BASICS OF E-DISCOVERY

Jason E. Starling
Willis Spangler Starling
4635 Trueman Boulevard, Suite 100
Hilliard, Ohio 43026
(614) 586-7900
jstarling@willisattorneys.com

What is E-Discovery?

The discovery of electronically stored information or "ESI."

- E-mails
- Text Messages
- Social Media
- Other Electronic Communications (Facebook Messenger, LinkedIn Messages, Skype Messages, etc.)
- Word-Processed Documents
- Spreadsheets
- PowerPoint Presentations
- Audio and Audiovisual Recordings
- HRIS Systems
- Cellular Phone Data – Browser History, Application Access Dates and Times, etc.

Why Do E-Discovery?

WILLIS // SPANGLER // STARLING

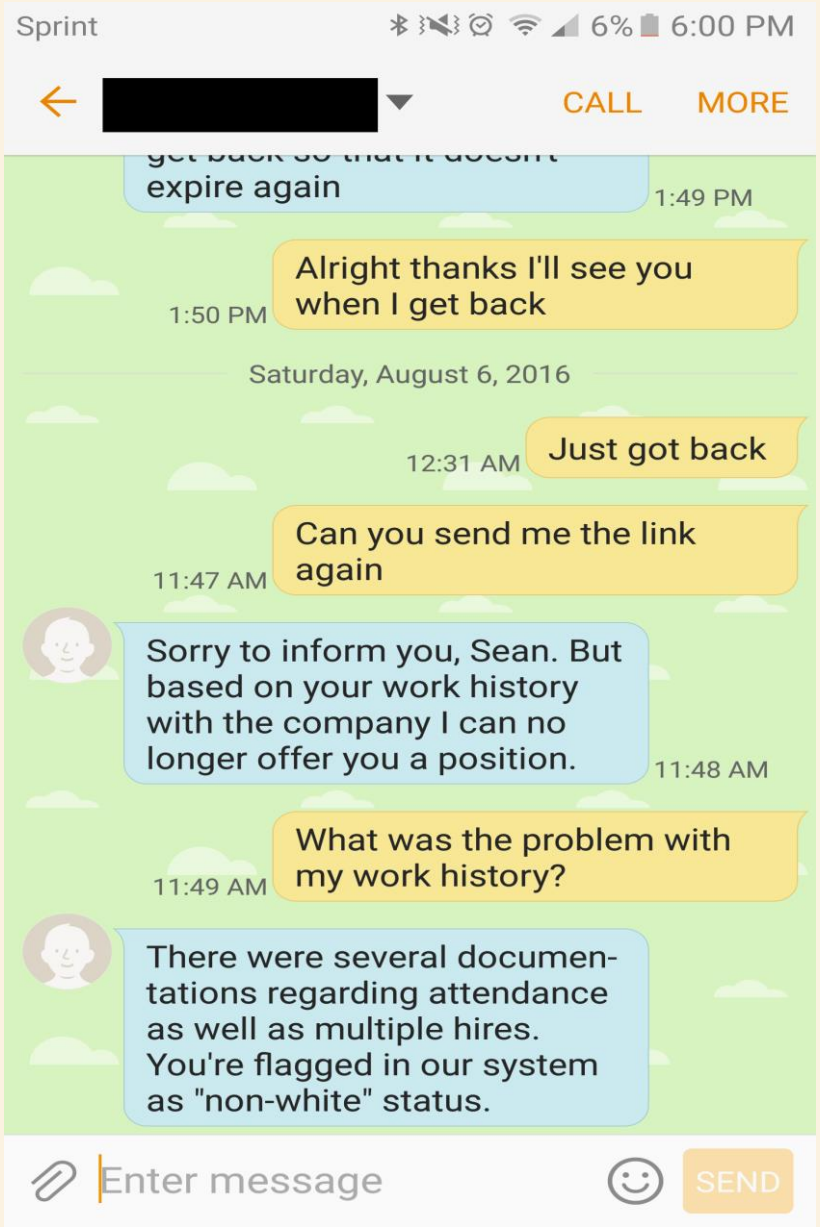
REASON #1: Because people lie under oath all the time!

WILLIS // SPANGLER // STARLING

How Depositions in Many Cases May Proceed

WILLIS // SPANGLER // STARLING

REASON #2: Because people are stupid and say stupid things in electronic communications!



WILLIS // SPANGLER // STARLING

Good Afternoon,

Michelle Gallo Please see attached claim.... We can we terminate Mr. Jackson.

Crystal Rice-Minor
Human Resource Manager
Brinks U.S.

