

Leveling the Playing Field in Asymmetric Litigation

Ethical Duties of ABA Model Rule 1.1

Mary Kim
Director &

Associate General Counsel
General Dynamics Corporation

Jessica Block

Senior Managing Director
Ankura

Patrick Oot
Partner

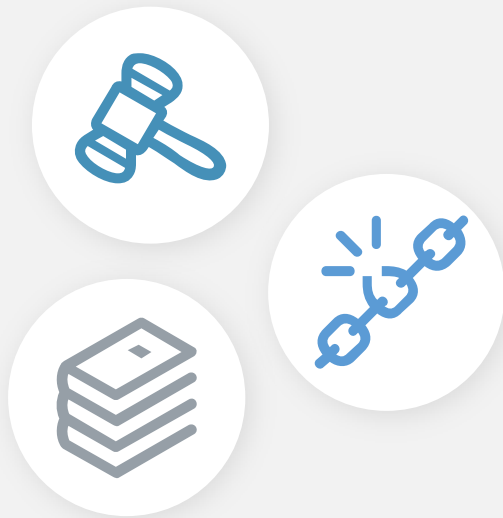
Shook, Hardy & Bacon LLP

Mike Zito
Partner

Shook, Hardy & Bacon LLP



Asymmetric Litigation Discovery



- Cost and burden = large data holders
- Facts sheets provide limited discovery.
- Everyone has ESI.
- More sophistication requests to level the playing field.

Extraction: Discovery Stages



Identify



Preserve

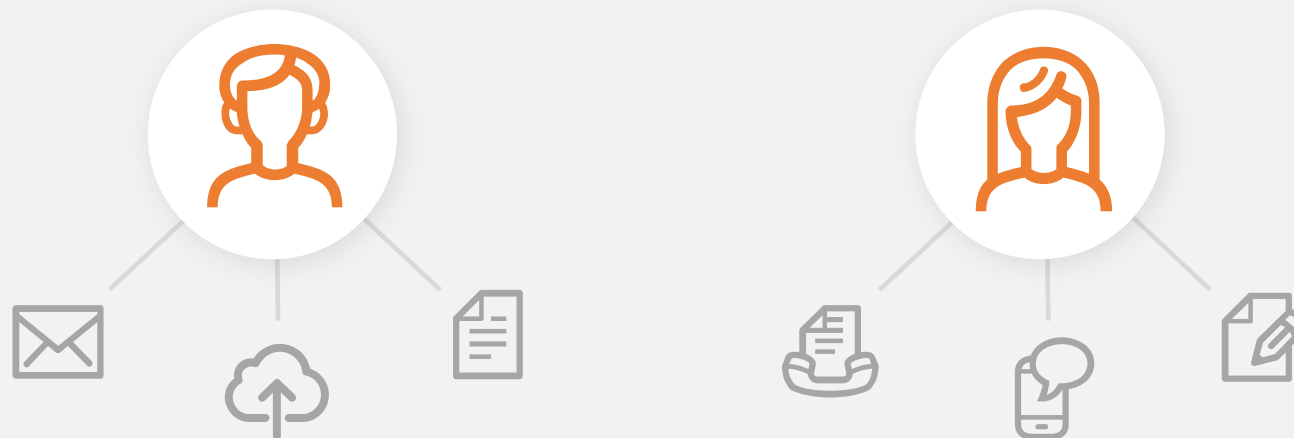



Collect



Produce

In-House Counsel as Expert in Company Systems And Communications Tools





Wow, [boss] sucks! You won't believe what [boss] did today

We could do that job in our sleep! [Boss] doesn't deserve it...

UGH I know, th
the worst. They
to go

LOL I bet we could
[boss] fired! Ther
of us could take

April 2016

SHOOK
HARDY & BACON

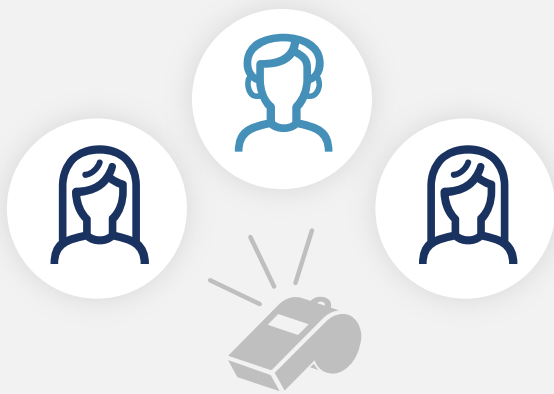


Hey, I'm leaving the company. I'm turning in the messages.



