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E-DISCOVERY

2016 ESI Case Law Update

INTRODUCTION

The December 1, 2015, amendments to the Federal Rules of Civil Procedure constituted an unequivocal acknowledgment that e-Discovery forms a central part of nearly all litigation. The rules as amended emphasize a proactive approach involving cooperation throughout the discovery process. As is usual following rule amendments, we expect a period of acclimation by practicing attorneys, spurred on by lower court decisions, before seeing a perceptible change in behavior by attorneys.

This update also covers best practices in litigation as culled from recent court decisions. For example, the failure to take reasonable steps to preserve relevant evidence remains the foremost focus of a court when imposing sanctions against parties. The good news is that courts have continued to provide practitioners with better guidance to avoid adverse rulings while recognizing that preservation requires a fact-specific inquiry.

Technology has become an integral part of daily life and, in turn, information governance impacts our handling of data and the practice of law. As a result, an attorney’s duty of competence now includes an obligation to understand relevant technologies and how they can impact litigation, from discovery through trial. This ranges from understanding a client’s records management practices, including everything from banker’s boxes to cloud-based storage, to understanding the technology required to collect and produce information pursuant to discovery orders. More importantly, an understanding of technology can foster cooperation by permitting counsel to engage in an open and intelligent dialogue during case management planning and discovery conferences. It is, after all, an understandable impulse for parties to become adversarial when they do not comprehend the nuances of the other side’s proposal.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

On December 1, 2015, a package of amendments to the Federal Rules of Civil Procedure went into effect. Many of the amendments have a direct bearing on the e-Discovery topics addressed in this update. In his 2015 Year-End Report on the Federal Judiciary, United States Supreme Court Chief Justice John Roberts explained that “the amendments may not look like a big deal at first glance, but they are.”

Notable rule amendments in the e-Discovery context include:

- Rule 1: Insertion of language that the Federal Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” [Emphasis added]
- Rule 26(b)(1): Insertion of language that discovery is limited to matters “proportional to the needs of the case” considering six articulated factors.
- Rule 34(b)(2)(B) and (C): Addition of a requirement that objections to document demands must be stated with specificity and that objections “must state whether any responsive materials are being withheld on the basis of that objection.”
- Rule 37(e): Entire replacement of former Rule 37(e) with a rule that permits spoliation sanctions only where a party “failed to take reasonable steps to preserve” and limits certain severe sanctions for spoliation, including adverse inferences and dispositive sanctions, to when there has been a finding “that the party acted with the intent to deprive another party of the information’s use in the litigation.”
Rule 1

Although the amendment to Rule 1 may not appear significant on the surface, the added language is of great importance as the intent of the drafters was to encourage cooperation among parties. As addressed below, many courts have been encouraging litigants to adopt a cooperative approach when handling e-Discovery issues with the goal of expediting case handling, minimizing burden and expense, and removing contentiousness as much as practicable from litigation.

Rule 26(b)(1)

Regarding 26(b)(1), many commentators have described this amendment as adding proportionality to discovery. However, five of the six articulated proportionality considerations had been present in Rule 26(b)(2)(C)(iii) for decades, and of course many courts and litigants have for many years been applying the concept of proportionality to e-Discovery. See Will Changes to Federal Rules Reduce Scope of Discovery? The intention of the drafters in revising Rule 26 was not to insert proportionality into the rule but rather to emphasize and bring attention to the need for the application of proportionality. While it will be interesting to see how courts apply proportionality to discovery post-December 1, 2015, any issued decisions are unlikely to answer the question of whether the amendment to Rule 26(b) has served to reduce discovery costs. Of course, a court’s application of proportionality to discovery with an analysis under the current proportionality considerations does not mean that the concept of proportionality would not have limited the scope of discovery prior to December 1, 2015, under Rule 26(b)(2)(C)(iii). Only time will tell whether discovery budgets decrease following the amendment to Rule 26.

