



Important eDiscovery Case Law Decisions for September 2020

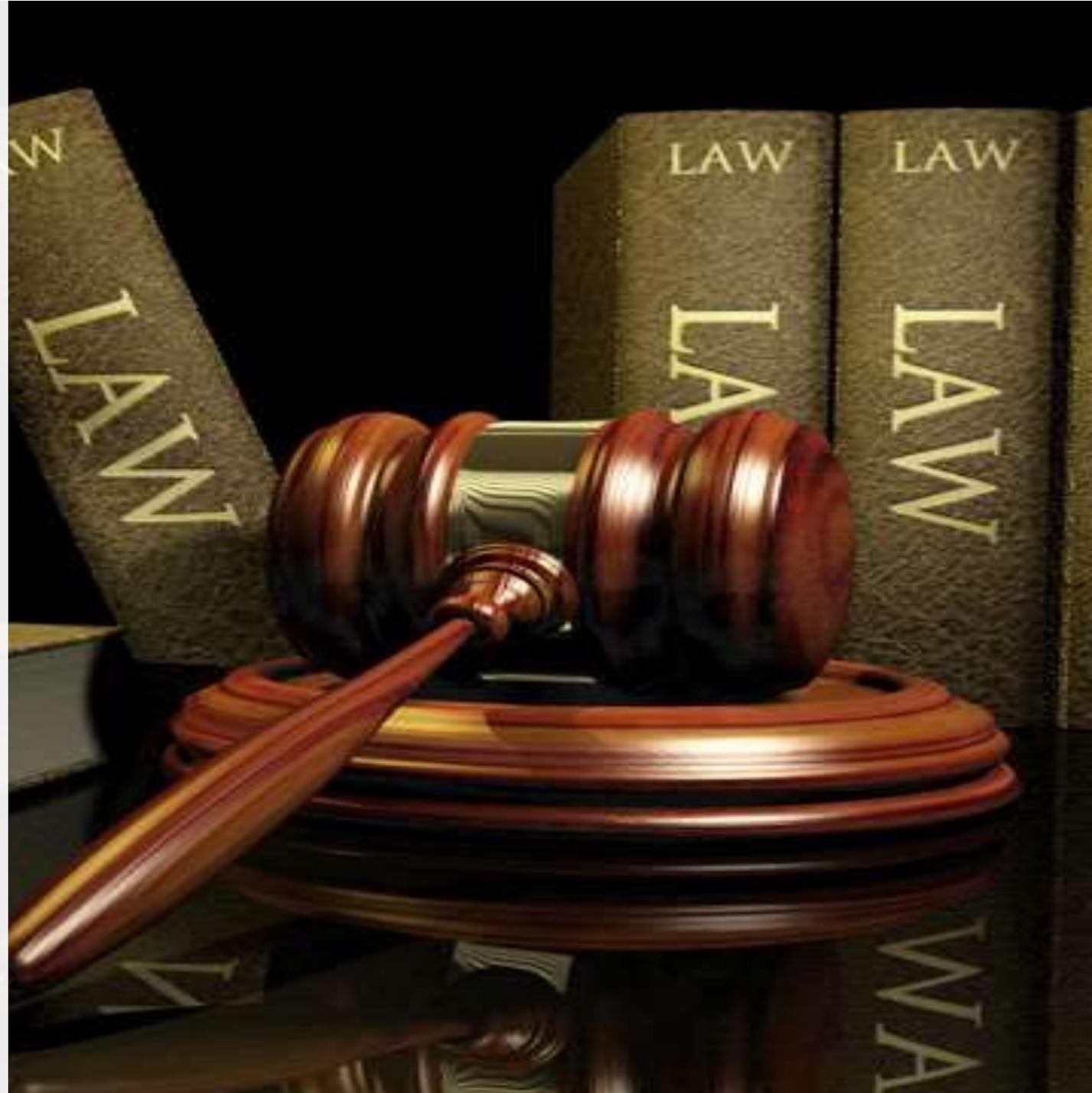
Presented by:

Doug Austin, Editor, eDiscovery Today

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Craig Ball, Craig D. Ball, P.C.

