also be subverted.

Objections to the viewpoint of the animation, the speed of the animation, the timing of the animation, the freeze frames in an animation, flaws in the background of the animation, and the accompanying sound of the animation may be made. A trial attorney should have their expert ready to reply to the objection and offer further testimony explaining the foundation before continuing.

Trial courts enjoy wide latitude in admitting or rejecting replicas, illustrations, and demonstrations and in controlling the manner of presentation ad whether or not particular items are merely exhibited in court or actually received in evidence. Therefore, disclosure is very important. Disclosure makes a judge more inclined to allow technology in the courtroom. If the judge has concerns or the adversary attorney has concerns, they can be addressed prior to the start of trial and remedied. Also, early disclosure can provide your adversary with an opportunity to object before the trial. This will allow you to make your changes to your presentation prior to actually using it. This has the potential of protecting the money expended on the creation of the evidence and preserves its potential use.

Disclosure does not apply to everything. Work product is clearly protected and does not have to be turned over to your adversary. Nor does disclosure require you to tip your hat as to your trial strategy. Disclosure is the providing of information regarding artistic interpretation, animation, and the basic description of what technology you will be utilizing.

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**Judicial Notice**

In New Jersey, pursuant to *N.J. R. Evid. 201*, Judicial Notice may be taken in any case. Some courts have used Judicial Notice to permit Google to confirm their intuition on “matters of common knowledge.” In the *Bari* case, Judge Denny Chin performed a Google search to determine that “there are lots of different rain hats.” He used the search results to eliminate the possibility of a coincidence when a rain hat, identified to the one used in the bank robbery, was found in the suspect’s garage. The use of Judicial Notice was limited to application of the supervised release revocation where the rules of evidence are relaxed.

Probably the best use of judicial notice and technology is Google Maps and Google Earth. “Google Earth is an internet-based program that provides a virtual globe through a compilation of, among other things, satellite imagery, maps, terrain, buildings, and other structures. In short, it is a virtual repository of countless overhead photographs of the entire globe.” The US District Court for New Jersey, though unpublished, appears to look kindly on Google Maps. One Judge took judicial notice of “the fact, obtained from Google Maps, that all three beach towns are located over one hour from Atlantic City.” Another took judicial notice that the case was taking place 10 and a half miles from a particular location based on Google Maps. The case sites to a District Court of Massachusetts decision where the court took judicial notice of distance provided by a comparable online map service, www.mapquest.com.

In a family court matter, the Appellate Division noted, without criticizing or commenting, that the trial court found that the distance between defendant’s resident and plaintiff’s residence was 38 minutes (29.8 miles) according to Google maps and added that it

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830 *N.J. R. Evid. 201*
832 *United States v. Bari*, 599 F. 3d 176 (2d Cir. 2010).
recognized that with traffic and weather conditions, the distance in minutes may vary.\textsuperscript{838} In another case, the Court stated it “observes that, according to Google Maps, a vessel which is 108 nautical miles south of Isle de Coiba would also be well over 12 miles from the coast of Columbia.”\textsuperscript{839} In a civil matter, Google Maps revealed distances between three places.\textsuperscript{840}

In a juvenile case, a prosecutor attempted to utilize a Google Earth image, without authentication or testimony, to demonstrate that the defendant’s home was closer to one location than another location.\textsuperscript{841} However, it should be noted that the purpose changed, by the end of the trial, and its admission was completed without being offered as substantive evidence but as illustrative evidence of the officer’s testimony.

In reviewing a motion to suppress evidence in a criminal matter, the Appellate Division noted the location of an address and configuration of streets was taken from Google Maps.\textsuperscript{842}

These cases demonstrate that Google Maps, Google Earth, and Google Street View can be useful in the presentation of your matters. It is important to determine what you are going to utilize it to show and how you can have it substantively admitted at the time of trial.

Taking Judicial Notice, though, can be dangerous. For instance, a publication, out of the United Kingdom, entitled The Guardian, reported, in January 2007, that Wikipedia, an encyclopedia written by nobody, was becoming a source for Judges to rely upon in their opinions. The article reported that “a search of court decisions, by the New York Times, turned up more than 100 rulings that have cited the online encyclopedia since 2004, including 13 from the Circuit Quarter Appeals, 1 rung below the Supreme Court: Americas highest court has yet to succumb to the site’s call.”\textsuperscript{843} Despite this report, by the New York Times and The Guardian, some cases have come out finding Wikipedia to be unreliable.

In one such case\textsuperscript{844}, the Court found that “a review of the Wikipedia website reveals a pervasive and, for all purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article “maybe, at any given moment, in a bad state: for an example it could be in the middle of a large edit or it could’ve been recently vandalized;” (ii) Wikipedia articles are “also subject to remarkable oversights and omissions;” (iii) “Wikipedia articles (or series of related articles) are reliable to be incomplete in ways that should be less usual in the more tightly controlled reference network;” (iv) “[A]nother problem with a lot of content on Wikipedia is that many contributors do not site their sources, something that makes it hard for the reader to judge the credibility of what is written;” and (v) “Many articles commence their lives as partisan…” and maybe “caught up in a heavily imbalanced viewpoint.”

“Since when did a Web site that any Internet surfer can edit become an authoritative source by which law students could write passing papers, experts could provide credible testimony, lawyers could craft legal arguments, and judges could issue precedents?”\textsuperscript{845} In \textit{Badasa}, the Department of Homeland Security submitted, to the Immigration Judge, information from Wikipedia.

In New Jersey, the Appellate Division has held that it was error for a trial judge to permit plaintiff, in order to demonstrate a commercial transaction between two lenders occurred, to admit, as evidence, an article printed from Wikipedia.\textsuperscript{846} The Appellate Division found that “the trial courts acceptance of Wikipedia was...contrary to the principal that Judicial Notice must be based upon “sources whose accuracy cannot be reasonably questioned.” The court noted that even Wikipedia’s own disclaimer indicated that it was unreliable. Moreover, the Appellate Division noted that a party itself could published the material which it later seeks to admit into

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\item[\textsuperscript{844}] Campbell v. Secretary of Health & Human Servs., 69 Fed. Cl. 775 (2006).
\item[\textsuperscript{845}] Badasa v. Mukasey, 540 F.3d 909 (8th Cir. 2008) (citing R. Jason Richards, \textit{Courting Wikipedia}, 44 Trial 62 (Apr. 2008)).
\end{itemize}
\end{footnotesize}
evidence in Court. Despite the holding in the Palisades case, other New Jersey courts have utilized Wikipedia in their decisions.\textsuperscript{847}

**Opening**

“Before any evidence is offered at trial, the State in a criminal action or the plaintiff in a civil action... shall make an opening statement. A defendant who chooses to make an opening statement shall do so immediately thereafter.”\textsuperscript{848} Although there is leeway\textsuperscript{849} and a little courtesy given, in the presentation of an opening statement, “[t]he fundamental purpose is to do no more than inform the jury in a general way of the nature of the action and the basic factual hypothesis projected, so that they may be better prepared to understand the evidence.”\textsuperscript{850} In an opening statement, “[c]ounsel must be summary and succinct. Proposed evidence should not be detailed and it will be little more than an outline, quite frequently a fairly indefinite one by reason of the nature of the case. In no sense can it be argumentative or have any of the attributes of a summation. Nothing must be said which the lawyer knows cannot in fact be proved or is legally inadmissible.”\textsuperscript{851} Argument, however, always seems to creep into the presentation of an opening. Unless that argument prejudices the jury, the final verdict is usually upheld.