Rule 34(b)(2)(B) & (C)

Of all the December 1, 2015, amendments, the amendment to Rule 34 has the potential to have the greatest immediate impact on federal court litigation practice, provided that attorneys follow the rule. Boilerplate objections − that document demands are “overbroad, unclear, vague and ambiguous, improper in form, unduly burdensome and oppressive, not reasonably calculated to lead to the discovery of admissible evidence, requests information outside the defendant’s knowledge and control and seeks information that is already in the custody and control of the plaintiff or is accessible to the plaintiff” − are no longer acceptable in federal courts. Counsel must state objections with specificity and indicate whether materials are in fact withheld on the basis of the stated objection. Fortunately, there is no need to specifically identify withheld documents as this can be achieved by indicating the scope of search efforts. See Methods for Asserting Objections Under Amended Rule 34.

Rule 37(e)

Rule 37(e) was amended in response to complaints by many litigants that have felt compelled to over-preserve electronically stored information (ESI) in an effort to avoid severe spoliation sanctions. Contributing to the problem was the previous lack of uniformity across federal courts, as courts used their inherent powers as a basis for imposing spoliation sanctions. Most notably, within the Second Circuit, courts were able to impose an adverse inference instruction based on a negligence standard while in other circuits such a sanction would be imposed only upon a showing of deliberate bad faith conduct.
Although the “bad faith” approach has now been adopted, litigants still must “take reasonable steps to preserve” potentially relevant ESI to avoid sanctions under Rule 37(e). Although “reasonable steps” is not defined, courts will almost certainly consider whether the litigant followed standard preservation best practices that have developed over the past decade, including (1) issuing a formal legal hold, (2) identifying ESI locations and key players, (3) conducting custodian and information technology personnel interviews, (4) suspending routine deletion, (5) monitoring employee compliance with the hold, and (6) amending and reissuing the hold when appropriate.

As courts interpret and apply amended Rule 37(e) in the coming months and years, it will be interesting to see the degree to which the amended rule is viewed as abrogating federal judges’ inherent powers to sanction litigants. Almost certainly, at a minimum this rule will not limit a court’s ability to issue sanctions in response to a litigant’s general discovery misconduct. The question remains as to whether spoliation deriving from negligence may be treated as general discovery misconduct or if it appropriately falls within the framework of amended Rule 37(e). Much like the potential impact of amended Rule 26, only time will tell.

**PRESERVATION / SPOLIATION**

ESI-related case law continues to evolve, with some of the more notable recent cases recognizing that certain document retention efforts have been reasonable, while other cases have involved imposition of sanctions against parties that continue to disregard their duty to preserve. While courts continue to reaffirm that the duty to preserve is intensely fact-specific, trends have emerged that provide guidance to parties and counsel in this area of the law. While the following decisions were issued prior to the recent amendment to Rule 37(e), they continue to provide guidance as to preservation best practices.

In *Giuliani v. Springfield Township*, the court found that the duty to preserve ESI is not triggered “at the mere onset of a potential claim or litigation,” but rather when the party has notice that the ESI is relevant to litigation. 2015 WL 3604343 (E.D. Pa. June 9, 2015). In this civil rights case, the court agreed that the defendant’s lost ESI was relevant to the plaintiff’s claims and was in the defendant’s control, but that the defendant had no notice that the ESI was relevant to any potential litigation prior to the plaintiff serving the lawsuit. Additionally, the ESI lost or destroyed prior to the service of the complaint was “at the most” mere inadvertent negligence. Without bad intent or ill motive, the court held that the defendant’s failure to preserve the requested ESI did not constitute spoliation or warrant sanctions. Additionally, in *Gladue v. Saint Francis Medical Center*, the court found that an employer’s purging of a terminated employee’s emails several months after termination but two months prior to notice from counsel of a potential claim was not spoliation because no litigation hold was required at the time the emails were deleted. 2015 WL 1359091 (E.D. Mo. Mar. 24, 2015).

Not surprisingly, a party’s unilateral destruction of ESI after the inception of a suit is routinely considered spoliation and may result in sanctions, including adverse inference instructions and costs. In *Grady v. Brodersen*, the plaintiff filed a copyright infringement suit against the defendant in March 2013 related to the defendant’s publication of copyrighted images to its website. 2015 U.S. Dist. LEXIS 35788 (D. Colo. Mar. 23, 2015). Four
months later, the defendant claimed that his computer became inoperable and he discarded it. He testified that while he attempted to transfer the old files to a new computer, he did not attempt to have the old computer repaired. The court found that the defendant’s discarding of the computer after litigation commenced was done intentionally and in bad faith, and required the jury to be given an adverse inference instruction based on the defendant’s spoliation.

