Webcast Presentation

On the Case?

eDiscovery Case Law Update for the First Half of 2020

HAYSTACK

August 2020

Agenda

Case Topics to Be Discussed

- Fourth Amendment and Mobile Devices
- GDPR and Personal Social Media Posts
- Ephemeral Messaging Apps and Discovery
- Mobile Devices and Criminal Evidence
- Compelled Technology Assisted Review
- Form of Production Considerations
- GDPR and Discovery Responses
- Sanctions Requests and Discovery
- *Questions*

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Areas of Expertise

- eDiscovery
- Consulting
- Litigation
- Project Management
- SCRUM Product Lifecycle Management

Doug is an established eDiscovery thought leader with over 30 years of experience providing eDiscovery best practices, legal technology consulting and technical project management services to numerous commercial and government clients.

Doug has published a daily blog since 2010 and has written numerous articles and white papers. He has received the JD Supra Readers Choice Award as the Top eDiscovery Author for 2017 and 2018 and a JD Supra Readers Choice Award as a Top Cybersecurity Author for 2019.

Doug has presented at numerous events and conferences, including Legaltech New York, ILTACON, Relativity Fest, University of Florida E-Discovery Conference, Masters Conference and many local and regional conferences. Doug has also presented numerous CLE-accredited webcasts.

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Areas of Expertise

- eDiscovery
- Managed Review
- Litigation
- Government Investigations
- Records Management

As VP and GC for HaystackID, Ashish Prasad is widely regarded as among the leading experts on discovery in the United States. He has served, among other things, as Litigation Partner, Founder, and Chair of the Mayer Brown LLP Electronic Discovery and Records Management Group, Executive Editor of The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production (2004), Co-Editor in Chief of the Practicing Law Institute treatise Electronic Discovery Deskbook: Law and Practice (2009), Adjunct Professor of Law at Northwestern University Law School, Chair of the Defense Research Institute Electronic Discovery Committee, and Chair of the Advisory Council of the National South Asian Bar Association.

Ashish has authored over two dozen articles and given over a hundred continuing legal education seminars on topics of electronic discovery before judges, practicing lawyers, and industry groups in the United States, Europe, and Asia. Ashish is a graduate of the University of Chicago Law School, where he was a member of the Law Review, and the University of Michigan, where he graduated with High Honors and High Distinction.

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Areas of Expertise

- Project Management
- Document Review
- Recruiting and Staffing

As VP of eDiscovery Services for HaystackID, Vazantha has extensive experience in advising and helping customers achieve their legal document review objectives.

Previously, she worked as a litigation associate at Mayer Brown LLP. While at Mayer Brown, Vazantha worked in the Electronic Discovery and Records Management Group, providing counsel to corporate clients on discovery and records management issues.

She has developed workflows, documentation, processes and procedures that successfully create efficient and defensible managed review matters. She has trained of team of highly skilled managed review professionals, who are proficient in several review tools and methodologies, including the latest analytical tools. As part of her client consultation, she works with corporate clients to create internal workflows aimed at increasing accountability, while lowering the cost and inconsistency of managed review across projects.

Vazantha contributed to the Practicing Law Institute treatise Electronic Discovery Deskbook: Law and Practice (2009 and 2019) and has written many articles and presentations on various topics related to electronic discovery. Vazantha attended Valparaiso University School of Law, where she graduated as a Monsanto Honors Scholar.

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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.

Fourth Amendment and Mobile Devices

U.S. v. Sam, No. CR19-0115-JCC (W.D. Wash. May 18, 2020)

- In this criminal case, there were two examinations of the defendant's cell phone, one by the Tulalip Police Department and a second one by the FBI;
- Regarding the police examination, there was a dispute as to when and how the defendant's cell phone was examined. But, regarding the FBI examination, on February 13, 2020, the FBI removed Mr. Sam's phone from inventory, powered the phone on, and took a photograph of the lock screen, which showed the name "STREEZY" right underneath the time and date. The defendant filed his motion to suppress any evidence obtained from the first and second examinations of the phone;
- With regard to the FBI examination, Washington District Judge John C. Coughenour stated: ***"Here, the FBI physically intruded on Mr. Sam's personal effect when the FBI powered on his phone to take a picture of the phone's lock screen… The FBI therefore 'searched' the phone within the meaning of the Fourth Amendment…And because the FBI conducted the search without a warrant, the search was unconstitutional."*** As a result, he granted the defendant's motion regarding the FBI examination.
- Judge Coughenour didn't have enough information to rule on the police exam and ordered the parties to file supplemental briefing addressing the circumstances surrounding those examinations.