So, how can technology assist in presentation within these guidelines? Technology helps speed up presentations, demonstrate points, highlight the issues, and keep the attorney focused on the presentation. The Federal Judicial Center, specifically referencing slideshow


\textsuperscript{848} N.J. Ct. R. 1:7-1.

\textsuperscript{849} State v. Timmendequas, 161 N.J. 515 (1999) ("Prosecuting attorneys are afforded considerable leeway in making opening statements").


\textsuperscript{851} Id. (citing Passaic Valley Sewerage Comm’rs v. Geo. M. Brester, 32 N.J. 595 (1960)).
presentations, highlighted the effectiveness of using technology in an opening. Utilizing a slideshow, for example, will keep the attorney organized and focused on the main issues that they want to highlight during the trial. “The opening statement holds a uniquely important place in the trial because it is the lens through which the jury views and evaluates the entire trial... an opening statement is counsel’s opportunity to make an indelible first impression on the jury.” Studies show that as many as 85 percent of all jurors make up their minds about liability or guilt during opening statements and do not change their preconceived determinations over the course of the trial.

Today’s judges appear to be taking a liberal approach on the use of visual aids and evidence during the opening statement. Others, however, cling to the restrictive view that only a lawyer’s voice may be presented to the jurors during the opening. And since the case law provides the trial judge significant discretion over presentations, it is important to explain the benefits of its use in a coherent and positive way.

Utilizing portions of a video deposition (or deposition transcript) during the opening can be an extremely powerful device as it allows the jurors to familiarize themselves with a witness that will appear before them during the trial. It provides direct information about what is to be presented, during the trial, as opposed to a complicated rambling about what testimony is going to be heard. Meaning, let the jury observe, hear, and judge the testimony through your opening. Allow them, in the manner you wish, to be introduced, to the adversary.

New Jersey Court Rules provide a basis for deposition transcript utilization against a party opponent or agent during the opening: “At the trial...any part or all of a deposition... of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent... may be used by an adverse party for any purpose against the

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853 State v. Gutierrez, 142 N.M. 1 (N.M. 2007).
deponent or the corporation, partnership, association or agency.”

This is similar to the Federal Rules of Civil Procedure, “At... trial, all or part of a deposition may be used against a party” under certain condition or “an adversary party may use for any purpose the deposition of a party or anyone who, when deposed, was the party’s officer, director, managing agent, or designee...” Therefore, these statements provide an intelligent argument for their use during an opening statement. As of the date of this publication, there have been no New Jersey State Court decisions advancing or precluding the use of this technique. With the amendments to the Court Rules which anticipate and accept the growing use of video-taped depositions, it is likely that, in the near future, the Court’s will reach an answer on video deposition use in opening statements. And it will most likely fall within the wide latitude given to the trial judge.

Obviously, there is an argument that portions of a videotaped deposition presented during opening, testimony, and at summation may have the opportunity to embed information in the jurors’ heads with only two chances of rebuttal, explanatory direct and possibly closing argument of counsel. Yet, as noted in Sadler v. Advanced Bionics citing Hynix, there is sparse case law on whether a court should permit parties to play portions of video depositions in their opening statements. And “the Court is aware of no authority prohibiting such a practice.” Sadler further questions the logic in preclusion of the depositions by citing the Hynix court’s reference to “one respected treatise [that] recommends the practice as ‘very effective’ advocacy.” The Sadler court, after stating that other courts have condoned the practice, ordered that counsel “shall provide opposing counsel copies of the video excerpts they intend to use during opening statement prior to trial. Any objections thereto should be brought to the Court’s attention. If this testimony is otherwise admissible at trial and is not necessarily lengthy,

856 FED. R. CIV. P. 32.
859 Id.
the Court may consider allowing this procedure for both parties.”

If you provide the information in advance, any potential argument against its presentation is severely diminished. This way, the adversary can reply to the potential presentation, if they wish, in their opening statement. In effect, this preemptive providing of clips would deflate the argument against its repetitive nature interfering with the limited response opportunity.

Attorneys may use demonstrative or actual evidence in opening statements if it is reasonably believed that it will be properly admitted during the trial, it does not distort the actual evidence, it is relevant, it pertains to the merits of the case, and is approved by the trial court judge. The problem that exists, however, is that the courts have inconsistently ruled on the issues of presentation during an attorney’s opening. Therefore, it is the advisable practice to alert your adversary of your intent to utilize demonstrative evidence during an opening statement. Consent can save a complex and heated argument. If consent cannot be gained, an attorney should be prepared for the intellectual arguments for and against admissibility.

The Court will most likely inquire about what will be used during the opening and ask to see any display that involves more than simple bullet-point slides or enlargements of exhibits. “Lawyers may be tinkering with their opening statements at the last moment and the ‘final’ versions of the supporting slides may not be created until shortly before they are used. It is often administratively easier (and serves the purpose of checking out the equipment as well) to just run quickly through the illustrative aids for opening statement as a preliminary matter at trial so that the court knows what is coming.”

In Brenman v. Demello, the New Jersey Supreme Court referenced, without objection, that defense counsel utilized a photograph of the damage to the Plaintiff’s vehicle in the opening with the purpose to demonstrate the lack of severity in the collision. In Rodd v. Raritan, the Appellate Division found error in that the demonstrative evidence produced to the jury was not identified as such nor was adequate notice provided to the adversary about its

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863 Id.
potential use. But the Appellate Division did not take issue with the fact that it was presented in the opening statement.865

The most important thing the courts will look to is whether or not the presentation drifts from outlining the trial into argument. Due to the fluid nature of digital presentation, if there is a questionable or objectionable part of the proposed presentation, it is easily removed or editable. It is better to resolve this issue prior to presentation before the jury and the exchange will help flesh out any issues. Titles or headers may have been added which would turn a proper slide to an argumentative slide. Labels, cropping, highlighting, color, motion and sound can all cause an illustrative aid to slip into argument.