Cell [redacted]
Office
Fax
Email:
website: www.brinksinc.com

From: Dave T Gruber
Sent: Thursday, January 12, 2017 3:56 PM
To: Crystal Rice-Minor
Subject: FW: Otavio Jackson 006098-126142-WC-01

Dave Gruber
City Manager Columbus Ohio B0160/B0137
1362 Essex Avenue Columbus Ohio 43211
Work # [redacted]
Cell
Fax
Dave.gruber@brinksinc.com

From: Deborah Love [mailto:[redacted]
Sent: Thursday, January 12, 2017 3:37 PM
To: Michelle A. Gallo; Paulette M. Ivan
Cc: Lisa McVay; Dave T Gruber
Subject: Otavio Jackson 006098-126142-WC-01

Good Afternoon,

I am happy to see that the claim was denied and the TTD also was denied. I wanted to share the orders so that you could see the denials.

Thanks,
Deb

Gallagher Bassett is committed to delivering exceptional service and we are here to help.
Please contact my supervisor [redacted] with any questions.

Deborah Love | Senior Resolution Manager | Gallagher Bassett

From: Chris Miller <cmiller@cmactrans.com>
Sent: Wednesday, August 17, 2016 10:12 PM
To: Unknown
Subject: Re: Fwd: Re: Brian Easter

Fuck that. He's getting replaced

On Aug 17, 2016 9:52 PM, "Samuel Wright" <swright@cmactrans.com> wrote:
This happened to me at Rush with a Brownstown driver.... we couldn't do anything. I had to just deal with his schedule.

Sent from my T-Mobile 4G LTE Device

-------- Original message --------
From: Chris Miller <cmiller@cmactrans.com>
Date: 8/17/16 6:30 PM (GMT-05:00)
To: Stacey Jose <sjose@cmactrans.com>
Cc: Unknown <swright@cmactrans.com>
Subject: Re: Brian Easter

What are our legal responsibilities? To operate this lane, I need a driver in place consistently.

On Aug 17, 2016 6:28 PM, "Stacey Jose" <sjose@cmactrans.com> wrote:

FYI

Brian Easter will be going on Intermittent FMLA. He is aware he needs to let dispatch know as soon as possible any time off he may need.

Challenges of Conducting E-Discovery

Challenge #1:

Attorneys and Parties Can Make Cases Personal

WILLIS // SPANGLER // STARLING

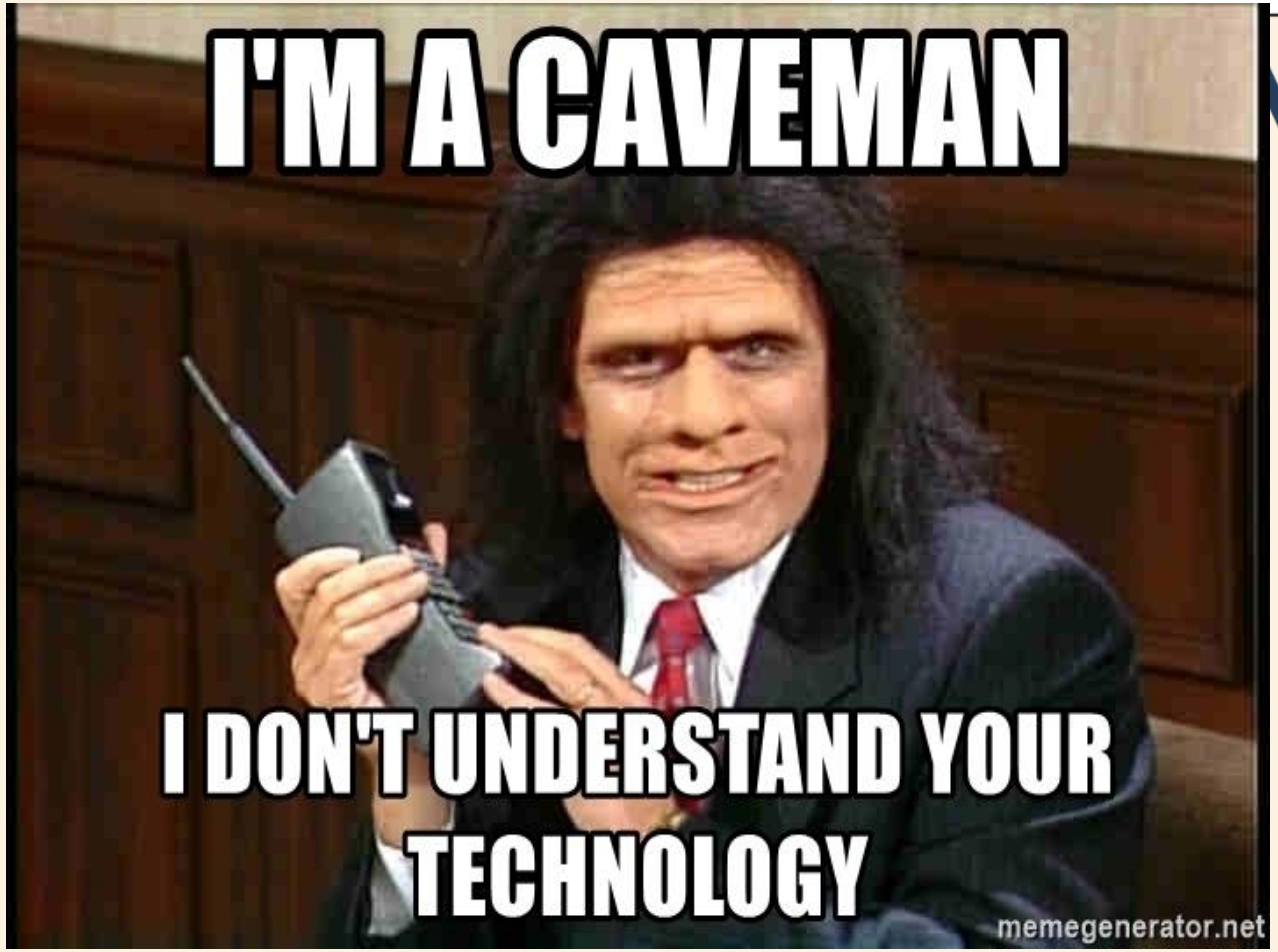
Opposing Counsel in Many Types of Cases

WILLIS // SPANGLER // STARLING

Challenge #2:
No One Knows What They Are Doing

WILLIS // SPANGLER // STARLING

Almost Every Lawyer and Judge



Challenge #3:
Unethical Opposing Counsel

WILLIS // SPANGLER // STARLING

You Will Encounter Unethical Lawyers in Your Practice, All The Time

Preserving ESI

WILLIS // SPANGLER // STARLING

Don’t Be
Like This Guy!

Preserving ESI: The Duty to Preserve

- Notice of potential litigation triggers the duty to preserve.
- Includes duty to preserve any potentially relevant evidence within your "possession, custody, or control."
- What triggers notice?
  - A filed lawsuit.
  - A threat letter from an attorney.
  - A litigation hold letter from an attorney.
  - A charge of discrimination.
  - A written or verbal threat from an employee or an employer to "file suit" or "take legal action" or similar words.
  - An internal complaint of discrimination or retaliation.

Preserving ESI: Mechanics of Preservation

- Representing a Company:
  - Identify All Potential Custodians
  - Give Each Custodian a Litigation Hold Letter
  - Give the IT Department a Litigation Hold Letter
  - Talk to the IT Department
  - Talk to Each Custodian
  - Turn off All Auto-Deletes
  - Follow-Up
- Representing an Individual:
  - Talk to the Client
  - Give the Client a Litigation Hold Letter
  - Turn off Auto-Deletes
  - Make Social Media Accounts Private
  - Follow-Up

Preserving ESI: Spoliation and Sanctions

- State Law Tort Claim
  - Some states have a spoliation tort available. Sometimes requires intentional conduct, but may also be available for negligent spoliation.
- Sanctions Under the Civil Rules
  - Rule 37(b): Cannot Produce in Response to Court Order Because of Spoliation
  - Rule 37(c): Cannot Supplement Because of Spoliation
  - Rule 37(e): Auto-Deletes
    - Federal Rule: The Completely Ridiculous New Rule 37(e), Must Show Specific Intent for Any Decent Sanction
  - Inherent Authority: Bad Faith Litigation Conduct
- Sanctions Available:
  - Attorneys' Fees
  - Permissive or Mandatory Adverse Inference
  - Exclusion of Evidence
  - Preclusion of Arguments
  - Default Judgment or Dismissal with Prejudice

Preserving ESI: Seeking Spoliation Sanctions

- File a Written Motion
- Do Not Be Too Hasty: You Do Not Have to File Before the Discovery Cut-Off. *See, e.g.*, *Freeman v. Collins*, No. 2:08-cv-71, 2014 WL 325631, at *7 (S.D. Ohio Jan. 29, 2014) ("[T]he Court rejects Defendants' assertion that Plaintiff's request for sanctions is untimely. No federal rule dictates the timing of a request for spoliation sanctions . . . [but] [t]his Court has previously concluded that a party who fails to raise the issue of spoliation sanctions prior to or within the final pretrial order has waived the issue absent an explanation for the delay.").
- Use the Discovery Process to Obtain the Evidence in Support of the Motion
  - Interrogatories
  - Document Requests
  - Depositions

