Understanding the Federal Rules of Civil Procedure in the eDiscovery Process

Speakers:

Jeremy Deutsch, Shareholder, Cozen O' Connor

Daniel B. Garrie, Co-founder, Law & Forensics; Mediator, Arbitrator, and eDiscovery Special Master, JAMS

Jennifer Hoekstra, Partner, Aylstock, Witkin, Kreis & Overholtz PLLC

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Speakers



Jeremy Deutsch
Shareholder,
Cozen O'Connor



Daniel B. Garrie, Esq.
Co-founder, Law & Forensics
Mediator, Arbitrator and
eDiscovery Special Master, JAMS



Jennifer Hoekstra
Partner
Aylstock, Witkin, Kreis & Overholtz PLLC

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eDiscovery Overview



What is eDiscovery?

- Electronic Discovery or “eDiscovery” is discovery in legal proceedings such as litigation, where the informa tion sought is in an electronic format (known as ESI).
- eDiscovery is subject to 'civil procedure rules and agreed upon processes, often involving review for privilege and relevance before data are turned over to the requesting party.'
- ESI can include: e-mails, texts, chats, instant messages, files, website activity and history, information posted on social networking websites, videos, audio, images, database (structured) data, and (very importantly) metadata (data about data).

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Potential Issues with eDiscovery Providers

- Shortfall in Experience, Preparation, or Expertise;
- Cross-border litigation; and
- Avoid Capacity and Resourcing Risks in eDiscovery

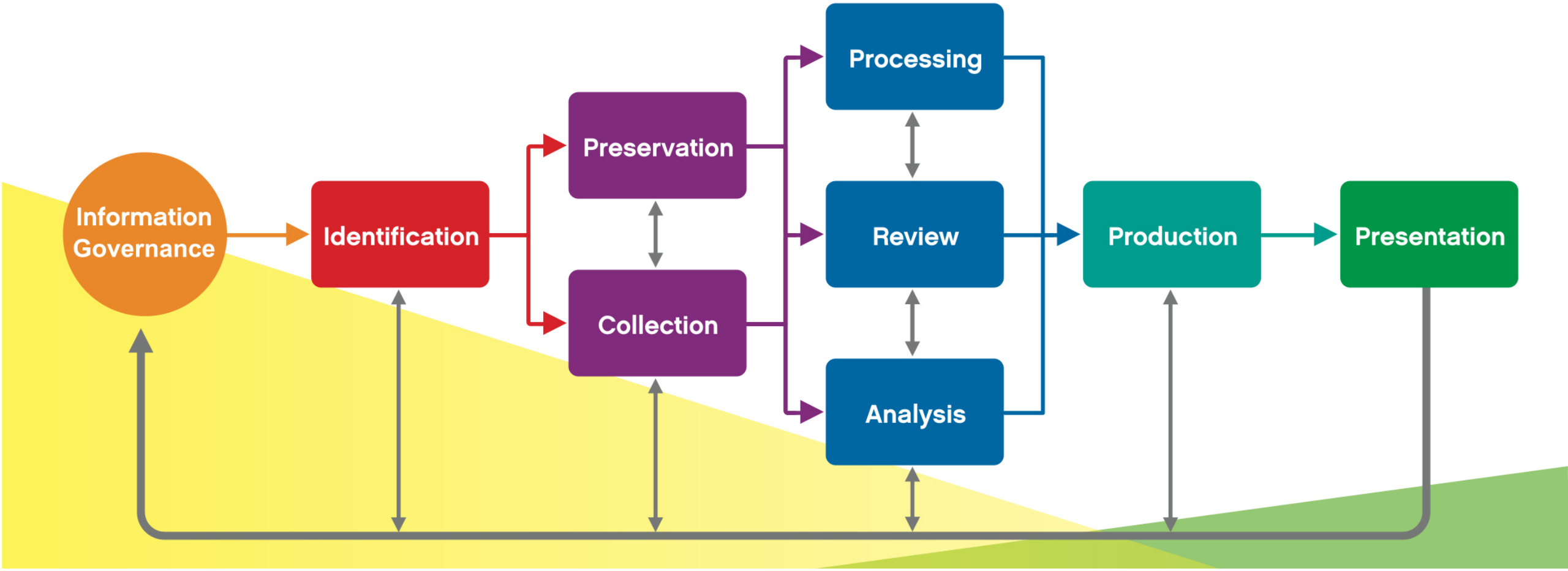
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So Much Data, Too Little Time

