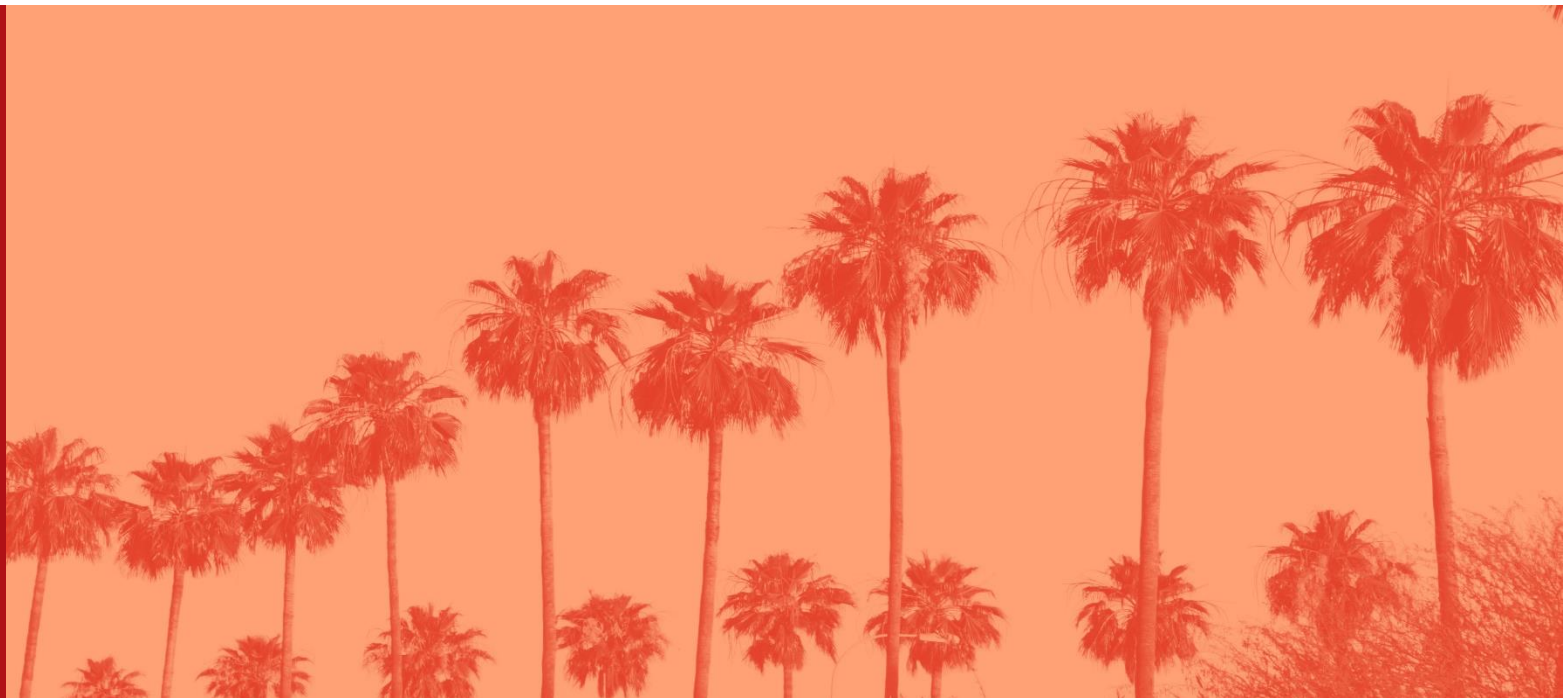


LOOKING AHEAD

- > **Brent Cossrow**– Fisher Phillips, Philadelphia
Chair of the E-Discovery Committee
- > **Usama Kahf** - Fisher Phillips, Irvine
Vice Chair of the E-Discovery Committee



2019 FISHER PHILLIPS INSIDE COUNSEL CONFERENCE
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Defensible ESI Preservation, Collection & Ethics for In-House & Outside Counsel

Ethics of ESI Preservation in Employment Cases

- > When does an employer have a duty to preserve various types of evidence in employment cases?
- > How should employers satisfy the duty to preserve?

What about employee-owned devices?



Employees' Text Messages

True or False?

- > An employer that fails to preserve its employees' relevant text messages may be sanctioned for spoliation of evidence.



Duty to Preserve

- > Employers have a duty to preserve evidence within their “**possession, custody or control**” that is relevant to reasonably anticipated or pending litigation
- > This is complicated by emerging technologies, particularly use of social media and messaging applications in the workplace, as well as employee use of personal devices

But What Is “Control”?

Control exists when the employer has:

1. The right or authority to obtain the data, or
2. The practical ability to obtain the data, or
3. **Awareness of the employee's possession and use of devices and data for work purposes?**

Definition of “Control”

The right or authority to obtain the data

- > 1st, 3rd, 4th, 6th, 9th, and 11th Circuits
- > Language in employment contracts that requires employee return of files upon request or to give the employer access to a device used for work
- > Policies that define ESI on corporate computers as belonging to employers
- > BYOD policies may give rise to “control”

Definition of “Control”

The practical ability to obtain the data

- > 2nd, 4th, 8th, 10th, 11th, and DC Circuits
- > Where employer can require that employees turn over their devices on demand
- > Forensic images of computers that retrieve .html files from personal email accounts

“Control” Based on Right or Ability to Obtain

The University of Phoenix

- > Employer failed to preserve a thumb drive owned and used by its managing director
- > Federal court found “control” by the employer because employer “had control over the thumb drive when it went missing” because even though the managing director had personal possession of the thumb drive, his employer had the authority and ability to ask him to preserve the documents and things in his possession

“Control” Based on Awareness of Use

Cotton v. Costco Wholesale Corp.

