2023 DATA DISCOVERY LEGAL YEAR IN REVIEW

BY DAVID HORRIGAN

Ninth Edition

Foreword

Welcome to this year's edition of the *Data Discovery Legal Year in Review*. For this ninth annual e-book, we moved publication from January to February. We made the move for a variety of reasons—one of which was to ensure we could capture the entire year. In fact, this year, we have multiple December decisions that we would have missed with the old January publication date.

Topic of the Year: Artificial Intelligence

Despite appearances, this is really not the *Artificial Intelligence Law Year in Review*. Yes, we devote a lot of this year's edition to AI, but it's an obvious understatement to note that artificial intelligence has been the biggest data discovery legal topic over the past year.

In 2023, we saw artificial intelligence affect the practice of law in multiple ways. First, there were the highly publicized hijinks of matters where attorneys or their clients relied on generative AI (GenAI) to do their legal research for them.

It didn't work out well.

In *Mata v. Avianca, Inc.* (Please see page 8), we saw sanctions where the court-ordered letters to various courts were probably more serious than the monetary penalties. In *United States v. Cohen* (Please see page 9), we saw another legal research fiasco when lawyers relied on the legal research of their client, former Trump lawyer Michael Cohen. Sadly for counsel, Mr. Cohen did his legal research with GenAI as well. Also in this year's edition, you'll see copyright and data privacy issues involving GenAI.

From Emojis to Ephemeral Apps

Of course, artificial intelligence was not the only data discovery issue in 2023. We continued to see emojis become an issue in e-discovery in matters such as *In re Bed Bath & Beyond Corp. Sec. Litig.* (Please see page 23). Ephemeral apps are still an e-discovery issue. Does the use of apps such as WhatsApp and Signal indicate bad faith or an intent to deprive? Hint: The court in *Barak v. Rooster's Guide & Outfitting Adventures* (Please see page 21) said no.

These relatively new e-discovery law topics weren't the only issues the courts faced in 2023. We still had the issues we've had for years, such as the attorney-client privilege and the work product doctrine, sanctions, and questions of possession, custody, and control.

Discovery Action in the Courts

Although it didn't match 2021's all-time high of over 5,500 e-discovery decisions, 2023 was another robust year for e-discovery law with over 4,800 decisions from the courts.

Failure to produce continued to be the most litigated issue in e-discovery decisions, followed by proportionality and sanctions, which were in a virtual dead heat for second place for the highest number of e-discovery decisions.

Cooperation in e-discovery decisions continued to lag behind. Of course, we're not sure if that's because counsel and clients are cooperating more or there are simply not as many reported decisions. Sadly, we think it's probably the latter.

As we have in the past, we use multiple legal research tools in developing this e-book, including LexisNexis and data from our educational partners at eDiscovery Assistant. Thanks to Kelly Twigger and her team for providing free links to the decisions for our readers. You'll find the hyperlinks where available on each page.

Special Thanks and Predictions

As long as we're thanking people, I should mention my longtime Relativity colleagues who have helped bring this publication to life. As she has done for many years, Kristy Esparza brings her immense talent and virtual red pen to ensure we maintain our flow, style, and syntax, and our very skilled designer, Natalie Andrews, makes the pages far more pleasing to read than simple text.

As always, our standard disclaimer: nothing here constitutes legal advice. If it sounds like advice, please consider it friendly advice, not legal advice.

What do we see for 2024? Artificial intelligence isn't going anywhere, and we may take another jurisprudential step. There's been a lot of discussion about GenAI being technology-assisted review version 2.0 or TAR on steroids. We look to see GenAI enter the case law on disputes over methodology—and we'll see the continuing evolution of the law of emojis and other topics that make e-discovery one of the most fascinating and rapidly changing areas of the law.

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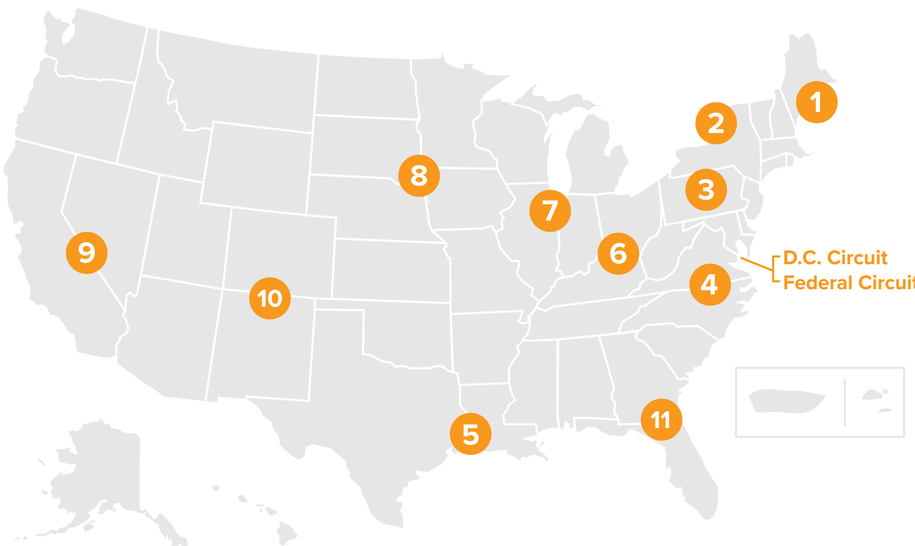
**Denotes a U.S. Territory, Possession, or Federal District*

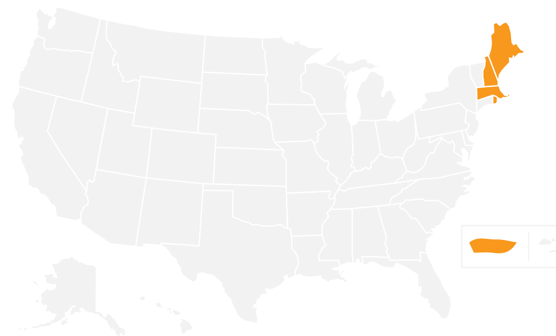
Jurisdictions of the U.S. Circuit Courts of Appeals



- **First Circuit:** Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico*
- **Second Circuit:** Connecticut, New York, Vermont
- **Third Circuit:** Delaware, New Jersey, Pennsylvania, U.S. Virgin Islands*
- **Fourth Circuit:** Maryland, North Carolina, South Carolina, Virginia, West Virginia
- **Fifth Circuit:** Louisiana, Mississippi, Texas
- **Sixth Circuit:** Kentucky, Ohio, Michigan, Tennessee
- **Seventh Circuit:** Illinois, Indiana, Wisconsin
- **Eighth Circuit:** Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota
- **Ninth Circuit:** Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington State, Guam*, Northern Mariana Islands*
- **Tenth Circuit:** Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming
- **Eleventh Circuit:** Alabama, Florida, Georgia
- **District of Columbia Circuit:** District of Columbia* and Appeals of Federal Administrative Decisions
- **Federal Circuit:** (Subject Matter Jurisdiction) Patents, International Trade, Federal Claims

Analyses of Our Selected 2023 Cases

First Circuit: Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico*



SANCTIONS: DISMISSAL AND FED. R. CIV. P. 37(E)(2)

Failing to Respond to Discovery Requests Can Get You Sanctioned Even If You're Pro Se

Collagan v. Aroostook County Jail, **No. 22-cv-00362 (D. Me. Dec. 29, 2023).**

The Facts

Leslie Collagan was an inmate in Maine's Aroostook County Jail. Ms. Collagan claimed that her Christian faith and her interpretation of Scripture passages required that she maintain a vegan diet. She then converted to Judaism and requested that jail officials supply her with the Torah and the Talmud. Claiming that jail officials refused her vegan meals, Talmud, Torah, a meeting with her pastor, and that they committed unlawful acts during her hunger strike over the vegan diet, Ms. Collagan sued the jail and several individuals.

Whether she was dining or not, Ms. Collagen committed a veritable cornucopia of discovery violations, mostly for failing to file discovery responses. The jail first sent discovery responses on July 3, 2023, and sent another letter on August 30. On September 22, 2023, a magistrate judge ordered Ms. Collagan to respond by October 16. As of the court's December 29, 2023 order, Ms. Collagan had still not responded.

The Law

In his December 29, 2023, order, U.S. District Judge John Woodcock Jr., conceded, "Dismissal is a harsh sanction, especially for someone who is incarcerated and whose silence may be explained by a practical reason that the Court is unaware of." However, Judge Woodcock issued somewhat of a compromise by dismissing Ms. Collagan's complaint—a nuclear sanction under Fed. R. Civ. P. 37(e)(2). However, the court made it a compromise by dismissing the complaint without prejudice instead of with prejudice.

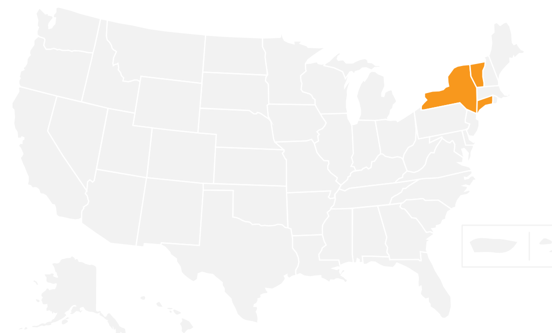
"Ms. Collagan is not barred by this order from reinitiating her claims, assuming they otherwise comply with the law. If she does so, however, she must be prepared to comply with the discovery and other orders of this Court. To this extent, the Court is denying the Defendants' motion for sanction of dismissal as the Defendants demand in their motion that the dismissal be with prejudice," Judge Woodcock wrote.