Similarly, in Malibu Media, LLC vs. Harrison, the defendant received notice of a copyright infringement lawsuit in October 2012 related to his alleged unlawful download of several copyrighted movies. 2015 U.S. Dist. LEXIS 73447 (S.D. Ind. June 8, 2015). A few months later, in March 2013, defendant’s custom-built computer hard drive crashed and the defendant took it to an electronics recycling company to have it melted. However, unlike the court in Grady, the court found the defendant’s testimony credible and did not find that the defendant acted in bad faith. Nevertheless, the court ordered that the jury should be instructed to assume that the evidence on the destroyed hard drive was unfavorable to the defendant if the jury found the defendant had destroyed the hard drive in bad faith. The plaintiffs in both cases were awarded costs and attorney’s fees – reaffirming that a party’s destruction of ESI after the commencement of litigation is a dangerous gamble.

Document retention policies remain a central tenet of a court’s analysis of whether a party failed to preserve ESI. In Blue Sky Travel & Tours, LLC v. Al Tayyar, the Fourth Circuit overturned a lower court’s spoliation sanction after finding that the court had misapplied the legal standard. 2015 WL 1451636 (4th Cir. Mar. 31, 2015). In this case, the magistrate judge sanctioned a party for failing to preserve ESI, finding that the party was required to stop its normal document retention policies and “preserve all documents” because it does not know what may or may not be relevant to the litigation. The Fourth Circuit held that a party is not required to preserve all documents, but rather “only documents that a party knew or should have known were, or could be, relevant to the parties’ dispute. Additionally, in United Corporation v. Tutu Park Limited, the Superior Court of the Virgin Islands denied the plaintiff’s motion for sanctions against non-party Kmart for not producing documentation to plaintiff’s satisfaction. 2015 WL 457853 (V.I. Super. Jan. 28, 2015). Kmart argued that its record-retention policy did not allow for the preservation of records prior to 2005 and that its emergence from bankruptcy in 2003, merger with Sears, Roebuck and Co. in 2005, and software and database conversions were valid reasons why some data might be unavailable. The court ruled that Kmart diligently attempted to comply with the court’s order and that a corporation may be justified if it chooses not to retain records that, in this case, are more than nine years old.

Similarly, in Fidelity National Title Ins. Co. v. Captiva Lake Investments, the court sanctioned the plaintiff for failing to implement a legal hold, for deleting emails after litigation had commenced, and for an “unexcused delay in producing relevant documents [that] caused prejudice” to defendant. 2015 WL 94560 (E.D. Mo. Jan. 7, 2015). The plaintiff argued that a legal hold was unnecessary because it had a standard document collection procedure when a claim was made, namely
E-DISCOVERY

that staff retained hard copies of documents in a physical file and emails and electronic documents in a separate database for each claim. However, the court held that the “mere existence of a procedure is insufficient to satisfy [a party’s] obligation to preserve discoverable evidence, if it does not actually preserve evidence.” The plaintiff further argued that the defendant was not prejudiced because it had produced thousands of emails in discovery, which the court deemed “meaningless because [plaintiff] does not know the quantity or contents of emails that were deleted.” While sanctioning the plaintiff and ordering it to pay the defendant’s attorney’s fees related to the deletion of emails, the court refused to sanction the plaintiff for the loss of data from a proprietary database system that was automatically overwritten every month. The court found that there was no indication that the plaintiff could have preserved relevant database data “without significant intervention in a major computer system.”

DUTY OF COMPETENCE

The reality of today’s litigation environment is that nearly every case involves, at least on some level, the discovery of ESI. As a result, an attorney’s duty to provide “competent representation” necessarily extends to the context of e-Discovery. However, the degree of proficiency that is “reasonably necessary” in this regard may not always be clear.