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Overview

Case Topics to Be Discussed

- Efficacy of Boilerplate Objections in 2020
- How Courts Should Address Search Term Disputes
- What Parties Should Do When Correcting Production Deficiencies
- When Courts Should Conduct In Camera Review to Resolve Privilege Disputes
- What Forensic Examiners Need to Discover for Potential Spoliation Sanctions
- **Bonus Case!** Rule 26(g) Attorney Certification Violations and Sanctions
- Questions

Presenter Credentials

- **[Doug Austin](#)**: Doug is the Editor of [eDiscovery Today](#) and is an established eDiscovery thought leader and blogger with over 30 years of experience providing eDiscovery best practices, legal technology consulting and technical project management services to numerous clients.
- **[Tom O'Connor](#)**: Tom is a nationally known consultant, speaker and writer in the field of computerized litigation support systems. Tom's consulting experience is primarily in complex litigation matters where he has worked on numerous major cases, most recently Opioid litigation.
- **[Craig Ball](#)**: Craig is a Texas trial attorney, certified computer forensic examiner and Adjunct Professor at the University of Texas teaching Electronic Evidence and Digital Discovery and at Tulane University Law School teaching Digital Evidence. Craig brings expertise in digital forensics, emerging technologies, visual persuasion, electronic discovery, and trial tactics, limiting his practice to service as a court-appointed Special Master and consultant in electronically stored information.
- **[Mary Mack](#)**: Mary is the CEO and Chief Legal Technologist of [EDRM](#). Mary is known for her skills in relationship and community building as well as for the depth of her e-discovery knowledge. She is frequently sought out by media for comment on industry issues, and by conference organizers to participate, moderate a panel, lead a workshop or deliver a keynote.

Disclaimer

Ideas expressed here are not necessarily those of our clients or partners and may simply represent ideas intended to be helpful in the context of this seminar.

