Hypotheticals for Joint CLE Seminar  
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Hypothetical No. 1
S is the wholly owned U.S. subsidiary of P, a foreign corporation. S is sued in federal court in the United States. Plaintiff’s counsel writes to S’s counsel demanding that S’s litigation hold be extended to P and sends S a request for production that includes specific requests for documents in P’s possession. An associate meets with S’s in-house counsel regarding plaintiff’s request. S’s in-house counsel tells the associate to tell plaintiff’s counsel that plaintiff is overreaching and plaintiff’s demand is rejected, and further tells the associate to object to all of the discovery requests directed at P. The associate talks with the partner-in-charge, who tells the associate, “Do what you were told by in-house counsel. They pay the bills.”

What civil procedure issues do you see in this hypothetical? Any ethics issues?

Hypothetical No. 2
You are negotiating the terms of a case management order in a case with two defendants and one plaintiff. One such term involves the application of Rule 502(d) of the Federal Rules of Evidence. Your opponent has proposed the following text for the CMO:

The Parties agree that the inadvertent production of privileged documents or information (including ESI) shall not, in and of itself, waive any privilege that would otherwise attach to the document or information produced.”

Your co-defendant has proposed this language:

Non-waiver of privilege for inadvertently disclosed materials. Pursuant to Fed. R. Evid. 502(d), the inadvertent disclosure of any document that is subject to a legitimate claim that the document is subject to the attorney-client privilege or the work-product protection shall not waive the protection or the privilege for either that document or for the subject matter of that document. The recipient of the inadvertent disclosures must return or destroy the materials unless the recipient disputes the claim in which case the recipient may retain a single copy of the materials and seek a judicial determination of the matter pursuant to...Fed. R. Evid. 502.

Do you prefer one formulation over another? Do you reject both of them and offer up a different version? If so, why? Any ethics issues?

Hypothetical No. 3
A client tells an associate in a law firm that the client will handle production of documents in pending federal court litigation. The client is a technology company and has an in-house counsel staff. The client
tells the associate that it will be much cheaper for the client to do the work, and the associate need not worry about the thoroughness of the production. The associate returns to the office and tells the partner about the conversation. The partner says, “This is an important client. We will do what the client says.” The Rule 26(f) meet-and-confer session is going to occur in a week.

**What civil procedure issues do you see in this hypothetical? Any ethics issues?**

**Hypothetical No. 4a and 4b**

A litigant has electronic documents harmful to its position. It deletes them. In the course of the litigation, the deletion is discovered and a forensic examiner is able to recover all of the deleted files from the spoliator’s hard drive. You seek sanctions from the court for the spoliator’s conduct.

**What rule or rules do you invoke? What sanction or sanctions do you seek? What is the response to your motion? How should the Court rule?**

FBI agents exchanged text messages with a cooperating witness. The text messages were not preserved on an FBI server. The agents testified that they manually deleted the text messages from their phones to free up space in the phone’s memory. There was testimony that the text messages related to logistics of meetings with witness, but the agents could not recall whether there was text that could be said to relate to the subject matter of the witness’s testimony. No litigation hold was placed on information on the agents’ cell phones and the FBI servers did not capture the text messages.

**Are spoliation sanctions available? If so, what standard should be applied?**

**Hypothetical No. 5a and 5b**

You are working with an expert witness. The expert meets with you in your office and gives you her expert opinion. Working with the expert, you write the first draft of the expert report. You give a copy of the draft to the expert on a thumb drive. The expert then returns to her office and edits the report and sends it to you for review. You edit the document in three respects. You add two facts to the expert’s fact statement. You also add two comments asking questions about the bases for two of the technical conclusions reached by the expert.

You put both the report that you drafted based on what the expert told you and the draft containing your comments and two additional facts on a privilege log. Your opponent moves to compel production of both documents.

**What civil procedure issues do you see in this hypothetical?**

Let’s change the facts slightly. Your expert communicates with other experts in her consulting firm about her expert report. You list on the privilege log these expert-to-expert communications. Your opponent moves to compel their production.

**What civil procedure issues do you see in this hypothetical?**