Adjectives and adverbs can make an admissible slide argumentative and thus precluded from use during openings.

Normally there would be no objection to the presentation of a document in the proceeding, the enlargement of parts of those pages, the boxes marking particular language, or the callouts enlarging the words. Those are all standard techniques for explaining a document.866

Direct Examination

Direct examination is the presentation of a party’s issues, in a case, through the questioning of witnesses called by the questioning party. Issues are defined by the pleadings and consist of allegations and facts claimed by one party and denied by another.867 Since it is an opportunity for the fact witness to tell the facts and the expert witness to tell their opinions, the attorney wants to assist in allowing them to provide that information in the best way to a jury. Technology is a teaching tool and can be useful in assisting the witness in presenting their testimony. It is important to remember that adversaries and certain members of the judiciary may not be receptive to computer technology in the courtroom. Therefore, it is important to have a backup plan for laying a foundation.

866 Id. at 160.
Think of how or even where a witness will testify. If necessary, testifying by video or speakerphone is an option, depending on the case. Municipal courts routinely have inmates appear by videoconference. Many criminal courtrooms are now equipped with this technology. A witness may even be able to appear by Skype unless you are involved in a highly publicized trial. For certain cases, even an attorney’s appearance may be made by speakerphone in the courtroom.

One of the most common objections, to the use of technology during direct examination, is leading. Leading questions are generally not permitted on direct examination. Therefore, it is important to have testimony before electronically displaying any information. Imagine putting an answer on the screen before the question is asked.

**Lay a foundation before presentation.**

Also, it is important to mark the evidence before publishing it to the jury. Otherwise, it will appear like you are placing the testimony before the witness and telling them how to testify. A question is leading when it suggests what the answer should be or contains facts which in the circumstances can and should originate with the witness. Therefore, hand the document to the witness, allow them to identify it, follow your normal steps marking and admitting the document, then ask the court to allow you to publish it to the jury.

**Example Authentication and Presentation of a Document:**

Q. You have referred to a letter. If you were to see it, would you be able to identify it?
A. Yes.
Q. Your Honor, I would like to mark this document as P-1 for identification. (If not done in advance, you should mark the exhibit for identification, provide a copy to your adversary, and approach the witness to verify authenticity)
Q. Your Honor, may I approach the witness.
Court. Yes.
Q. What is the document I have just handed you that was marked P-1 for identification?
A. It is the letter that I was discussing, written by my wife to myself.
Q. How do you know that?
A. I recognize the handwriting and that is my wife’s signature.

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868 [https://www.youtube.com/watch?v=QOy5RqOTBDE](https://www.youtube.com/watch?v=QOy5RqOTBDE)
869 N.J. R. EVID. 611.
Q. Your Honor, I would like to offer the exhibit into evidence.
Court: Any objections? Seeing none, so admitted.
Q. Your Honor, I would like to publish the document to the jury.
Court: You may proceed.

It is always best to request to display the digital rendition of evidence before actually presenting it on the screen. It will help avoid the inevitable objection of leading your witness. From this point, you can ask questions about parts of the document, utilizing call outs, to have the witness explain the contents of the documents. As discussed in Chapter 8, a “call-out” is an extremely useful tool. It provides the ability to focus on a specific portion of a document and zoom-in for demonstrative purposes. It would be an incorrect belief to expect a juror to read an entire page when it is displayed on a projected screen. The “call-out” feature allows you to zoom in on portions of the document to allow for better clarity and focus juror attention.

Callouts are not limited to documents containing writings. It is also beneficial to explain photographs. The witness can explain the contents of the photograph and focus in on important aspects of the picture.

P1 – Exhibit  

P-1a – Exhibit with callout
There are several available annotation tools to assist the witness in their testimony:
Annotations are powerful tools to assist in focusing the jury’s attention on the relevant portion of the evidence. If the attorney records the marked exhibits, they can be used throughout the remainder of the trial and during summation. Three are many different types of trial presentation software. Each one has its own toolbar and annotation tools. It is imperative that the operator be familiar with the tools their software provides and prepare for its use during direct testimony. It is beneficial to review and practice the use of technology with the witness so that they are comfortable with its use. It is recommended that the attorney anticipate the created document. The presentation options are limited only by the attorney working with the matter and witness comfort. The more technologically savvy the attorney, the quicker the creation of the presentation.

When it comes to admitting certain evidence, it may be enough to validate that it accurately reproduces the information. As stated by the Supreme Court of New Jersey, “the reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness.” Many pieces of evidence are admitted because they fairly and accurately represent that which they purport to demonstrate. It is not the creation that is relevant; the focus is more on the reliability and authenticity the content it presents.

Trial presentation software does not limit the attorney to one document at a time or one particular callout at a time. It allows the user to “call-out” different portions of the same document for comparison. It also allows numerous documents to be presented and compared.

EXAMPLE OF UTILIZING A DIGITAL DIAGRAM OR AN ILLUSTRATIVE AID TO ASSIST THE JURY IN UNDERSTANDING THE TESTIMONY:

(Mark the diagram of intersection as Exhibit P-1 for identification)
Let the record reflect that I am showing Exhibit P-1 for identification to the witness.
Q. Directing your attention to Exhibit P-1 for identification, do you recognize it?
A. It is a diagram of the Halls Mills Road and Willow Brook Road intersection.
Q. Is it a fair and accurate depiction of the layout of the intersection at the time of the accident?
A. Yes.
Q. Would the use of Exhibit X assist you in explaining the layout of the intersection?
A. Yes.
(If not done in advance, you should offer the blank diagram as an exhibit for identification or as a visual aid depending on purpose)
(You should ask to display the exhibit to the jury on the screen and request that the witness be allowed to approach the screen)
Q. Would you please describe the intersection where the accident occurred?
A. Sure. Halls Mills Road is a two lane road that runs north and south; Willow Brook Road is a two lane road that runs east and west. The two streets cross at a right angle. There is a traffic light at the intersection.
Q. Mr. Smith, can you point to where you were standing so that we can place an X on the diagram.
A. Yes, here. (Place an X annotation at the location where the witness points)
Q. Is the X marked on the screen where you were standing?
A. Yes
Q. Now, can you point to where you first saw Defendant’s vehicle so that we can place a Blue D on the diagram.
A. Yes, here. (Place the Blue D annotation at the location)
Q. Is the Blue D on the screen located where you first saw Defendant’s vehicle?
A. Yes.
Q. Please point to the location where Plaintiff’s vehicle was located when you first observed it so that we can place a Green P on the diagram.
A. Right here. (Place the Green P annotation at the location)
Q. Is the Green P on the screen located where you first saw Plaintiff’s vehicle?
A. Yes.
Q. Finally, please point to the location where the collision occurred so that we can place an Orange Circle at the collision site.
A. Here. (Place the Orange Circle on the diagram)
Q. Is the Orange Circle located on the diagram where the collision occurred?
A. Yes. (Save the annotated diagram, print the diagram and offer the annotated diagram into evidence as P-1A)

Depending on how comfortable the user is with technology, they can save the illustrative aid with the markings as a new file, send the digital copy by e-mail to a “runner” to create a blowup version and have them bring it to the courthouse to be entered into evidence.