GDPR and Personal Social Media Posts

Grandmother Ordered to Delete Facebook Photos of Her Grandchildren Because of GDPR

- According to the BBC, this matter ended up in court in the Netherlands after a falling-out between the woman and her daughter. The case went to court after the woman refused to delete photographs of her grandchildren which she had posted on social media. The mother of the children had asked several times for the pictures to be deleted;
- The judge in the case ruled the matter was within the scope of the EU's General Data Protection Regulation (GDPR). While GDPR does not apply to the "purely personal" or "household" processing of data, the Dutch Court ruled that exemption did not apply because posting photographs on social media made them available to a wider audience;
- ***"With Facebook, it cannot be ruled out that placed photos may be distributed and may end up in the hands of third parties,"*** the Court said.
- The woman was ordered to remove the photos or pay a fine of **€50** for every day for failing to comply with the order (maximum fine of **€1,000**), with a fine of an extra **€50** a day for posting more photos.

Ephemeral Messaging Apps and Discovery

WeRide Corp. v. Huang et al., No. 5:18-cv-07233-EJD (N.D. Cal. Apr. 24, 2020)

- In this case involving claims of trade secret misappropriation by the defendants who were former employees of the plaintiff's company, the plaintiffs alleged that defendants solicited its employees and also allegedly downloaded significant amounts of data from the plaintiffs' servers and at least one company laptop;
- During discovery, the defendants were alleged to have committed several acts of spoliation, including:
  - **Destroyed Email:** AllRide acknowledged it destroyed email even through the Court's preliminary injunction;
  - **Source Code**: The plaintiffs argued defendants spoliated, or failed to produce, five categories of source code;
  - **Wiped Devices**: Included a MacBook returned to an Apple store when plaintiffs sent a cease-and-desist letter;
  - **Ephemeral Messaging:** Use of the app DingTalk which allows for "ephemeral messages" that automatically delete after they have been sent and read.
- California District Judge Edward J. Davila granted the plaintiffs' motion for sanctions through FRCP Rules 37(b) and 37(e), issuing terminating sanctions against defendants Wang, Huang, and AllRide and ordering them to ***"pay WeRide's reasonable fees and costs incurred in connection with (i) this motion; (ii) all discovery related to their spoliation of evidence; and (iii) the discovery motion practice before {Magistrate} Judge Cousins".***

Mobile Devices and Criminal Evidence

U.S. v. Morgan, No. 1:18-CR-00108 EAW (W.D.N.Y. March 6, 2020)

- In this case alleging conspiracy to commit wire fraud and bank fraud served on this defendant on May 21. 2019, a search warrant over a year earlier was issued for the defendant's company on devices, including his iPhone;
- In May 2018, the government started to try to crack the defendant's iPhone's passcode, using a device called "GrayKey", which uses "brute force" to try and access the iPhone by entering potential passcodes until it finds the correct passcode. A six-digit passcode yields **1,000,000** potential passcode combinations, but the iPhone's hardware only allows two or three passcode attempts each hour;
- GrayKey's efforts to unlock the iPhone continued, with "a mere **960,526** possible passcodes" remaining in January 2020, around which time the defendant filed a Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g);
- The government estimated that, at its current pace, it could take as long as **37** years to successfully unlock the iPhone;
- While agreeing that ***"anywhere close to 37 years is an unreasonable time to retain the iPhone"***, New York District Judge Elizabeth A. Wolford denied the defendant's Motion for Return of Property Under Federal Rule of Criminal Procedure 41(g), stating that ***"with a trial not scheduled to commence until next year…there is still plenty of time for the government to access the iPhone's contents"*** and ruling that ***"[t]he government's evidentiary interest in the [defendant's] iPhone outweighs Defendant's interest in its return, at least at this stage of the proceedings"***.

Compelled Technology Assisted Review

In re Mercedes-Benz Emissions Litig., No. 2:16-cv-881 (KM) (ESK) (D.N.J. Jan. 9, 2020)

- In this emissions test class action involving an automobile manufacturer, the plaintiffs proposed that the defendants use TAR, asserting it yields significantly better results than either traditional human "eyes on" review and/or the use of search terms, arguing alternatively if their request was declined, the Court should enter its proposed Search Term Protocol;
- The defendants argued that there is no authority for imposing TAR on an objecting party and that this case presented a number of unique issues that would make developing an appropriate and effective seed set challenging, instead contending that they should be permitted to utilize their preferred custodian-and-search term approach;
- Citing ***Hyles v. New York City***, Special Master Dennis Cavanaugh stated: ***"Despite the fact that it is widely recognized that 'TAR is cheaper, more efficient and superior to keyword searching'…, courts also recognize that responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for producing their own electronically stored information."***
- As a result, Special Master Cavanaugh adopted the search term protocol negotiated by the parties, with three areas of dispute resolved by his ruling.