Why *Collagan* Matters

It's often said that so-called pro se litigants—litigants who represent themselves—get to play by a different rulebook than parties represented by counsel. *Collagan* is important because it illustrates that this leniency toward litigants without lawyers goes only so far.

Collagan shows that pro se litigants, despite their often difficult circumstances, must still follow court local rules, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence. In *Collagan*, we think Judge Woodcock found an enlightened way to deal with a pro se litigant who had run afoul of the rules of discovery. The court did not excuse Ms. Collagan's failure to participate in discovery. However, by dismissing her action without prejudice instead of with prejudice, the judge took Ms. Collagan's pro se status into account by giving her the opportunity for another day in court. That is, of course, another day in court if she follows the rules.

Second Circuit: Connecticut, New York, Vermont



ARTIFICIAL INTELLIGENCE LAW

AI Hallucination Leads to Fake Legal Research and Sanctions for Counsel

Mata v. Avianca, Inc., **No. 22-cv-1461 (S.D.N.Y. June 22, 2023).**

The Facts

On an Avianca Airlines flight from El Salvador to New York's John F. Kennedy Airport in August 2019, Roberto Mata alleged that a drink cart struck his left knee, injuring him seriously. Mr. Mata sued Avianca in New York State Court in February 2022, but Avianca moved the case to federal court, citing federal question jurisdiction.

Avianca argued Mr. Mata's claims were time-barred under the Montreal Convention. In response, Mr. Mata's attorneys replied in March 2023, and their filing included legal research and arguments on the time-bar question. However, Avianca replied to the court that it was unable to locate most of the case law cited by Mr. Mata. The court couldn't find them either, and it issued an order to Mr. Mata's counsel instructing them to file copies of the cases with the court. The reason no one could find the cases is because the cases didn't exist. One of Mr. Mata's attorneys admitted he obtained the cases from ChatGPT. ChatGPT gave him fake cases, what the computer scientists call "hallucinations."

The Law

Mr. Mata's counsel essentially doubled down in an affidavit in response, continuing to use the fake cases. Counsel later asked ChatGPT, "Is Varghese a real case?" and "Are the other cases you provided fake?" ChatGPT replied that it had supplied "real" authorities. The court issued an Order to Show Cause why Mr. Mata's lawyers should not be sanctioned.

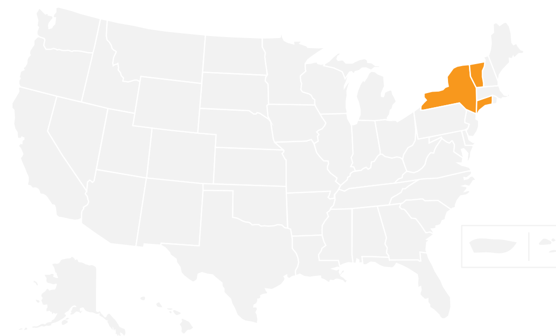
In sanctioning the lawyers, U.S. District Judge P. Kevin Castel wrote that filing court papers "without taking the necessary care in their preparation" was an abuse of the judicial system that was subject to sanctions under Fed. R. Civ. P. 11. Citing the U.S. Supreme Court's 1990 decision in *Cooter & Gell v. Hartmax,* the court wrote, "Rule 11 creates an incentive to stop, think, and investigate more carefully before serving and filing papers." Judge Castel issued a $5,000 monetary sanction. Probably far more serious for the lawyers involved, the sanctions also included a requirement that the lawyers send a copy of the sanctions order and the fake cases to Mr. Mata and all judges included in the fake cases.

Why *Mata* Matters

As Judge Castel wrote in one of his orders in this case, "The Court is presented with an unprecedented circumstance." The judge is certainly engaging in understatement—*Mata* gives new meaning to the term, "case of first impression." *Mata* matters not only because it is new and novel. To quote appellate courts on one of their jurisdictional bases, it's a question that's likely to recur. In 2023, we saw other cases following *Mata* where ChatGPT fake case hallucinations had bad endings in court. (Please see *Morgan* on page 20.) In fact, Mata was the first of many important cases stemming from generative artificial intelligence. Courts are now grappling with copyright issues (Please see *New York Times Co.* on page 10 and *Silverman* on page 17) as well as data privacy challenges (Please see *A.T. v. OpenAI LP* on page 18).

Mata is the first of what is certain to be a long line of cases where generative AI and the law collide. More basically, the court notes Mr. Mata's lawyers would have been in far less trouble had they fessed-up initially. As with so many things in life, the cover-up is worse than the crime.

Second Circuit: Connecticut, New York, Vermont



ARTIFICIAL INTELLIGENCE LAW: HALLUCINATIONS AND LEGAL RESEARCH

Former Trump Lawyer Michael Cohen Uses Google Bard and Gets Fake Cases for Filing

United States v. Cohen, **No. 18-CR-602 (S.D.N.Y. Dec. 12, 2023).**

The Facts

Based on crimes committed in his work for former President Donald Trump, attorney Michael Cohen pleaded guilty to campaign finance, tax fraud, and other crimes in federal court. Mr. Cohen was sentenced to three years in prison, and, after completing his time in prison, he was still subject to supervised release. In seeking to end his supervised release, Mr. Cohen, through his lawyers, filed court papers, which included legal research.

Unfortunately for Mr. Cohen and his lawyers, the legal research included research by Google Bard, a generative artificial intelligence (GenAI) platform. Mr. Cohen, now disbarred due to his convictions, conducted the Google Bard research himself, thinking Google Bard was simply a more advanced version of the popular search engine. However, Google's GenAI Bard had so-called "hallucinations" where it produced false information, in this matter, fake cases.

The Law

Noting that the cases cited by Mr. Cohen did not appear to exist, U.S. District Judge Jesse Furman issued an order requiring Mr. Cohen's counsel to produce the three court cases created by Google Bard. Judge Furman wrote that if Mr. Cohen's counsel was unable to provide copies of the cases, he should show cause for why he should not be sanctioned under: 1) Fed. R. Civ. P. 11, 28 U.S.C. § 1927, a section of the United States Code providing for counsel's liability for excessive costs, or the court's inherent authority.

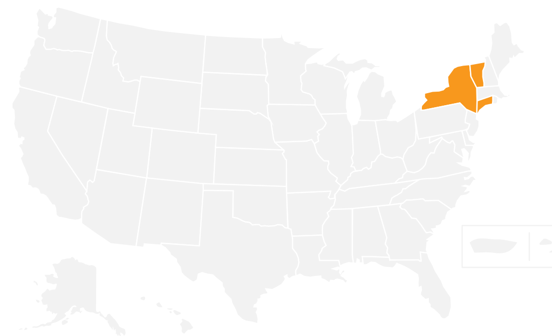
In his order, Judge Furman further requires, "Any such submission shall take the form of a sworn declaration and shall provide, among other things, a thorough explanation of how the motion came to cite cases that do not exist and what role, if any, Mr. Cohen played in drafting or reviewing the motion before it was filed." The court said it would reserve judgment on the underlying issue, the end of Mr. Cohen's supervised release, until after the submission.

Why *Cohen* Matters

In today's edition of "No Good Deed Goes Unpunished," Mr. Cohen's counsel, David Schwartz, took the case pro bono because Mr. Cohen is a longtime personal friend. In addition, Mr. Schwartz told the court he saw no need for case law in the first place because supervised release decisions are so fact-specific and because court's have so much discretion in supervised release decisions. He said he assumed Mr. Cohen had worked on the cases with his other lawyer, E. Danya Perry, from another law firm.

e-Discovery legal teams are often faced with challenges due to the way their clients handle their data. The GenAI saga in *Cohen* is a corollary for discovery legal research. The fact pattern is somewhat unusual where the client is a high-profile former lawyer, but the case illustrates the communications breakdowns on legal teams, with Mr. Schwartz apparently unaware of what Mr. Cohen and Ms. Perry were doing. In the age of artificial intelligence, such breakdowns can be costly, as they were here. There were multiple cooks in the kitchen, and the head chef was unaware of all the ingredients in the legal soufflé.

Second Circuit: Connecticut, New York, Vermont



ARTIFICIAL INTELLIGENCE LAW: COPYRIGHT

New York Times Sues Microsoft and OpenAI, Alleging Copilot and ChatGPT Violate Copyright

New York Times Co. v. Microsoft Corp., **No. 23-11195 (filed Dec. 27, 2023).**

The Facts

In November 2022, OpenAI, of which Microsoft Corporation is a major investor and partner, made its ChatGPT generative artificial intelligence (GenAI) chatbot offering widely available. In addition, Microsoft itself released a GenAI offering, Copilot, known formerly as Bing Chat.

Many GenAI tools are based on so-called large language models (LLMs). LLMs are AI systems that work by ingesting massive amounts of data and applying machine learning algorithms to enable the LLMs to generate high-quality content, including text and images on which the system is trained.

The New York Times alleged Microsoft's generative AI was created by copying and using millions of *New York Times* articles and content. The Times said that—through Copilot and ChatGPT—Microsoft sought to "free-ride on The Times's massive investment in its journalism by using it to build substitutive products without permission or payment."

The Law

The Times sued Microsoft, OpenAI, and affiliated organizations, alleging their business models were based on mass copyright infringement. The complaint included examples of GPT-4 and Bing Chat/Copilot content that were almost verbatim copies of content from *The New York Times.* The Times claimed the GenAI product's ability to mimic human natural language responses from user-generated input resulted from Microsoft's numerous reproductions of copyrighted works, a violation of the federal Copyright Act.