**P-1 BEFORE TESTIMONY**

**P-1a AFTER TESTIMONY**
The Apple iPad® provides a unique ability to have the witness write on the displayed evidence and send the information by Apple Airprint® to a wireless printer in the courtroom. Also, the iPad allows the expert to present the demonstrative aids without a wired connection to a television or projector. This can be accomplished with an Apple TV® and Apple Airport®.

QUESTIONS FOR AN EXPERT UTILIZING AN ILLUSTRATIVE AID OF AN ANIMATION OR A DIGITAL ARTISTIC RENDITION

Q. Dr. Smith, have you had an opportunity to observe the animation and artistic stills rendered in the present matter?
A. Yes, I have.
Q. And will these items assist you in explaining to the jury the steps you took during the surgery of John Doe?
A. Yes, the animation and story board will allow me to have a visual depiction of the surgery as I explain the process.
Q. Does the animation fairly and accurately depict the surgical process you are going to describe for us?
A. Yes.
Q. And does the story board accurately depict the surgical process that you are going to describe for us?
A. Yes.
(Thank You. At this time Your Honor I would like the witness to explain the surgical procedure and utilize the animation and storyboard to help the jury understand his testimony.)

If the illustrative aids have been provided to your adversary in advance of the trial, the questioning of your expert regarding the proposed presentation may be as simple as asking, “have you prepared some materials that would assist you in presenting your testimony and
assist the jury in understanding that testimony? A. Yes (Your Honor I would like to mark these printouts of the digital slides as P2 for identification).

Be aware of the evidence you are utilizing in your presentation. There is a substantial difference between a visual aid and an item that you want to have admitted into evidence. In Rodd v. Raritan Radiologic Associates,873 the Appellate Division explained that “the use of [a] computer-generated exhibit requires a more detailed foundation than that for just photographs or photo enlargements. The latter must be proved to be faithful representations of the subject at the time in question... there must be testimony by a person with some degree of computer expertise, who has sufficient knowledge to be examined and cross-examined about the functioning of the computer. Mere visual inspection... is simply not enough to ensure the reliability of the computer-generated exhibit. Rather, what is required is testimony from a witness who possesses sufficient knowledge of the technology used to create the exhibits.”

QUESTIONS FOR CREATOR OF DIGITAL MODEL AND MODEL (IF NECESSARY)

Q. What is your occupation?
A. I am a computer programmer at the Re-Create-ION Company.
Q. How many years have you worked as a computer programmer?
A. I've been with Recreation for 5 years and a programmer for 15.
Q. What type of business does Recreation perform?
A. We develop digital simulations, models, and animations, in a computer format.
Q. What education do you have that assists you in your occupation?
A. I have been working with computers since high-school. I have a bachelor’s degree in computer science from Rutgers and a master’s degree in computer engineering also from Rutgers.
Q. Can you explain what a digital simulation is?
A. Yes, a digital simulation is where we construct, on the computer in digital form, a recreation of an event.
Q. Did you create a digital simulation in this case?
A. Yes.
Q. What hardware did you utilize when creating your simulation?
A. A computer, electronic scanner, video monitor, and connection cables.
Q. In creating the simulation, what software did you utilize?
A. We utilized a computer-assisted design program called Design.
Q. What did you create using that equipment and software for the present case?

A. I created a digital model of the loading dock at ABC food store, detailing the roadway leading to the dock, the actual loading dock, the garage opening to the ABC store, and all of the characteristics of the scene of the accident.
Q. How did you accomplish this?
A. First, we viewed the architectural plan for the store, reviewed photographs provided to us of the scene, and we went to the scene to verify the measurements. We took additional photographs and measurements of the loading area, dock, and entrance to ABC store.
Q. What did you do next?
A. We inputted the information into the Design program and generated a two dimensional image and printed a two-dimensional diagram for our file.
Q. What did you do next?
A. Design allows you to transform the two-dimensional model into a three-dimensional model for demonstrative purposes.
Q. Is the inputted data changed when the three-dimensional model is created?
A. No. The data remains. It is just displayed differently.
Q. How do you know the data remains unchanged?
A. We check for accuracy during each step of the model creation and verify the numbers are identical to those inputted at the start of the process. Also, the program verifies the data entered to make sure it is geometrical accurate.
Q. What happens next?
A. The model is then saved in the computer program. And once the data is in existence, the program allows you to view various elements utilizing a computer-generated camera. This provides the user the ability to look at the model from different angles and positions. The views are displayed on the screen.
Q. Is there a difference between accident reconstruction and the creation of your model?
A. Yes. Accident reconstruction involves the determination of a sequence of events based on hypothetical reconstruction based upon memory. Our model is static and can be measured by using existing field conditions. It is an illustration of the scene.
Q. The digital model that you created, was it consistent with the architectural plans and the conditions you observed on your visit to the scene?
A. Yes.
Q. Would you say it fairly and accurately depicts the scene?
A. Yes.

CONTINUED QUESTIONS, IF NECESSARY, FOR A DIGITAL SIMULATION

Q. Now, that you have explained the creation of the model, did you complete any other work on this matter?
A. Yes, I created a demonstration utilizing the same hardware and software.
Q. Can you explain the process of creating that demonstration?
A. Yes. You see, by applying certain conditions to the model, physical events can be depicted through animation on the monitor.
Q. How can they be depicted?
A. We utilize information provided to us to recreate the events that transpired on the model that we created.

Q. What kind of information did you review in the present matter?
A. We reviewed the depositions of the Plaintiff, Defendant, and the witnesses. We reviewed the photographs taken on the day of the accident and the police report created from the accident. And we watched the surveillance video stills.

Q. And how does this information assist you in creating the demonstration?
A. It allows the computer and ourselves to demonstrate or predict physical events by applying certain conditions to the model. Those physical events are then depicted through animation on monitor. You see, a computerized demonstration is a compilation of mathematical formula that are integrated into Design. Based on scientific principles, such as permeability, absorption, friction, and flow, the computer can test different hypotheses. After several different calculations, the result would be the proper demonstration.

Q. Did you provide opposing counsel the opportunity to review all of your calculations, software, hardware, and digital files?
A. Yes.