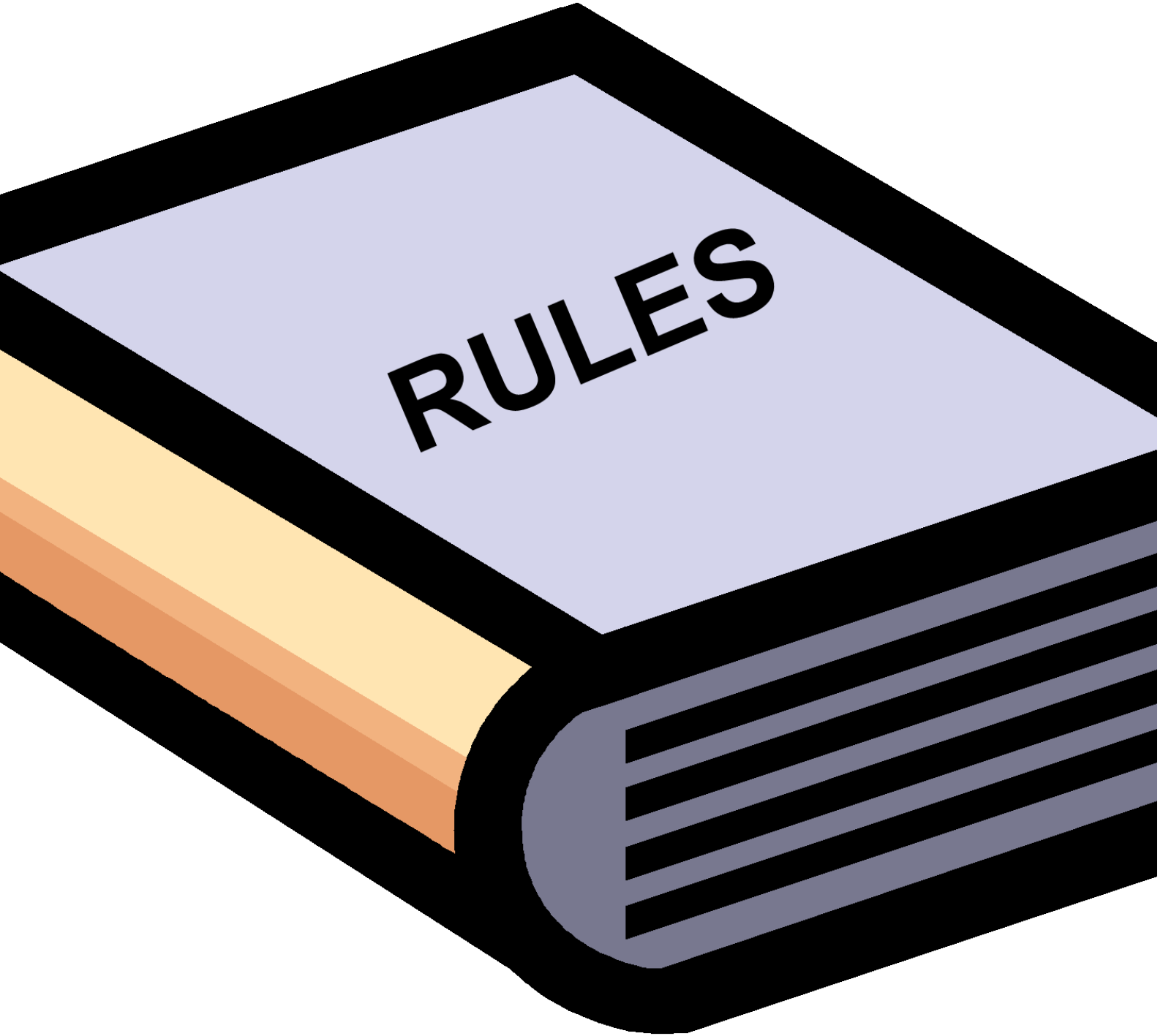
- There is too much data and there are not enough hardware resources to analyze it…
- A single 1TB $50 hard drive contains enough storage space for 10% of all the printed documents in the Library of Congress

