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Rule 26(f)

Conference of the Parties

a/k/a

“Meet and Confer”

This presentation does not contain or constitute legal advice.

No attorney-client relationship is created.

The views expressed are solely those of the author.

OLD VIEW OF LITIGATION

- The vector of two damn lies is the truth.
 - Anon.



GOLD STANDARD & GAMING THE SYSTEM

- Gold Standard:
 - Human Review of Every Document
 - Document Review Teams of Lawyers and Assistants
- Gaming the System:
 - Give Me Everything – Cookbook Discovery
 - You Get Nothing
 - You did not ask the correct question
 - Boilerplate litany -
 - Unduly vague, overly broad, and to the extent it seeks privileged documents, object. . . .
 - Motion Practice – End of the Civil Trial



LITIGATION BY AMBUSH

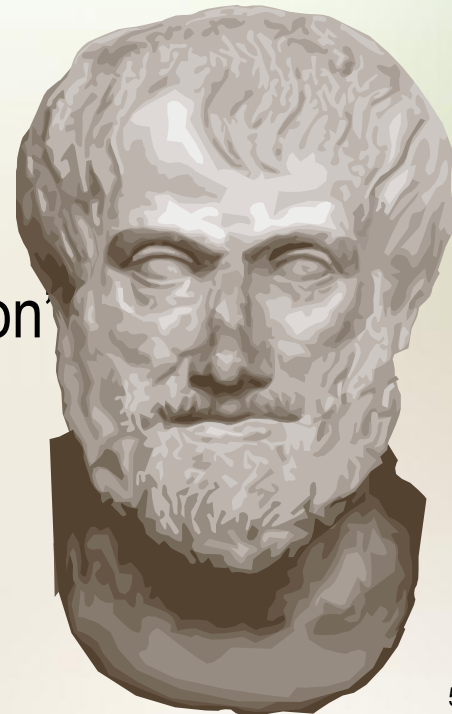
- When the federal discovery rules were adopted in 1938, civil litigation abandoned trial by ambush



- Our system is an honor system in which information is exchanged upon request

UNDERLYING PHILOSOPHY - CHANGING

- Original Intent:
 - Lawyers handle discovery & Judges rarely become involved
- Led to studies and loud complaints of “discovery abuse”:
 - Courts became more involved
- December 2006 ESI Amendments:
 - G. Paul & J. Baron, “Information Inflation”
 - Information has changed
 - Litigation culture must change
 - Early (1st?) call for cooperation



RESULT? SATELLITE LITIGATION

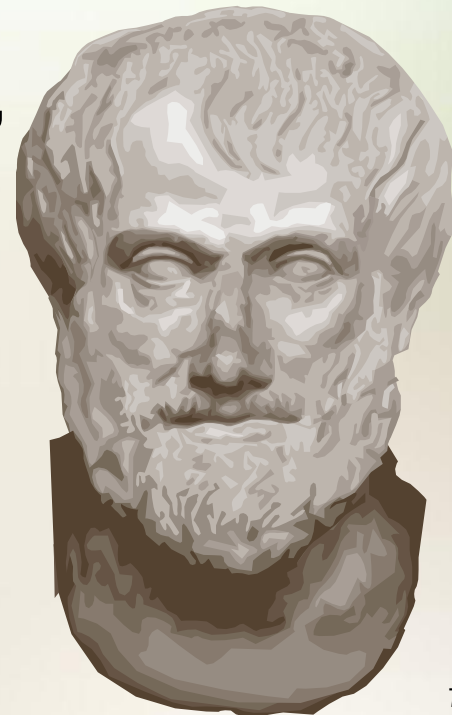
- Decline in civility
- Careers have been ruined – “marquee” sanctions
- Forensic experts have been sued by the law firms that hired them
- Courts complain – 100’s of hours to resolve fights



“Marquee” was coined by D. Willoughby, et al., 60 Duke L.J. 789 (2010).

UNDERLYING PHILOSOPHY

- Discovery is too important to be left to the lawyers
 - Apologies to Geo. Clemenceau (“war is too important to be left to the generals”)
 - M. Berman, C. Barton, and The Hon. P. Grimm, eds., “Managing E-Discovery and ESI: From Pre-Litigation Through Trial” (ABA Jul. 2011), 422.
- Judges take an early and active role
- According to 60 Duke Law Journal 789, Imposition of sanctions was at an all-time high in 2010.



