

# IPRO's 2021 eDiscovery Case Law Wrap-Up

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To better understand how technology continues to affect the legal industry, you just have to look at case law and the resulting court rulings, particularly in regards to eDiscovery and the Federal Rules of Civil Procedure (FRCP).

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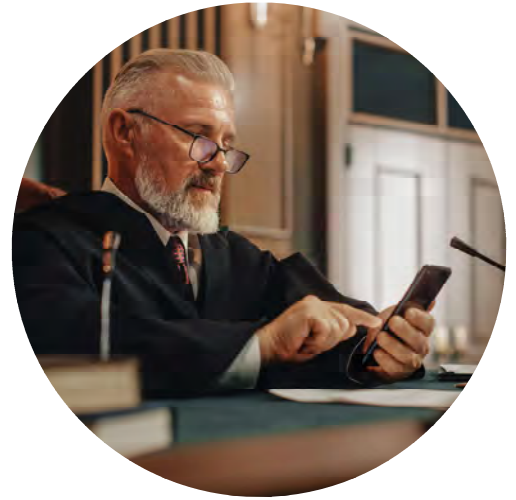
Each year, there are hundreds of case rulings that involve eDiscovery and related technology in some way. As such, we can't review all of them in this paper but instead will offer our thoughts on 10 of the most significant rulings in 2021 involving eDiscovery or Information Governance.

## 1. Data Deletion Doesn't Mean Case Dismissal

*Liadis v. Suburban Mobility Authority for Regional Transportation Mich. App. January 28, 2021*

In this case, 41,000 files were deleted from the plaintiff's computers as a result of a previously installed program called CCleaner, and the defendant asked to dismiss the case. However, the burden for case dismissal or even sanctions for data spoliation is a heavy one, requiring proof of intent that the deleted data was relevant, and that there aren't other copies available. Needless to say, this one didn't meet the standard. [Read the full ruling here.](#)

*Information Governance, including a documented process regarding the use of data security and minimization solutions, can prove that reasonable efforts were made to preserve data, and that any deletions were not intentional. [Learn more](#) in this guide to Information Governance 2021 how these tools and processes can help improve eDiscovery outcomes.*



## 2. You Must Have Evidence of Your Evidence

*Reed v. Royal Caribbean Cruises, LTD. S.D. Fla. February 11, 2021*

In this case, the plaintiff claimed the defendant spoliated body cam footage of an interview. The problem is, they never had proof the video existed in the first place. Even if the footage had been proven to have existed, it still must meet the requirements laid out by the Federal Rules of Civil Procedure for sanctions (see above).

[Read the full ruling here.](#)

*Emerging video and other [data derived from IoT devices](#) is increasingly becoming a part of ESI—and resulting litigation. IPRO recently discussed how information stored in Fitbit, Amazon devices and other technologies must be preserved.*

## 3. A Legal Hold Doesn't Mean Data Has Been Preserved

*Mahboob v. Educational Credit Management Corp. S.D. Cal. March 1, 2021*

In this case, the defendant placed a legal hold on phone call data and recordings as requested but failed to suspend their data retention policies. As the case continued, those retention policies came due and the data placed under hold was automatically deleted. Partial sanctions were levied against the plaintiff, though no jury instruction was given, and the defendant also had to pay the plaintiff's attorney's fees related to the spoliated data.

[Read the full ruling here.](#)

*While Information Governance policies can inform Legal Hold and preservation policies, they must be periodically managed and amended based on current case rulings. Find out more best practices on how to [effectively preserve evidence](#).*

## 4. Taking a Break from Facebook or Spoliation of Requested Data?

*Brown v. SSA Atlantic S.D. Ga. March 16, 2021*

In this case, the defendant claimed the plaintiff had spoliated requested data from a Facebook account because it was deactivated (It was unclear at times how many accounts the plaintiff had and when they were activated). However, just because an account is deactivated (as opposed to permanently deleted) doesn't mean the data is gone. The court ruled against sanctions, citing the FRCP parameters which state that data must be irretrievably lost or can't be found in other forms. If, after the plaintiff reactivates his account, evidence relevant to the case is found to be lost, then the defendant can request a new motion for sanctions. [Read the full ruling here.](#)

*Facebook is not so new anymore, and eDiscovery professionals must keep informed of data retention policies in it, as well as other social media and collaboration tools. How [mature are your organization's Information Governance policies?](#)*

## 5. Social Media is an Evidence Treasure Trove and Must Be Preserved

*Torgersen v. Siemens Building Technology, Inc. N.D. Ill. May 21, 2021*

Unlike the previous case, this plaintiff deleted (not deactivated) his Facebook account after discovery had begun, against the advice of his attorney. Facebook has a 30-day data retention policy for deleted accounts, therefore the requested ESI couldn't be retrieved. The court ruled that all of this met the requirements of the FRCP regarding spoliation sanctions -- data had been intentionally deleted, it was relevant to the outcome of the case, and it could not be retrieved or didn't exist in other forms -- and adverse inference sanctions were ordered.