Requesting ESI

Requesting ESI: Decide Which Forms of Production

WILLIS // SPANGLER // STARLING

1. Native Form: Producing the electronically stored information exactly as it is maintained on the producing party's electronic systems.
2. Near-Native Form: Producing electronically stored information that is stored as data in a database by converting it into individual, viewable electronic files.
3. Image Format: Producing electronically stored information by splitting it into three different files: (1) a .TIFF or .PDF file that is has an image of how the ESI looks if printed on paper; (2) a text file containing the text of the ESI image; and (3) a text file containing the metadata fields for the document. "Load files" then ensure these three files, for each piece of ESI, correlate together when loading them into a document review tool.
4. Paper Format: Producing electronically stored information by printing it onto paper.

Requesting ESI: Specify the Forms of Production

- Rule 34 provides that a party's document requests "may specify the form or forms in which electronically stored information is to be produced . . . ." *See* FED.R.CIV.P. 34(b)(1)(C).
- Include an instruction in the document requests and then an appendix specifying the forms.
- Do this for interrogatories as well.
- If you do not specify the forms, you will have a harder time insisting on them later if the other side produces in forms you do not like.

Requesting ESI: Mechanics of Requesting in State Court

- Use Civ.R. 33 Interrogatories to Identify Potential Custodians
  - Decision-Makers
  - Supervisors
  - Human Resources Employees
  - Other Relevant Witnesses
- Use. Civ.R. 33 Interrogatories to Request Transparency Details
  - Ask for Details on Preservation Efforts
  - Ask for Details on Whether Any Potentially Relevant ESI Lost, Destroyed, Deleted, or Altered
  - Ask for Details on Collection
  - Ask for Details on Review and Production
- Use Civ.R. 34 Document Requests to Request the ESI
  - Specify Forms of Production: Use an Instruction and Appendix
  - Use Multiple Specific Document Requests to Seek All ESI Relevant to Set a Topics
  - Meet and Confer and Then Move to Compel

Requesting ESI: Mechanics of Requesting in Federal Court

- Make Use of Your Rule 26(f) Meeting
  - Fed. R. Civ. P. 26(f)(3)(C): Parties are supposed to plan for "issues about disclosure, discovery, or preservation of [ESI], including the form or forms in which it should be produced."
  - Send a letter to opposing counsel before the Rule 26(f) meeting asking them to be prepared to discuss the pertinent details. Use the checklists referenced in your written materials.
  - At the Rule 26(f) meeting, basically depose your opposing counsel about preservation, custodians, sources of ESI, sources of non-custodial ESI, etc.

Producing ESI

Producing ESI: Opposing Forms of Production

- If the requesting party specified forms of production:
  - Specific objection and statement of alternative forms required, or you waive the right to contest.
  - Responding party has the burden of persuasion that is very high.
  - Native or near-native are default preference for most courts.
- If the requesting party did NOT specify forms of production:
  - Statement of forms required. Must be “as ordinarily maintained” or “a reasonably usable form or forms.”
  - Native or near-native are default preference for most courts. Small minority of courts consider image format without metadata as “reasonably usable”; probably wrong.
  - Requesting party has the burden of persuasion that is not very high.

Producing ESI: Opposing The Scope of Production

- Standard Objections
  - Relevance and overly broad typically mean nothing. Just fight over search parameters.
  - Privilege review productions.
- Undue Burden or Cost and Cost-Shifting
  - Accessible versus inaccessible data.
  - Quantifying and explaining the claimed burden.
  - Cost-Shifting:
    - Typically not allowed for accessible data, but federal court's proportionality rule probably allows shifting despite accessible data.
    - May be allowed for inaccessible data.
- Proportionality:
  - Overused and abused in federal court.
  - May not exist in state court.

Collection, Processing, Review, and Production

- Forensic collections and processing should be done by third-party vendors:
  - Reveal Data Corporation
  - Interhack
- Document Review Tools:
  - Use a third-party vendor. Some collection vendors also offer document review programs.
- Document Review Processes:
  - Multi-Level Review
  - Quality Control
  - Issue Tagging
  - Privilege Review Productions
- Technology Assisted Review (TAR)
  - Much more accurate and cost-effective than human coding.
  - Predictive Coding: Humans code a “seed set” and a computer algorithm learns from that “seed set” what is likely to be responsive and codes the rest. “Seed set” much be accurate.
  - Continuous Active Learning: Humans code while the computer algorithm observes, learns, and continues to feed the humans what are likely the most relevant documents.
  - Federal judges have approved of TAR, but you cannot force an unwilling opponent to use it even though it may be the most efficient means of conducting e-discovery.

