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2017 ESI Case Law Update

INTRODUCTION

Since the December 1, 2015, amendments to the Federal Rules of Civil Procedure, we continue to see an increasing body of decisions that address e-Discovery on a more sophisticated level. This affirms our view that the practice of law has evolved with the integration of technology and information governance in everyday life. While the topics of preservation and cooperation remain familiar to those who are experienced in the practice of e-Discovery, the law continues to develop in those areas. Given the number of high-profile decisions rendered with clear reasoning by the courts, the courts clearly expect more from the practitioners. Attorneys following the old-school “business as usual” adversarial approach to litigation are placing themselves at greater risk of reprimands, if not outright sanctions, by the courts.

PRESERVATION/SPOLIATION

A party’s duty to preserve documents and other electronically stored information (ESI), while not typically a high-profile topic, made headlines in 2016. From the National Football League (NFL) “Deflategate” rulings to the invalidation of New York’s stop-and-frisk policies, parties continue to be held accountable for failures to comply with preservation obligations. To enforce these obligations on litigants, courts are able to impose any of several different types of sanctions. However, in federal courts whether and to what an extent a party can or should be sanctioned will depend on the court’s analysis under the revised framework of Rule 37(e) of the Federal Rules of Civil Procedure (FRCP).

At the outset, Rule 37(e) prescribes a three-part test to determine whether sanctions are warranted in the event ESI is lost or destroyed:

- Did the allegedly spoliated ESI constitute evidence that should have been preserved?
- Was the allegedly spoliated ESI lost because a party failed to take reasonable steps to preserve it?
- Can the allegedly spoliated ESI be restored or replaced through additional discovery?

If the answer to any of the questions is “no,” the analysis ends and no sanctions or curative measures will be imposed under Rule 37(e). (However, see below regarding the inherent authority of courts to sanction for general discovery misconduct that may involve ESI spoliation.) On the contrary, if each of those questions can be answered affirmatively, the court will proceed to analyze the facts under subsection (e)(1) if there is a finding of “prejudice” or under subsection (e)(2) if there is a finding of “intent to deprive.” See Rule 37(e); Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd., 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016). Depending on a court’s findings under subsections (e)(1) and (e)(2), sanctions can range from being “no greater than necessary to cure the prejudice” to dismissal of the action or entry of default judgment.

In Stinson v. City of New York, 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016), the Southern District of New York found that the City did not comply with its preservation obligations in class-action litigation challenging the New York Police Department’s “stop and frisk” policies. The Court held that the City’s issuance of a litigation hold three years after the lawsuit was filed was inappropriate and that because of the existence of a 2008 lawsuit involving the same “stop and frisk” policies, the City’s obligation to preserve records arose prior to the May 2010 filing of the Stinson lawsuit.

The City’s routine document destruction policies continued during the first three years of the litigation, which the Court opined resulted in the destruction of emails and documents likely relevant to the plaintiffs’ claims. The Court in Stinson rejected the City’s argument that the plaintiffs’ demands were overly broad, finding that “the Plaintiffs’ putative overbroad demands do not excuse the City’s failure to issue a litigation hold, to properly supervise its implementation, or to suspend
document retention policies that would foreseeably lead to the spoliation of evidence.” *Id.* at 5. Despite the City’s failure to preserve relevant ESI, the Court refused to issue the most severe adverse inference requested by plaintiffs, finding that the plaintiffs “are entitled to an inference that helpful evidence may have been lost, not relief from their obligation to prove a case.” *Id.* at 8.

The Tom Brady “Deflategate” saga thrust preservation into the spotlight and brought discussion of preservation obligations mainstream. In *NFL Mgmt. Council v. NFL Players Ass’n.*, 2016 WL 1619883, 18 (2d Cir. Apr. 25, 2016), the Second Circuit discussed whether Brady’s destruction of his personal cell phone during the NFL’s investigation of his alleged involvement in a scheme to use deflated footballs during the 2015 AFC Championship Game warranted an adverse inference from an arbitrator. The NFL argued that Brady’s destruction of his cell phone permitted the NFL Commissioner to draw an adverse inference against Brady that he participated in the ball deflation scheme. The NFL Players Association, on behalf of Brady, argued that he had no notice that destruction of his cell phone would be at issue in the arbitration, and further that his four-game suspension could not be sustained on grounds that he obstructed the NFL’s investigation. The district court agreed with the NFL Players Association’s position. However, the Second Circuit reversed the district court and upheld the adverse inference, reasoning that it “is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence [while] the party had an obligation to produce did so in order to conceal damaging information from the adjudicator.”