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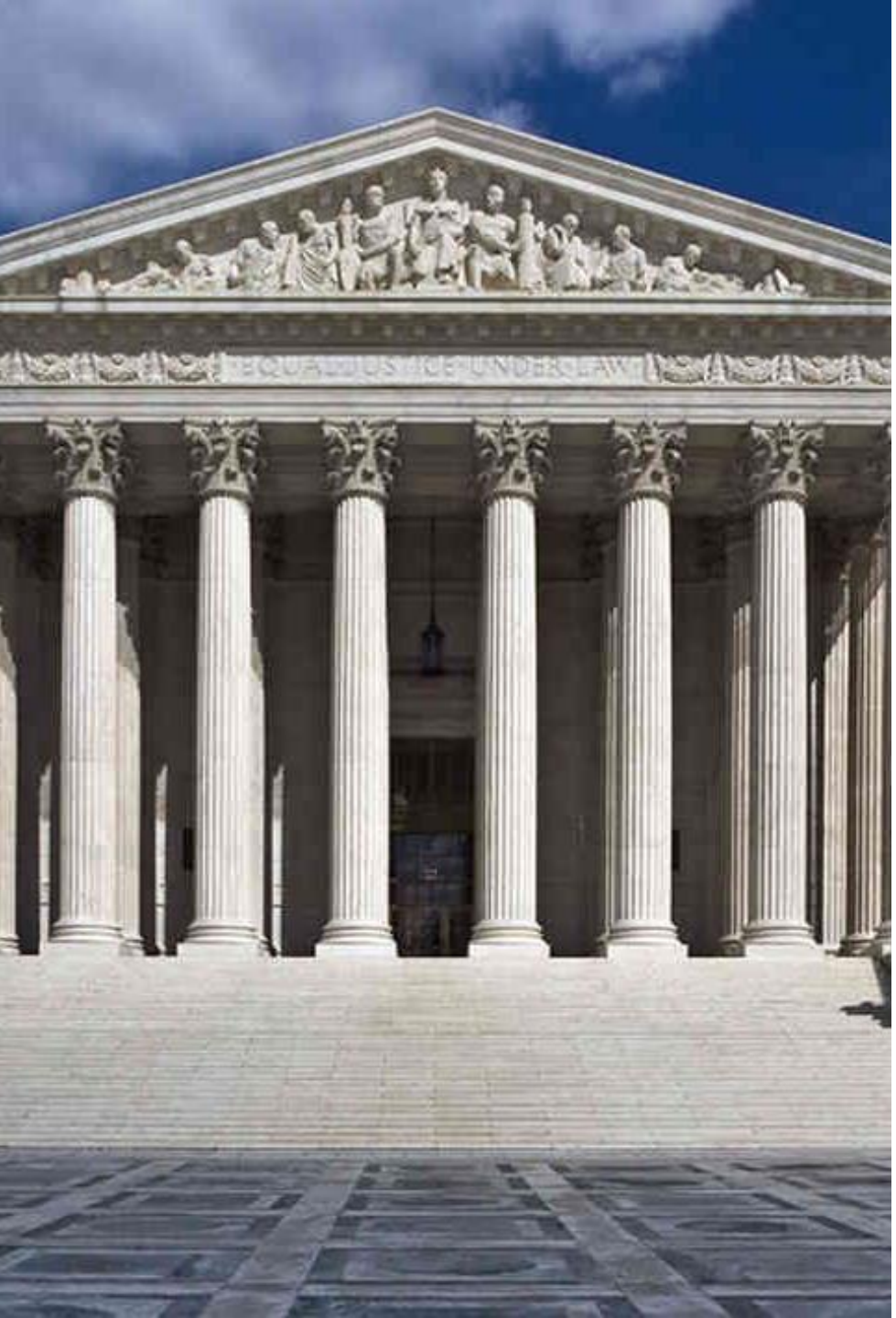
The Process of Electronic Discovery

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The Federal Rules of Civil Procedure for eDiscovery