The Times argued the various Microsoft/Open AI defendants were liable for copyright infringement, vicarious copyright infringement, contributory copyright infringement, violations of the federal Digital Millennium Copyright Act (DMCA), common law unfair competition by misappropriation, and trademark dilution under the federal Lanham Act. The trademark count comes from The Times' claim that the GenAI platforms have hallucinations where they claim content is from *The New York Times* when it is not.

The Times seeks monetary and injunctive relief, including the "destruction under 17 U.S.C. § 503(b) of all GPT or other LLM models and training sets that incorporate Times Works."

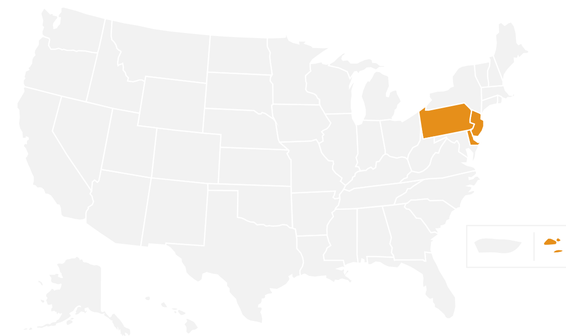
Why *New York Times v. Microsoft* Matters

This matter matters because—like in *Silverman v. OpenAI, Inc.* (Please see page 17)—these copyright claims go to the basic operation of GenAI systems. If 17 U.S.C. § 503(b) were applied to all GenAI system, forcing proprietors to destroy all GPT or other LLM models using copyrighted works, it could bring a screeching halt to the advancement of generative artificial intelligence. Having said that, OpenAI CEO Sam Altman feels the lawsuit is no big deal. Speaking to the World Economic Summit in Davos, Switzerland, Mr. Altman said he was surprised by The Times' lawsuit because the parties were negotiating.

"We actually don't need to train on their data. I think is something that people don't understand. Any one particular training source, it doesn't move the needle that much for us," Mr. Altman said.

One training source—even if it is *The New York Times*—may not matter that much. However, when you have The Times, Sarah Silverman, Ms. Silverman's co-plaintiffs, and the many prominent creators complaining about the use of their content, it may just start moving Mr. Altman's needle.

Third Circuit: Delaware, New Jersey, Pennsylvania, U.S. Virgin Islands*



DISCOVERY AND JUDICIAL ESTOPPEL

Trial Court Erred in Using Judicial Estoppel in Discovery Dispute, Third Circuit Holds

Pace-O-Matic, Inc. v. Eckert, Seamans, Cherin & Mellott, LLC, Nos. 22-2445, 22-2446, 22-2902, 22-2959, and 22-2959 (3d Cir. Nov. 13, 2023).

The Facts

Pace-O-Matic Inc., is an electronic game developer of so-called "skill games." Unlike slot machines, skill machines require the user to use hand-eye coordination to complete tasks with the game. Pace-O-Matic retained the law firm Eckert, Seamans, Cherin & Mellott LLC to represent it in regulatory matters in Virginia. Eckert Seamans also represented a Pace-O-Matic competitor, Greenwood Gaming and Entertainment Inc. d/b/a/ Parx Casino. Pace-O-Matic was also in matters in Pennsylvania, retaining other counsel, in a dispute with Pennsylvania government agencies challenging the seizure of some of Pace-O-Matic's games in Pennsylvania.

The casino moved to intervene in opposition to Pace-O-Matic's position in the Pennsylvania matters, and when Pace-O-Matic discovered that, it requested Eckert Seamans withdraw from representing the casino in the Pennsylvania matters. In an episode of a law firm choosing one of its clients over another client, Eckert Seamans declined to withdraw and instead withdrew from representing Pace-O-Matic in Virginia. Not taking kindly to being snubbed by its law firm, Pace-O-Matic sued Eckert Seamans in federal district court in Pennsylvania, alleging the law firm breached its fiduciary duty to Pace-O-Matic.

The Law

Pace-O-Matic requested discovery from Eckert Seamans, seeking communications between Eckert Seamans and the casino. The law firm objected, arguing the communications were protected by both the attorney-client privilege and the work product doctrine. Pace-O-Matic filed a motion to compel, and a magistrate judge heard oral arguments and held an in-camera review of the contested documents. The magistrate judge issued an order invoking the doctrine of judicial estoppel to preclude Eckert Seamans' use of the attorney-client privilege and the work product doctrine, holding the use of judicial estoppel was appropriate because Eckert Seamans had misrepresented facts when it asserted that the law firm did not represent any parties adverse to Pace-O-Matic in the Pennsylvania litigation. A district judge affirmed the magistrate judge.

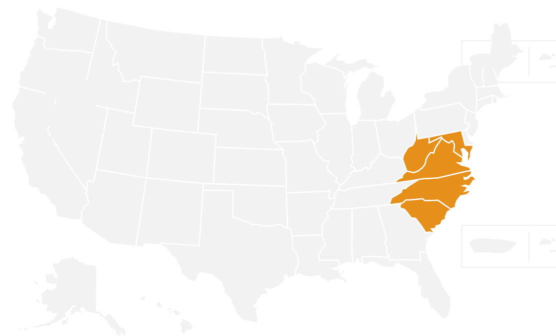
Reversing the magistrate judge and the district judge, the Third Circuit held they erred in allowing the application of judicial estoppel in the matter. Citing its opinion in the 1953 case of *Scarano v. Central Railroad Co.,* the Third Circuit held that judicial estoppel applies only when three requirements were met, including bad faith, and the court held there was no evidence that Eckert Seamans acted in bad faith.

Why *Pace-O-Matic* Matters

Ever since the 2015 e-discovery amendments to the Federal Rules of Civil Procedure, the authority of trial judges has been a major issue. Due to the language of the Advisory Committee Notes to Fed. R. Civ. P. 37(e), courts have grappled with the issue of whether the sanctions provisions of Rule 37(e) preclude the use of court's inherent authority in the spoliation of electronically stored information.

Here, the issue is limitation of the court's use of judicial estoppel. It would appear that something in those documents caused the magistrate judge to apply judicial estoppel, but the Third Circuit wasn't buying it. Even though the appellate court conceded that Eckert Seamans' argument that it was not counsel of record for Pace-O-Matic in the Pennsylvania matters was perhaps "hyper-technical," the court said the argument was not "wholly incompatible" with the assertion of the attorney-client privilege. The takeaway from *Pace-O-Matic*? Judicial estoppel can be used in only limited circumstances.

Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, West Virginia



DELIBERATIVE PROCESS PRIVILEGE

Deliberative Process Privilege Protected Draft Federal Camp Lejeune Study from Production

In re Camp Lejeune Water Litig., **No. 7:23-CV-897 (E.D.N.C. Dec. 19, 2023).**

The Facts

Named for General John Lejeune, the 13th commandant of the Maine Corps, and opened during World War II, Marine Corps Base Camp Lejeune is a major facility of the United States armed forces, located on the North Carolina Coast. For many years, water that Marines and military families used for drinking, cooking, and bathing at Camp Lejeune was contaminated with toxic substances, and Congress passed the Camp Lejeune Justice Act, providing for compensation for those exposed from the 1950s to the 1980s. Affected people filed over 1,000 civil actions against the United States in the U.S. District Court for the Eastern District of North Carolina.

During discovery, the affected parties sought production of a draft report, the Cancer Incidence Study prepared by the Agency for Toxic Substances and Disease Registry (ATSDR). Because the study was still in progress, the government argued the report and related documents were subject to the deliberative process privilege, and thus, the government opposed the motion to produce the report.

The Law

U.S. Magistrate Judge Robert Jones Jr. rejected the motion to produce the draft report, agreeing with the government that it was subject to the deliberative process privilege. Quoting the Eastern District's 2014 decision in *Heyer v. U.S. Bureau of Prisons,* the court wrote, "The deliberative process privilege protects 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'"

In the Camp Lejeune cases, Judge Jones held the draft report documents were deliberative and protected by the privilege.

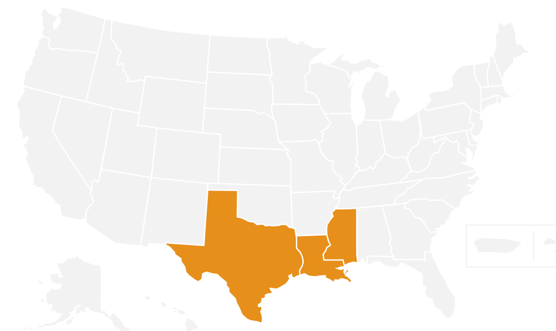
"All the documents identified by Defendant are deliberative; they are 'prepared to help the agency formulate its position,' specifically, to publish a hypothetical final CIS," Judge Jones wrote, citing the U.S. Supreme Court's 2021 decision in *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*

Why *In re Camp Lejeune* Matters

The *Camp Lejeune* decision is important because it illustrates the sometimes broad scope of important privileges beyond the attorney-client privilege and the protections of the work product doctrine. Most legal teams have an eagle eye for ESI or other documents protected by the attorney-client privilege or the work product doctrine, but other privileges may not come to mind.

Federal Rule of Evidence 501 provides for privileges, and the Judiciary Committee Notes on Senate Report No. 93-1277 cites various privileges federal courts must recognize, including attorney-client, spousal, psychotherapist-patient, and others. The *Camp Lejeune* cases illustrate just how broad the deliberative process privilege can be. Many drafts in government work can be considered documents prepared to help agencies formulate positions—and you don't need to jump through many of the hoops required for protection under other privileges. However, another thing to remember is that—like other privileges—the deliberative process privilege is not absolute. As the *Camp Lejeune* court noted, it can be overcome if the need for the information outweighs any harm from its production.