Using ESI

Using ESI: Authentication

- Use Depositions
  - Authentication by Individuals
    - Standard Set of Authentication Questions:
      - Identify e-mail accounts, cell phone devices, cell phone numbers, and cell phone providers.
      - Ask about passwords and whether the author allows others to use his or her e-mail account or cellular phone device.
    - Direct Authentication by Willing Deponents:
      - If you are deposing the author of an e-mail or text message, ask the author if he or she sent or received the e-mails or text messages depicted in the exhibit on the dates and times depicted in the exhibit.
    - Authentication with Unwilling Deponents:
      - Ask the standard set of authentication questions early in the deposition before it gets contentious.
      - Ask questions to establish that they were the user/owner of the e-mail account or cell phone device at the time the message was sent.
  - Authentication by Companies
    - Use a Rule 30(b)(6) deposition of the company that produced or had possession, custody, or control over the ESI.

Using ESI: Summary Judgment & Trial

- Authentication
  - Not Required for Summary Judgment: You do not have to authenticate ESI you use in a summary judgment motion under an amendment to Rule 56. You do, however, need to show that the ESI is capable of being authenticated at trial if you are challenged. Practically, no one challenges authentication unless they're a jerk.
  - Authentication is required at trial unless you can reach stipulations. Always try to reach stipulations, authentication witnesses are extremely boring, and you'll lose the jury.
- Admissibility:
  - Hearsay is the most common objection. You usually overcome this with a business records exception, but some courts hold the exception is not automatically assumed with obvious business records like e-mails. There are other exceptions, such as offered to show motive or intent.
- Expert Witnesses & Metadata:
  - Luri v. Republic Waste Services. Ohio state court wrongful termination case. Jury came back with $46million verdict. Jurors tell the newspapers the size of the verdict was in large part because the plaintiff's attorneys presented expert witness testimony providing, through metadata, that the company had altered a termination document to add more false reasons for the termination after the plaintiff threatened a lawsuit.

E-DISCOVERY: SPECIAL SITUATIONS AND ADVANCED TACTICS

Jason E. Starling
Willis Spangler Starling
4635 Trueman Boulevard, Suite 100
Hilliard, Ohio 43026
(614) 586-7900
jstarling@willisattorneys.com

Initial Strategic Considerations

Initial Strategic Considerations: State Court v. Federal Court

- If you are a plaintiffs' attorney: NEVER GO TO FEDERAL COURT IF YOU CAN AVOID IT.
- If you are a defense attorney: ALWAYS TRY TO GO TO FEDERAL COURT, REMOVE WHENEVER POSSIBLE.
- Notable Differences:
  - Taxation of E-Discovery Costs: Yes in federal court, maybe no in state court.
  - Proportionality: Yes in federal court, maybe no in state court.
  - Immediate Interlocutory Appeals: No in federal court, maybe yes in state court.
  - Rule 37(e): Terrible, amended version in federal court, maybe an old version in state court.
  - The stereotype is that federal court judges are more likely to have Big Law pedigrees and, as a result, are more likely to be more familiar with e-discovery law and concepts.