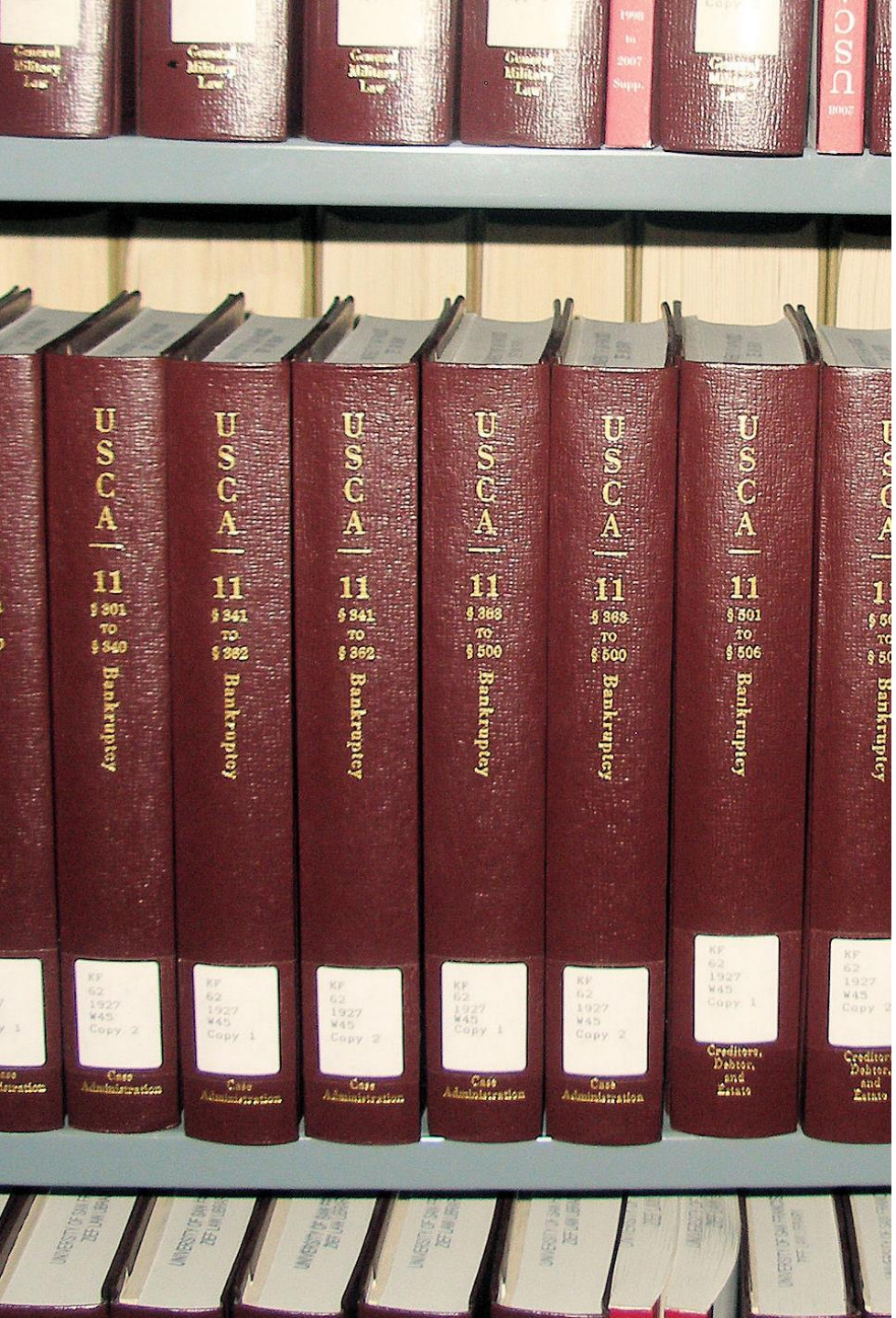
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History

- In April 2018, the Supreme Court approved amendments to the Federal Rules of Civil Procedure that went into effect in December 2018.
- Rules that were updated: 5, 23, 62, 65.1.
- In 2019, the Supreme Court announced that **no** changes would be made to the rules through December 1, 2020.

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Federal Rule of Civil Procedure 26(b)

(b) DISCOVERY SCOPE AND LIMITS

(1) *Scope in General.* 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.

(2) *Limitations on Frequency and Extent.*

[. . .]

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party **identifies as not reasonably accessible because of undue burden or cost.** [. . .]

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

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Rule 26 (b)(1) – Narrows the Scope of Discovery

- Retains
  - The standard that "parties may obtain discovery regarding any non privileged matter that is relevant to any party's claim or defense"
- Drops
  - The requirement to produce evidence "reasonably calculated to lead to the discovery of admissible evidence"

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Factors To Determine What Is "Proportional"

- A key aspect of the amended Rule 26(b)(1) was the decision to explicitly adopt a proportionality standard in the text of the rule.
- The factors used to determine proportionality include:
  - 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

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Limitations on Broad Discovery Requests or Objections

- Parties can no longer use broad objections to avoid discovery; the days of simply stating the 'request is not proportional' are over. Correspondingly, a party may not simply state that information requested is relevant and expect to be granted discovery.
- Both parties need to be prepared to argue why and how requests are, or are not, proportional and relevant. One thing is sure: courts are as committed as ever to ensuring that parties receive the appropriate amount of information, they need to successfully argue their cases.