Fifth Circuit: Louisiana, Mississippi, Texas



ATTORNEY-CLIENT PRIVILEGE

University Report Protected by Attorney-Client Privilege Despite State Open Records Law

University of Texas Sys. v. Franklin Ctr. For Gov't and Pub. Integrity, **No. 21-0534 (Tex. June 30, 2023).**

The Facts

Members of the media and a member of the University of Texas System Board of Regents raised questions about undue influence on admissions at the University of Texas at Austin. In response to the allegations, the University System's chancellor retained Kroll Associated to conduct an independent review of the entire admissions process, including an examination of possible undue influence on UT Austin admissions. Kroll reviewed about 9,500 emails, conducted numerous interviews, and issued a 101-page report. Although it noted minor individual issues, the Kroll Report found no evidence of systemic undue influence on admissions. Not satisfied with Kroll's report, the Franklin Center for Government and Public Integrity sought access to all documents associated with the report. A Franklin Center reporter issued a request under the Texas Public Information Act, and the University System sought an attorney general opinion on the issue. The Texas attorney general agreed with the University System that many of the documents were privileged. However, the system sued, arguing more documents were protected by the attorney-client privilege because Kroll was a lawyer's representative. A trial court held for the University System, but an intermediate appellate court reversed. The University System sought review by the Texas Supreme Court.

The Law

In reversing the intermediate appellate court and siding with the University System, the Texas Supreme Court noted the Texas Public Information Act provided that records were public unless excepted by "other law." Holding the Texas Rules of Evidence constituted such an "other law," the state's high court for civil matters held the attorney-client privilege applied.

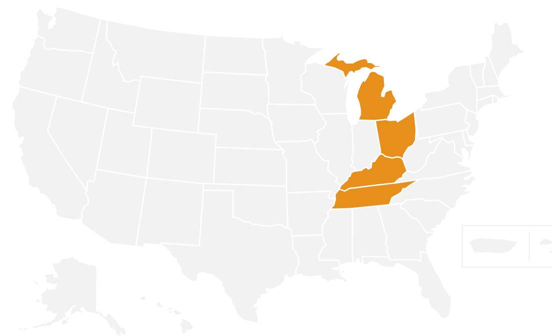
Next addressing whether Kroll was a lawyer's representative for purposes of the privilege, the Texas Supreme Court noted that Texas Rule of Evidence 503 defined "lawyer's representative" as "one employed by the lawyer to assist in the rendition of professional legal services." The court went on to note that the agreement with Kroll provided that Kroll's work was "to be conducted under the direction" of the System general counsel's office and that the final report was to be submitted to the general counsel's office. The court held the evidence established Kroll was employed by a lawyer to assist in the rendition of professional legal services and that the communications between Kroll and the University System in the course of Kroll's investigation were made for the purpose of facilitating the rendition of professional legal services.

Why *University of Texas* Matters

As we've noted over the years in the *Legal Year in Review*, the attorney-client privilege is a fragile thing, and it can be waived easily. It's worth taking a look back to 2021 to *In re Rutter's Data Sec. Breach Litig.*, coincidentally enough, another matter involving a report from Kroll. However, in *In re Rutter's*, we saw a different result. A federal district court held there was no attorney-client privilege in that matter where—unlike in *University of Texas*—Kroll submitted its report directly to the client instead of to the lawyers.

In examining these cases and others, it's clear the extent an external agent works with counsel is critical to the analysis. As the dissenting justice in *University of Texas* wrote, "When a client hires a lawyer or a lawyer hires a consultant, one could argue that at least a patina of privilege arises. But to extend the attorney-client privilege to an independent investigation by a nonlawyer independent contractor under a contract made directly with the client rather than with legal counsel, I would require much more clarity and certainty at the engagement level than the Court does."

Sixth Circuit: Kentucky, Ohio, Michigan, Tennessee



ATTORNEY-CLIENT PRIVILEGE

Ford Motor Company Had No Attorney-Client Privilege in Its ESI Search Protocol

[*Lyman v. Ford Motor Co.,*] No. 21-20024 (E.D. Mich. June 28, 2023).

The Facts

The Ford F-150 pickup truck is one of the most popular vehicles in the world, with more Ford F-Series pickups sold each year in the United States than any other vehicle. David Lyman and other motorists who purchased Ford F-150 pickups beginning in 2018 sued Ford, arguing the truck's engines were defective. Specifically, Mr. Wyman argued the F-150 engine Ford debuted in 2018, the five-liter Coyote, had an engine defect that caused excessive oil consumption, which resulted in low oil levels, poor lubrication of engine parts, engine rattling, engine stalling, and ultimately engine failure while driving at any speed. Mr. Lyman and his fellow motorists claimed the Ford F-150's excessive oil consumption damaged other components such as oxygen sensors, catalytic converters, and spark plugs.

During discovery, Ford provided what the court described as a "vague" description of its search methodology for most custodians. Ford claimed the attorney-client privilege protected its search protocol, but Mr. Lyman and his fellow F-150 purchasers moved to compel production of evidence from four custodians.

The Law

Siding with Mr. Lyman and the pickup owners, U.S. Magistrate Judge Elizabeth Stafford was critical of Ford's employee self-collection of electronically stored information (ESI).

"An attorney may not simply rely on custodian self-collection of ESI. Instead, counsel must test the accuracy of the client's response to document requests to ensure that all appropriate sources of data have been searched and that responsive ESI has been collected—and eventually reviewed and produced," Judge Stafford wrote, citing the Eastern District's decision in *Waskul v. Washtenaw Cnty. Cmty. Mental Health*.

In addition, the court rejected Ford's attorney-client privilege argument. Citing *Vasoli v. Yards Brewing Co.*, Judge Stafford wrote, "It would go against reason to find that the steps a party takes to identify responsive documents are privileged when those steps result in an evasion of discovery obligations by not collaborating on their discovery and ESI search strategies. Such a holding would reward attempts to circumvent the collaborative process envisioned by the discovery rules and would run contrary to their instruction that this kind of gamesmanship should instead be met with sanctions."

Why *Lyman* Matters

There are two important lessons from *Lyman v. Ford Motor Co.* First, unsupervised self-collection in e-discovery is a really bad idea and will often get you into trouble. Second, be careful in your consideration of search technologies because your search methodology may not be privileged.

As we saw in the *2020 Data Discovery Legal Year in Review,* courts will often reject attempts to have clients collect their own data without the supervision of their lawyers. As Judge William Matthewman wrote in 2020's *EEOC v. M1 5100 Corp.*, "It is clear to the Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable rules and case law and permit an interested party or person to 'self- collect' discovery without any attorney advice, supervision, or knowledge of the process utilized."

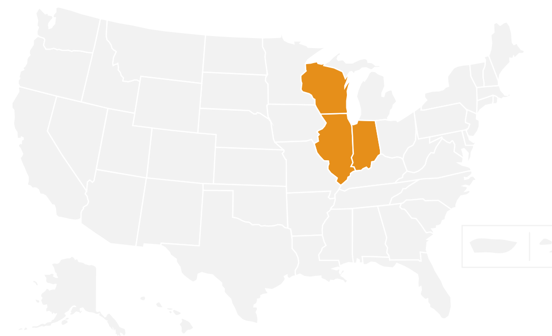
In addition, many courts are rejecting the idea that search methodologies are privileged. As the *Lyman* court wrote, citing *Romero v. Allstate Ins. Co.*, "The underlying facts of what documents are responsive to Plaintiffs' document requests and does not delve into the thought processes of Defendants' counsel."

Seventh Circuit: Illinois, Indiana, Wisconsin

E-DISCOVERY LAW: POSSESSION, CUSTODY, AND CONTROL

U.S. Subsidiary Had Control Over Parent L'Oréal's Discovery Documents, Court Holds

***In re Hair Relaxer Mktg. Sales Practices and Prods. Liab. Litig.,* MDL No. 3060, No. 23-cv-00818 (N.D. Ill. Dec. 27, 2023).**



The Facts

In 2022, the federal National Institutes of Health (NIH) issued a report with findings that "women who frequently used chemical hair straightening or hair relaxer products were more than twice as likely to develop uterine cancer as women who did not use such products." Numerous civil actions ensued, and the cases were consolidated in multidistrict litigation in the Northern District of Illinois.

During discovery, the relaxer users moved to compel discovery from L'Oréal S.A., the French parent company of defendant, L'Oréal U.S.A. L'Oréal U.S.A. objected, arguing its French parent company's documents were not within the American subsidiary's possession, custody, and control within the meaning Fed. R. Civ. P. 34(a).

The Law

Citing *Dexia Credit Local v. Rogan*, U.S. District Judge Mary Rowland wrote, "On the issue of control, it is well-settled that a party need not have actual possession of the documents to be deemed in control of them; rather, the test is whether the party has a legal right to obtain them." The instant court held that the corporate closeness of the parties was dispositive of this control issue and, citing *In re Subpoena to Huawei Techs. Co., Ltd.*, Judge Rowland wrote, "The test for corporate closeness involves various factors, including: "(1) commonality of ownership; (2) exchange or intermingling of directors, officers, or employees of the two corporations; (3) the exchange of documents in the ordinary course of business; (4) the non-party's connection to the transaction at issue; (5) any benefit or involvement by the non-party corporation in the litigation; (6) the corporate party's marketing and/or servicing of the non-party company's products; and (7) the financial relationship between the companies."