Q. And were you able to create a demonstration of the physical events that took place in the present matter?
A. Yes.

Q. And does your digital demonstration fairly and accurately depict the physical events in the present matter?
A. Yes.

It may also be beneficial, in cases with large amounts of documents, to use summaries. The contents of voluminous writings or photographs which cannot conveniently be examined in court may be presented by a qualified witness in the form of a chart, summary, or calculation.\textsuperscript{874}

There are three types of evidentiary summaries that may be presented in the courtroom: (1) Primary-evidence summaries typically used to condense voluminous material that cannot be conveniently examined in court; (2) Pedagogical-device summaries, or “demonstrative aids,” such as charts or models, not themselves admitted into evidence, presented to summarize, clarify, or simplify the proofs which are admitted; and (3) Secondary-evidence summaries which are hybrids of the first two, admitted not in lieu of the evidence they summarize but in addition thereto.\textsuperscript{875}

\textsuperscript{874} N.J. R. EVID. 1006.

Witness Depositions at Trial

As we have previously discussed, depositions may be taken under the civil, family, and, though in an extremely limited manner, criminal. N.J.Ct.R. 4:11 to N.J.Ct.R. 4:16 provide the governing rules for civil depositions. For this section, we will assume that the deposition has already occurred.

N.J.Ct.R. 4:16 dictates the rules on the use of depositions. It begins with the premise that, at the trial, any part or all of a deposition may be used in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Rules of Evidence;

(b) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing or authorized agent, or a person designated... to testify on behalf of a public or private company, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose against the deponent or the corporation;

(c) Except as otherwise provided by R. 4:14-9(e), the deposition of a witness, whether or not a party, may be used by any party for any purpose, against any other party who was present or represented at the taking of the deposition or who had reasonable notice thereof if the court finds that the appearance of the witness cannot be obtained because of death or other inability to attend or testify, such as age, infirmity or imprisonment or is out of this state or because the party offering the deposition has been unable in the exercise of reasonable diligence to procure the witness's attendance by subpoena, provided, however, that the absence of the witness was not procured or caused by the offering party. The deposition of an absent but not unavailable witness may also be so used if, upon application and notice, the court finds that such exceptional circumstances exist as to make such use desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court. 876

Based on these rules, there are many ways to present a deposition to a jury. It would be best with a synched transcript containing the video, audio and typed transcript. This way it is simultaneously being presented in an appealable way to audio learners, visual learners, and interactive learners.

However, a synched audiovisual deposition is not always available.

It is recommended to, at least, scan the deposition readings into your computer and present the wording utilizing your preferred presentation hardware. That way, the jury can read along with the attorney or the person narrating the testimony of the deposed individual.

Deposition readings from the adversary can be some of the best evidence that can be presented to the jury. Every word becomes an admission and can be presented powerfully as part of your case. Obviously, as will be addressed in the cross examination section, the defendant’s deposition can be utilized directly against the party opponent when they are on the stand. But it is available as a reading to the jury, without any testimony, during the case and can be a powerful tool of persuasion.

As we discussed, during the subsection Opening, within this chapter, video depositions can be a fantastic way to enhance your case from the first statement. Utilizing portions of a
video deposition (or deposition transcript) during the opening can be an extremely powerful
device as it allows the jurors to familiarize themselves with a witness that will appear before
them during the trial. It provides direct information about what is to be presented, during the
trial, as opposed to a complicated rambling about what testimony is going to be heard.

**Expert De Bene Esse Deposition**

N.J.Ct.R. 4:14-9(e) provides the basis for taking audio-visually-recorded depositions. It
specifically references treating physicians and expert witnesses. The rule proscribes that the
deposition of an expert may be used at trial in lieu of testimony whether or not such witness is
available to testify. As with all videotaped depositions, all evidential objections shall be made
during the course of the deposition. Within 45 days after the completion of the deposition,
each party objecting shall file a motion for rulings by the court. The reason for the advanced
determination and limited timeframe is to allow for editing and copying of the videotaped
testimony. Therefore, by the time you are in court, any issues should have been resolved. An
objection made at a de bene esse deposition has difficulty remaining viable at trial without a
motion within thirty days of its creation, as prescribed by N.J.Ct.R. 4:14-9(f). In *Mellwig*, the
Appellate Division explained that had a motion been made seeking a ruling on an objection
raised during a de bene esse deposition then a remedy fair to both parties could have been
crafted. But the Appellate Division found that by, waiting eight months and until trial, counsel
pocketed his objection and held that it is “inappropriate to treat objections as concealed
weapons to brandish at a future trial.”

Under N.J.Ct.R. 4:36-3(c), if an adjournment of a trial date is required based upon expert
witness unavailability, for a second time, without exceptional circumstances, the party
producing the expert shall be required to take a de bene esse deposition of their expert.

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879 Id.
880 Id. at 171. 
881 Id. at 171.
882 N.J. Ct. R. 4:36-3(c).
Although this rule exists, it requires that the trial adjournments be due to expert unavailability. Under N.J.Ct.R. 4:36-3, adjournments for any other reason would not force the de bene deposition. However, it is important to note that the de bene deposition of an adversary’s expert cannot be substantively used against the adversary over objection. The Appellate Division, in Genovese, stated that N.J.Ct.R. 4:14-9(e) is a valuable innovation, cheaper for litigants, more convenient for experts, and more efficient for the court. The Appellate Division determined that it would discourage the use of de bene depositions of experts if the deposition could be utilized substantively by the other side. Therefore, the court held that only the offering party can determine whether or not to utilize the de bene esse deposition of its expert. “The purposes are to achieve economy, convenience and efficiency, but not to present in amber parts of the trial proofs, or to prefer recorded to live testimony, or to obligate a party to present a witness – live or on tape.” However, if a party does not use a N.J.Ct.R. 4:14-9 videotapes deposition and does not produce an expert at trial, an adversary party would be entitled to the benefit of an adverse inference.

Cross-Examination

“Cross-examination is perhaps the single most important tool of the trial lawyer; the effective use of this tool in the hands of the skilled examiner often is the difference between victory and defeat in the court room. Professor Wigmore said this of cross-examination: ‘For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law... [I]t [Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of the truth.”

