



Ethics & E-Discovery: A MT State Court View

21st Jud. Dist., Dept. 2

Winter 2016



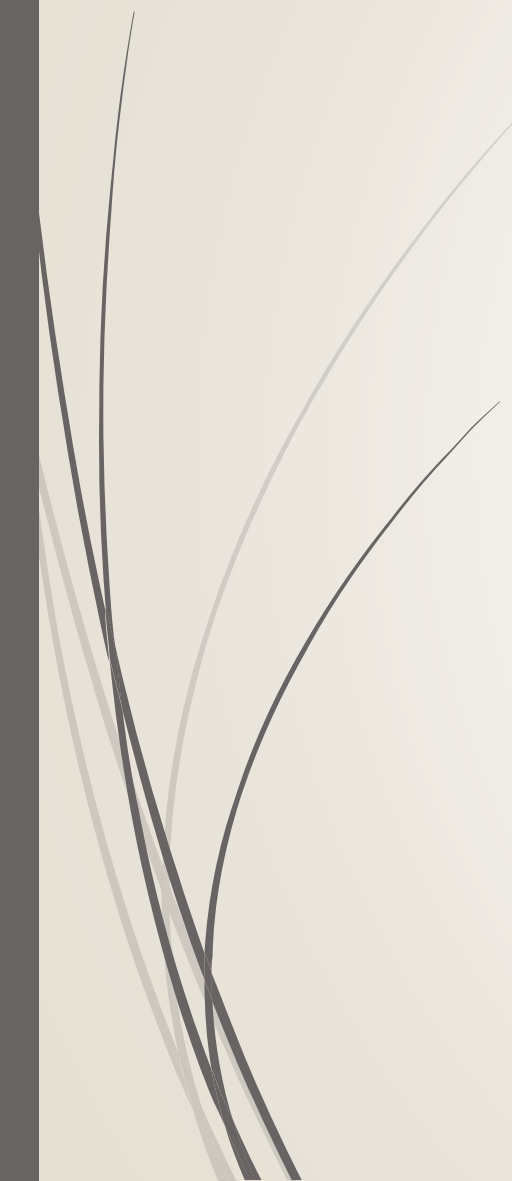
Objectives



- 1. Remind you of a “think like the court” rule of thumb helpful before ediscovery & Oct. 2011
- 2. Review basic post-*Richardson* discovery/sanctions contours
- 3. Reassure you that your basic job is still the same
- 4. Recognize key differences under ediscovery
- 5. Understand the *Zubulake* litigation hold
- 6. Understand the need to get ESI “facts and forms”



1. The Rule of Thumb

- ▶ Act competently to prevent your client from causing a breakdown of court administration or you and/or your client will have a big problem.
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1. Act Competently to Prevent . . .

- Preamble to MT Rules of Prof. Conduct
- Rule 3.4

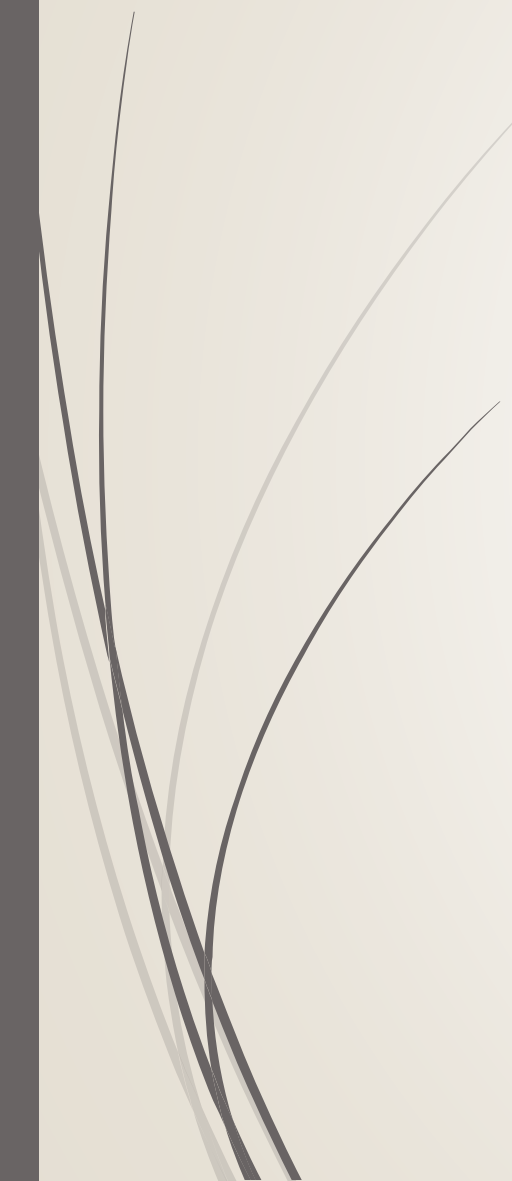


2. Post-*Richardson* Contours (2006 MT 43)

- Discovery =
- Broad, Unsupported Discovery
Objections =
- As Vague =
- Can't Evaluate Case =