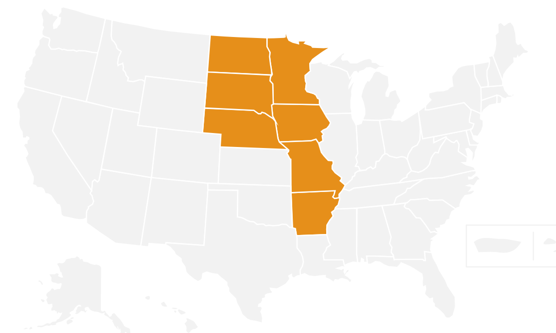
Thus, "Weighing the above factors, the Court finds that L'Oréal U.S.A. and L'Oréal S.A. have a close corporate relationship such that L'Oréal U.S.A. is in 'control' of the documents possessed by L'Oréal S.A. that Plaintiff requests," Judge Rowland wrote.

Why *In re Hair Relaxer* Matters

International e-discovery has been an issue for many years. Although the issue here—whether a parent company's data is within the possession, custody, and control of a subsidiary for purposes of e-discovery under Rule 34(a)—need not be an international consideration, the cross-border implications are evident.

It seems reasonable that a parent company would have possession, custody, and control of a subsidiary's data, but does a vice-versa application of this concept work? Does a subsidiary, in this case, L'Oréal U.S.A., have possession, custody, and control of a parent company's data, in this case the French company, L'Oréal S.A.? In the court's analysis here, the question is not whether the relationship is parent-subsidiary or vice versa. The question is the closeness of the companies, and, at least in the case of L'Oréal, the court said the relationship was close enough to establish control under Rule 34—something corporate counsel with subsidiaries may want to keep in mind.

Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota



E-DISCOVERY LAW: MOBILE PHONES

Eighth Circuit Reverses District Court on Retention of Mobile Phone of MyPillow's Mike Lindell

Lindell v. United States, **82 F.4th 614 (8th Cir. 2023).**

The Facts

Mike Lindell has become a ubiquitous figure on American television thanks to his commercials for his company, MyPillow, where he is founder and CEO, and his vocal advocacy for former President Donald Trump and conspiracy theories around the 2020 election. After forensic images of Colorado voting machines were released without authorization, agents of the Federal Bureau of Investigation allegedly raided Mr. Lindell's mobile phone as part of their investigation of the breach of the voting machine images.

Mr. Lindell sued the federal government, arguing this issuance and execution of the warrant for his mobile phone violated his constitutional rights. Mr. Lindell moved for the return of his phone, but a federal district court denied injunctive relief and declined to exercise equitable jurisdiction over the motion for return of the property. Mr. Lindell appealed.

The Law

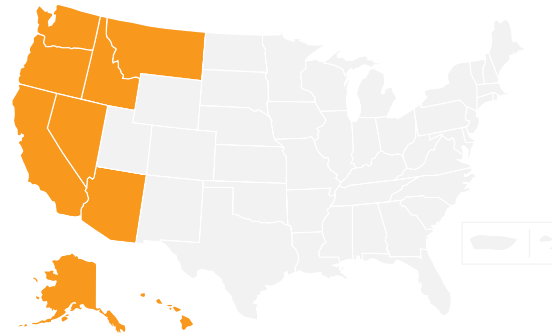
Reversing the district court in part, the court did reject many of Mr. Lindell's arguments. However, writing for the Eighth Circuit, U.S. Circuit Judge Ralph Erickson wrote, "Nonetheless, absent sufficient justification, the government has no right to hold onto property that is not contraband indefinitely." Citing the U.S. Supreme Court's holding in *Riley v. California*, the Eighth Circuit noted that mobile phones are different than other types of seized property as it wrote, "As noted by the Riley Court, modern cell phones 'are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.' Thus, the court held, the government's continued retention of Lindell's cell phone and all its data could amount to a callous disregard of Lindell's constitutional rights." Writing that it was unable to determine from the record whether the government could reasonably justify its continued retention of Mr. Lindell's mobile phone, the Eighth Circuit partially reversed and remanded the matter back to the district court to hold a hearing and conduct a balancing test to determine whether the government's interest outweighed Mr. Lindell's interest in getting his property back.

Why the MyPillow Matter Matters

In the world of e-discovery, the focus is often on commercial litigation—with corporate counsel sometimes amazed that, when one gets outside the friendly confines of commercial matters—the government can, and does, seize stuff with remarkable speed and efficiency. However, *Lindell v. United States* is important because it illustrates such seizures have limits.

As the saying goes, if the government wants your data, it can almost always get it. The question is what the government can do with your seized data—and, of course, as in *Lindell*, when law enforcement must return your data. An important takeaway from *Lindell* is that, just because the government needs something as evidence doesn't mean the government gets to keep it as long as it likes. As the Eighth Circuit wrote, citing its 1992 decision in *Black Hills Inst. of Geological Rsch. v. U.S. Dep't of Justice*, "When the government's interest in retaining the property is merely to keep it as evidence, the court should consider whether this purpose could be equally served by alternatives to holding the evidence itself."

Ninth Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington State, Guam*, Northern Mariana Islands*



ARTIFICIAL INTELLIGENCE LAW: COPYRIGHT

Comedian Sarah Silverman and Others Claim ChatGPT Infringes on Their Copyrights

*Silverman v. OpenAI, Inc.**, **No. 3:23-cv-03416 (N.D. Cal. filed July 7, 2023).**

The Facts

Comedian Sarah Silverman came to national prominence in 1993 as a cast member on *Saturday Night Live*. Known for her risqué—and occasionally controversial—performances, Ms. Silverman went on to star in her own Comedy Central show, *The Sarah Silverman Program*, for which she won an Emmy Award. She won a 2015 Screen Actors Guild Award for the film, *I Smile Back*, and her 2010 autobiography, *The Bedwetter*, became an off-Broadway musical.

Horror writer Christopher Golden is the author of *New York Times Best Sellers*, including *Ararat* and *Hell of Bones*. He's also been a contributor to well-known series projects such as *Buffy the Vampire Slayer* and *Hellboy*. Author Richard Kadrey is the author of 14 *New York Times Best Sellers*. His *Sandman Slim* series has spanned 12 years, and he has also written articles for *Omni*, *Wired*, and the *San Francisco Chronicle*.

Ms. Silverman and Messrs. Golden and Kadrey claimed that—without their permission—OpenAI* has used their copyrighted works to train its ChatGPT generative AI platform.

The Law

The copyright holders alleged that OpenAI's product was based on a large language model (LLM), AI software that parses and emits natural language, programmed not by humans writing code, but by the machines copying and ingesting massive amounts of text—including the copyrighted works of Ms. Silverman and Messrs. Golden and Kadrey—to create a so-called training dataset.

On behalf of a putative class, the authors sued OpenAI, arguing that its wholesale copying—without consent, credit, or compensation—of their works violated the federal Copyright Act, 17 U.S.C. § 106, the federal Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 106, as well as the unfair competition provisions of California Business and Professions Code § 17200 et seq. The copyright holders filed separate litigation against Meta Platforms.

OpenAI rejected the copyright holders' claim that OpenAI's generative AI output was a derivative work of their works for copyright purposes. Seeking dismissal, OpenAI argued the works were too dissimilar to be derivative works. The case is pending.

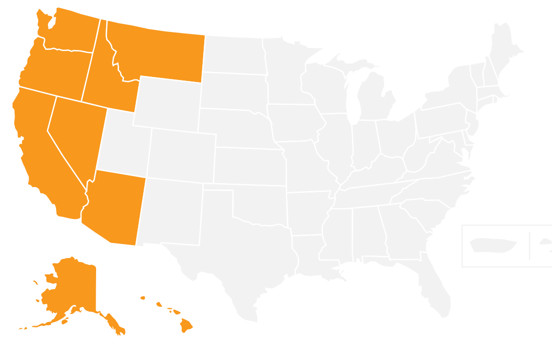
Why *Silverman* Matters

The case is interesting, to say the least, and its outcome could help determine the legal future of generative artificial intelligence. In cases such as *Andersen v. Stability AI Ltd.*, courts have sided with the AI companies, but that doesn't mean Ms. Silverman and Messrs. Golden and Kadrey don't have a shot here.

In some ways, today's AI copyright cases are an example of history repeating itself. In litigation that began over two decades ago, in *Authors' Guild v. Google, Inc.*, the Second Circuit held that Google did not commit copyright infringement when it—without the consent of or credit or compensation to the authors—scanned massive amounts of copyrighted material from the New York Public library and major universities' libraries. Will OpenAI be able to make and prevail on the same type of argument under the Fair Use Doctrine or win on its claim that it's not even a derivative work? This case is one to watch.

**OpenAI's corporate entity now is "Open AI LP." The plaintiffs filed the case with the defendant as, "OpenAI, Inc.," the name of the original non-profit entity.*

Ninth Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington State, Guam*, Northern Mariana Islands*



ARTIFICIAL INTELLIGENCE LAW: DATA PRIVACY

Putative Class Action Claims ChatGPT Violates a Veritable Cornucopia of Data Privacy Laws

A.T. v. OpenAI LP, **No. 3:23-cv-04557 (N.D. Cal. filed Sept. 5, 2023).**

The Facts

As noted in previous cases above, OpenAI, founded in 2015, develops generative artificial intelligence (GenAI) products, including the ChatGPT chatbot and DALL-E. Named for the artist, Salvador Dalí, DALL-E is a deep learning model that generates digital images. OpenAI's founders include Tesla's Elon Musk, LinkedIn co-founder Reid Hoffman, PayPal co-founder Peter Thiel, Amazon Web Services, and others. Microsoft later invested $1 billion in OpenAI. OpenAI had been developing its technology for several years when, on November 30, 2022, OpenAI launched a free public release of its chatbot, ChatGPT, based on its GPT-3.5 technology.