October 2016

SHOOK
HARDY & BACON



November 2016

SHOOK
HARDY & BACON



December 2016

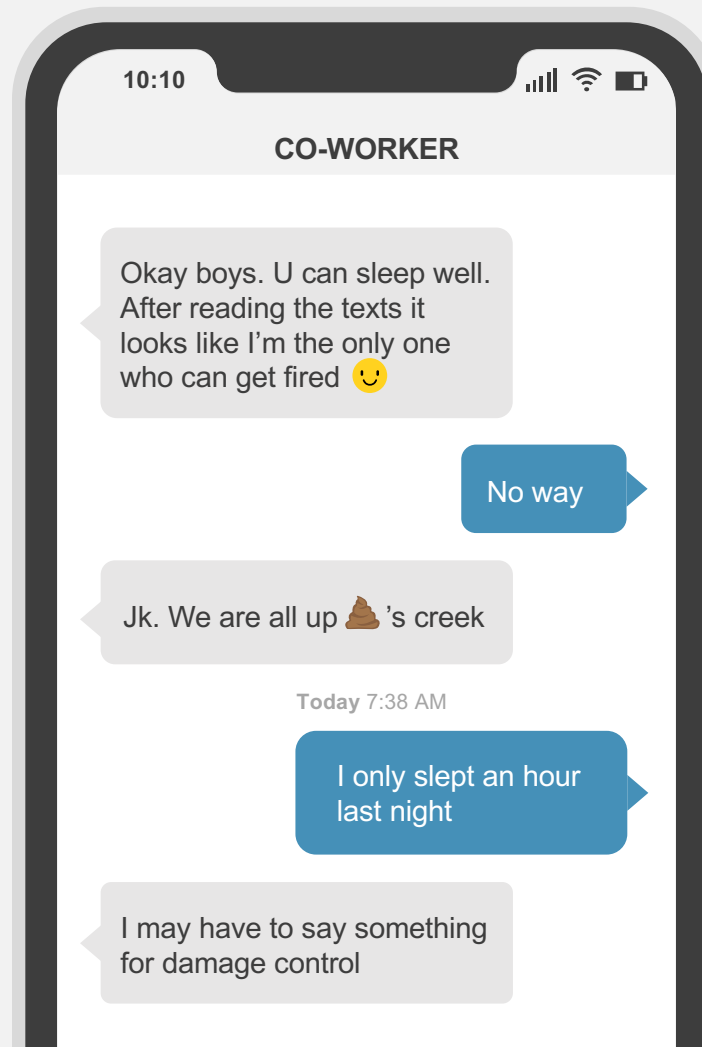
SHOOK
HARDY & BACON



December 2016



September 2017



sts within ESI that
ing (e.g., merits, value,
mitations)

omply, their failures
the court — deepening
with the court

aintiffs puts pressure on

plaintiffs' ESI can
s to conceal highly

“The value of emails and text messages can be particularly significant in litigation due to the fact that the ease of sending or replying to such messages can cause people to say things they might not otherwise say in traditional correspondence...

...Simply stated, [e]lectronic communications have the potential to... provide the proverbial ‘smoking gun.’”

BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc., 2018 WL 1616725 (N.D. Ill. Apr. 4, 2018)

Extraction: Discovery Stages



Identify



Preserve



Collect



Produce

Discovery Stages | Identify



Half of the world's population use messaging apps to communicate: WhatsApp has a user base of **1.5 BILLION**, while Facebook Messenger clocks in at **1.3 BILLION** users



In 2016, the wearable device (smartwatches, fitness trackers) market had a 10% adoption rate in the U.S.—that figure is **expected to double by 2021**



Nearly 20% of U.S. adults have access to smart speaker devices such as the Amazon Echo or Google Home



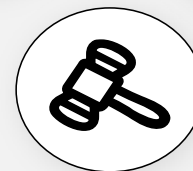
Proceed with Caution



- Be ready for “goose and gander” arguments
- Not one-size-fits-all
- Make decisions based on the circumstances of your case

Offensive Discovery Toolkit Quick Takeaways

- **Plaintiff Fact Sheet Order/Targeted Discovery Requests**
 - Requiring disclosure and production of ESI
- **ESI Protocol**
 - Specifying production format and search methodology for ESI
- **Protective Order**
 - Favorable to client and OUSA data protection laws
- **FRCP 26(g) Certifications**
 - Regarding ESI productions
- **ESI Guidance**
 - Instructing counsel regarding obligations to identify, preserve, collect, and produce ESI
- **Deficiency Protocol Order**
 - Setting out deficiency process for plaintiffs' ESI productions
- **ESI Authorizations**
 - For release of plaintiffs' ESI directly from third-party providers
- **Review Plan**
 - Formalized strategy for substantive review of ESI



Offensive Discovery In Action Without Formal Discovery



- Public Sources
- Company Systems
- Open Social Media
- Company Devices and Backups
- Consider Policies and Privacy Law





31 STATES

have currently adopted an ethical duty
of technology competence

Ethics | Technology Competency



Pennsylvania

The Pennsylvania Bar recommended that the state supreme court adopt a “one-hour, every two years” technology CLE requirement.



Florida

As of January 1, 2017, Florida mandates three hours of technology CLE for every three-year reporting period



North Carolina

In April 2018, the North Carolina Bar proposed for the state supreme court’s approval that one out of 12 approved CLE hours must include technology training

Stay Current, Stay Competent



**Seek
education**



**Consult
experts**



**Know your
limits**



Ethics

Defense Counsel

- Don't communicate with represented parties
- Use caution when communicating with unrepresented third parties
- Don't use subterfuge, trickery, dishonesty, deception, pretext, false pretenses, or an alias to gain access to information from third parties that is not publicly available

Plaintiffs' Counsel

- Technology competency
- Oversight of ESI preservation, collection, and production



Questions

Offensive Discovery Toolkit Quick Takeaways

- **Plaintiff Fact Sheet Order/Targeted Discovery Requests**
 - Requiring disclosure and production of ESI
- **ESI Protocol**
 - Specifying production format and search methodology for ESI
- **Protective Order**
 - Favorable to client and OUSA data protection laws
- **FRCP 26(g) Certifications**
 - Regarding ESI productions
- **ESI Guidance**
 - Instructing counsel regarding obligations to identify, preserve, collect, and produce ESI
- **Deficiency Protocol Order**
 - Setting out deficiency process for plaintiffs' ESI productions
- **ESI Authorizations**
 - For release of plaintiffs' ESI directly from third-party providers
- **Review Plan**
 - Formalized strategy for substantive review of ESI