2. Post-*Richardson*

- Discovery = **Ascertainment of Truth**
 - Broad, Unsupported Discovery Objections = **Abuse**
 - As Vague = **How not to interpret an interrogatory**
 - Can't Evaluate Case = **Prejudice**
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2. Post- *Richardson*

- If you are following the spirit of *Richardson*, you are helping to prevent a break down of court administration





2. Post-*Richardson*

- Sanctions possible under Rule 37(b), Rule 16(f), Rule 26(g), Rule 37(d)
- Under Rule 37(e) Safe harbor – routine, good faith operation no good if you didn't place a proper litigation hold
- Since 2009 – Rule 2.16 MT Code of Jud. Conduct

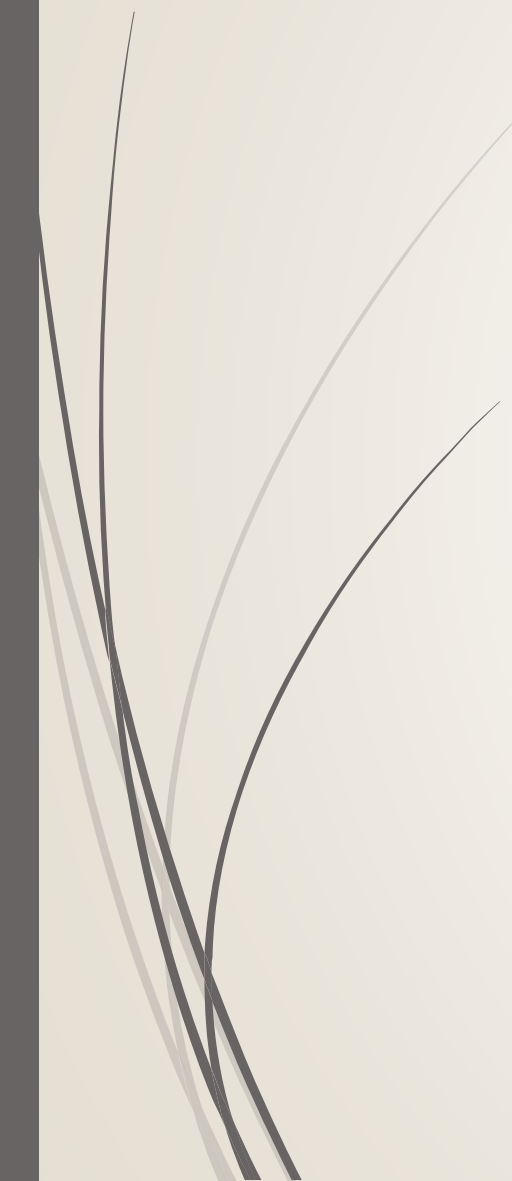


2. Post-*Richardson*

- ▶ A Bitterroot Example Under the Old Rules – **Wilson v. Powers**
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3. Your Basic Job is Still the Same

- ▶ Ensure people work together within an **organized process** to ensure discovery obligations fulfilled
 - ▶ Focus on issues, arguments, claims, defenses
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3. Your Basic Job is Still the Same

Wilson v. Powers

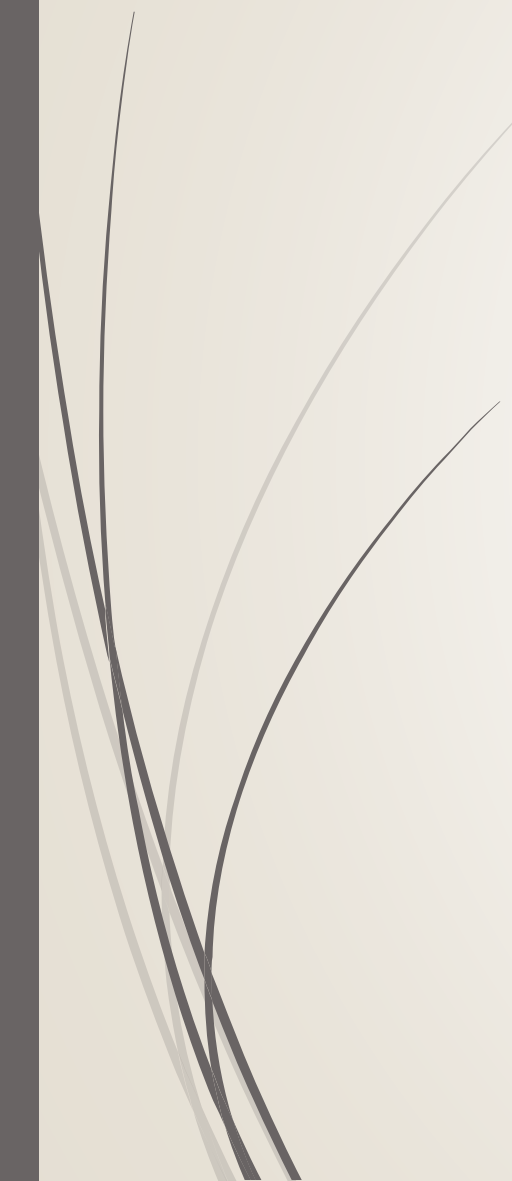
- **Knowledge Ex:** There is a bankruptcy trustee, bankruptcy trustee may have the paper docs
- **Process Ex:** How to preserve, access, sort through/analyze that box