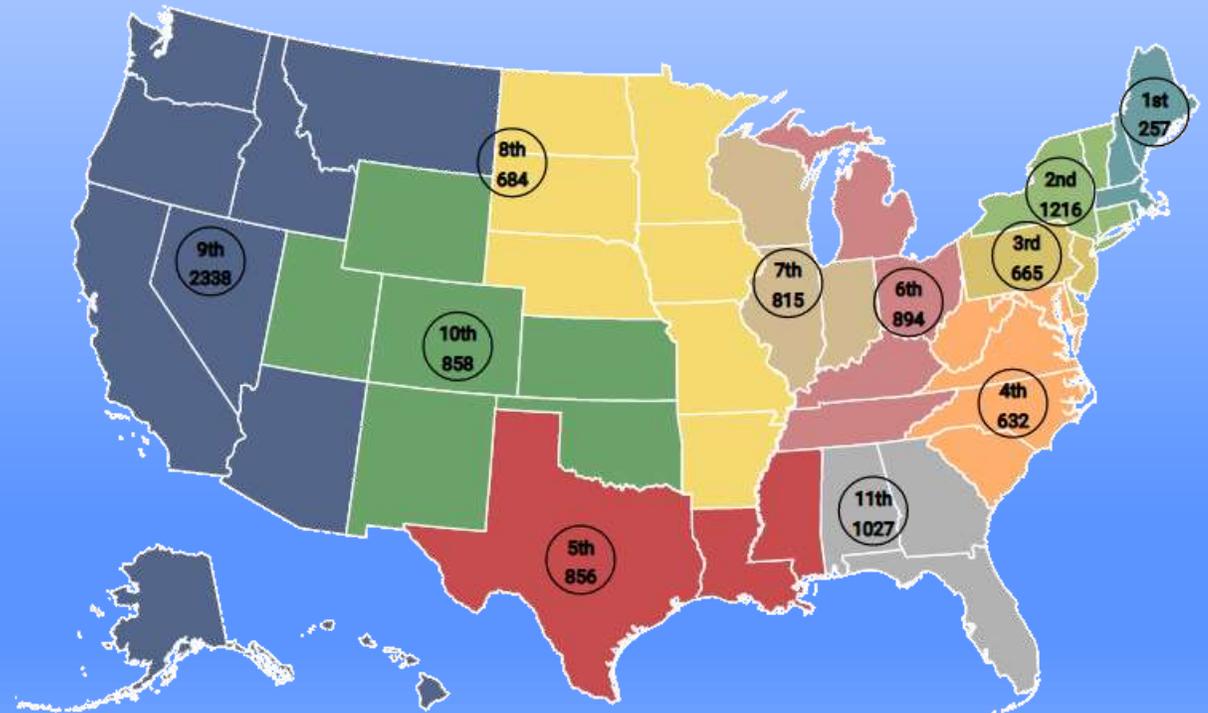
Sources of Cases to Be Discussed



Typically cases covered within the past month



13,484 lifetime Federal and State case law opinions*



*As of 8/29/2020



Important eDiscovery Case Law Decisions for September 2020

Efficacy of Boilerplate Objections in 2020

Saleh v. Pfister, No. 18 C 1812 (N.D. Ill. July 30, 2020)

- In this case concerning a Muslim inmate at an Illinois Correctional Center and a conflict between the schedule for a trip to the commissary and Friday Jumu'ah prayers, the defendant, after making boilerplate objections, was late with production and was ordered to complete it by March 31, 2019;
- When defense counsel produced its entire production – 4 pages of documents – plaintiff's counsel speculated that defendant had either not conducted a good faith search or destroyed documents;
- Illinois Magistrate Judge Jeffrey Cole stated: ***“First things first. Time and time again, attorneys are warned that boilerplate objections are unacceptable. They are tantamount to not making any objection at all...The boilerplate answer constituted a waiver of whatever objection, if any, IDOC might properly have made. Boilerplate objections, as we have shown, are ineffectual in all contexts.”***;
- Judge Cole also granted the plaintiff's motions, ordering defendant to ***“1) produce a witness for an IDOC 30(b)(6) deposition; 2) produce all documents, wherever located, that relate to the incidents leading to plaintiff's grievance, any investigation done regarding the grievance, and any determinations made regarding that grievance; and 3) identify within seven days Defendant Pfister's so-called designee.”***

Courts And Search Term Disputes

McMaster v. Kohl's Dep't Stores, Inc., No. 18-13875 (E.D. Mich. July 24, 2020)

- In this discrimination case related to the Americans With Disabilities Act (“ADA”), the plaintiff filed a motion to compel discovery regarding several specific discovery requests and Michigan Magistrate Judge R. Steven Whalen ruled on the time periods and scope for searches for several custodians;
- In ruling on search terms, Judge Whalen cited ***United States v. O’Keefe, 537 F. Supp. 2d 14, 23–24 (D.D.C. 2008)***, which stated: ***“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.”*** Judge Whalen stated: ***“I, for one, have no interest in going where angels fear to tread. Therefore, if the parties cannot agree on appropriately limited search terms, they will share the cost of retaining an expert to assist them. If they still cannot agree, then Plaintiff may renew his motion regarding the search terms, and will provide the Court with an expert report substantiating his position.”***;
- Judge Whalen also denied the plaintiff's interrogatory request for a description of the defendant's methodology, stating ***“This is, in effect, discovery about discovery”***.

