

Preservation, Discovery, and Presentation of Cyber Evidence

Wednesday, June 26, 2019

Presented By the IADC Business Litigation Committee, Cyber Security, Data Privacy and Technology Committee, Intellectual Property Committee, and Trial Techniques and Tactics Committee

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ESI DISCOVERY / COLLECTION

HOW E-DISCOVERY WORKS

CaseCentral



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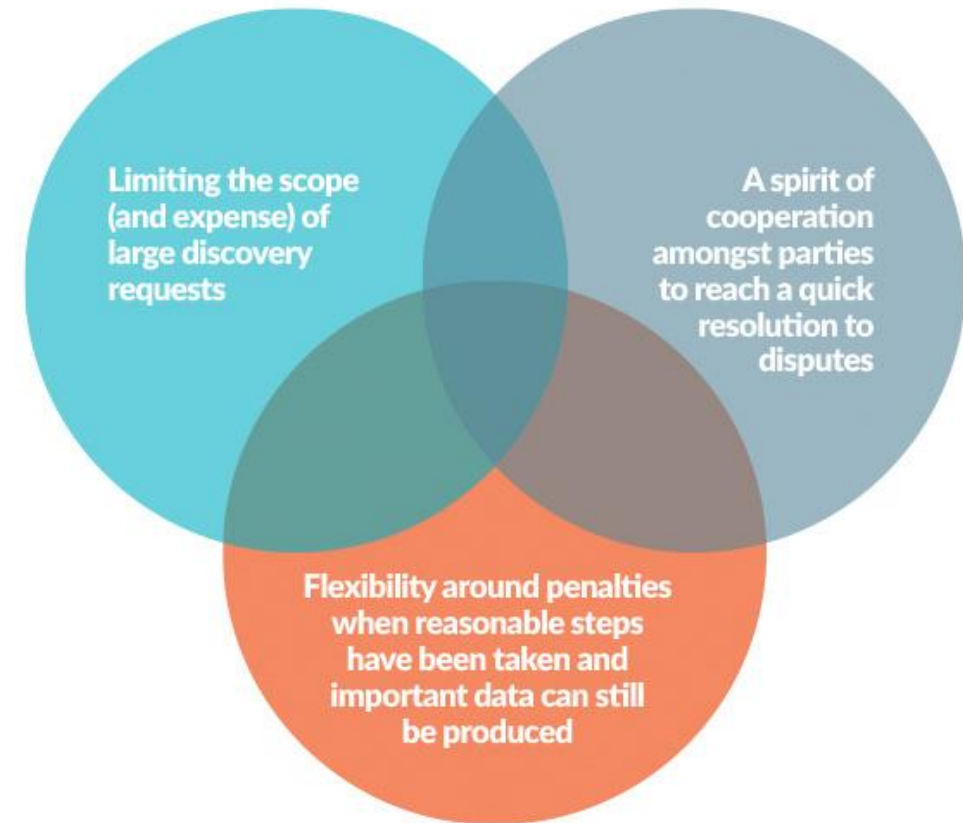
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Federal Rules and E-discovery

- The FRCP were first created in 1938, and have had 10 major revisions since that time.
- The revision that took place in 2006 created parameters for electronic records, which formalized e-discovery within the FRCP.
 - Redefined discoverable material
 - Encouraged early attention to issues relating to eDiscovery
 - Introduced the concept of “reasonably accessible”
 - Provided a procedure for asserting claims of privilege and work product after production
 - Provide a mechanism for "safe harbor" limits on sanctions related to loss of ESI as a result of routine operation of computer systems