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Federal Rule of Civil Procedure 34(a)

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

- to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
  - any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or
  - any designated tangible things

- "Possession, custody, or control" can mean something very different depending on which Circuit you're in.
- Three current tests:
  - "Legal Right"
  - "Legal Right plus Notification"
  - "Practical Ability."

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Rule 34(b)(2)

(2) ***Responses and Objections.***

(B) *Responding to Each Item.* For each item or category, the response must either state that **inspection and related activities will be permitted** as requested or **state with specificity** the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state **whether any responsive materials are being withheld** on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

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Rule 34 & The Request For Production

4 Primary Takeaways From the Updated Rule 34

1. Provide greater specificity in objections;
    - A responding party may need to identify what in a request is "vague and ambiguous" or "unduly burdensome" — not simply that the request as a whole is.
2. Produce responsive documents within a "reasonable time"; and
    - Under the new rules, parties can no longer state that documents will be produced in the future without committing to a certain date. Parties that wish to produce documents in lieu of inspection, now must specify when that production will occur.
3. Give an express confirmation on whether documents are being withheld based on a stated objection.
    - This heightened standard forces litigants to consider their objections to requests for production, which will help expedite the litigation process.
4. A good practice is to state what you **are** producing, the steps you **are** taking to collect and produce data, and then let the other side critique the sufficiency. Trying to determine what you are "withholding" based on the vagueness of the request can be a fruitless exercise.

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Federal Rule of Civil Procedure 37(e)

- Rule 37 (e): **Failure to preserve electronically stored information.**

  If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

  (1) Upon a **finding of prejudice** to another party from loss of the information, order measures no greater than necessary to **cure the prejudice**; **OR**

  (2) Only upon a finding that **the party acted with the intent to deprive another party of the information's** use in the litigation:

  (A) presume that the lost information was unfavorable to the party;

  (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

  (C) dismiss the action or enter a default judgment.

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Parties Must Take "Reasonable Steps"

- At first glance, the requirement that a party only take "reasonable steps" to preserve **relevant** ESI—and not perfect steps to preserve—seems like a prudent obligation under amended Rule 37(e).
- However, it has proven to be difficult for courts to determine when a party has met its "reasonable steps" obligation. Making this determination can be difficult because the definition of "reasonable steps" varies from case to case, and party to party.

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Sanctions Require a Finding of Intent or Bad Faith

- Even if ESI is destroyed, courts will not impose sanctions (harsher actions listed in 37(e)(2)) unless there is a finding that the party acted intentionally to prevent the evidence from being used by an opposing party. The courts have set a high bar for what constitutes intent, it takes more than suspicious conduct.
- While honest mistakes are not enough to warrant sanctions, when it happens that a party acts irresponsibly to preserve evidence, a court may infer a finding of intent.

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Inherent Power of the Court to Impose Sanctions

- "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."
  - Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (internal citations omitted).
- In applying this principle to the spoliation of ESI, Judge Francis found that "If, notwithstanding this reasoning, Rule 37(e) were construed not to apply to the facts here, I could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented."
  - *CAT3, LLC v. Black Lineage, Inc.*, F. Supp. 3d (S.D.N.Y. 2016).

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Case Law

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Alsadi v. Intel Corporation, D. Ariz. July 17, 2020

- Issue: Can the Plaintiff apply for a motion for a negative inference for failing to collect data from a gas detector regarding hazardous emissions? The Plaintiff claimed that "The 2015 amendment to Rule 37(e) now 'forecloses reliance on inherent authority' to determine whether and what sanctions are appropriate for a party's loss of discoverable ESI."
- Rule: A Plaintiff's reliance on the Court's inherent inference has to be persuasive.
- Observations:
  - Judge Campbell stated: "The drafters of Rule 37(e) specifically 'intended to preempt use of other sources of sanctions – such state law or the long-established 'inherent power' doctrine – and require findings consistent with Rule 37(e) as the only path to remedying the loss of [ESI].'…They did so because they were seeking to bring uniformity to an area of the law that had been badly splintered by various courts' reliance on inherent authority."