Modern Case

- **Knowledge Ex:** General IT knowledge, how your client's IT system works, clouds, facebook
- **Process Ex:** *Zubulake* litigation hold letter for client & for other parties, how to preserve evidence

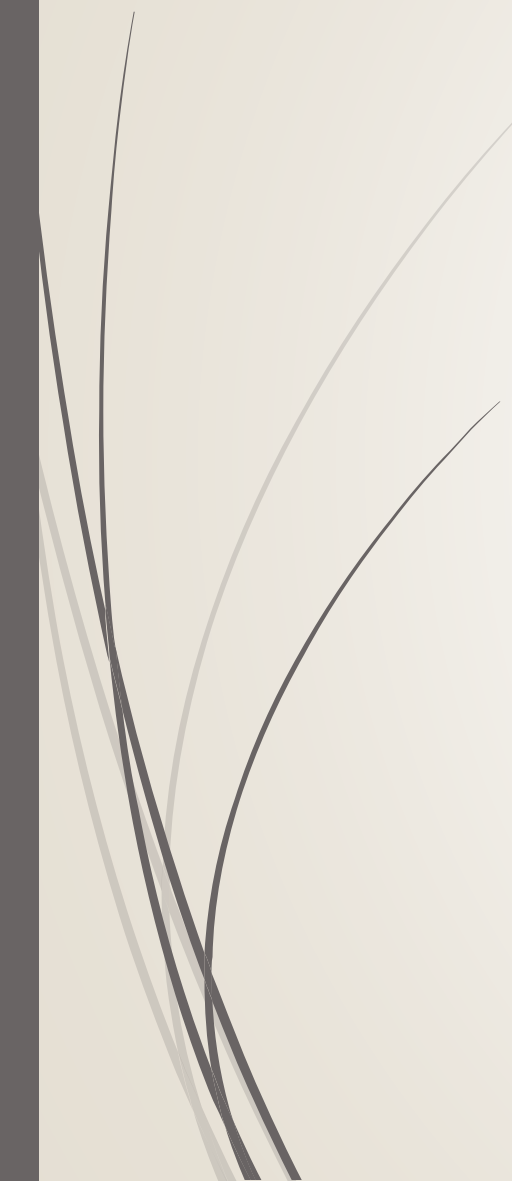


4. Key Differences with ESI

- More: Volume, complexity, locations, difficulty to completely eliminate a document
 - Multiple: locations, copies, authors
 - Starts Sooner: “reasonably anticipated”
 - Early Potential for Prejudice
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4. Key Differences with ESI