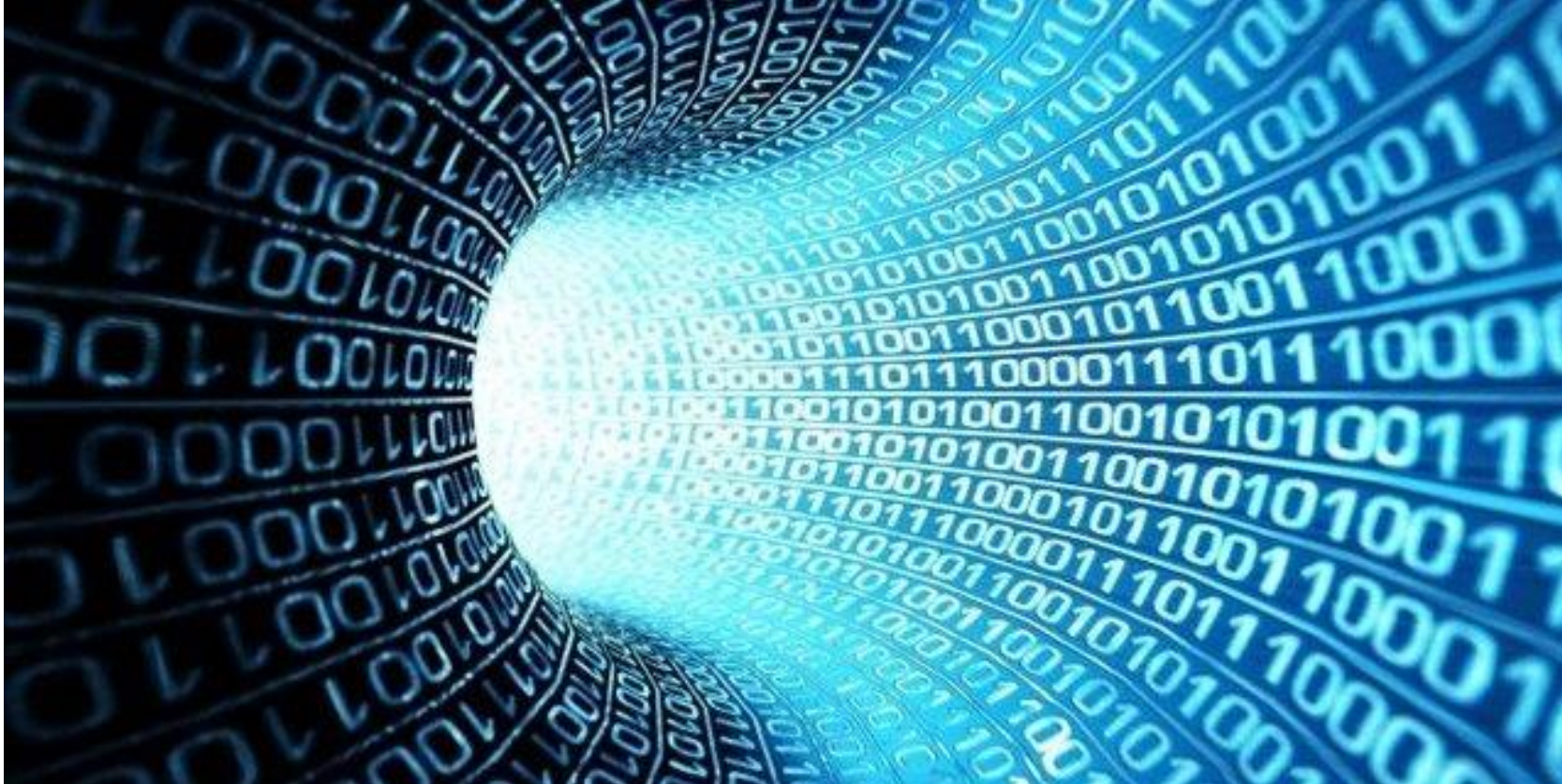
2015 Amendment to FRCP

In 2015, the FRCP amendments on e-discovery rules focused on three key areas



Source: <https://www.exterro.com/frcp-e-discovery-guide/>

Rules of the “Road”



- **Rule 26(f):** How many lanes are there and how wide
 - 26(f) Conference before any discovery can occur.
 - The courts have made it clear these conferences should happen as early as possible and parties should agree on foundational principles like the forms of production—including ESI.
 - Rule 16 – scheduling orders may provide for the preservation of ESI in addition to the disclosure and discovery of ESI

- **Rule 26(d)(2): There is More Than One Way**
 - Do not let opposing counsel or judges impose a set pattern on the process.
 - Do not let the other party's timeline get in the way of what you need to do.
- **Rule 34(b): Get what you want, how you want it**
 - Rule 34(b) allows the requesting party to decide how it wants information to be produced and lets the responding party object if impractical.
 - When in doubt, get the native format. It retains potentially useful metadata and is usually easier to access.