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Oppenheimer v. Episcopal Communicators, Inc., W.D. N.C. August 14, 2020

- Issue: Was the Defendant reasonable in requesting information pertaining to prior copyright assertions, alleged infringement, etc?
- Ruling: The Defendant's motion to compel production of the requested information was granted as the Plaintiff failed to prove that the Defendant's requests were disproportionate, privileged or protected.
- Observations:
  - 'When trying to identify proportional e-discovery parameters, it behooves both sides to cooperate and work together.'
  - The Defendant's actions leading up to their motion to compel should be emulated by others when one side is uncooperative. That is: You should suggest alternative measures, attempt negotiation and if all your efforts fail, the next step will be to involve the court to help in the resolution of the discovery issues.

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Schmalz v. Vill. of N. Riverside, No. 13C8012, 2018 U.S. Dist. (N.D. Ill. Mar. 23, 2018).

- The Plaintiff, Schmalz, asked for dispositive sanctions under Rule 37(e)(2), either striking the defense or an adverse inference instruction. Judge Rowland passed-over these harsh sanctions as over-kill. She found that was unnecessary to counteract the prejudice caused to the plaintiff by loss of the text messages. She reached this opinion based on her finding that intentional, or bad faith, destruction of evidence was not shown. Instead, the evidence proved that defendants failure to preserve a few cell phones within their control was gross-negligence, not bad faith.
- Judge Rowland did, however, enter sanctions, permitting the plaintiff to present evidence at trial concerning the negligent text message loss. The Order also allows plaintiff to argue to the jury that they should presume that the contents of these texts would be contrary to defense witnesses testimony. Judge Rowland also granted Plaintiff Schmalz a fee award.

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Klipsch Grp., Inc. v. ePRO E-Commerce Ltd., 880 F.3d 620 (2nd Cir. 2018).

- The Second Circuit recently upheld discovery sanctions stemming from the spoliation of evidence by an accused vendor of counterfeit goods, to the tune of $2.7 million, plus an additional $2.3 million bond to cover future damages and fees. While those numbers alone are significant, they appear even more gargantuan when placed alongside the paltry damages that were likely to result from the underlying dispute, which could be as low as $20,000.
- This case began with the plaintiff, Klipsch Group, Inc., challenging a subsidiary of ePRO E-Commerce for selling counterfeit Klipsch headphones. The parties have disagreed from the outset about the value of the infringing sales. Klipsch believes monetary damages should number in the millions, while ePRO counters that the case is worth less than $8,000.
- As the discovery process in the dispute played out, it quickly became clear that ePRO was not meeting its *e*Discovery obligations. Its initial production consisted of fewer than 500 documents and the company claimed it had no original sales documents at all, instead producing a sales spreadsheet prepared specifically in response to the suit. A deposition of ePRO's CEO revealed that the company hadn't placed a litigation hold on "a substantial portion of its electronic data," *including emails*, and hadn't disclosed relevant documents in its possession.

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Questions?

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Contact Us



Jeremy Deutsch
Email: jdeutsch@cozen.com
Phone: 212-453-3955
URL: https://www.cozen.com/



Daniel B. Garrie
Email: daniel@lawandforensics.com
Phone: 855-529-2466
URL: www.lawandforensics.com



Jennifer Hoekstra
Email: jhoekstra@awkolaw.com
URL: https://www.awkolaw.com

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Jeremy E. Deutsch
Cozen O'Connor— Shareholder
Contact
E: jdeutsch@cozen.com
W: (212) 453- 3955
URL: https://www.cozen.com/

Jeremy E. Deutsch is a shareholder at Cozen O'Connor. Mr. Deutsch has over 20 years' experience in business law, including transactional and day to day legal counseling as well as complex corporate and commercial litigation and arbitration.

In 2018, Mr. Deutsch was selected as a member of Law360's Banking editorial advisory board. Mr. Deutsch's corporate practice embraces all areas of corporate transactional and advisory roles. In transactional work, he has represented clients in mergers/ acquisitions, sales/ leases, employment agreements/ terminations, and all manner of commercial transactions, including private investment deals, technology transactions, and private equity. In advisory work, he acts as general counsel to a number of different businesses and provides counsel and advice to established businesses and startups on corporate relationship creation and architecture; corporate governance, including disputes between partners and advising Boards of Directors; and day to day business issues.