According to ABA Model Rule of Professional Conduct 1.1, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Providing further guidance, Comment 8 to Model Rule 1.1 explains as follows:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. …”

When read in conjunction, the plain language of Model Rule 1.1 and Comment 8 clearly contemplates both a legal and a technological component of the duty of competence. Reinforcing this development, a recent opinion from the U.S. District Court for the Southern District of California highlights the growing expectation by courts that attorneys should be able to comprehend and effectively manage the legal and technological issues that can arise in the discovery of ESI. In HM Electronics, Inc. v. R.F. Technologies, Inc., the plaintiff brought a motion after the close of discovery alleging that the defendant had engaged in discovery misconduct. No. 12cv2884-BAS-MDD, 2015 U.S. Dist. LEXIS 104100 (S.D. Cal. Aug. 7, 2015). After holding a hearing on the plaintiff’s motion, the court concluded that the defendants and their attorneys had engaged in sanctionable conduct in several ways, including, among other things, the failure to implement a litigation hold and the failure “to perform quality control checks or supervise their ESI vendor” during the collection, review and production processes. Ultimately, these failures resulted in the (1) intentional destruction of relevant documents by the defendants, (2) withholding of more than 150,000 pages of unprivileged ESI on the basis of privilege, and (3) failure to produce 375,000 pages of ESI until “well after the close of discovery.”

A recent opinion from the State Bar of California (Formal Opinion Interim No. 11-0004) explained that attorneys handling litigation who do not personally have competence for e-Discovery issues have three options: (1) acquire sufficient learning and skill before performance is required, (2) associate with or consult technical consultants or competent counsel, or (3) decline the client representation.

Citing from this opinion, the HM Electronics court stated that attorneys should be able to perform, either by themselves or in association with competent counsel or expert consultants, the following:

- Initially assess e-Discovery needs and issues, if any
- Implement/cause to implement appropriate ESI preservation procedures
- Analyze and understand a client’s ESI systems and storage
■ Advise the client on available options for collection and preservation of ESI
■ Identify custodians of potentially relevant ESI
■ Engage in competent and meaningful meet-and-confer conferences with opposing counsel concerning an e-Discovery plan
■ Perform data searches
■ Collect responsive ESI in a manner that preserves the integrity of the ESI
■ Produce responsive non-privileged ESI in a recognized and appropriate manner.

The court sua sponte imposed monetary sanctions on the defendant’s attorneys and their firm after finding that they had “ignored these basic principles.” Additionally, the court ultimately imposed monetary sanctions, issue sanctions and an adverse inference against the defendant.

The “basic principles” discussed above are the minimum skills an attorney will need to effectively manage e-Discovery-related issues. Practitioners have an obligation to keep abreast of the legal issues and technologies that can materially impact their clients during litigation, especially in the context of e-Discovery. However, the degree of proficiency that is “reasonably necessary for the [competent] representation” of one client may not ensure the competent representation of another. As a result, attorneys should evaluate proficiency on a case-by-case basis to confirm that their degree of skill is commensurate with the size and scope of the litigation. Attorneys lacking the requisite degree of skill for a particular case can and should consult with qualified experts or associate with counsel that have a requisite level of competence.

COOPERATION

Long before the recent amendment to Rule 1 of the Federal Rules of Civil Procedure, courts have encouraged cooperation among parties to avoid and resolve discovery disputes.

Many courts have specifically emphasized that cooperation reduces the costs of discovery to the parties and the burden on the judicial system while at the same time permitting counsel to avoid gamesmanship in order to better serve clients’ interests.

In CMFG Life Ins. Co. v. Morgan Stanley & Co., LLC, Judge Randa noted that the Seventh Circuit Electronic Discovery Pilot Program, in which he is a participant, has adopted Principles Relating to the Discovery of Electronically Stored Information. 2015 U.S. Dist. LEXIS 157046, 5-6 (W.D. Wis. Nov. 19, 2015). Counsel for both parties were ordered to be fully prepared to discuss methods and techniques to accomplish cooperative fact-finding at the initial status conference. In connection with the conference, the court proposed entry of a discovery order with an attachment titled “Consideration of Issues Concerning Electronically Stored Information (ESI),” which provided as follows:

“Experience teaches that unless conducted with careful planning and a spirit of cooperation, discovery of ESI can result in an unnecessarily high level of conflict, expense and delay in resolving cases on the merits. That is why the Court has endorsed The Sedona Conference® Cooperation Proclamation dated July 2008.”
Furthermore, the court’s form Standing Order Relating to the Discovery of Electronically Stored Information states that:

“An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.”