[Read the full ruling here.](#)

*Legal Hold is more than just sending emails—it must include audit and reporting to ensure defensibility—as the FRCP requires you to show reasonable effort to preserve it. It's not something to take lightly. [Learn why you need a formal process for Legal Hold.](#)*



## 6. The Case of the Business Phone, the Burner Phone, and the Pharma Bro

*Federal Trade Commission v. Vyera Pharmaceuticals, LLC. S.D.N.Y. June 1, 2021*

In this case, the phones belonging to Martin Shkreli, AKA The Pharma Bro, in an ongoing antitrust suit were requested as part of discovery. The first phone was a business phone he kept after leaving the organization. The second, was a contraband phone he was found to be using from prison. After forensic imaging, the business phone was found to be completely wiped. A witness for the defendant testified to communicating with an incarcerated Shkreli over WhatsApp, which would automatically delete the messages. Shkreli pleaded the 5th, and the judge had more than enough evidence to order spoliation sanctions. [Read the full ruling here.](#)

*WhatsApp, SnapChat, and other ephemeral messaging apps are increasingly becoming important in regard to eDiscovery and Information Governance. IPRO recently covered other [case law](#) regarding these technologies.*

## 7. Producing Files From Home is Difficult When it Comes to Paper

*Ricardo Sanz v. Wells Fargo Bank S.D. Fla. June 21, 2021*

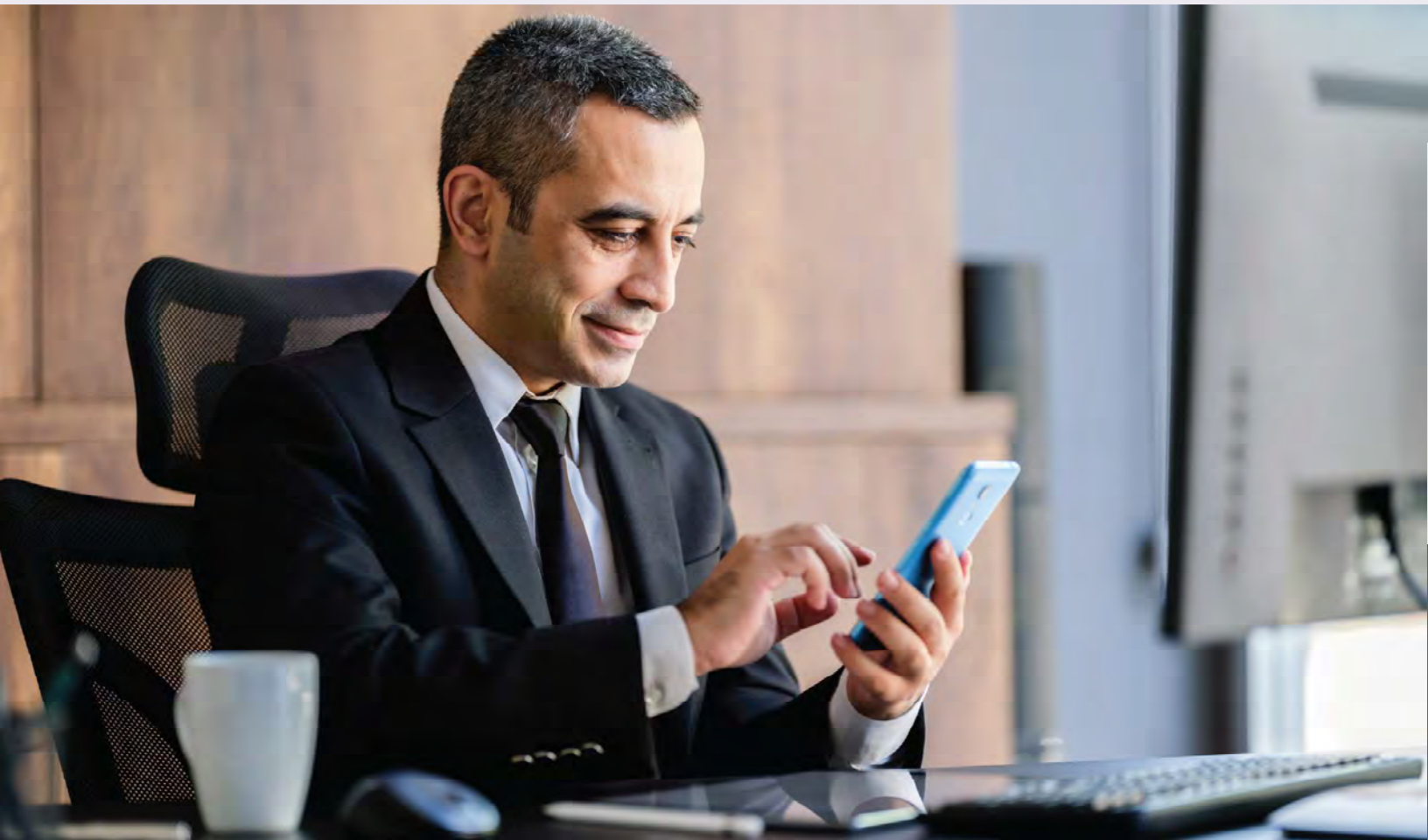
The global pandemic has many people working from home, and most of the time, this isn't a problem, except when it comes to paper documents. In this case, the plaintiff accused the defendant of spoliation after a requested file wasn't produced. Because the file was a paper document, the defendant couldn't produce it until they returned to the office, which they did. The plaintiff still asked for an adverse inference, saying the document could have been tampered with, but the judge overruled this, citing a lack of evidence proving bad faith. However, the judge did award attorney's fees due to the production delay. [Read the full ruling here.](#)