Form of Production Considerations

Corker, et al. v. Costco Wholesale, et al., No. C19-0290RSL (W.D. Wash. Apr. 27, 2020)

- Washington District Judge Robert S. Lasnik granted the plaintiffs' motion to compel defendant BBC Assets to produce a document, that had previously been produced as a **2,269-page PDF**, in its original native Excel format without redactions and also granted the plaintiffs' motion to seal the document for confidentiality reasons, while denying defendant BBC Assets' motion for a protective order confidential commercial information contained in the responsive spreadsheets.

Lundine v. Gates Corp., No. 18-1235-EFM (D. Kan. Mar. 30, 2020)

- Kansas Magistrate Judge James P. O'Hara, depicting the situation as a ***"classic case of what happens when lawyers (even good, experienced lawyers such as those involved here) don't spend the requisite time on the front end of a case nailing down how discovery of ESI will be handled"***, denied the plaintiff's motion to compel production of data in Excel or native format, as well as the request for plaintiff's experts to retrieve the data under defendant's supervision.

Form of Production Considerations

NY Machinery v. The Korean Cleaners Monthly, No. 2:17-12269-SDW-ESK (D.N.J. Jan. 6, 2020)

- In this case involving allegations unfair competition, false advertising, defamation, false light and trade libel (among other allegations), the plaintiffs wrote to the defendants in April 2019 asserting various deficiencies in the defendants' discovery responses, including the expectation for "Defendants to promptly produce certified translations of these documents";
- New Jersey Magistrate Judge Edward S. Kiel noted that ***"Rule 34 does not address which party has the obligation to translate documents into English"*** and also noted that ***"There is no clear answer in the Third Circuit"***;
- But, Judge Kiel, finding the analysis and decision in ***Nature's Plus Nordic A/S v. Natural Organics, Inc.*** to be persuasive, stated ***"Plaintiffs do not claim that the documents produced by Defendants in response to Plaintiffs' discovery demands are irrelevant"*** and that ***"to satisfy their obligation under Rule 34, Defendants produced all documents responsive to Plaintiffs' request, including the foreign-language documents at issue"***.
- As a result, Judge Kiel denied the plaintiffs' request to have the defendants translate the documents or shift any of the costs for translating the documents to the defendants.

GDPR and Discovery Responses

Giorgi Global Holdings, Inc. v. Smulski, No. 17-4416 (E.D. Pa. May 21, 2020)

- In this case against the defendants alleging violations of the RICO Act (among other things), the plaintiffs requested via letter that defendant Wieslaw Smulski be ordered to produce documents in compliance with the Federal Rules of Civil Procedure without regard to Polish law and/or the EU General Data Protection Regulation (GDPR);
- Defendant Smulski who lived in Poland, claimed that he couldn't produce otherwise discoverable documents in the case because the GDPR and/or Polish privacy law prohibit him from doing so;
- Pennsylvania District Judge Jeffrey L. Schmehl ruled that the defendant, ***"an American citizen sued in the United States, bears the burden of showing that the GDPR and/or Polish privacy law bar production of…relevant documents"*** which ***"he cannot do"***.
- As a result, Judge Schmehl ruled that the ***"GDPR and/or Polish privacy law does not bar Smulski's production of relevant documents in this matter."***

Sanctions Requests and Discovery

EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., Nos. 19-5836/5838 (6th Cir. Apr. 15, 2020)