884 Id.
885 Id. at 382.
A paramount purpose of cross-examination is impeaching the credibility of the witness.\textsuperscript{888} “In a few years, it will be commonplace to use videotape instead of a cold transcript for the purposes of impeachment of critical witnesses.”\textsuperscript{889} Efficient and relatively inexpensive software (e.g. PowerPoint®, Trial Director®, Summation®, etc.) is available to assist in quick and accurate replaying of videotaped deposition testimony. “Incorporating a video deposition into such software to impeach the witness at trial will ordinarily be less time consuming and more effective than fumbling back and forth referring the witness to lines and pages in a transcript.”\textsuperscript{890} Fanelli was aware of another benefit that could come from video depositions: providing a critical assessment of the strengths and weaknesses of a witness expected to testify at trial and how a jury might view the particular testimony thus having the potential to assist in a settlement or a just, speedy and inexpensive determination of a case.\textsuperscript{891}

**EXAMPLE OF IMPEACHING WITH TECHNOLOGY:**

Q. Isn’t it true that, on December 27, 2009, you had your deposition taken at my office?
A. Yes
Q. And at that time, you were placed under oath, correct?
A. Yes
Q. During that deposition, you were asked questions and provided answers?
A. Yes
Q. And those answers were true and complete answers?
A. Yes

(If not done in advance, you should mark the exhibit for identification, provide a copy to the adversary and approach witness to verify authenticity)

Q. What I am handing you is a copy of your deposition from December 27, 2009. I’d like to draw your attention to page 33, lines 24-28. Please read that to yourself.
(You should ask the court to allow you to display the lines on the overhead projector as you read them to the witness)
Q. Lines 24-28 state “……..”, correct?
A. Yes.

(If you have a videotaped deposition linked to the testimony; it is possible to present the witness giving the answer that contradicts their present statement)

\textsuperscript{888} New Jersey Practice, Civil Trial Handbook, (5th ed. 2009).
\textsuperscript{889} Fanelli v. Centenary College, 211 F.R.D. 268 (D.N.J. 2002).
\textsuperscript{890} Fanelli v. Centenary College, 211 F.R.D. 268 (D.N.J. 2002).
\textsuperscript{891} Id.
It is important to demonstrate facts through cross-examination that may not be elicited by the direct examination of your adversary’s witness. Utilizing leading questions, it is possible to elicit information to be placed on diagrams, maps, or gain admissions about evidence that is displayed before the jury. Leading questions should be permitted on cross-examination.\(^{892}\) It is always beneficial to have learned the answers to your leading questions during a deposition prior to attempting a creation of a live trial exhibit through your adversary or their witness.

We have all had that moment when we think of the perfect zinger to have asked on cross-examination, but we have rested our case and are prepping for closing. The use of laptops or tablets during cross-examination means you can have one or all trial team members feeding you questions during cross-examination. Answers that are unexpected, issues arising that you did not contemplate, or that you were sidetracked from can be addressed in real time by attentive colleagues.

**Closing**

After the close of evidence, the parties may make closing statements.\(^{893}\) They may use forceful expressions and strong advocacy in their closing arguments. But the presentation must be limited to fair comment upon the facts presented in evidence.\(^{894}\) Counsel is to be given broad latitude in summation but comments must be restrained with the facts shown or reasonably suggested by the evidence adduced throughout the trial. Counsel may not misstate the evidence nor distort the factual picture. Remember the Technology Rules; you cannot display what you cannot say. Further, technology can help expedite the presentation without losing emphasis. “Closing argument can be made much shorter and better with the use of good illustrative aids.”\(^{895}\)

\(^{892}\) N.J. R. Evid. 611.
\(^{893}\) N.J. Ct. R. 1:7-1.
\(^{894}\) State v. Bogen, 13 N.J. 137 (1953).
It is clear from case law, developed since the admission of blackboards into the courtroom, that demonstrative aids are permissible during closing.\textsuperscript{896} It is frequently done and its continued use should be encouraged.

Many courtrooms have become audio and video capable. Therefore, counsel has gained the ability to have recordings of the testimony after it is completed. Possession of testimony allows for replaying of portions of videotaped trial testimony during summation. In \textit{Condella v. Cumberland Farms, Inc.},\textsuperscript{897} counsel crafted approximately 10 minutes of testimonial clips for replay in his summation. Further, counsel did not want to have the video clips shown, because of trial strategy, to opposing counsel until after his closing. The Court allowed the presentation and explained that “it is within the trial court’s discretion to allow counsel to show portions of the videotaped trial testimony and make comments thereon during summation. Just as it is acceptable to read portions of the trial testimony from a transcript to the jury during summation, similarly, there should be no prohibition against showing actual portions of the videotape testimony.” Portions of the videotaped testimony can be more accurate than reading the written transcript for it is complete with intonations and emotions of the witness. The portions of the testimony to be shown during summation should not be so lengthy as to constitute a second trial and the court must exercise its discretion to limit the amount actually played. The Court recommended that a 104(a) hearing\textsuperscript{898} should be conducted, out of the jury’s presence, where the proposed portions of the videotape are reviewed to verify that it accurately reflects the evidence. The final factor, in deciding the admissibility of the clips if not presented ahead of the opposing counsel’s closing, would be the length of delay between the closings.

\textit{State v. Muhammad}\textsuperscript{899} had a similar holding as \textit{Condella}. A party wished to show video clips of trial testimony during summation. The Court found that the trial judge, on a case-by-case basis, can determine whether or not to permit a prosecutor or defendant to utilize videotaped trial testimony during summation. A further warning was provided that the trial

\begin{flushleft}
\textsuperscript{898} N.J. R. Evid. 104(a).
\end{flushleft}
must not be reduced to a battle of highlight films. The testimony must be an aid to the argument of counsel and not an end in itself.

In State v. Miller, the Supreme Court addressed whether the trial court could play back video-recorded witness testimony at the jury’s request. Condella, Muhammad, and Miller pointed out that playing back recorded testimony reveals more than a sterile read-back does; allowing jurors to not only recall specific testimony but also to assess a witness’ credibility. Miller stated that playback is superior to a read back and that if jurors’ memories are to be refreshed, they should have the benefit of the superior form of assistance.

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Appendix

The chart below contains the contact information for the Subpoena Compliance Centers for various cell phone companies and social media networks. 901