Examples of courts facilitating a cooperative approach among counsel abound. In Bagley v. Yale Univ., the court noted that at the outset of litigation, the parties “sensibly sought to agree upon identifying the ‘custodians’ whose computers would be reviewed for ESI, and also to agree upon the ‘search terms’ that would inform and direct those reviews.” 307 F.R.D. 59 (D. Conn. 2015). Quoting from Magistrate Judge Andrew Peck’s William A. Gross Constr. Assoc’s. v. Am. Mfs. Ins., the court noted that “the best solution in the entire area of electronic discovery is cooperation among counsel,” and that trial courts encourage and expect that sort of cooperation among counsel. See 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (Peck, M.J.).

In Burd v. Ford Motor Co., the court ordered Ford to produce a Rule 30(b)(6) witness to provide an overview of its claims investigation process, to testify regarding its document retention and destruction policies, and to supply details regarding the document search performed to date. 2015 U.S. Dist. LEXIS 88518, 31-34 (S.D. W. Va. July 8, 2015). In support of its decision, the court quoted the Sedona Conference Cooperation Proclamation’s comment that “costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.” The court further noted that cooperation in a transparent discovery process is the path to efficient, cost-effective litigation and achieves the purpose of the federal discovery rules, specifically to reduce gamesmanship and to ensure forthright sharing of all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. See Burnett v. Ford Motor Co., 2015 U.S. Dist. LEXIS 88519 (S.D. W. Va. July 8, 2015); Johnson v. Ford Motor Co., 2015 U.S. Dist. LEXIS 90108 (S.D. W. Va. July 8, 2015).

At the same time, courts continue to encourage parties and their counsel to devise discovery methods and strategies that fit their particular case. In Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125 (S.D.N.Y. 2015), three years after his decision in Da Silva Moore v. Publicis Groupe & MSL Grp., 287 F.R.D. 182 (S.D.N.Y. 2012), Judge Peck evaluated the parties’ proposed protocol for technology-assisted review (TAR) (i.e., predictive coding) and considered the parties’ appropriate level of transparency and cooperation with respect to seed sets/training sets used for training the document classifier. While again noting that he believes in cooperation, Judge Peck emphasized that requesting parties can ensure that training and review were conducted appropriately by means other than disclosing all non-privileged documents in the training or seed set to the opposing side. Other possible methods include statistical estimation of recall at the conclusion of the review, an analysis of gaps in the production and quality control review of samples from the documents categorized as responsive. The court approved the parties’ TAR protocol, but noted that it was the result of the parties’ agreement, not the court’s order.
When parties fail to cooperate and discuss proposed e-Discovery search protocols, the courts have ordered further mandatory meet-and-confer conferences, specifying the persons required to attend. In *Lights Out Holdings, LLC v. Nike, Inc.*, plaintiffs complained of the allegedly deficient document production, but did not cooperate with Nike in designing the additional search and did not propose search terms. 2015 U.S. Dist. LEXIS 100530, 9-11 (S.D. Cal. July 31, 2015). The parties filed a joint motion for determination of a discovery dispute. The court reminded the parties that the ESI Order entered in this action provided that “Email production requests will identify the custodian, search terms, and time frame. The parties will cooperate to identify the proper custodians, proper search terms and proper time frames.”

Similarly, in *ACI Worldwide Corp. v. MasterCard Techs., LLC*, the Court ordered the parties to confer once again in an effort to reach an agreement regarding the search methodology to be employed in retrieving the requested information. 2015 U.S. Dist. LEXIS 90445, 6-7 (D. Neb. July 13, 2015). “In the event the parties cannot come to an agreement, the Court will immediately refer the matter to a special master who will oversee the production of ESI in this case. The parties are advised that costs of retaining the special master will be assessed against the parties in proportion to their success (or lack thereof) on the merits of their arguments regarding a reasonable search methodology (if any) that can be used to retrieve ESI in this case.”