Common Objections in E-Discovery

Common Objections in E-Discovery

- Form of Production:
  - If you specify your form of production, the opponent has the burden of proof. *See, e.g.*, *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prods. Liab. Litig.*, 279 F.R.D. 447 (S.D. Ohio 2012) (the burden falls on the responding party if the requesting party specified the forms of production and on the requesting party if it failed to specify the forms of production) ("The Court finds no requirement that Plaintiffs specify a form of production pursuant to Rule 34(b)(1)(C) and simultaneously demonstrate why this form is relevant to each of their requests."); *Linnebur v. United Telephone Assoc.*, No. 10-1379-RDR, 2011 WL 5103300, at *6 (D. Kan. Oct. 27, 2011) (employment case) ("[P]laintiff may specify the form in which defendant should produce the requested ESI. Defendant bears the burden . . . .").
  - The standard for successfully objecting to a specified form is extremely high. Courts require "compelling reasons" or "a clear showing of substantial hardship and/or expense." *See, e.g.*, *Express Lien, Inc. v. Nat'l Assoc. of Credit Mgmt., Inc.*, No. 13-3323, 2014 WL 12767814, at *3-4 (E.D. La. Mar. 20, 2014) (placing the burden on the party responding to document requests) ("The rule says that the requesting party may specify the 'form . . . in which [ESI] is to be produced,' and [the defendant] has not shown compelling reasons why it cannot produce the information in the format requested by [the plaintiff]."); *Saliga v. Chemtura Corp.*, No. 3:12CV832 RNC, 2013 WL 6182227, at *2 (D. Conn. Nov. 25, 2013) (same and employment case) ("[T]he defendant has not shown compelling reasons why it cannot produce the information in the format requested by the plaintiff."); *Susquehanna v. Commercial Fin., Inc. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 WL 4973317, at *12-15 (M.D. Penn. Dec. 1, 2010) (same) ("[C]ourts have generally found that the burden rests with the party objecting to the production of metadata or ESI to show undue hardship or expense."); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 107 (E.D. Pa. 2010) (same and employment case) ("Multiple courts have found that, in light of the emerging recognition of the benefits of producing metadata, the burden falls on the party objecting to its production to show undue hardship or expense."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2010 WL 2104639, at *7 (W.D. Penn. May 24, 2010) (same and employment case) ("Preferably, and absent a clear showing of substantial hardship and/or expense, Defendants shall supplement their production by reproducing ESI in native [i.e., electronic] format."); *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 681-82 (N.D. Ga. 2009) (same) ("The Defendants having given no good reason why they should not produce [the plaintiff's] requested documents in native [i.e., electronic] format, the Motion to Compel . . . is granted.").
  - Check Local Rules. Many federal courts now have default preferences for the form of production.

Common Objections in E-Discovery

- Unduly Burdensome:
  - Make them prove it. The case law requires them to quantify the burden. *See, e.g.*, *Linnebur v. United Telephone Assoc.*, No. 10-1379-RDR, 2011 WL 5103300, at *6 (D. Kan. Oct. 27, 2011) (employment case rejecting an employer's undue burden argument on the production of ESI because the employer failed to provide sworn evidence quantifying the burden and explaining it in detail) ("Typically, this showing requires an 'affidavit or other evidentiary proof of the time or expense involved' in responding to the discovery request."); *see also Jones v. Bank of Am., N.A.*, No. 3:14-cv-11531, 2015 WL 1808916, at *5 (S.D. W.Va. Apr. 21, 2015) (rejecting an undue burden argument on the production of ESI because the resisting party providing no sworn evidence providing details in support) ("[The defendant] provides no supporting affidavits or other corroborating information that lays out in detail the undue burden or cost . . . [The defendant's] failure to provide the requisite support for its objection renders the objection meritless."); *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, No. 12-2350-SAC, 2014 WL 806122, at *3-5 (D. Kan. Feb. 28, 2014) (same) ("No estimate of hours and cost per hour to produce or review such information was provided. No affidavit detailing the costs of production was provided . . . In fact, nothing was provided beyond the conclusory statement that it will cost several hundred thousand dollars."); *Ross v. Abercrombie & Fitch Co.*, Nos. 2:05-cv-0819, 2:05–cv–0848, 2:05–cv–0879, 2:05–cv–0893, 2:05–cv–0913, 2:05–cv–0959, 2010 WL 1957802, at *3 (S.D. Ohio May 14, 2010) (same) ("Without such a showing, the Court simply may not preclude discovery on the grounds that to allow it would unduly burden the responding party.").
  - Offer a privilege review production; they only need to review for privilege not relevance.

Common Objections in E-Discovery

- Overly Broad:
  - Make them quantify the alleged breadth. *See, e.g.*, *Coale v. Metro North R. Co.*, No. 3:09-cv-2065, 2011 WL 1870237, at *3 (D. Conn. May 16, 2011) (employment discrimination case rejecting a defendant's overly broad argument for comparator discovery because it failed to substantiate it) ("As for the overbroad and unduly burdensome objection, 'a party objecting . . . must go beyond the familiar litany than requests are burdensome, oppressive or overly broad and submit affidavits or other evidence revealing the nature of the burden.'"); *Norton v. Bank of Am., N.A.*, No. 05-61344, 2006 WL 8432180, at *8-9 (S.D. Fla. Apr. 27, 2006) (same as to other discovery in an employment case) ("Defendant has provided no affidavits or other evidence demonstrating that the discovery requests are overbroad . . . .").
  - Ask them to work with you using the "hit list" to perhaps narrow search terms, dates ranges, or custodians.
  - Find case law that has approved of your search terms, date ranges, or number of custodians.