<table>
<thead>
<tr>
<th>Provider</th>
<th>Address</th>
<th>Phone Number</th>
<th>Fax Number</th>
<th>Notes and Instructions</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T</td>
<td>AT&amp;T Mobility (Cingular) National Subpoena Compliance Center P.O. Box 24679 West Palm Beach, FL 33416</td>
<td>(800) 291-4952 Subpoena 8am-5pm M-F CST</td>
<td>-www.att.com/subpoena -Can fax subpoena to them -Typically takes 3 months to get their records -GoPhone prepaid service = AT&amp;T</td>
<td>Information Required for Subpoena -Full description of information requested -Subscriber information -Usage records for outgoing calls -Timeframes -Complete list of target telephone numbers with area code -Electronic method for return of records produced (i.e., email address/fax number) Procedure for Service of Process -“Online tool” available for certain requests and to expedite subpoena requests at <a href="http://www.att.com/subpoena">www.att.com/subpoena</a> -Address subpoena to proper AT&amp;T legal entity -Use corresponding AT&amp;T legal entity fax, or “online tool” fax if applicable</td>
</tr>
<tr>
<td>Cricket</td>
<td>Cricket Communications Subpoena Communications 10307 Pacific Center Court San Diego, CA 92121</td>
<td>(858) 882-9301 Connects to Neustar for records</td>
<td>(858) 882-9237</td>
<td>- Roaming partner with MetroPCS Information Required for Subpoena -Phone number, timeframe, requested information</td>
</tr>
<tr>
<td>MagicJack</td>
<td>MagicJack YMax Communications ATTN: Lorrain Fancher 5700 Georgia Avenue West Palm Beach, FL 33405</td>
<td>(561) 586-3380</td>
<td>(888) 762-2120</td>
<td>-<a href="http://www.magicjack.com">http://www.magicjack.com</a> <a href="mailto:-Lorrain.Fancher@ymaxcorp.com">-Lorrain.Fancher@ymaxcorp.com</a> Information Required for Subpoena -Phone number, timeframe, requested information</td>
</tr>
</tbody>
</table>

901 Updated as of May 20, 2013; see also http://cryptome.org/isp-spy/cellular-spy3.pdf
<table>
<thead>
<tr>
<th>Company</th>
<th>Address</th>
<th>Phone Numbers</th>
<th>Information Required for Subpoena</th>
<th>Procedure for Service of Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>MetroPCS</td>
<td>MetroPCS Attn: Custodian of Records 2250 Lakeside Boulevard Richardson, TX 75782</td>
<td>(800) 571-1265 (972) 860-2635</td>
<td>Phone number, timeframe, requested information</td>
<td>Email: <a href="mailto:subpoenas@metropcs.com">subpoenas@metropcs.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Procedure for Service of Process - Via fax or email is preferred</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Call records are kept for 6 months - Text records are kept for 60 days</td>
</tr>
<tr>
<td>Sprint / Nextel</td>
<td>Sprint PCS Wireless Sprint Spectrum, L.P. 6160 Sprint Parkway Overland Park, KS 66251</td>
<td>Sprint Spectrum (800) 829-0965 Compliance HQ (888)877-7330</td>
<td>See manual for specific/additional information - Virgin Mobile prepaid service = Sprint - Boost Mobile prepaid service = Nextel</td>
<td>Trials and/or Appearances <a href="mailto:CSTrialTeam@sprint.com">CSTrialTeam@sprint.com</a></td>
</tr>
<tr>
<td>T-Mobile</td>
<td>Subpoena Compliance Department 4 Sylvan Way Parsippany, NJ 07054</td>
<td>(973) 292-8911 Law enforcement 11am-5pm EST</td>
<td>Phone number, timeframe, requested information</td>
<td>Procedure for Service of Process - Via U.S. mail or fax</td>
</tr>
<tr>
<td>TracFone Wireless</td>
<td>TracFone Wireless, Inc. Subpoena Compliance 9700 NW 112th Avenue Miami, FL 33178</td>
<td>(800) 820-8632</td>
<td>- Also sold as Net10, SafeLink and StraightTalk</td>
<td></td>
</tr>
<tr>
<td>U.S. Cellular</td>
<td>U.S. Cellular Subpoena Compliance Department One Pierce Place, Suite 800 Itasca, IL 60143</td>
<td>(630) 875-8270 (866) 669-0894</td>
<td>Phone number, timeframe, very specific details about requested information</td>
<td>Procedure for Service of Process - Via U.S. mail or fax</td>
</tr>
<tr>
<td>Verizon</td>
<td>Cellco Partnership</td>
<td>(800) 451-5242 Subpoenas (888) 667-0028</td>
<td>- Alltel, AirTouch, Jitterbug, INpulse, and OAS Phone in the box, are all Verizon companies</td>
<td></td>
</tr>
<tr>
<td>Company</td>
<td>Address</td>
<td>Contact Person</td>
<td>Phone</td>
<td>Email</td>
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<tr>
<td>dba Verizon Wireless</td>
<td>180 Washington Valley Road Bedminster, NJ 07921</td>
<td>Custodian of Records</td>
<td>(888)667-0026</td>
<td>Information Required for Subpoena - Phone number, timeframe, detailed description of information requested</td>
</tr>
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<td></td>
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<td></td>
<td></td>
<td>Procedure for Service of Process - Via fax is preferred</td>
</tr>
<tr>
<td>Vonage</td>
<td>Vonage Holdings Corp.</td>
<td>Administrator – Legal</td>
<td>(732) 231-6705</td>
<td>Information Required for Subpoena - Phone number, timeframe, requested information</td>
</tr>
<tr>
<td></td>
<td>ATTN: Legal Affairs</td>
<td>Department</td>
<td></td>
<td>Procedure for Service of Process - Via U.S. mail or by fax</td>
</tr>
<tr>
<td></td>
<td>23 Main Street Holmdel, NJ 07733</td>
<td></td>
<td>(732) 202-5221</td>
<td><a href="http://www.vonage.com">http://www.vonage.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Email: <a href="mailto:SubpoenaProcessTeam@vonage.com">SubpoenaProcessTeam@vonage.com</a></td>
</tr>
<tr>
<td>Facebook</td>
<td>Facebook Attn: Legal Department</td>
<td></td>
<td>(650) 543-4800</td>
<td>Procedure - Contact via email (<a href="mailto:legal@facebook.com">legal@facebook.com</a>) or phone to inform them a request is coming. - Fax subpoena then follow-up with email copy and a paper copy</td>
</tr>
<tr>
<td></td>
<td>156 University Avenue Palo Alto, CA 94301</td>
<td></td>
<td>(650) 644-0239</td>
<td>Information Available from Facebook - User Neoprint, Photoprint, Contact Info, Group Contact Info, IP Logs</td>
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<td></td>
<td>Required Information for Subpoena - Facebook user ID or Group ID - If ID is unknown, give account email address</td>
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<td></td>
<td>Other Helpful Information for Subpoena - Full name, school or networks, date of birth, known email addresses, AIM ID, known phone numbers, physical or IP addresses, URL to Facebook profile, other known website</td>
</tr>
<tr>
<td>Foursquare</td>
<td>Foursquare Labs, Inc.</td>
<td>Law enforcement only</td>
<td>No phone support</td>
<td></td>
</tr>
<tr>
<td></td>
<td>R68 Broadway, 10th Floor,</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: The information is from the provided document and may contain various formats and details specific to each company's process.
<table>
<thead>
<tr>
<th>Service Provider</th>
<th>Address</th>
<th>Contact Information</th>
<th>Required Information for Subpoena</th>
<th>Procedure for Service of Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York, NY</td>
<td>10012 Attn: Legal Department</td>
<td>(561) 586-3380 (888) 762-2120</td>
<td>Phone number, timeframe, requested information</td>
<td>- Via fax or email is preferred - Call records are kept for 6 months - Text records are kept for 60 days</td>
</tr>
<tr>
<td>MagicJack</td>
<td>MagicJack YMax Communications ATTN: Lorrain Fancher 5700 Georgia Avenue West Palm Beach, FL 33405</td>
<td>(561) 586-3380 (888) 762-2120</td>
<td>Phone number, timeframe, requested information</td>
<td>- Offers cell service through Verizon - May be necessary to send subpoena to both Quest and to Verizon</td>
</tr>
<tr>
<td>MetroPCS</td>
<td>MetroPCS Attn: Custodian of Records 2250 Lakeside Boulevard Richardson, TX 75782</td>
<td>(800) 571-1265 (972) 860-2635</td>
<td>Phone number, timeframe, requested information</td>
<td>Email: <a href="mailto:subpoenas@metropcs.com">subpoenas@metropcs.com</a></td>
</tr>
<tr>
<td>MySpace</td>
<td>Custodian of Records MySpace.com 407 N. Maple Drive Beverly Hills, CA 90210</td>
<td>None</td>
<td>The “Friend ID” - Requested information</td>
<td>Records concerning the identify of the user with the Friend ID #### consisting of name, postal code, county, e-mail address, date of account creation, IP address at account sign-up, logs showing IP address and date stamps for account access, and the contents of private messages in the user’s inbox, and sent mail folders.</td>
</tr>
<tr>
<td>Pinterest</td>
<td>Pinterest, Inc. 52 7th St. San Francisco, CA 94107</td>
<td>650-561-5407</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td>Quest</td>
<td>Quest Communications Subpoena Compliance 1801 California Street, 11th Floor</td>
<td>(303) 896-2522 8am-5pm CST M-F</td>
<td>Phone number, timeframe</td>
<td>Offers cell service through Verizon - May be necessary to send subpoena to both Quest and to Verizon</td>
</tr>
</tbody>
</table>