In September 2023, a putative class of individuals sued OpenAI and Microsoft in federal district court in California, alleging the development of OpenAI's products violated their data privacy rights under various state and federal laws by scraping data about them from various sources without their consent. The class seeks a "commercial pause" on AI, quoting OpenAI CEO Sam Altman, saying, "AI will probably most likely lead to the end of the world, but in the meantime, there'll be great companies." The civil action complaint was almost identical to a similar suit filed in June 2023.

The Law

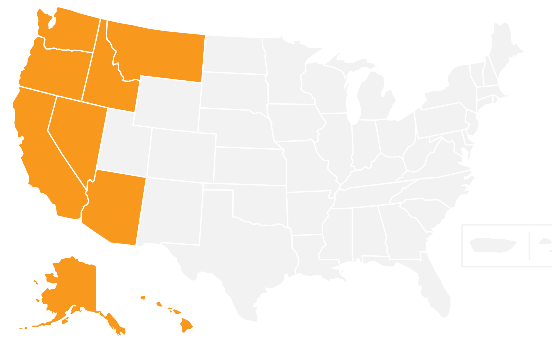
As noted above, the putative class sued under various state and federal laws, including the federal Electronic Communications Privacy Act (ECPA), the federal Computer Fraud and Abuse Act (CFAA), the California Invasion of Privacy Act (CIPA), the California Unfair Competition Law, the Illinois Biometric Information Privacy Act (BIPA), the Illinois Consumer Fraud and Deceptive Business Practices Act, and New York General Business Law § 349. The proposed class sued also under theories of conversion, failure to warn, and unjust enrichment.

In a motion to dismiss, Microsoft, among other things, argued that the class plaintiffs "do not plead any facts plausibly showing they have been affected by any of the supposed 'scraping,' 'intercepting,' and 'eavesdropping' they allege. Nowhere do they say what of *their* private information Microsoft ever improperly collected or used; nor do *they* identify any harm they individually suffered from anything that Microsoft allegedly did." (Emphasis in original.) Microsoft argues further that, for the most part, the class complaint merely "devotes 198 pages to doomsday hyperbole about AI as a threat to civilization."

Why *A.T. v. Open AI* Matters

If the class can establish and prevail on its massive collection of potential causes of action, it could put a serious dent in the development of generative artificial intelligence. Of course, that's a big "if." Microsoft alleges the "shotgun" complaint alleging everything and the kitchen sink violates the general rules of pleading provided in Fed. R. Civ. P. 8. In addition, the class will have the big hurdle of arguing OpenAI's alleged scraping is fundamentally different than many others, such as Internet Archive's Wayback Machine, that scrape the internet daily. As a nonprofit, Internet Archive may not be as attractive as a possible defendant, but it does engage in widespread, legal scraping nevertheless, and it is done by many others. The class seems unlikely to prevail on its injunctive relief demand of imposing a commercial pause on all AI activities until the appointment of "an independent body of thought leaders" to decide the future of AI. However, the European Union's pending AI Act (Please see page 25) could achieve something similar.

Ninth Circuit: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington State, Guam*, Northern Mariana Islands*



ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

Cher Prevails Over Former Rep. Mary Bono in Privilege Dispute in Sonny Bono Royalty Matter

Cher v. Bono, **No. CV-21-8157 (C.D. Cal. Dec. 26, 2023).**

The Facts

Sonny and Cher were one of the most popular musical acts in the nation in the 1960s and 1970s. Sonny Bono and Cher, the former Cherilyn Sarkisian, were nominated for two Grammy Awards and sold millions of records in addition to having two successful television shows in the 1970s. Cher went on to become one of the most successful solo acts in music history, and Sonny Bono went on to become a Republican U.S. member of Congress from California.

In 1978, after the couple had split, Sonny Bono assigned to Cher 50 percent of all his royalties on all compositions prior to the couple's separation. After their divorce, Sonny Bono married Mary Whitaker. Rep. Sonny Bono died tragically in a skiing accident in 1998, and Mary Bono succeeded him in Congress, and after his death, Cher and Mary Bono agreed to cooperate in the collection and disbursement of royalties. However, in 2016, Mary Bono and her children served notice terminating Sonny Bono's 1978 assignment, and Cher sued. During discovery, Mary Bono claimed attorney-client privilege and work product protection on documents, and Cher objected.

The Law

Siding mostly with Cher, U.S. Magistrate Judge Rozella Oliver noted that, in federal question cases such as this one, federal law on the attorney-client privilege applied, and that, in all federal cases, federal law applied on questions of the work product doctrine. Applying federal law, the court held Rep. Bono failed to establish that either the privilege or the doctrine applied.

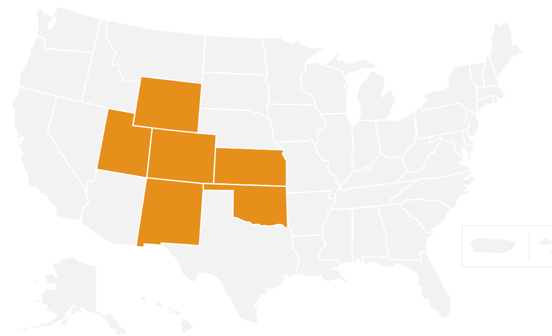
The court rejected Rep. Bono's attempt to claim privilege on communications with Sonny Bono's music publisher, Warner Chappell, because, the court ruled, Rep. Bono failed to establish that the company was retained for legal purposes, nor did she establish how or why she expected confidentiality from the music publisher. As to another music publisher, Wixen Music Publishing, the court held Rep. Bono could not possibly have expected her communications with Wixen were in confidence because Wixen also represented Cher. However, in a small win for Rep. Bono, the court ordered redactions on two pages of a document. On the work product doctrine, the court held Rep. Bono failed to establish the required reasonable anticipation of litigation.

Why *Cher* Matters

Cher matters because it illustrates the limits of the attorney-client privilege and the work product doctrine. Rep. Bono attempted to push the envelope on the privilege and the doctrine by attempting to apply them to non-traditional actors. As readers know, their most common application is to law firm lawyers. The privilege and the doctrine protect corporate counsel in many jurisdictions, but as *Cher* illustrates, applying them beyond these personas can be tricky.

The court notes it was unreasonable for Rep. Bono to believe communications with an organization were confidential when the organization represents your opposing party as well. Large law firms establish conflict walls all the time so different lawyers of the firm can represent clients opposing each other. However, *Cher* involves Rep. Bono's attempt to apply it to the same organization representing the opposing party on the same matter. That kind of Hail Mary pass is rarely going to fly. On the work product doctrine, as we discussed on the Relativity case law CLE at Legalweek, reasonable anticipation of litigation must be established with a certain degree of particularity.

Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming



ARTIFICIAL INTELLIGENCE LAW: HALLUCINATIONS AND CHATGPT

Court Issues a Warning to Pro Se Litigant about the Dangers of Using GenAI in Litigation

Morgan v. Community Against Violence, **No. 23-cv-353 (D.N.M. Oct. 23, 2023).**

The Facts

Sorche Morgan, a former employee of the organization Community Against Violence, sued the organization, representing herself as a pro se litigant and alleging unlawful discrimination in violation of both federal and New Mexico federal law, alleging violations of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, 42 U.S.C. § 1981, known commonly as Section 1981, and various New Mexico state laws.

During discovery, Ms. Morgan cited *Doe v. United Airlines, Inc., EEOC v. Lockheed Martin Corp.,* and *Las Cruces Sun-News v. City of Las Cruces*. All of these cases are fake.

Ms. Morgan apparently used generative AI to do her legal research. As the court noted in *Morgan*, this case is apparently the second case involving fake GenAI cases after *Morgan v. Avianca*, Inc., in the U.S. District Court for the Southern District of New York. "Quite obviously, many harms flow from such deception—including wasting the opposing party's time and money, the Court's time and resources, and reputational harms to the legal system (to name a few)," Chief U.S. District Judge William Johnson wrote.

The Law

Citing the Tenth Circuit's decision in *Hall v. Bellmon*, Judge Johnson noted, "Parties who proceed pro se are afforded some latitude and held to a less stringent standard of pleading than formal pleadings drafted by lawyers." However, citing the Tenth Circuit's decision in *Neilsen v. Price*, the court said, "Even so, the Tenth Circuit requires all litigants, including those who are not represented by counsel, to comply with the Federal Rules of Civil Procedure."

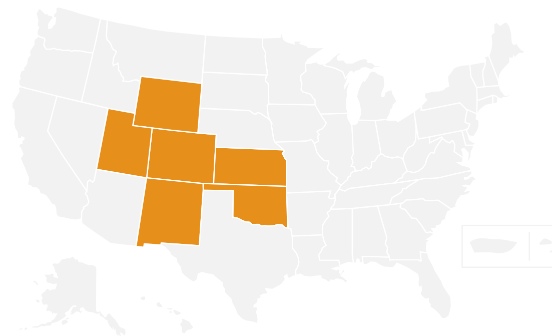
"Although courts 'make some allowances for the pro se Plaintiff's failure to cite to proper legal authority,' courts do not make allowances for a Plaintiff who cites to fake, nonexistent, misleading authorities," Judge Johnson wrote, citing the Tenth Circuit's decision in *James v. Wadas*, and telling Ms. Morgan the instant decision served as her "FINAL WARNING" (all capital emphasis supplied by the court) that any subsequent violations would result in dismissal with prejudice.