The Court quoted the decision in *Saliga v. Chemtura Corp.*, holding that “cooperation between counsel regarding the production of electronically stored information allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and generally get to the litigation’s merits at the earliest practicable time.” No. 3:12-cv-832, LEXIS 167019 (D. Conn. Nov. 25, 2013). Quoting *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 339 (2009).

The decision in *Engineered Abrasives, Inc. v. Am. Mach. Prods. & Serv.* serves as a good reminder that less-than-diligent responses to discovery will not be tolerated. 2015 U.S. Dist. LEXIS 33691, 48-49 (N.D. Ill. Mar. 18, 2015). The Court in *Engineered Abrasives* reviewed the defendants’ discovery responses and excerpts of depositions, in which it was clear that the defendants failed to cooperate in the discovery process by providing evasive responses and disclaiming knowledge of responses that they had certified. The Court awarded sanctions against the the defendants in the amount of $12,800, the cost of plaintiff’s forensic computer examination.

**SEARCH METHODOLOGIES & PREDICTIVE CODING**

Search methodologies continue to provide a point of contention among litigants. In *New Orleans Regional Physician Hosp. Org., Inc. v. United States*, the plaintiff filed a motion to compel further discovery, challenging both the thoroughness of the defendant’s search for responsive documents and the sufficiency of the ultimate production. 122 Fed. Cl. 807, 809 (Aug. 21, 2015). Upon review of the record, the court determined that counsel for the defendant had failed to exercise any “meaningful oversight” over the review process, and even delegated responsibility to the custodians involved to determine which search terms should be used. While all custodians used some of the search terms provided, it became apparent that none of the custodians used all of the 28 terms as the defendant had represented to plaintiff. Although the court acknowledged the possibility that the defendant’s searches uncovered “all of the existing,
relevant documents,” it ultimately concluded that some relevant documents may have been destroyed as a result of the defendant's failure to “put into place a systematic, reliable plan to find and produce all relevant documents in the case.” As a result, the court granted the plaintiff's request and ordered the parties to “develop a list of custodians, search protocols, and search terms....”

While search methodologies remain a point of contention, predictive coding (i.e., technology-assisted review, or TAR) has continued its emergence as an effective and cost-efficient discovery tool. Despite its obvious benefits, some parties have remained reluctant to adopt predictive coding in the document review process. The use of predictive coding was first approved by the judiciary in a 2012 opinion by Judge Peck in Da Silva Moore v. Publicis Groupe & MSL Group, 287 F.R.D. 182 (S.D.N.Y. 2012). Three years later, Judge Peck followed up with a decision subtitled “Da Silva Moore Revisited” and held that “the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.” (Emphasis added.) Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125, 127 (S.D.N.Y. 2015). Judge Peck explained that “it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review.”

MOBILE DEVICES

As one of the primary means by which people stay connected in today’s digital age, mobile devices have become an essential part of the discovery process. With processing power comparable to many computers, mobile devices can quickly generate substantial amounts of ESI, from text messages and third-party app data to social media posts and GPS information. As a result, mobile devices present a unique challenge for litigants in terms of preservation, collection and production.

A December 31, 2014, opinion from the Eastern District of Virginia sheds light on preservation obligations involving mobile devices. Federico v. Lincoln Military Housing, LLC, No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943 (E.D. Va. Dec. 31, 2014). In Federico, eight families brought an action for personal injury and property damage after allegedly being exposed to mold in properties managed by the defendant property manager. A discovery dispute began after the plaintiffs failed to produce text messages and emails. After the plaintiffs' repeated failures to produce ESI from mobile devices, the defendants filed a motion for sanctions seeking the dismissal of the plaintiffs’ claims. However, the court ultimately concluded that the loss of the plaintiffs’ text messages in the case came as a result of “routine, good-faith operation” of the phones, and declined to dismiss the case. The court explained that although the plaintiffs anticipated litigation at the time the loss occurred, a party only has a duty to preserve once it has notice of the material's relevance. Although the plaintiffs could have backed up their messages to an external source or possibly suspended the routine deletion, plaintiffs were unaware of their obligation. To hold otherwise, the court reasoned, would have required the plaintiffs to understand their preservation obligations before any discovery requests were served and even before conferring with counsel.
In some circumstances, discovery demands can extend to mobile devices owned by nonparties, including spouses or significant others. The defendant in Brown Jordan Int’l, Inc. v. Carmicle, acting pursuant to a jointly stipulated court order, turned over his electronic devices and provided access to storage sites to permit forensic examination in connection with discovery. No. 3:15-MC-00027-GNS, 2015 U.S. Dist. LEXIS 141668 (W.D. Ky. Oct. 19, 2015).