- **Rule 26(b)(1): Keep it in Proportion**

- New Rule 26(b)(1) (December 1, 2015 amendments)

- Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

- US Mag. Judge for SD of NY Henry Pitman: “[g]iven the recent amendments to the Federal Rules of Civil Procedure that became effective December 1, 2015, proportionality “has become ‘the new black,’” in discovery litigation, with parties invoking the objection with increasing frequency.” *Vaigasi v. Solow Mgmt. Corp.*, 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016).

OUT-OF-PROPORTIONALITY



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eDiscovery is Here to Stay

Core Competency

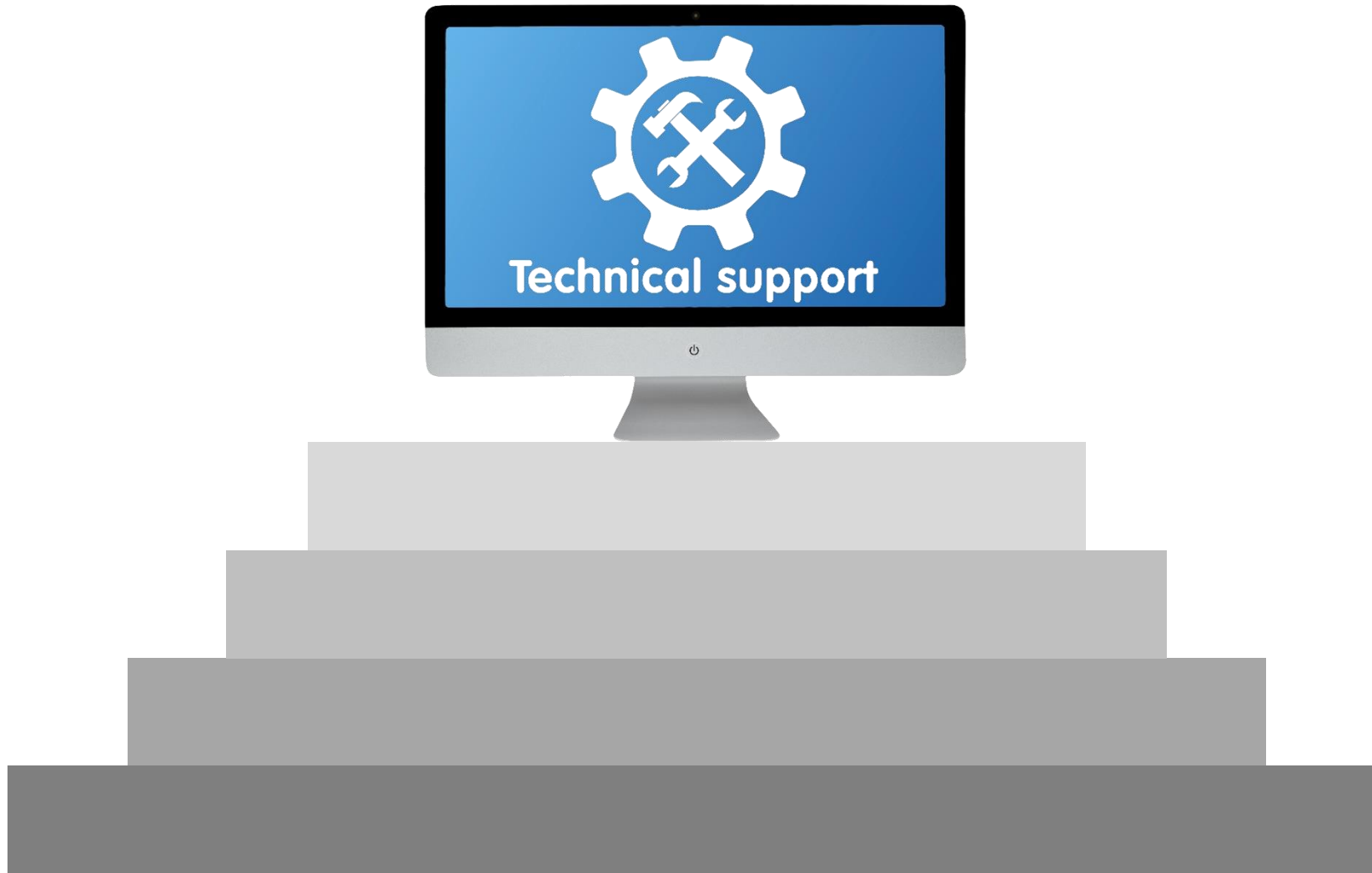
Client Expectations

Strategic Tool

Significant Costs

Significant Risks





What is Electronic Stored Information?



Social Media



ESI PRESERVATION

PRESERVATION – FRCP RULE 37(e)

Failure to Preserve Evidence – Federal Rule of Civil Procedure 37(e).

The loss or destruction of relevant ESI including, cell phone texts and emails, intentional or not, can lead to sanctions under Federal Rule of Civil Procedure 37(e).

Rule 37(e) authorizes courts to issue sanctions where four conditions are met:

1. the ESI at issue should have been preserved in the anticipation or conduct of litigation;
2. the ESI is lost;
3. the loss is due to a party's failure to take reasonable steps to preserve it;
4. the ESI cannot be restored or replaced through additional discovery.

CIVIL CASE SUMMARIES

EEOC v. The Original Honey Baked Ham Company of Georgia, Inc. (Feb. 27, 2013)

EEOC filing suit on behalf of employees alleging sexual harassment and retaliation. Defendant requested cellphone and social media access, court ordered them discoverable and requested production to a “Special Master.” EEOC failed to produce and the court issued sanctions against EEOC.

Garcia v. City of Laredo, US Court of Appeals, Fifth Circuit (2012)

Garcia, a former police dispatcher for the City of Laredo, claims Defendants accessed the contents of her cellphone without permission in violation of the Stored Communications Act (SCA). District court granted summary judgment for Defendants – SCA Statute did not apply, upheld on appeal.

Christou v. Beatport, LLC (D. Colo. Jan. 23, 2013)