Why *Morgan* Matters

Not unlike what we saw in *Mata v. Avianca*, Inc. (Please see *Mata* on page 8), Morgan illustrates the perils of using generative artificial intelligence as a legal research tool without augmenting what you do in a GenAI app. The different twist in *Morgan* is that we have a pro se litigant. The importance of *Morgan* is that—even in the age of GenAI—being a pro se litigant without a lawyer will only get you so far in avoiding sanctions for e-discovery violations, including the use of fake legal citations produced by generative artificial intelligence.

As we saw in *Collagan v. Aroostook County Jail* (Please see page 7), the court issued the nuclear option of throwing the case out of court—but with a catch, dismissing the matter without prejudice instead of with prejudice, giving the litigant the option of refiling. Although the dismissal in *Morgan* was due also to substantive legal deficiencies, perhaps it the sign of things to come: Courts can do what we'll call Dismissal Light, issuing the toughest sanction possible—but with a chance to see another day in court.

Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming



E-DISCOVERY LAW: EPHEMERAL DATA

Use of Signal App Did Not Establish Bad Faith Spoliation in Stolen Marijuana Matter

Barak v. Rooster's Guide & Outfitting Adventures, **No. 19-cv-03556 (D. Colo. May 1, 2023).**

The Facts

Alon Barak and Rooster's Guide & Outfitting Adventures entered into a joint venture to cultivate hemp on 30 acres of farmland in Mesa County, Colorado. The parties executed an agreement where Mr. Barak would provide the financing, and Rooster's Guide would provide the property and labor with the profits being split between the two.

Sadly, things went up in smoke. Mr. Barak sued Rooster's Guide, alleging Rooster's Guide and its fellow defendants breached the contract by comingling funds and stealing the hemp. Rooster's Guide countered that Mr. Barak did not provide all the funds agreed to in the contract, that his agents stole some of the crop, and that the plants Mr. Barak provided resulted in a harvest with a THC content so high that it was classified as cannabis and had to be destroyed.

Discovery in the matter revealed that the Rooster's Guide had been using Signal, an app for ephemeral messages, around the time of the crop theft.

The Law

Mr. Barak sought monetary sanctions as well as an adverse instruction due to deletion of text messages, claiming Rooster's Guide was on notice of potential litigation when Mr. Barak, upon being told about the theft of the crop, yelled at Rooster's Guide's agent that he and his lawyer would be suing. (On a non-e-discovery spoliation note, Rooster's Guide admitted that it destroyed some of the crop due to its high THC content.)

The court rejected Mr. Barak's motion for sanctions. Citing the District of Colorado's 2007 decision in *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, U.S. District Judge Raymond Moore wrote, "The Court is not persuaded that this heated exchange constitutes 'unequivocal notice of impending litigation' giving rise to a duty to preserve."

In addition, Judge Moore didn't buy Mr. Barak's argument that the mere use of Signal showed a bad faith spoliation maneuver.

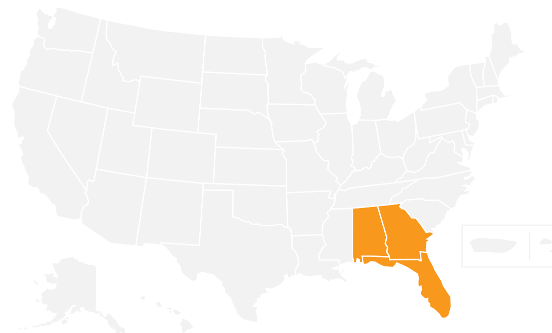
"Defendants' use of the Signal app does not establish that they acted in bad faith," Judge Moore wrote.

Why *Barak* Matters

This decision has some odd moments. We agree with Judge Moore that the mere use of an ephemeral app—in this case, Signal—does not establish that a user engaged in bad faith. More precisely, Signal use in and of itself does not establish that a party acted with an intent to deprive in violation of Fed. R. Civ. P. 37(e)(2).

However, that's where our agreement with the judge ends. Readers of the *Year in Review* know that—both under the common law and Rule 37(e)—parties must preserve data when there is a reasonable anticipation of litigation. Call us crazy, but someone calling and yelling that they and their lawyer are going to sue you would seem to create a reasonable anticipation of litigation. The court discounted the threat because it was a "heated" exchange. We don't buy it. Angry people sue all the time. In addition, although the *Barak* court's transgression was not as egregious as some other courts, it's now been over eight years since the 2015 e-discovery amendments to the Federal Rules of Civil Procedure. When analyzing Rule 37(e), citing case law from 1997 and 2007 is a really bad idea.

Eleventh Circuit: Alabama, Florida, Georgia



LEGISLATIVE PRIVILEGE

11th Circuit Reverses Trial Court and Quashes Subpoena to Legislators in Stop WOKE Act Case

Pernell v. Florida Bd. Of Governors of State Univs., **84 F.4th Cir. 1339 (11th Cir. 2023).**

The Facts

In 2022, Florida Governor Ron DeSantis signed into law the Individual Freedom Act, known also as the "Stop the Wrongs to Our Kids and Employees (W.O.K.E.)" Act, which the governor described as "a stand against the state-sanctioned racism that is critical race theory." Among other things, the act prohibits schools from teaching that any person, "by virtue of his or her race, color, national origin, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously," or that a "person, by virtue of his or her race, color, national origin, or sex, should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion." Seven professors and one student from public universities in Florida challenged the law in federal court as violative of their civil rights. They described the Act as "racially motivated censorship that the Florida legislature enacted, in significant part, to stifle widespread demands to discuss, study, and address systemic inequalities." During discovery, the professors issued subpoenas to non-party state legislators, seeking data from personal and government devices. Although the district court quashed parts of the subpoena, it ordered production of some, holding, among other things, that the legislative privilege did not apply to factual data.

The Law

Supported by the attorneys general from 17 states as amici curiae, the Florida legislators argued on appeal to the Eleventh Circuit that legislative privilege does, in fact, apply to factual information and that the legislative privilege should not yield to important federal interests in the case. The Eleventh Circuit agreed with the legislators, reversing the district court.

Citing its 2015 decision in *In re Hubbard*, the appellate court noted, "Our precedent makes clear that we consider the purpose of a subpoena, not what the subpoena seeks, to determine if the legislative privilege applies," adding, "In other words, courts need not decide whether a document befits some descriptor, like 'purely factual,' to determine whether it is protected. If the document is sought for an impermissible purpose, the inquiry is over." The appellate court noted, "By the plaintiffs' own admission, the subpoenas' purpose was to uncover the legislators' motives in passing the law." Thus, Eleventh Circuit held, "The privilege applies with its usual force against the discovery of even the factual documents in the Florida legislators' possession. The district court abused its discretion when it determined otherwise."

Why *Pernell* Matters

This matter is important because we see continuing use of the legislative privilege in discovery, and it's important also because we should note not all courts agree with the Eleventh Circuit on the issue of factual data being covered by the privilege. We should also be sure not to confuse legislative privilege with legislative immunity. Legislative privilege is not absolute. In fact, unlike the decision here, other courts, such as the U.S. District Court for the Eastern District of Virginia in *Bethune-Hill v. Virginia Bd. of Elections*, have held that factual documents are not protected by the legislative privilege. Another important consideration, as the Eleventh Circuit noted in *Pernell*, is that the standard for the legislative privilege is very different in a criminal prosecution verses a civil action as in *Pernell*.

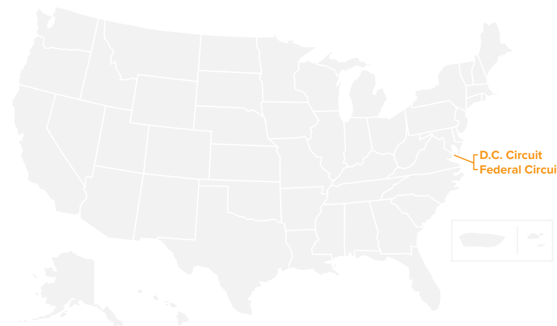
Finally, important federal interests trumping the legislative privilege remains an open question. As Eleventh Circuit Judge Jill Pryor wrote in her dissent in *Pernell*, "I disagree because the Supreme Court has instructed that the legislative privilege held by state legislators is a qualified one: it may yield in the face of important federal interests."

District of Columbia Circuit: District of Columbia*

EMERGING DATA LAW: EMOJIS AND EMOTICONS

Investor Ryan Cohen Was Potentially Liable for His ‘To the Moon’ Emoji on Social Media

In re Bed Bath & Beyond Corp. Sec. Litig., **No. 1:22-cv-2541 (D.D.C. July 27, 2023).**



The Facts

Bed Bath & Beyond was a ubiquitous feature of the American retail landscape. Founded in 1971, the company began as a small New Jersey store, and it eventually had over 1,400 stores across North America, and its discount coupons were famous across the land. Whether it was shoppers leaving brick and mortar for online shopping, private equity investors driving the company into the ground, or both, Bed Bath & Beyond fell on hard times, closing stores and declaring bankruptcy. In 2022, Ryan Cohen, the chairman of GameStop and the founder of the pet supply company, Chewy, disclosed he had acquired a 10% stake in Bed Bath & Beyond. On August 11, 2022, Mr. Cohen posted a tweet responding to a CNBC article predicting Bed Bath & Beyond’s stock price would fall to $1. Mr. Cohen’s tweet read, “At least her cart is half full,” and he included a smiling moon emoji. Investors believed Cohen’s tweet meant the stock was going to the moon, and the company’s stock rose from just over $10 to $16 a share. The price eventually went to $30, and Mr. Cohen sold his stake, making $68 million.