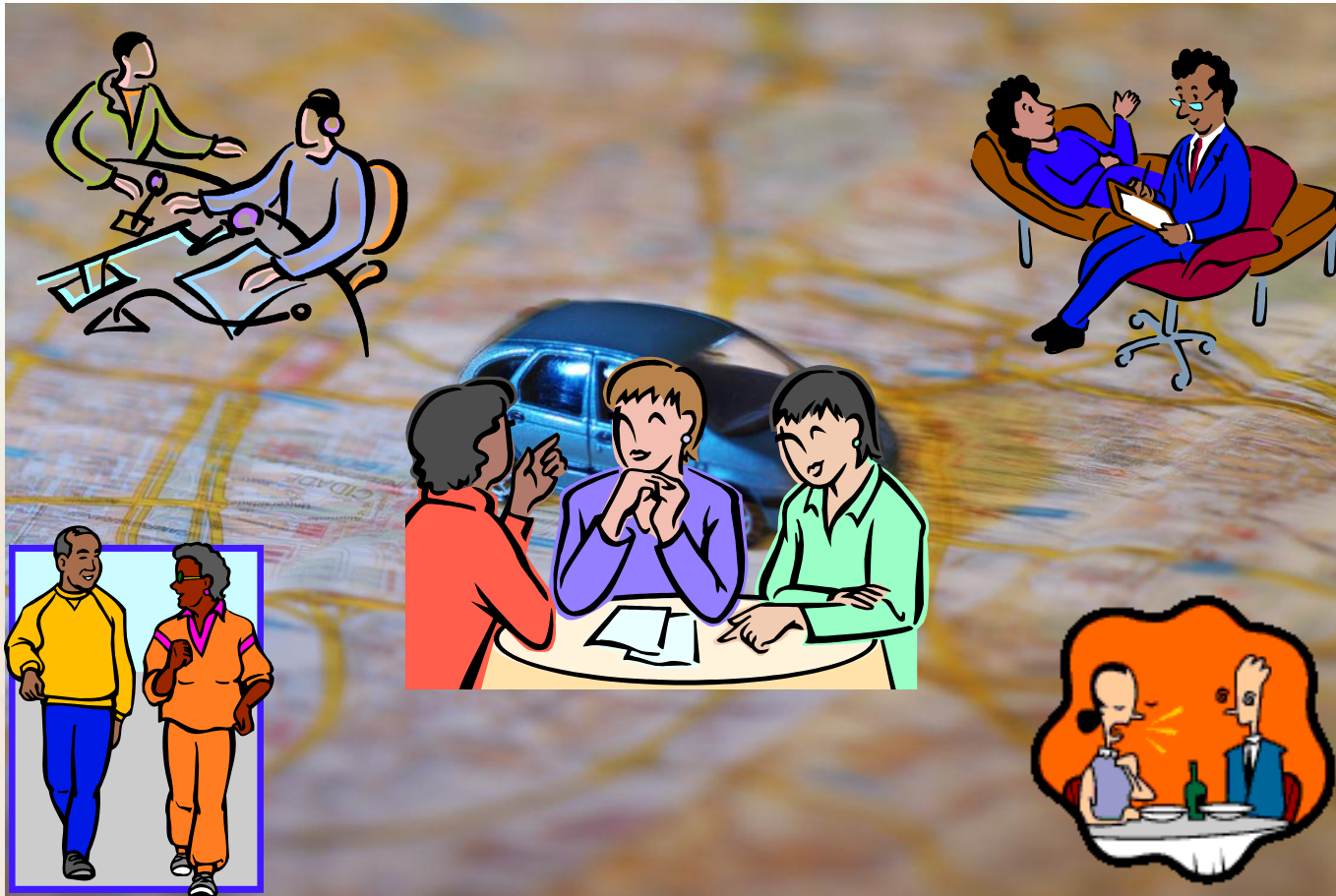
ANTITDOTE

- Rule 26(f) provides a road map



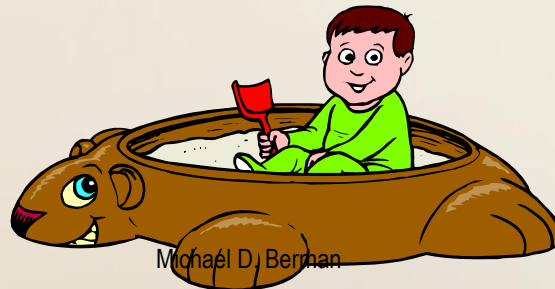
ANTITDOTE

- Previously, DISCOVERY was the path
- DISCUSSION is the path compelled by the Rules