Christou, a club owner hired Bradley Roulier who opened a music website called Beatport. Roulier offered part ownership to Christou that was never given. Also opened a rival club and used the threat of being dropped from Beatport site if acts performed at Christou’s clubs. Litigation hold sent to defendant 2010. May 2011 discovery request ignored. August 2011 Roulier reported lost his Iphone. Plaintiff was able to introduce litigation hold letter and defendants failure to preserve text messages. Can argue for inference.

Nuvasive, Inc. v. Madsen Med. Inc. (S.D. Cal. Jan. 26, 2016)

Nuvasive was accused of conspiring with Madsen employees to remove Madsen from the partnership contract at which point Nuvasive would hire on the Madsen team as their own employees. Spoliation sanctions were sought after Nuvasive only moved to preserve the evidence two years after the incident when messages had been lost.

Litigation Hold

- Communication within a company that requires that all information – whether paper or electronic – relating to the subject of a current or an impending litigation be preserved for possible production in litigation.
 - *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003)
- Purpose of a litigation hold is to prevent the automatic destruction of potentially relevant or discoverable documents and information pursuant to a document retention policy.

Litigation Hold

- This Litigation Hold is to inform you of your legal requirement to preserve documents. You have been identified as an individual who may have information potentially relevant to these issues. Effective immediately, and until further notice:
- **DO NOT DESTROY, DISCARD, ALTER, OR ERASE ANY DOCUMENT OR ELECTRONIC INFORMATION THAT RELATES IN ANY WAY TO THE BELOW CATEGORIES OF MATERIALS.** The specific instructions below will help you understand your obligations, but in summary, **you should preserve any documents, data, or physical objects related in any way to The Allegation, even if they may not relate to the specific claims that have been filed to date. If you have any doubt about whether something should be preserved, keep it. You must also retain all of your personal records that are described by this Litigation Hold.**