The Law

Investors filed a class action against Mr. Cohen and others, arguing Mr. Cohen’s tweet was part of a so-called “pump and dump” scheme, where Mr. Cohen drove up the price of the stock so he could sell his shares and make a huge profit, leaving the investors to sustain massive losses. The investors alleged Mr. Cohen knew a “shoot to the moon” emoji would cause his followers on social media to buy the stock so he could sell at a healthy profit. The court was left with a probable question of first impression: Can an emoji be an actionable misrepresentation? Mr. Cohen countered that emojis cannot possibly be actionable because they have no defined meaning, thus they could mean different things to different people. The court wasn’t buying it. Rejecting Mr. Cohen’s motion to dismiss, U.S. District Judge Trevor McFadden wrote, “The Court declines Cohen's blanket rule. Emojis may be actionable if they communicate an idea that would otherwise be actionable. A fraudster may not escape liability simply because he used an emoji. Just like with words, liability will turn on the emoji's particular meaning in context.”

Why *Bed Bath & Beyond* Matters

This matter matters because the emoji represents a new challenge for e-discovery law professionals. Mr. Cohen’s argument outlines this issue: emojis can mean different things to different people. However, if other courts follow the *Bed Bath & Beyond* court’s rejection of Mr. Cohen’s argument, e-discovery teams will have to invest time in investigating the meaning of emojis in review. In some ways, the emoji dilemma is nothing new. e-Discovery law teams have almost always had to interpret words with different meanings. The emoji could be seen as just another communication to interpret.

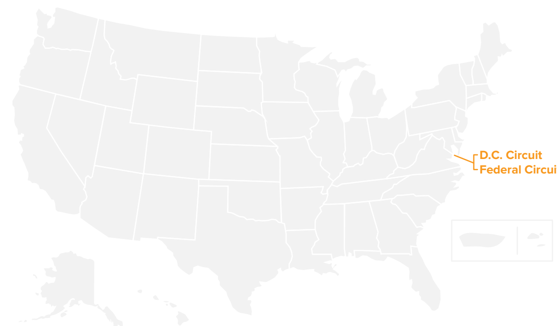
However, it’s not that simple. It’s fair to say that an emoji can have many more meanings than a word. Legal teams need technology capable of helping them deal with emojis and their cousin, the emoticon, and they need to have a cultural awareness and knowledge of existing trends. For instance, before reviewing the court’s decision in *Bed, Bath & Beyond,* this author had no clue that a smiling moon emoji could mean anything pertaining to a stock price.

Federal Circuit

E-DISCOVERY LAW: SANCTIONS

Pro Se Patent Litigant's Novel Discovery Response Doesn't Prevent Rule 37 Death Penalty

[*Askan v. FARO Techs.,*](#) No. 2022-2117 (Fed. Cir. June 21, 2023).



The Facts

After having had a previous civil action dismissed for discovery violations, in 2021, Yoldas Askan sued again in the U.S. District Court for the Eastern District of Pennsylvania, arguing FARO Technologies' Focus 3D scanner infringed on two patents. The district court transferred the matter to the Middle District of Florida.

In a somewhat novel discovery tactic, instead of responding to FARO's request for production (RFP), Mr. Askan merely served requests for production on FARO that were word-for-word identical to the document requests FARO served on Mr. Askan. Then, instead of responding to the RFPs, Mr. Askan objected to each FARO RFP with the assertion that because Mr. Askan requested the same documents from FARO, any production by FARO satisfied Mr. Askan's duty to produce. Despite a magistrate judge rejecting Mr. Askan's strategy, Mr. Askan continued to contend he had satisfied his discovery obligations. FARO sought sanctions under Fed. R. Civ. P. 37, which the court granted, dismissing the action with prejudice.

The Law

In affirming the district court's dismissal with prejudice, the Federal Circuit rejected Mr. Askan's attempt at cut and paste discovery. "The district court did not abuse its discretion in dismissing Mr. Askan's complaint due to his discovery misconduct. Mr. Askan failed to produce any documents in response to FARO's RFPs and counter-served identical RFPs to FARO, claiming that this negated any need for him to produce documents," the appellate court wrote, adding, "Despite the magistrate judge's warning that this response was deficient, Mr. Askan still did not comply with FARO's RFPs."

Citing the Eleventh Circuit's decision in *United States v. Real Prop. Located at Route 1*, the Federal Circuit wrote, "Mr. Askan's deficient response to FARO's initial discovery requests and his subsequent disregard of the magistrate judge's order to comply amounted to a 'bad faith,' 'flagrant disregard and willful disobedience of discovery orders.'"

Why *Askan* Matters

Mr. Askan was representing himself in this matter, but as we saw in *Collagan v. Aroostook County Jail* (Please see page 7), although courts give deference to pro se litigants, that deference will not protect you when you engage in truly egregious e-discovery behavior. In *Askan*, Mr. Askan repeated his stunt of merely copying and pasting FARO's e-discovery requests even after the magistrate told him such discovery behavior was deficient.

In another takeaway, *Askan* illustrates that—although the 2015 e-discovery amendments to the Federal Rules of Civil Procedure changed the standard for discovery sanctions in electronically stored information matters, causing many commentators to opine that it would be overly difficult to get sanctions for bad behavior in e-discovery—Fed. R. Civ. P. 37(e) is not the only tool in a judge's toolbox for sanctioning discovery abuse. As is the case here, when the e-discovery bad behavior involves violating a court order, courts can—and will—use Fed. R. Civ. P. 37(b) instead of Rule 37(e) to issue case terminating sanctions.

Finally, *Askan* illustrates that cutting and pasting your opponent's RFPs for your own will probably not get you very far.

EU PARLIAMENT AND COUNCIL REACH PROVISIONAL AGREEMENT ON ARTIFICIAL INTELLIGENCE ACT

Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts.

The Facts

In the midst of growing concern about the rapid advancement of artificial intelligence, in the fall of 2020, the European Council asked the European Commission to consider ways to coordinate AI research, increase investment in AI, protect against risks, and even define AI. In April 2021, the Commission proposed a regulation on artificial intelligence, what it called, “the first ever legal framework on AI, which addresses the risks of AI and positions Europe to play a leading role globally.”

In December 2022, the Council adopted its “general approach” on the AI Act, allowing the Council to enter its negotiations or “trilogues” with the Parliament. On December 9, 2022, following months of negotiations and after three days of what the Council called “marathon” talks, the European Council and European Parliament agreed on a provisional agreement on the AI Act. The act is expected to take effect in 2026.

The Law

The scope of the EU AI Act is narrower than what the Commission proposed in April 2021. The definition of “AI systems” follows proposals by the Organisation for Economic Co-Operation and Development (OECD). Some notable exclusions from the definition include AI for military and defense purposes, purely research and innovation, or people using AI for personal use. This personal use exception makes sense when considering the act covers AI systems “placed on the market, put into service or used in the EU.” The AI Act classifies AI systems into four categories, based on their level of risk: minimal or no risk, limited risk, high risk, or unacceptable risk. AI systems with unacceptable risk will be banned from the EU. Among the banned uses are biometric information using sensitive characteristics, untargeted scraping of facial images, emotion recognition in the workplace and in education, social scoring based on behavior or personal characteristics (Anyone who has seen the episode, ***Nosedive***, on the British television show, *Black Mirror*, will understand the EU’s concern here.), and other AI activities. Other key provisions include a reporting procedure for tracking serious incidents, AI system assessments, and transparency requirements, among others. Sanctions range from 1.5 to 7% of global revenue.

Why the EU AI Act Matters

The act is important because—not unlike with data privacy and protection and the EU’s General Data Protection Regulation (GDPR)—it gives Europe a leadership position in an important area of legal technology. It’s no surprise governments around the world and various U.S. states have adopted data privacy laws in the wake of the GDPR. Of course, it’s not just an important area of legal technology—it’s not engaging in hyperbole to say this endeavor could impact the future of human civilization. As we noted in *A.T. v. OpenAI, Inc*. (Please see page 18), OpenAI CEO Sam Altman said famously (or perhaps, infamously) that AI would probably lead to the end of the world. The concerns are real and legitimate. However, we should also remember AI’s potential for good. Advancing technologies often have unintended consequences. For instance, unlike today, when first introduced, the automobile and its internal combustion engine were seen as the solution to pollution. The pollution at the time was horse excrement in the streets. Climate change was not on the horizon. As we march through history, the pending EU AI Act may very well give the Europeans the driver’s seat in the advancement of artificial intelligence.

About the Author

David Horrigan is Relativity's discovery counsel and legal education director. An attorney, law school guest lecturer, e-discovery industry analyst, and award-winning journalist, David has served as technology and intellectual property counsel at the Entertainment Software Association, reporter and assistant editor at *The National Law Journal,* and analyst and counsel at 451 Research.

His articles have appeared also in *The American Lawyer, Corporate Counsel, The New York Law Journal, Texas Lawyer, The Washington Examiner,* and others, and he has been quoted by *The Wall Street Journal,* American Public Media's Marketplace, *TechRepublic,* and publications of the law schools of Yale, Northwestern, Emory, and others.

David serves on the Resource Board of the National Association of Women Judges (NAWJ), the Global Advisory Board of the Association of Certified E-Discovery Specialists (ACEDS), the Editorial Advisory Board of *Legaltech News,* the Planning Committee and Faculty of the University of Florida E-Discovery Conference, the Advisory Board of the *MIT Computational Law Report* at the Massachusetts Institute of Technology, and the Data Law Board of Advisors at the Cardozo Law School at Yeshiva University. David was also First Runner-Up for Best Legal Analysis in the 2020 LexBlog Excellence Awards. He founded the *Data Discovery Year in Review* in 2015. He holds a juris doctor from the University of Florida and a certificate in international law from Universiteit Leiden in The Netherlands.