After conducting a forensic review, the plaintiffs formed a belief that a cell phone owned by the defendant’s wife also contained discoverable information and served a subpoena requesting its production. The defendant’s wife refused to comply with the subpoena, and attempts to reach an agreement regarding the forensic review of the phone failed. Noting that the plaintiffs had presented evidence that the phone likely contained relevant information, the court explained that the “heavy burden” of establishing that the materials were either outside the scope of relevance or of marginal relevance shifted to the defendant and his spouse. The defendant’s wife advanced several arguments in opposition to production, including that the information did not exist on her current device, the parties already had the information from another source, the production would infringe on her right to confidentiality and privacy, production would create an inconvenience, and there was insufficient time to review the results to assert applicable privileges. Nevertheless, the court ordered that the phone be turned over for forensic review. In doing so, the court explained, among other things, that it would be impossible for the plaintiff to refute the spouse’s claims without a forensic review, that information could have been transferred to her current device from a prior device, and that some degree of inconvenience is inevitable in discovery. However, the court tailored discovery to provide the defendant’s wife an opportunity to conduct her own review of the materials recovered from her phone before final submission to the plaintiffs.

**SOCIAL MEDIA**

Given its inherently personal nature, social media remains one of the most divisive issues in the context of e-Discovery and a constant source of motion practice. On one hand, information on social media sites has been considered relevant and subject to production – particularly when a plaintiff’s claim for damages is very broad, such as claiming a loss of enjoyment of life. At the same time, however, discovery should not entitle a party to “unfettered access to an opponent’s social networking communications” any more than it should allow that party to “rummage through the desk drawers and closets in his opponent’s home” as explained in Moore v. Wayne Smith Trucking Inc., 2015 U.S. Dist. LEXIS 143750, 7 (E.D. La. Oct. 21, 2015). In response, courts across the country have struggled to find a balance between an individual’s right to privacy and the competing demands of full and fair discovery.

A case from the District Court for the Eastern District of New York provides just one example of how courts have addressed this issue, and serves as a reminder that parties should focus on the scope of the demands to ensure that they are narrowly tailored and proportional to the needs of the case. In Caputi v. Topper Realty Corp., the defendant sought access to five years of the plaintiff’s Facebook account information in order to prove that the plaintiff was engaged in non-work-related activities during working hours and to rebut
E-DISCOVERY

claims that the plaintiff suffered emotional distress. 2015 U.S. Dist. LEXIS 67050 (E.D.N.Y. Feb. 25, 2015).

Applying the pre-December 2015 version of Rule 26(b), the court found that the defendant’s demand was overbroad, determining that the defendant failed to show that the request was “reasonably calculated to lead to the discovery of evidence establishing Plaintiff’s whereabouts during the Relevant Time Period.” The court did, however, allow a “sampling” of the plaintiff’s Facebook activity over a two-year period, which allowed the defendant to look for references to the alleged emotional distress, and to renew their discovery request upon a finding of probative evidence.

Although it may not work in every situation, some courts have found a middle ground by ordering an in camera review of the social media content at issue. In A.D. v. C.A., the court ordered an in camera review of the defendant’s social media accounts and ordered the defendant to produce the Facebook posting in question and to “provide an affidavit describing the printouts … [and] an authorization permitting the court to have access to her Facebook postings.” 16 N.Y.S.3d 126 (N.Y. Sup. Ct. 2015).

While parties might debate whether a request is overbroad and invades privacy, courts remain adamant that a failure to comply with discovery demands for social media is simply not an option. In Cuvello v. Feld Entm’t, Inc., an action regarding defendant’s alleged threats to infringe on plaintiff’s free speech, the plaintiff was ordered to produce both public and private Facebook entries regarding the defendant. 2015 U.S. Dist. LEXIS 24263, 8-9 (N.D. Cal. Feb. 27, 2015). The plaintiff only produced two pages of his public Facebook account and nothing else, despite the court order. In response, the defendant sought sanctions in three forms:

“(1) an award of reasonable fees and costs associated with bringing this motion, (2) coercive sanction to encourage compliance with this court’s outstanding discovery order and (3) a recommendation to the district judge that [the plaintiff] be held in civil contempt.”