Litigation Hold

Please understand that [CLIENT's] duty to preserve covers both hard copy documents, like printouts and handwritten notes, and electronically-stored information in its possession, custody or control, as well as any physical objects, such as parts. Electronically-stored information can come in many formats and must be maintained without alteration. Although not an exhaustive list, examples include the following:

- • Electronic communications (current and archived e-mail, voice mail, instant messaging, texts, etc.);
- • Digital files (word processing documents, spreadsheets, presentations, pictures, etc.);
- • Internet posts or messages, including social media (Salesforce.com, Facebook, etc.);
- • Accounting application data (QuickBooks, Money, Peachtree data files, etc.);
- • Sound recordings (e.g., .WAV and .MP3 files) and voice mails;
- • Video and animation (e.g., .AVI and .MOV files);
- • Databases (Access, Oracle, SQL Server data, SAP, and CRM);
- • Contact data (Outlook, ACT!);
- • Calendar and diary application data (e.g., Outlook PST, Yahoo, blog tools);
- • Online access data (Temporary Internet Files, History, Cookies);
- • Network access and server activity logs;
- • Other electronic information, including logs of email history and usage, header information, and “deleted” files;
- • Paper documents (e.g., correspondence, contracts, handwritten notes, photographs or image/photo files);
- • Backup files (e.g., backup tapes or drives, internet history files, computer system activity logs, and all file fragments and backup files).

Litigation Hold

SOURCES OF INFORMATION: Please note that the duty to preserve extends to materials in [CLIENT'S] possession, custody, or control. This Litigation Hold, therefore, applies not only to documents and data at [CLIENT], including those on your computer's hard drive and your work mobile device, but also may extend to potentially relevant material elsewhere, including documents that you may have at home, on personal devices, or in your vehicle(s). Out of an abundance of caution, you must also preserve potentially relevant data or documents that may exist on any home computers, tablets, external hard drives, flash drives, CDs, DVDs, Blackberries, iPhones, Android Phones, or other smartphone devices, **in your personal email account, in a cloud computing infrastructure, in a storage facility, or off-site on a remote server or back-up tapes. If any potentially relevant material exists on the Internet or social media sites (such as Salesforce.com, LinkedIn, Facebook, Twitter, etc.), please leave those postings intact and do not deactivate those accounts.**

CELLPHONE / DEVICE DATA PRESERVATION

Mobile technology data / text data is volatile.

Crucial data can be lost by:

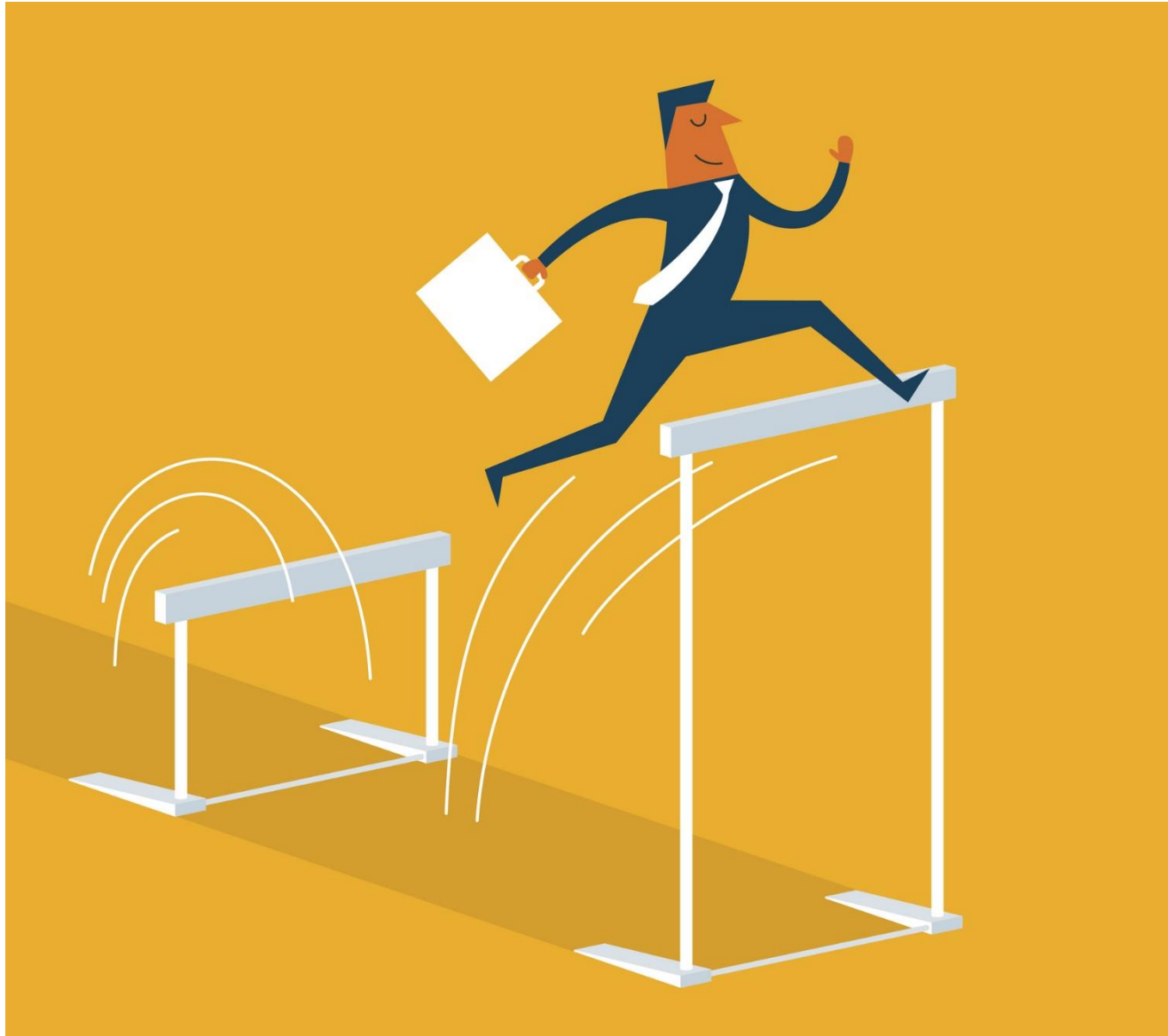
- User selective deletion
- App updates
- Constant OS updates
- Factory Reset
- Remote wipe capability

Deleted data may not be recoverable because:

- Security on the device

Emerging Issues`

- Emerging Data Types
 - Cell Phone Data
 - Chat Data
- Shadow IT Systems
- Global Data Privacy Regulations



- Relevance
- Authenticity
- Hearsay

Federal Rule of Evidence 901(a)

Proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Fed. R. Civ. 801 Is it hearsay?

- Was it a statement made by a declarant?
(Rule 801(a))
- Is it being offered to prove the truth of the matter asserted? (Rule 801(c)(2))

Is it excluded from definition of hearsay?

(1) Witness' Prior Statement

- Prior inconsistent statement
- Prior consistent statement used to rebut suggestion of recent fabrication or acting from improper motive in testifying

(2) An Opposing Party's Statement

- Made or Adopted by a party
- Made by someone party authorized to make it
- Made by agent or employee of party
- Made by a co-conspirator during conspiracy

Is it an exception to hearsay?

(Unavailability Not Required)

- Present sense impression
- Excited utterance
- Then-existing mental, emotional, or physical condition
- Statement made for medical diagnosis or treatment
- Recorded Recollection
- Records of a Regularly Conducted Activity
- Public Records

Is it an exception to hearsay?

(Unavailability Required)

- Statement under belief of eminent death
- Statement against interest
- Statement of personal or family history
- Reputation as to character

Is it an exception to hearsay?

- Statement has equivalent circumstantial guarantees of trustworthiness;
- Offered as evidence of a material fact
- More probative on the point for which it is offered than any other evidence that proponent can obtain through reasonable efforts



Tue 6/25/2019 2:57 PM

Wunderlich, Sandra J.

RE: Hello

To: Wunderlich, Sandra J.

Retention Policy | Inbox TE Policy (6 months)

Expires 12/22/2019

Nope! I hate him! He never invites me!