In litigation, Mr. Deutsch has represented clients and tried cases to verdict and arbitrated matters to final award in matters involving large frauds, breaches of fiduciary duty, breaches of contract and joint venture agreements, complex financial instrument and securities litigation, real estate lending, shareholder derivative suits, stock option litigation, construction disputes, employment disputes, and violations of restrictive covenant agreements by employees. He has experience in cross-border litigation in the United States, Canada and in England, including matters involving securities fraud, trade secret theft, copyright and trademark infringement, commodities fraud, investment fraud, various types of financial fraud, employee theft of high-tech products, officer liability/mandatory indemnification issues, RICO claims, employment contracts and management buyout litigation. He has been lead trial counsel in United States Federal Courts, New York State courts, the state courts of other states, and private dispute resolution in the American Arbitration Association, FINRA, JAMS, and the International Chamber of Commerce International Court of Arbitration. Mr. Deutsch also has extensive federal and state court injunction experience.

Mr. Deutsch's training as a trial lawyer gives him an unusual perspective on corporate matters, as he has seen and litigated the results of failed deals and ventures. He views corporate work as a form of centralized risk management, insofar as well-designed contracts on other corporate documents foster productive partnerships and can help prevent disputes and litigation.



Daniel B. Garrie, Esq.
Law & Forensics – Co-founder
JAMS – Mediator, Arbitrator, eDiscovery Special Master
Contact:
W: (855) 529-2466
E: daniel@lawandforensics.com
URL: www.lawandforensics.com

LAW & FORENSICS
A Global Legal Engineering Firm

B.A., Computer Science, Brandeis Uni.
M.A., Computer Science Brandies Uni.
J.D., Rutgers School of Law

Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers' phone and computer, despite the embezzlers' attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cyrptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach, No. 30-2012-00582855* (Super. Ct. Cal. 2014); *Small v. University Medical Center of Southern Nevada, 2014 WL 4079507*(D. Nev. 2014); *C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc.* et al (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

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Jennifer Hoekstra
Aylstock, Witkin, Kreis & Overholtz PLLC – Partner
Contact:
E: jhoekstra@awkolaw.com
URL: https://www.awkolaw.com

Jennifer M. Hoekstra is a partner with Aylstock, Witkin, Kreis & Overholtz, PLLC. A native of Saint Paul, Minnesota, Ms. Hoekstra boasts an impressive academic and professional record, including graduation from two of the nation's top schools. She earned her earned Bachelor of Arts in Environmental Science from Columbia College, Columbia University in the City of New York. She relocated to Louisiana to attend Tulane Law School, where she earned her J.D. while also completing a certificate in Environmental Law. During her law school career, she spent a semester studying at the University of Wisconsin School of Law and visited on their International Law Journal as a Junior Member during her Hurricane Katrina evacuation semester. While in law school, Ms. Hoekstra served as Executive Treasurer of the Student Bar Association and as a Graduate Student Association delegate.

Ms. Hoekstra has been involved in complex litigation cases of all forms since 2007. Jennifer was inspired to pursue her law degree while working as a Litigation Assistant at Cravath Swaine and Moore LLP in New York. Ms. Hoekstra has earned a solid reputation as a skilled writer and researcher, and plays an integral role in several complex litigation cases, practicing in the areas of Pharmaceutical Mass Torts, Defective Device Mass Torts, and other complex litigation. Ms. Hoekstra has been involved in all aspects of MDL litigation involving Actos, Genetically Modified Rice, DePuy ASR, DePuy Pinnacle, Biomet, Plavix, NuvaRing, the BP Oil Spill, and other defective drugs or devices. She is currently a member of the DePuy Pinnacle Law and Briefing Committee as well as a member of the Biomet II PSC. Jennifer was central to the successful outcome in bellwether trials in the Genetically Modified Rice, Actos and DePuy Pinnacle Hip MDLs with more than $11 Billion in trial verdicts resulting from those cases.

She is licensed to practice before all Louisiana state and federal courts and the U.S. District Courts for the Northern District of Texas and Eastern District of Missouri as well as the 5th and 8th Circuit Courts. She is a member of the American Bar Association, the Louisiana Bar Association, the Acadiana Federal Bar Association, the Alexandria Louisiana Bar Association and the American Association for Justice. She is a member of Women En Mass and was also a member of the inaugural 2018 Board of Directors for Emerge Louisiana.

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