ORDERING PEOPLE TO “COMMUNICATE”

- Courts are now in the “business” of ordering people to communicate
- This is not new – for over 30 years, before filing a discovery motion, attorneys were required to confer and provide a certificate that, despite good faith efforts they were unable to resolve the discovery dispute
- Cynics might say it wasn’t effective then and it is not effective now
- But Rule 16 changes the game with sanctions!



HOW DO YOU DO THIS?

- iSchool people don't speak legalese
- Law students don't understand networks and searching
- You talk exabytes and we want res judicata!
- Business people just look at the bottom line



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HOW DO YOU DO THIS?: Crossing the Great Divide

- But the meter is “ticking”
- And the stakes are high



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BERMAN'S FIVE-STEP 26(f) PROGRAM

- It is free; and,
- **Worth every penny** you paid for it



STEP 1: BE REASONABLE

- Consider how every position you take will “play” before a neutral person
- Patrick Henry could say: “Give me liberty or give me death,” but you can’t
- “Trading” is part of the game:
 - If your opponent wants something badly, maybe he/she will give something else up
- **UNDERSTAND the LEGAL & I.T. Landscape**



STEP 1: BE REASONABLE

- **UNDERSTAND the LEGAL & I.T. Landscape**
- What do you think will happen if you ask a big company to preserve all email or all backup media?
- If you wouldn't allow the opponent to access your system, should you ask them to allow you to access theirs?
- How can you avoid costly steps, e.g., backup media, by looking at other sources?
- Have you mapped your data?
 - Will you voluntarily offer to share your map?



STEP 1: BE REASONABLE

- For ABC – Gladys has duplicated paper records and Jane has been converting slowly to computer.
 - Can XYZ ask for both?
- XYZ has “Supermax” – can ABC ask for a license?
- Can XYZ demand preservation of son and daughter’s ESI at the law and accounting firms?