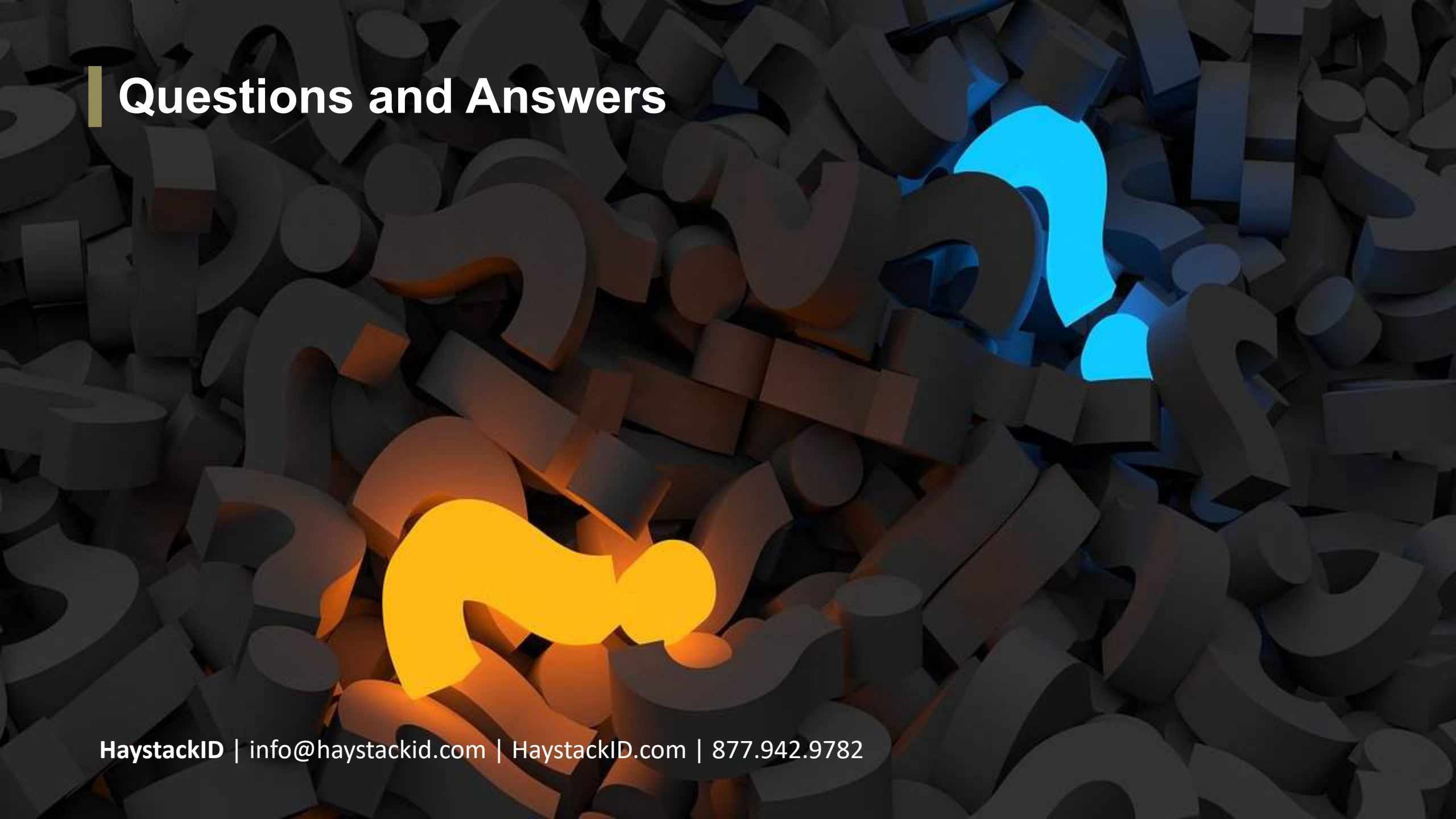
- In this contract dispute that arose when the defendant prematurely terminated a Master Services Agreement ("MSA") it had executed with the plaintiff, the jury awarded over $15 million in damages regarding the two remaining claims at time of trial, but the district court granted judgment in the defendant's favor on the fraudulent concealment claim, finding that the defendant did not have a duty to disclose. As a result, both parties appealed the ruling;
- On the defendant's cross appeal, he challenged the jury verdict in three ways, including claiming the district court's adverse inference instructions based on destruction of evidence prejudiced him;
- The Sixth Court of Appeals rejected that challenge, stating: ***"District courts have broad discretion to craft sanctions for spoliated evidence… First off, the instructions above are merely permissible, telling the jury what they 'may' infer. The fact that Thomas Nelson was only 'negligent' does not defeat the instructions. Only mandatory adverse instructions require a culpable state of mind in the destruction of evidence…Second, both instructions were no greater than necessary because they were only permissive in nature"***.

Sanctions Requests and Discovery

John, et al. v. Cnty. of Lake, et al., No. 18-cv-06935-WHA(SK) (N.D. Cal. July 3, 2020)

- This case involved claims by the plaintiffs of unlawful search and excessive force by the defendants, law enforcement officers trying to locate a family member of the plaintiffs who had an arrest warrant;
- On February 14, 2019, the District Court, in a hearing, addressed Plaintiffs' concerns about ESI preservation, stating: ***"Anything that relates directly to the case, like emails, text messages, voicemails, memos, handwritten notes, they should be preserved. And any document-destruction program should be interdicted in order to stop it. And if you fail to do that, on either side, then very likely the jury will be told"***;
- Despite that, the plaintiffs struggled to get ESI from the defendants and their IT director said he wasn't instructed to implement a litigation hold until the day before his deposition;
- California Magistrate Judge Sallie Kim ruled that ***"Defendants or their counsel breached their obligations to provide discovery and that monetary sanctions*** {of at least $105K} ***are appropriate"***. She also recommended that the District Court provide an adverse inference instruction to the jury at trial.

Questions and Answers



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