Sandra J. Wunderlich | Partner | Tucker Ellis LLP

100 South 4th Street | Suite 600 | St. Louis, MO 63102

Direct: 314-256-2544 | Mobile: 314-323-7967

Sandra.Wunderlich@tuckerellis.com

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Sent: Tuesday, June 25, 2019 2:57 PM

To: Wunderlich, Sandra J. <Sandra.Wunderlich@tuckerellis.com>

Subject: Hello

Hey! Just wondering if you heard about the party at Sam's this weekend?

Sandra J. Wunderlich | Partner | Tucker Ellis LLP

100 South 4th Street | Suite 600 | St. Louis, MO 63102

Direct: 314-256-2544 | Mobile: 314-323-7967

Sandra.Wunderlich@tuckerellis.com

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Not My Drug Dealer [Contact](#)

Don't save my name as anything sketchy.

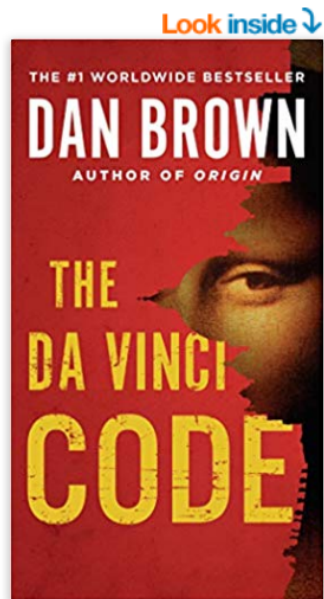
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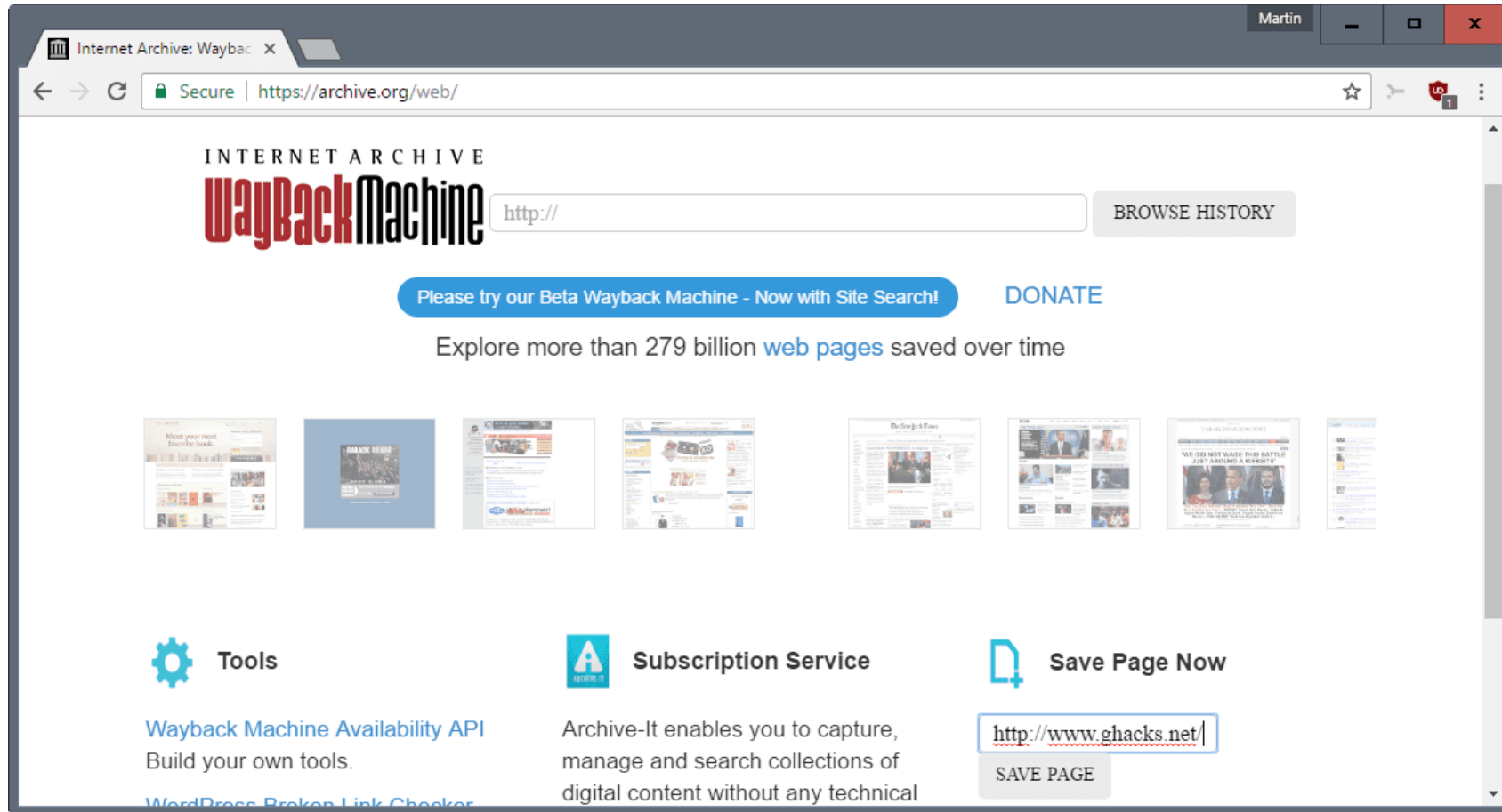
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Mark Zuckerberg
🏠 Founder and CEO at Facebook 🎓 Studied Computer Science at Harvard University 🏠 Lives in Palo Alto, California ❤️ In a relationship with Priscilla Chan 🗣️ Knows English, Mandarin Chinese 🏠 From Dobbs Ferry, New York 📅 Born on May 14, 1984