Awarding all three types of sanctions, the court – noting that the plaintiff simply chose not to produce – explained that it could “think of no clearer scenario in which an award of reasonable fees and costs associated with bringing this motion would be warranted.”

Along similar lines, courts “have recognized that the postings on a Facebook account, if relevant, are not shielded from discovery merely because a party used Facebook’s privacy settings to restrict access.” Melissa G. v N. Babylon Union Free Sch. Dist., 6 N.Y.S.3d 445, 448 (Sup. Ct. 2015). Further, a party’s attempt to avoid production of social media by deactivating an account also failed to stop a court from ordering that party to produce the requested information. Crowe v. Marquette Transp. Co. Gulf-Inland, LLC, 2015 U.S. Dist. LEXIS 9198 (E.D. La. Jan. 20, 2015).

CROSS-BORDER DISCOVERY

In the world of cross-border discovery for U.S. litigation, for the past several years all eyes have been focused on European data privacy laws. Under the European Union’s Data Protection Directive 95/46/EC (Privacy Directive), EU member states are permitted to transfer “personal data” only to countries that are considered to provide “adequate” privacy protections. The United States, with its patchwork of privacy laws, does not qualify. As a result, U.S. litigants frequently relied on the U.S.-EU Safe Harbor framework as it provided one of the few permissible methods of transferring personal data from the EU to...
the United States. Developed by the U.S. Department of Commerce and the European Commission in 2000, the Safe Harbor framework allowed the transfer of protected data to any U.S.-based service provider that opted in and was able to self-certify that it had implemented adequate protection measures for the data. However, on October 6, 2015, the European Court of Justice (ECJ), the European Union’s highest court, invalidated the 15-year-old Safe Harbor program in response to a challenge to Facebook’s use of Safe Harbor by Austrian college student Max Schrems. *Schrems v. Data Protection Commissioner*, E.C.J. C-362/14 (Oct. 6, 2015).

In Schrems, the ECJ addressed the legality of the transfer of personal information from Facebook’s Irish subsidiary to the United States under Safe Harbor. Schrems argued that, “in the light of the revelations made in 2013 by Edward Snowden concerning the activities of the United States intelligence services … the law and practice of the United States do not offer sufficient protection against surveillance by the public authorities of the data transferred to that country.” The Irish Data Privacy Authority rejected Schrems’s complaints, relying in particular on a decision by the European Commission finding that, under the Safe Harbor framework, the United States provided the requisite degree of protection. This determination was overturned by the ECJ, which found Safe Harbor invalid because U.S. government agencies were not subject to its guidelines, thereby placing data transferred to the United States at risk of government surveillance. The ECJ also observed that the lack of privacy legislation in the United States deprived European citizens of the ability to “pursue legal remedies … or to obtain the rectification or erasure of such data.…”

Although The EU-U.S “Privacy Shield” has been developed as a potential replacement, it has been criticized for its perceived inability to cure the deficiencies that ultimately led to the invalidation of Safe Harbor. As a result, only time will tell whether it will ultimately withstand judicial scrutiny.

**CONCLUSION**

As we noted at the outset, the December 1, 2015, amendments to the Federal Rules of Civil Procedure unequivocally confirmed that e-Discovery is central to litigation. Although it has been more than a decade since Judge Shira Scheindlin’s seminal series of opinions in *Zubulake v. UBS*, it is clear from recent case law that litigants continue to struggle with a variety of e-Discovery issues. Litigants cannot expect such issues to go away, as in fact they are becoming only more complex with emerging technologies. While counsel now struggle with e-Discovery as to mobile devices, the Internet of Things promises a far greater challenge on the horizon. Attorneys must gain competence in e-Discovery to avoid being faced with one of the three options (including the possibility of declining a representation) presented by the State Bar of California in its Formal Opinion Interim No. 11-0004 addressed above.
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