STEP 2 PROPORTIONALITY

PROPORTIONALITY

PROPORTIONALITY



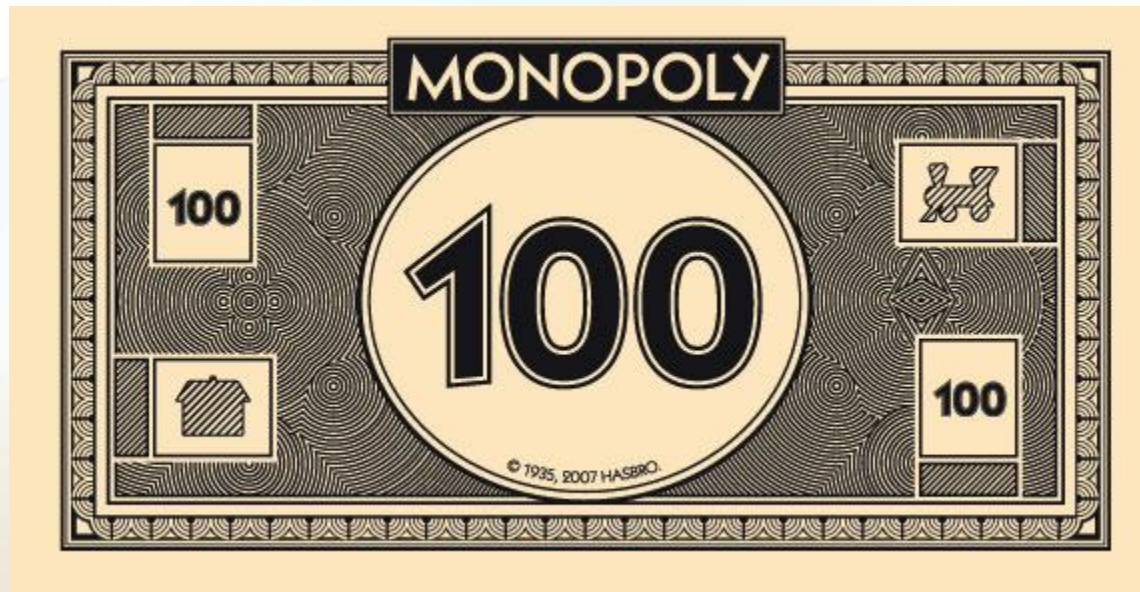
proportionality

PROPORTIONALITY



STEP 2

PROPORTIONALITY



Marens v. Carraba's Italian Grill, Inc., 196 F.R.D. 35 (D. Md. 2000) (limiting the number of hours for document discovery).
Mancia v. Mayflower Textile Servs. Co., 2008 U.S.Dist.Lexis 83740 (D. Md. 2008).

RALPH LOSEY,
“ADVENTURES IN ELECTRONIC DISCOVERY”
(West 2011), 24.

38%

ABC v. XYZ

- What are the costs of each step?
 - Can you use the prices given to estimate them?
 - What about the three RAID Supermax servers?
 - Can/should XYZ ask ABC to image all 50 workstations?
 - If so, what is a likely response?

STEP 3: TRANSPARENCY

- For two centuries, litigation has been played by holding your cards tight and springing a “Perry Mason” moment at trial
- ESI requires disclosure
- Rule 26(a)(1) mandates disclosure
- Rule 26(f) compels disclosure
- Rule 26(b)(2)(C) requires cost-benefit analysis
- Rule 1 calls for the just, speedy, and inexpensive resolution of disputes
- You need to show **SOME** of your cards
 - Even some “bad” ones!

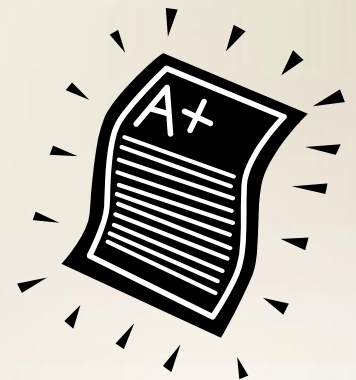


ABC v. XYZ

- Is Bill a “poster child” for transparency?
- What about ABC’s 45-day email deletion policy.

STEP 4: PERFECTION

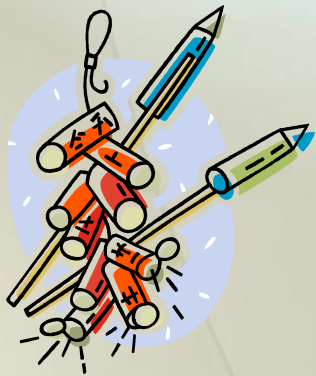
- Do not demand perfection
- Do not expect perfection
- Courts have said that they will tolerate mistakes
 - Pension Committee (2010)
 - For more detailed discussion, see <http://www.esi-mediation.com/2011/07/15/what-does-%e2%80%9cthe-making-of-a-surgeon%e2%80%9d-have-to-do-with-esi-and-software-glitches/>
- Ralph Losey has written that the word “all” is obsolete





STEP 5

COOPERATION



STEP 5: COOPERATION

- Sedona Conference Cooperation Proclamation
- Over 100 Judges have endorsed it
- Advocacy need not, and should not, be adversarial
- You can zealously represent your client, while you cooperate
- Absent cooperation, the system cannot function and litigants will be bankrupted
- Electronic litigation cannot be a war of attrition
 - World War I trench warfare bankrupted generations

THE RULE 26(f) CONFERENCE

- The goal is to develop a discovery plan & propose it to the Court
 - What will be preserved?
 - How will it be preserved?
 - What will be produced?
 - How will it be produced?
- Often there will be more than one conference
- Two are generally ideal
 - Research by Prof. D. Oard & Jason Baron, Esq.

END PRODUCT

- TELL THE COURT
 - Areas of Agreement:
 - We will produce TIFFs except for spreadsheets
 - We agree on the following search methodology
 - Here is how we will handle privilege
 - Areas of Disagreement
 - We won't preserve cell phones – they want us to
 - We won't search backup tapes – they want us to
 - Areas Where Parties Agree That Court Order is Needed
 - Rule 502
 - Clawback

ABC v. XYZ

- Complex facts – but realistic
- Law students don't know much about computers
- iSchool students don't know much about law
- Each have knowledge in their own sphere

ABC v. XYZ

- Complex facts – but realistic
- Each side has strengths and vulnerabilities
- Topics to Cover
 - Privilege
 - Preservation
 - Form of Production
 - Search

ABC v. XYZ

- Privilege
 - You have attorney-client privileged information
 - You have confidential medical information
 - You may have trade secrets
 - How do you find it, i.e., search for it?
 - How do you protect it?
 - What happens if you mistakenly produce it?