Correcting Production Deficiencies

[White, et al. v. Wiseman, et al. No. 2:16-cv-01179-CW-JCB \(D. Utah July 6, 2020\)](#)

- The defendants identified significant problems with the plaintiffs' production, so the plaintiffs agreed to replace their document production;
- However, in the plaintiffs' partial replacement production, the Bates numbers used in that production did not correspond to those used in the original production and the defendants were unable to determine the designation status of documents under the standing protective order;
- In response to the defendants' motion to compel, the plaintiffs argued that they should not be required "to engage in [such] a time consuming and unnecessary process" when nothing in the rules requires them to do so;
- Utah Magistrate Judge Jared C. Bennett disagreed, stating: ***"Although J White is correct in asserting that there is no rule, per se, that requires it to match Bates numbers between two productions, this fails to consider this Court's discretion to regulate discovery to ensure that it is relevant and proportional to the needs of this case"*** and ordering the plaintiffs to correct the production deficiencies.

Courts And *In Camera* Review

Washtena Cty Employees' Retirement Sys. v. Walgreen Co. et al., No. 15 C 3187 (N.D. Ill. July 14, 2020)

- In this securities fraud class action lawsuit against Walgreens, its former CEO and CFO, the lead plaintiff moved for an *in camera* inspection of **75** documents (out of approximately **5,700** documents designated privileged from those listed on privilege logs tendered by defendant Walgreens);
- The plaintiffs sought review not only of the documents in question, but hoped that guidance from the court's decision on the review of those documents would be instructive to the parties' on additional disputes over logged documents;
- Illinois Magistrate Judge Gabriel A. Fuentes, in denying the plaintiffs' request for *in camera* review stated ***“ultimately the question of whether to engage in an in camera review lies within the Court's discretion, and the Court ought not to engage in an in camera review of even a manageable number of documents if the review is not warranted...Where a court's discretion is involved, ‘two judges can reach two correct yet contrary conclusions based on identical fact patterns.’”***

Forensic Examinations and Spoliation Sanctions

[Bragg v. SW Health Sys., Inc., No. 18-cv-00763-MSK-NRN \(D. Colo. July 13, 2020\)](#)

- In this case involving claims of wrongful termination in retaliation, when the defendant produced less emails in discovery than plaintiff believed existed, plaintiff hired an expert to conduct a forensic examination of the computer and the file folders;
- The plaintiff's expert found no evidence that any files had been deleted, and could only testify that turning the computer off and on would have written over unallocated space on the hard drive; in turn, the defendant testified that its legal hold practices (including placing a write-block on the plaintiff's computer) had been followed;
- Colorado Magistrate Judge N. Reid Neureiter denied the plaintiff's motion for terminating sanctions, stating ***"If the Court were to accept Plaintiff and [the expert's] position, spoliation would necessarily occur in almost every lawsuit involving ESI"***;
- Judge Neureiter also stated he would consider a separate Rule 11 motion filed by the defendant for sanctions against the plaintiff for a filing a motion for an improper purpose.

Rule 26(g) Attorney Certification Violations

Optronic Tech., Inc. v. Ningbo Sunny Elec. Co., Ltd., No. 16-cv-06370-EJD (VKD) (N.D. Cal., June 1, 2020)

- In this antitrust case about the sale of telescopes, the Court had previously found that the defendant had deliberately withheld certain documents and ordered it to submit a declaration from a person with knowledge describing with specificity how it conducted a search for documents;
- The defendant did not comply, instead stating it “has been unable to locate any individual competent to sign a declaration describing with specificity” how it searched for responsive documents;
- According to California Magistrate Judge Virginia K. DeMarchi, the defendant’s failure to comply with its discovery obligations left the question as to whether defendant’s outside counsel **“failed to make the reasonable inquiry required by Rule 26(g) when signing Ningbo Sunny’s document request responses representing that all responsive documents would be produced.”**;
- As a result, Judge DeMarchi granted the plaintiff’s motion for Rule 26(g) sanctions, ordering monetary sanctions to compensate the plaintiff for attorneys’ fees and costs it incurred with respect to several activities it conducted in response to the defendant’s failure to meet its discovery obligations.

Questions/Comments/Contact

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Thank You
SO MUCH
Everyone