In *Cohn v. Guaranteed Rate, Inc.*, 2016 WL 7157358 (N.D. Ill. Dec. 8, 2016), the District Court of the Northern District of Illinois reaffirmed the generally held principle that a plaintiff’s duty to preserve typically arises prior to the commencement of litigation. In that case, the plaintiff filed suit against her former employer in November 2014 related to a business relationship that went sour. Prior to filing suit, and starting in November 2013, the plaintiff sent a series of emails to the former employer threatening to bring suit. During the litigation, the employer sought discovery of the plaintiff’s communications with the employer’s competitors prior to her separation from employment, which predated the filing of the lawsuit. The plaintiff responded that she had deleted emails from that time period and that the defendant was not prejudiced since many of those emails were produced as the result of third-party discovery. However, the Court found that not only did the plaintiff’s duty to preserve arise at the time she threatened suit against the former employer but also that her conduct constituted bad faith, which negated any need for a finding of prejudice. Central to the Court’s decision was evidence that the plaintiff instructed a subordinate to shift certain communications from her work to her personal email account, and that she provided her employer’s competitors with information that she recognized at the time as confidential, acting against her attorney’s advice. While the Court did not grant the most extreme sanctions of dismissal or default requested by the defendant, it did compel the plaintiff to turn over access to her entire personal email account to the defendant.
Despite the attempts by the Advisory Committee on Rules of Civil Procedure to foreclose “reliance on inherent authority or state law,” some courts may nevertheless invoke sanctions under inherent authority. However, a court’s reliance on such authority may vary by jurisdiction and depend on a number of different factors, including, among other things, the case precedent on topic in the jurisdiction, the actions of the parties and even the discretion of the court. For example, a decision from the Southern District of New York issued a clear warning that the inherent power of the court is not restricted by the changes to Rule 37(e), and upon a showing of bad faith, parties may be sanctioned even when the rule would not otherwise apply. \textit{Cat3, LLC v. Black Lineage, Inc.}, 164 F. Supp. 3d 488 (S.D.N.Y. 2016); c.f., Living Color Enterprises (“Clearly, when confronting a spoliation claim in an ESI case, a court must first look to newly amended Rule 37(e) and disregard prior spoliation case law based on ‘inherent authority’ which conflicts with the standards established in Rule 37(e).”)

A key issue in the case centered on emails provided by the plaintiffs in PDF format. However, the defendants discovered a discrepancy between those copies and the ones they had produced to the plaintiffs in discovery. To investigate this issue, the defendants requested the emails in native format and enlisted an expert to conduct a forensic analysis of the files. The defendants’ expert was then able to determine that each email contained two versions within the same production: one original copy that had been deleted and the altered version that was actually produced by the plaintiffs.

In response to the defendants’ motion for spoliation sanctions, the plaintiffs argued that there had been no destruction or loss of any evidence, and there certainly had not been both (1) loss of evidence and (2) “such evidence cannot be restored or replaced” as required by Rule 37…. Put simply, though there may be an evidentiary dispute as to which email address versions are more accurate, “Defendants’ [sic] have not been deprived of any information or potential evidence.” Cat3.

Rejecting these arguments, Judge James C. Francis IV held that the plaintiffs had intentionally altered the emails and that remedies were available to the defendants either under Rule 37(e)(1), (e)(2) or, in the event Rule 37(e) did not apply, under the court’s inherent power. Notwithstanding the Advisory Committee’s note that the new rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used,” Judge Francis also held that where “exercise of inherent power is necessary to remedy abuse of the judicial process, it matters not whether there might be another source of authority that could address the same issue.” Although a particularized showing of bad faith would be necessary in the event Rule 37(e) did not apply, “[the court] could nevertheless exercise inherent authority to remedy spoliation under the circumstances presented.” In keeping with the Advisory Committee’s notes, however, Judge Francis recognized that the important goals of Rule 37(e) are to avoid unnecessarily drastic sanctions and to impose only those measures necessary to cure the prejudice. As a result, the defendants’ motion was denied to the extent it sought dismissal of the entire action, but granted such that the plaintiffs were (1) precluded from relying on the subject emails and (2) ordered to pay the attorney’s fees and costs incurred to the defendants to establish spoliation and to obtain relief.

While courts continue to levy severe sanctions when finding prejudice or intent in the destruction of data
after the duty to preserve arose, it is important to remember that not every instance of lost ESI will be sanctionable or warrant curative measures – even where it may have been appropriate under the old Rule 37.

In *Living Color Enterprises*, for example, the Southern District of Florida denied a plaintiff's motion for sanctions despite the defendant's admitted failure to preserve text messages in his possession. In response to the plaintiff's motion for sanctions, the defendant explained that “he has always used the cell phone feature that automatically deletes text messages after 30 days and that he, admittedly, neglected to disable the feature when the lawsuit was filed.” As a result, the defendant was unable to produce any text messages between himself and several other parties involved in the case. In addressing the threshold questions presented under Rule 37(e), the Court determined that (1) certain text messages should have been preserved but were deleted, (2) the defendant failed to take reasonable steps to preserve those messages and (3) deleted messages could not be restored or replaced through additional discovery. Accordingly, the Court turned to an evaluation of the facts under Rule 37(e)(1) and (e)(2). Over the plaintiff’s protests to the contrary, the Court determined that either no prejudice existed or, if it did, it was so minimal that it was not necessary to take measures to cure it. Additionally, the Court found that there was no direct evidence of either an intent to deprive or bad faith. While the defendant clearly had an obligation to preserve the messages, the Court concluded that his actions were merely negligent and, therefore, sanctions were improper under Rule 37(e).