Common Objections in E-Discovery

- Proportionality:
  - The 2015 amendments to the federal rules added a proportionality component to Rule 26. *See* FED.R.CIV.P. 26(b)(1). Discovery must not only be relevant, it must also be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* This rule has a multi-factor test that, on appeal, is subject to a difficult abuse-of-discretion standard.
  - Make them quantify the claimed burden.
  - Argue the factors.
  - If your case has a civil rights component, and you are the plaintiff, argue that proportionality cannot be judged on the dollar value alone, but also the important civil rights at stake.

Common Objections in E-Discovery

- Possession, Custody, or Control
  - Some companies will claim no possession, custody, or control over their employees' personal e-mail accounts or personal devices.
  - Courts are split on whether an employer has control.
    - Some courts say yes. *See, e.g.*, *Allstate Ins. Co. v. Papanek*, No. 3:15-cv-240, 2018 WL 300170, at *4-5 (S.D. Ohio Jan. 5, 2018) (rejecting an employer's possession, custody, or control argument for text messages on the devices of employees) ("[T]he Court **ORDERS** [the employer] and [the employer's] counsel to conduct a reasonable search of the devices of these employees . . . ."); *see also H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.*, No., 2015 WL 12791337, at *4-5 (W.D. Penn. July 28, 2015) (same) ("[W]ith regard to Heinz data present on employee-owned personal mobile devices under its BYOD program, Heinz has custody or control of Heinz's data."); *Chevron Corp. v. Salazar*, 275 F.R.D. 437, 448-49 (S.D.N.Y. 2011) (same for personal Gmail account) ("Courts have repeatedly found that employers have control over their employees and can be required to produce documents in their employees' possession.").
    - Some courts say no. *See, e.g.*, *Cotton v. Costco Wholesale Corp.*, No. 12-2731-JW, 2013 WL 3819974, at *6 (D. Kan. July 24, 2013).
  - Moot the issue by subpoenaing the employees.

Defending Against Abuse in E-Discovery

Defending Against Abuse in E-Discovery

- Proactive Cost Control
  - For Attorneys Representing Companies:
    - Have efficient and cost-effective e-discovery systems in place. No legacy systems.
    - Have easy litigation hold software, trained IT personnel, in-house forensic collection capabilities.
    - Invest in TAR.
    - Use privilege review productions.
  - For Attorneys Representing Individuals:
    - Find a cost-effective e-discovery vendor for forensic collections, data hosting, and a document review platform.
    - Ensure clients don’t spoliate.

Defending Against Abuse in E-Discovery

- Object Based Upon Burden, Breadth, and Proportionality
  - You must quantify the burden using affidavits or declarations from those with appropriate personal knowledge. This likely means an IT person and outside counsel.
    - Identify the cost of a forensic collection, processing, and data hosting.
    - Identify the number of documents returned by opposing counsel's requested search parameters.
    - Identify the hours it would take to review those documents.
    - Identify the cost per hour to review those documents.
- Ask to Shift Some or All of the Costs
  - Prior to the proportionality rule being added, cost-shifting was reserved for inaccessible data.
  - Ask to shift some or all of the costs. Some courts hold shifting attorneys' fees is inappropriate, but e-discovery vendor costs might be shifted.

Dealing with Difficult or Unethical Opposing Counsel

Dealing with Difficult Opposing Counsel

- Opposing Counsel: I have no ESI.
- Actual quote from a letter an opposing counsel sent me after producing 9 pages of e-mails:
  - The No Paper Trail Policy: "Moreover, as I explained on our call, the company's policy is for employees to speak, either face-to-face or over the phone, to discuss issues of importance. This explains why minimal electronic communications exist."
- Actual Testimony From the 30(b)(6) Deposition of the Defendant:
  - Q. Go to page 2 at the top of the page, first sentence.
  - A. I see that.
  - Q. It reads "Moreover, as I explained on our call, the company's policy is for employees to speak, either face-to-face or over the phone, to discuss issues of importance." Continues "This explains why min – minimal electronic communications exist." Do you see that?
  - A. I do.
  - Q. Does the company have a policy against employees communicating in writing about issues of importance?
  - A. No, there's no policy.
  - Q. Okay. Does the company have any policy that employees must speak either face-to-face or over the phone to discuss issues of importance?
  - A. No, there is no policy.
  - Q. Nothing in writing?
  - A. No, nothing.
  - Q. Nothing communicated formally?
  - A. No.
  - Q. And how long have you worked at Bright Horizons?
  - A. 20 years.
  - Q. And you have never heard of any such policy at Bright Horizons?
  - A. No.
  - Q. Do you think you would have heard of such policy if it existed?
  - A. Yes, I do.
  - Q. Do you know why your outside counsel said there was a policy that doesn't actually exist?
  - A. I do not have that explanation . . . .