- Need: greater organization of process, knowledge of types of ESI, norms of their accessibility
 - Dependence: on software & hardware
 - Different Types of Support Services:
May need to vet and supervise a technology vendor
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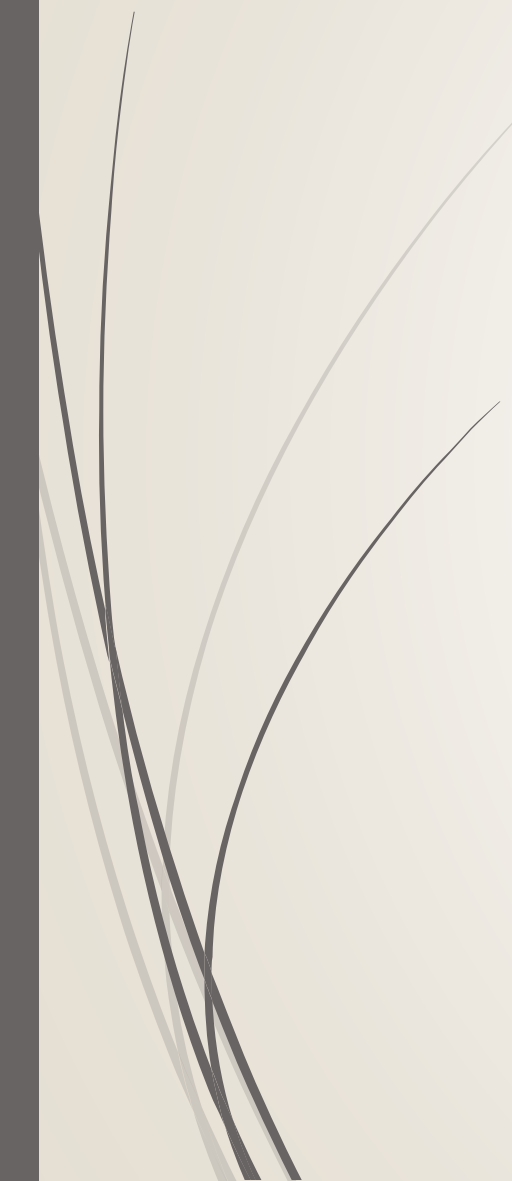


4. Key Differences with ESI

- Greater emphasis on cooperation among attorneys manifested in new certification requirements from Oct. 2011 (see Rules 37(a)(1), 37(d)(1)(B), 26(c)(1), Mont. R. Civ. P.)
- Clear, automatic, minimum consequence for failing to provide requested information unless failure substantially justified or harmless (Rule 37(c)).



5. *Zubulake* Litigation Hold

- Actively monitor client's compliance
 - Learn client's document retention policies, computing infrastructure
 - Communicate directly with key players re: ? info stored, advise to preserve
 - Issue litigation hold early & often
 - Instruct all employees to produce responsive ESI; ensure archival media safely stored
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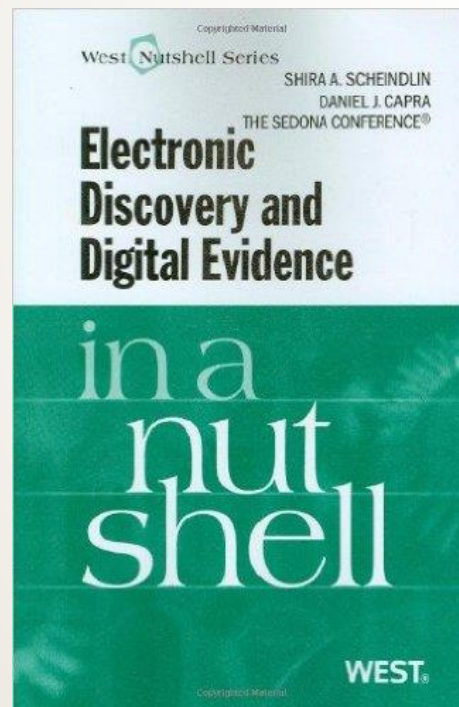
5. *Zubulake* Litigation Hold

- When you properly implement a *Zubulake* litigation hold, you help prevent the breakdown of court administration

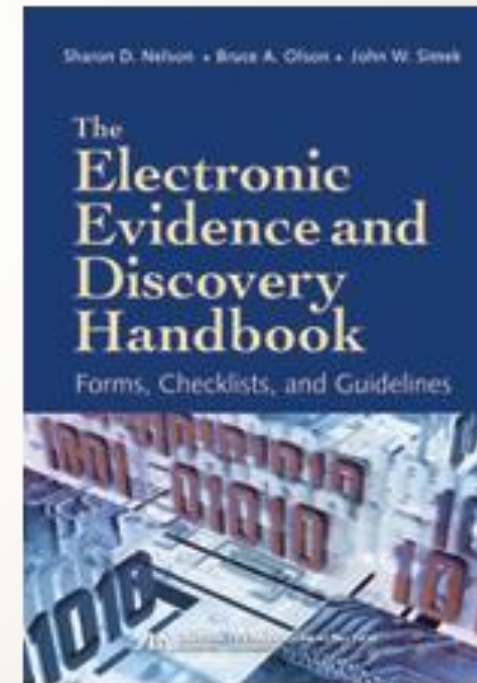


6. ESI “Facts and Forms”

ESI Facts



ESI Forms





6. ESI Facts & Forms

- Special Ethical Responsibilities re: Non Lawyers - Rule of Prof. Conduct 5.3
- Lawyers who Supervise/Manage other lawyers have special ethical responsibilities – Rule of Prof. Conduct 5.1 (a)-(b)

6. ESI Facts & Forms

- ➔ If you have the knowledge and procedures in place re: ESI to ethically supervise, you help prevent a breakdown in court administration.