## 8. Text Messages Must Be Given Context

*Sandoz, Inc. v. United Therapeutics Corp. D.N.J. July 16, 2021*

In this case, text messages were requested from the plaintiff, who in turn only produced messages which were identified using the agreed upon search terms. The defendant then asked for contextual text messages, even though discovery had ended. The court supported the defendant's motion to compel contextual text messages, "including the preceding text message or responding text message, if they exist. If they do not exist, [plaintiff] must so state, and provide an explanation based on information available to it why they do not exist." [Read the full ruling here.](#)

*Context in text and collaboration apps continued to be a challenge for eDiscovery professionals in 2021 as it was the subject of many LegalTech conferences and webinars this year. Here's IPRO's take on [best practices for putting together conversational data](#) across these technologies.*



## 9. Oops, My Bad. No Sanctions for Amazon Data Deletion.

*Via Vadis, LLC v. Amazon, Inc. W.D. Tex. July 23, 2021*

In this case, the plaintiff accused the defendant of “intentionally and continuously destroy[ing]...all evidence of its use of the BitTorrent protocol for at least six years after this case was filed, thus irreparably impairing Plaintiffs’ case.” The alleged spoliation was due to automatic retention policies, which Amazon didn’t realize was affecting the discovery request. Once they did, they ended the automatic deletion and provided still existing requested files. They also found other sources of data for those which had been deleted. Once again, because of the heavy burden required for sanctions under the FRCP (i.e. no ill intent to delete evidence; data could be found elsewhere) no sanctions were ordered. [Read the full ruling here.](#)

*Documented information governance policies are essential as a good foundation for your eDiscovery processes. Find out the positive impact they can have on your [legislative outcomes](#).*

## 10. Having a Team of Contract Reviewers Comes in Handy Sometimes

*O’Donnell/Salvatori Inc. v. Microsoft Corp. W.D. Wash. Oct. 1, 2021*

In this case, the defendant ran searches on the agreed upon search terms, then used contract reviewers to cull out irrelevant documents. The plaintiff sought to have all of the requested data produced, not just that which was deemed relevant by the defendant. The court ruled, “that a party’s agreement to run search terms does not waive its right to review the resulting documents for relevance so long as the review can be done in a reasonably timely manner. Here, Microsoft had the ability to hire contract reviewers – who review documents for a living – to conduct a document-by-document review of the production to determine relevance, and was therefore able to conduct the review within a reasonable time frame.” [Read the full ruling here.](#)

*IPRO offers both [managed discovery services](#) for document review and [AI-based review technologies](#) that help legal professionals get to relevant evidence faster in their eDiscovery processes. [Contact us to learn more.](#)*

## Conclusion

This paper is not meant to be inclusive of all case law related to eDiscovery and Information Governance in 2021.

But given the amount of rulings this year around Legal Hold (IPRO previously discussed the Top Challenges to Legal Hold in 2021 [here](#)) it’s clear that corporate legal departments, and the service providers and law firms supporting them, should employ a dedicated Legal Hold solution, along with clearly defined processes, to ensure they comply with FRCP requirements and, when litigation arises, have favorable outcomes in court.

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