Dealing with Difficult Opposing Counsel

- Opposing Counsel: I have no ESI.
- Case law says this is probably BS. *See, e.g.*, *Chura v. Delmar Gardens of Lenexa, Inc.*, No. 11-2090-CM-DJW, 2012 WL 940270 (D. Kan. Mar. 20, 2012) (finding it "questionable that Defendant's human resources manager and other employees . . . created no written email, correspondence, or reports" and holding "the plaintiffs "raise[d] justifiable concerns that Defendant may have 1) failed to preserve relevant evidence, or 2) failed to conduct a reasonable search for ESI responsive to the discovery requests."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2010 WL 2104639, at *7 (W.D. Penn. May 24, 2010) (employment case finding a small production of e-mails suspect) ("[T]he Court is persuaded by Plaintiffs' arguments regarding the relative paucity of ESI produced by Defendants . . . The Court joins Plaintiffs in questioning the degree to which Defendants have taken seriously their responsibilities . . . ."); *see also Ruiz-Bueno v. Scott*, No. 2:12-cv-0809, 2013 WL 6055402, at *1-5 (S.D. Ohio Nov. 15, 2013) (agreeing with the plaintiffs that the small number of e-mails produced by the defendants justified ordering them to detail preservation, collection, and search efforts) ("Simply put, when plaintiffs expressed some skepticism about the sufficiency of defendants' efforts to produce emails . . . defendants' counsel should have been forthcoming . . . That did not happen.").

Dealing with Difficult Opposing Counsel

- Demand Transparency on the E-Discovery Production:
  - Use a 30(b)(6) Deposition: *See, e.g.*, *Ballentine v. Las Vegas Metro. Police Dept.*, No. 2:14-cv-01584-APG-GWF, 2016 WL 3636917, at *1-3 (D. Nev. July 5, 2016) (compelling the defendant to produce a Civ.R. 30(b)(6) witness to testify under oath on "detailed information as to how the [e-discovery] searches were conducted and results verified").
  - Use Interrogatories: *See, e.g.*, *Ruiz-Bueno v. Scott*, No. 2:12-cv-0809, 2013 WL 6055402, at *1-5 (S.D. Ohio Nov. 15, 2013) (compelling a representative of the defendant to answer interrogatories under oath detailing its preservation, collection, and search efforts for e-discovery); *McNearny v. Wash. Dept. of Corr.*, No. C11-5930 RBL/KLS, 2012 WL 3155099, at *6 (W.D. Wash. Aug. 2, 2012) (same).
  - Move to Compel Cooperation: *See, e.g.*, *New Orleans Reg'l Physician Hosp. Org.*, No. 11-541C, 2015 WL 5000512, at *10-11 (Fed. Cl. Aug. 21, 2015) (granting the plaintiff's "request for an order that the parties work together") ("Defendant shall maintain a record of which custodians performed searches, what search terms they used, what records they searched, and how many responsive documents were found . . . [and] defendant shall produce to the plaintiff the record . . . ."); *Camesi v. Univ. of Pittsburgh Med. Ctr.*, No. 09-85J, 2010 WL 2104639, at *7 (W.D. Penn. May 24, 2010) (same and employment case) ("[O]pposing counsel shall meet and confer to discuss the production of ESI . . . .").
  - Try for a Forensic Inspection: *See, e.g.*, *Bennett v. Martin*, 186 Ohio App.3d 412, 928 N.E.2d 412 (Ohio Ct. App. 2009) (collecting federal case law and upholding the trial court's decision to allow an employment discrimination plaintiff to forensically image the defendants' e-mail accounts where "defendants repeatedly represented that they had disclosed all responsive documents when, in fact, they had not").

Arguing to Judges Who Are Unfamiliar with E-Discovery

Arguing to Judges Who Are Unfamiliar with E-Discovery

- Keep it simple. Judges are extremely busy. Make it easy on them. Make it understandable. Make it readable. Distill complex concepts into simple ones.
- Try to sound reasonable.
- Create a record of having offered compromises that were rejected by your opponent.
- Try to get written briefing. Some courts are requiring off-the-record telephone conference before you can file a written motion. Some courts limit discovery disputes to a single-page statement of the dispute. It is hard to educate the judge in those formats.
- Don’t be afraid to appeal a Magistrate Judge to a District Judge.

QUESTIONS?

Jason E. Starling
Willis Spangler Starling
4635 Trueman Boulevard, Suite 100
Hilliard, Ohio 43026
(614) 586-7900
jstarling@willisattorneys.com