Wall

 **Mark Zuckerberg** is in a relationship with Priscilla Chan.



❤️ 20 hours ago

👍 Jose Antonio Vargas and 40 others like this.

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Wall
Info
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Questions

In a relationship with

 **Priscilla Chan**
Harvard

Family



Someone doesn't want siblings..





Donald J. Trump ✓

@realDonaldTrump

 Follow

Sorry losers and haters, but my I.Q. is one of the highest -and you all know it! Please don't feel so stupid or insecure, it's not your fault

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6:37 PM - 8 May 2013



42K



38K





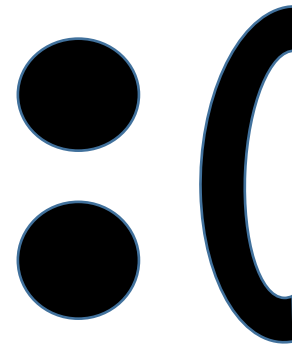
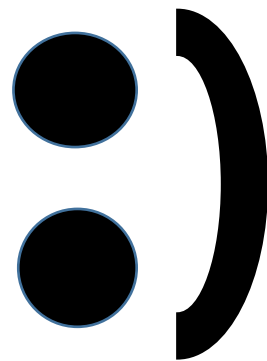
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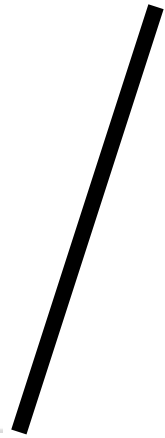


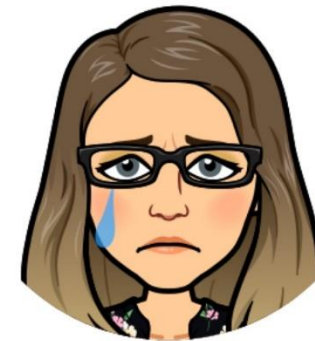
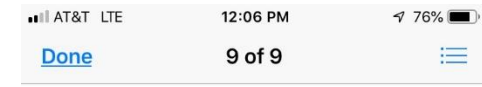
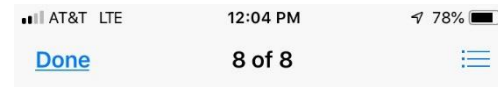
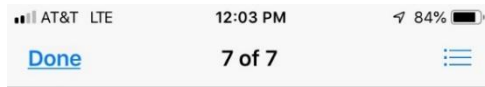
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Questions?



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