- > Text messages stored on employee personal cell phones that are **not** used for work-related purposes do not fall within an employer's possession, custody, or control

“Control” Based on Awareness of Use

Puerto Rico Tel. Co. v. San Juan Cable LLC

- > Company had a duty to preserve relevant emails from personal email accounts of its former officers because it “**presumably knew**” the officers used their personal email for business
- > Forensic analysis of personal email accounts and computers may be appropriate to determine if critical emails were lost

“Control” Based on Awareness of Use

Perez v. Shippers Transport

- > U.S. DOL lawsuit accusing shipping employer of FLSA violations
- > Dispatcher testified his practice was to delete all of his text messages on a **daily basis**, and **no one ever instructed him to preserve** any text messages

“Control” Based on Awareness of Use

Perez v. Shippers Transport

- > Court sanctioned employer for failing to adequately preserve ESI, including text messages
- > **Use of text messaging was too widespread for the employer to claim it was unaware of the practice**
- > Employer failed to even ask any employees whether they engaged in texting for work

“Control” Based on Awareness of Use

Perez v. Shippers Transport

- > Court sanctioned employer for failing to adequately preserve ESI, including text messages
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Practical Considerations & “Control”

- > Can the employer conduct a precise search to isolate the relevant ESI to avoid an invasive search of an employee's personal ESI?
- > How will it look in the context of the case if this ESI is mishandled, irretrievable or spoliated?
- > Is your employee's personal device this the only source of the relevant ESI?

Practical Considerations & “Control”

- > Is it possible to capture a forensic image of a device (or its equivalent) and put the image on ice – maybe it will not be needed in the case but the employer will have the ESI locked down?
- > Are there applicable privacy protections that might make the collection improper or illegal?
 - > Federal and state privacy protection statutes
 - > Password protection laws

Is there an Ethical Duty to Preserve?

- > State ethics rules require attorneys to exercise candor and fairness and prohibit making false statements to a tribunal, which includes unlawfully obstructing another party's access to evidence or unlawfully altering, destroying or concealing evidence.

Is there an Ethical Duty to Preserve?

- > Thus, to meet ethical standards, attorneys must know when their clients have a duty to preserve evidence and recommend appropriate steps to comply with the duty to preserve
- > **Recent changes to ethics rules also require attorneys to be sufficiently familiar with technology to execute ethical responsibilities**

Preservation Communications

Litigation Holds

- > Implementing a litigation hold is a critical step
- > **But it is not the only step!**
- > Preservation includes identifying the sources and custodians of relevant information and taking steps to preserve (such as discontinuing auto deletion, locking down certain devices, or making forensic images)
- > It also involves regular follow-up

Litigation Hold Letters and Memoranda

Are Litigation Hold Letters Privileged?

- > They provide legal advice to a client regarding the legal duty to preserve relevant evidence and how to do this

**... so these communications
are protected by the privilege
and work product doctrine, right?**

Not So Fast ... Not All Holds Are The Same

In re Blue Cross Blue Shield Antitrust Litigation

- > Court held that internal litigation holds were merely “**instructions**” from the company to its employees even if it was drafted by an attorney and labeled “ATTORNEY-CLIENT PRIVILEGED”
- > **Best Practice - prepare at least two litigation hold writings to the client – one that is privileged and one that is meant to be an internal managerial instruction to employees**

Ethics Opinions Regarding Preservation of ESI

California State Bar, Formal Opinion No. 2015-195

- > An attorney's duty of competence in litigation matters requires a basic understanding of e-discovery issues and the technological challenges involved in preservation and collection of ESI
- > **Higher level knowledge and ability may be required in some cases, which may require engaging an attorney who is highly experienced in e-discovery**

Ethics Opinions Regarding Preservation of ESI

California State Bar, Formal Opinion No. 2015-195

- > An attorney lacking the required competence for e-discovery has three options
 - > Learn
 - > Consult technical consultants or competent counsel
 - > Decline the client representation

Ethics Opinions Regarding Preservation of ESI

Pennsylvania Rules of Professional Conduct

- > Rule 1.1, Competence
- > Rule 1.6, Confidentiality of Information
- > Rule 5.3, Responsibilities Regarding Non-lawyer Assistance

Each Rule was amended in 2013 to require attorneys to be sufficiently familiar with ESI, media and electronic devices to avoid problems like spoliation and inadvertent disclosures of confidential information.

Ethics Opinions Regarding Preservation of ESI

Kentucky Bar Association Formal Ethics Opinion E-446 (July 20, 2018)

- > Attorneys have ethical responsibility to implement cybersecurity measures to protect client information, and to ensure that their employees and third parties they engage comply with those measures

Ethics Regarding Preservation of ESI

Fed. R. Civ. P. 37(e)'s advisory committee note to the 2015 amendment

- > “It is important that counsel become familiar with their clients’ information systems and digital data” in the discovery of ESI

FINAL QUESTIONS



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THANK YOU

FOR JOINING US

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