ABC v. XYZ

- Preservation
 - Do you leave it where it is?
 - If so, what happens if it is lost?
 - Do you make forensic copies of everything?
 - If so, what is the cost?
 - Can you agree to forensically copying less?
 - What is key to your case?
 - In your system?
 - In theirs?
 - What is reasonable to expect?

ABC v. XYZ

- Form of Production
 - The Rules allow you to request the form or forms that you want
 - Your opponent can object
 - Once it is produced in one form, you can't get it in another form
 - Do you want TIFFs? PDFs? Native? A mix?
 - Why?
 - What are the advantages?
 - The costs?

ABC v. XYZ

- Search
 - What methodology?
 - Keywords?
 - How developed?
 - How tested?
 - Quality control?
 - “Predictive Coding?”
 - Do you trust the “black box”?
 - How much will it cost?
 - How much will it save?
- Different techniques for privilege and for relevance?





"Fear Factor - NBC®"

"You either grab the reins or you get dragged by the horse."



Liz Spayd, WASHINGTON POST

NO SILVER BULLET

PHOTO of Clayton Moore as the Lone Ranger, Wikipedia,
http://www.google.com/imgres?imgurl=http://upload.wikimedia.org/wikipedia/en/c/ce/Moonre-LoneRanger.jpg&imgrefurl=http://en.wikipedia.org/wiki/The_Lone_Ranger&h=317&w=250&sz=59&tbnid=Q93uAfx0iNrYcm:&tbnh=94&tbnw=74&prev=/search%3Fq%3Dlone%2Branger%26tbn%3Disch%26tbo%3Du&zoom=1&q=lone+ranger&hl=en&usq=__2X04M1OLh5ttagy231dVY1TUj7A=&sa=X&ei=ter_TaCqEaPd0QHd_bTRDg&sqi=2&ved=0CDsQ9QEwAQ



“The Lone Ranger is a fictional masked Texas Ranger who. . . fights injustice in the American Old West. The character has become an enduring icon of American culture.”

**5-STEP PLAN - A RULES-BASED APPROACH:
REASONABLENESS, PROPORTIONALITY,
TRANSPARENCY, COOPERATION, IMPERFECTIONS**

ABC v. XYZ

- What is at stake?
 - Do you look at allegations of \$600K + \$1 million?
 - Do you evaluate them?
- Plaintiff has cash flow problems:
 - That is relevant to what is reasonable
 - But do you “bare your throat” and discuss it?
- There is a ten-year course of conduct:
 - Is all ESI for 10 years relevant?
 - How will you handle it?

ABC v. XYZ

- The cost to preserve .wav files is \$100 per GB
 - The cost of processing is TBD
 - On June 1, XXX0, ABC received a voice mail order from the surgeon
 - Ms. B then left a voice mail order on XYZ's system
- How do you analyze?
 - Relevant?
 - Preserved?
 - Produicable?
 - Proportionate?

ABC v. XYZ

- Why is there a mention of typewriter ribbons in an ESI class?
 - Does it give one party leverage?
- Jason spoke of asymmetry – where are there asymmetries here and how can you use them?
- XYZ has data wiping software
 - Is that OK?
 - How can you use it in arguments?
- What is the import of Bill, the rogue employee?
 - Why is he in the problem?

M. Berman, **“The Rule 26(f) Conference of the Parties,”**

in M. Berman, C. Barton, The Hon. P. Grimm, eds.,
MANAGING E-DISCOVERY AND ESI
FROM PRE-LITIGATION THROUGH TRIAL
(ABA 2011).

In *Zubulake*, the court wrote that the key problem
was a failure to communicate:
Talk with your client;
Negotiate with your opponent.



Online Sample Mock Rule 26(f) Conference of Parties

<http://www.esi-mediation.com/2011/08/07/mock-rule-26f-conference-of-parties-posted-online/>
<http://vimeo.com/29144124>