- Offers cell service through Verizon - May be necessary to send subpoena to both Quest and to Verizon
| **Sprint/Nextel** | Sprint PCS Wireless  
Sprint Spectrum, L.P.  
6160 Sprint Parkway  
Overland Park, KS 66251 | Sprint Spectrum  
(800) 829-0965  
Compliance HQ  
(888) 877-7330  
ASAP Requests  
(913) 315-8774 | Compliance HQ  
(913) 315-0736  
(816) 600-3111  
ASAP Requests  
(816) 600-3121 | Procedure for Service of Process  
-Fax is preferred  
See manual for specific/additional information  
-Virgin Mobile prepaid service = Sprint  
-Boost Mobile prepaid service = Nextel  
Trials and/or Appearances  
CSTrialTeam@sprint.com |
|---|---|---|---|---|
| **T-Mobile** | Subpoena Compliance Department  
4 Sylvan Way  
Parsippany, NJ 07054 | (973) 292-8911  
Law enforcement  
11am-5pm EST | (973) 292-8697 | Information Required for Subpoena  
-Phone number, timeframe, requested information  
Procedure for Service of Process  
-Via U.S. mail or fax |
| **TracFone Wireless** | TracFone Wireless, Inc. Subpoena Compliance  
9700 NW 112th Avenue  
Miami, FL 33178 | (800) 820-8632 | (305) 715-6932 | - Also sold as Net10, SafeLink and StraightTalk  
Information Required for Subpoena  
-Phone number, timeframe, requested information  
Procedure for Service of Process  
-Fax preferred  
-Allow 7 – 10 days for processing of request |
| **Twitter** | Twitter, Inc.  
c/o Trust & Safety  
795 Folsom Street, Suite 600  
San Francisco, CA 94107  
Twitter, Inc.  
1355 Market St.  
Suite 900  
San Francisco, CA 94103 | No phone support  
If not law enforcement use  
http://support.twitter.com | Attn: Trust & Safety  
(415) 222-9958 | Required Information for Subpoena  
-Username and URL of Twitter profile  
-Details of specific information requested  
-Relationship of information to the investigation  
-Valid e-mail address so Twitter can contact you  
Service of Process  
Twitter accepts legal process ONLY from LEO delivered by mail or by fax  
Questions can be sent to:  
lawenforcement@twitter.com  
Soon to be archived in the Library of Congress:  
<p>| <strong>U.S. Cellular</strong> | U.S. Cellular | (630) 875-8270 | (866) 669-0894 | -Roaming partner with Verizon |</p>
<table>
<thead>
<tr>
<th>Company</th>
<th>Address</th>
<th>Phone Number</th>
<th>Additional Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Subpoena</strong></td>
<td>Compliance Department One Pierce Place, Suite 800 Itasca, IL 60143</td>
<td></td>
<td><strong>Information Required for Subpoena</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Phone number, timeframe, very specific details about requested information</td>
</tr>
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<td></td>
<td><strong>Procedure for Service of Process</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Via U.S. mail or fax</td>
</tr>
<tr>
<td><strong>Verizon</strong></td>
<td>Cellco Partnership dba Verizon Wireless Custodian of Records 180</td>
<td>(800) 451-5242</td>
<td><strong>Subpoenas</strong></td>
</tr>
<tr>
<td></td>
<td>Washington Valley Road Bedminster, NJ 07921</td>
<td></td>
<td>(888) 667-0028</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Court Orders (888)667-0026</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Alltel, AirTouch, Jitterbug, INpulse, and OAS Phone in the box, are all Verizon</td>
</tr>
<tr>
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<td></td>
<td></td>
<td>companies</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong>Information Required for Subpoena</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Phone number, timeframe, detailed description of information requested</td>
</tr>
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<td></td>
<td><strong>Procedure for Service of Process</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Via fax is preferred</td>
</tr>
<tr>
<td><strong>Vonage</strong></td>
<td>Vonage Holdings Corp. ATTN: Legal Affairs Administrator – Legal Department 23 Main Street Holmdel, NJ 07733</td>
<td>(732) 231-6705</td>
<td><strong>Information Required for Subpoena</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Phone number, timeframe, requested information</td>
</tr>
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<td><strong>Procedure for Service of Process</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Via U.S. mail or by fax</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong><a href="http://www.vonage.com">http://www.vonage.com</a></strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Email: <a href="mailto:SubpoenaProcessTeam@vonage.com">SubpoenaProcessTeam@vonage.com</a></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong><a href="http://www.vonage.com">http://www.vonage.com</a></strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><strong><a href="http://www.vonage.com">http://www.vonage.com</a></strong></td>
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