Similarly, in *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016) the Southern District of California reversed an order that granted the defendant's motion for an adverse inference instruction that would have allowed, but not obligated, the jury to infer that lost ESI was unfavorable to the plaintiff. Although the old Rule 37 was in place at the time the Court originally granted the defendant's motion, the trial was scheduled to take place in February 2016 and the adverse inference instruction had not yet been issued. With the new rule being applied at trial, the plaintiff filed a motion for an order vacating the sanction. In granting the plaintiff's motion, the Court explained that its prior orders made no finding of any intentional failure to preserve or to otherwise deprive the defendant of the ESI at issue. Rather, the Court found that the plaintiff had simply failed to enforce compliance with a litigation hold and an adverse inference would be improper under the revised Rule 37(e). Instead, the Court allowed both parties to present evidence regarding the lost ESI with an instruction that the jury may consider any such evidence in addition to the other evidence presented in the case.

Although Rule 37(e) provides a more focused framework and better guidance on whether sanctions would be appropriate in a particular case, it nevertheless requires a highly fact-sensitive analysis that may vary from jurisdiction to jurisdiction. As the case law concerning preservation, spoliation and sanctions continues to develop, parties should bear in mind that courts around the country have routinely emphasized, consistent with the Advisory Committee notes, that “perfection” is likely an unattainable goal in discovery – particularly where large quantities of data are at issue. Rather, the rules only require parties to act in good faith and to take “reasonable steps” to identify and preserve relevant ESI.
Selecting the proper form of production for ESI is a crucial aspect of discovery that remains a point of contention among litigants. While the amendments to the Federal Rules of Civil Procedure aimed at resolving some confusion surrounding common issues in e-Discovery, the rapid evolution of technology has created new challenges for responding to e-Discovery demands.

A case from the Northern District of Georgia raised the issue of when ESI should be produced in native format or PDF format. *Mitchell v. Reliable Sec., LLC*, 2016 U.S. Dist. LEXIS 76128 (N.D. Ga. May 23, 2016), involved a civil rights lawsuit in which the plaintiff alleged pregnancy discrimination by her employer and requested that the defendant produce all relevant ESI in native format. The defendant objected to this request on the basis that it would cost an extra $3,000 to process and produce the 3GB of ESI in native format over the cost of PDF format. The plaintiff contended that producing the ESI in native format was necessary for two reasons: First, the emails and spreadsheets supporting the defense theory are susceptible to manipulation, so producing them in native format with retention of metadata is necessary. Second, the defendant’s estimate of the additional costs to produce native files was insufficient because it did not articulate how it arrived at the estimated cost, corroborate its estimate with an ESI expert or consider low-cost options for ESI production.

The court ultimately ruled in favor of the plaintiff. Citing Rule 26(b)(2)(B), the court found that the defendant did not make an adequate showing that production of the native files would be cost-prohibitive. The court added that in the context of a pregnancy discrimination suit, the public value of allowing the plaintiff to verify the validity of the defendant’s documents far outweighed the $3,000 cost of producing the documents.

Indeed, attempting to withhold metadata in ESI does not seem to bode well for parties. In *Singh et al. v. Hancock Natural Resources Group, Inc.*, 2016 LEXIS 179974 (E.D. Cal. Dec. 29, 2016), Magistrate Judge Jennifer L. Thurston ordered the plaintiffs to produce all emails and documents “in the format demanded with the accompanying metadata from the native computer.” Plaintiffs’ counsel initially produced TIFF-formatted emails that were forwarded to the client’s former attorney, which rendered the metadata “wholly useless and irrelevant.” Defendants argued that the metadata from the native versions of the emails was crucial to show that the emails produced by the plaintiffs were materially altered and different from the same versions produced by the defendants. Plaintiffs’ counsel (and thereafter former counsel) attributed the inconsistencies to his inexperience in e-Discovery.

Magistrate Judge Thurston, recognizing the importance of the metadata, granted the defendants’ motion to compel with respect to any request for ESI, and ordered the plaintiffs “to produce all emails and other documents sought by the defendants in the format demanded with the accompanying metadata from the native computer.” Adding insult to injury, Judge Thurston’s opinion included a footnote that “the lack of competency to respond to electronic discovery is absolutely not a sufficient explanation for the failure to provide proper responses and persisting in this explanation repeatedly through the joint statement as reasonable, frankly, is absurd.”

Sometimes, form of production is a much “larger” issue than metadata. In *Sky Med. Supply Inc. v. SCS Support Claim Servs.*, 2016 U.S. Dist. LEXIS 121215 (E.D.N.Y. Sept. 7, 2016), the defendants filed a motion to compel, arguing that the plaintiff’s production of documents on two CDs, which contained thousands of claims and did not have a convenient way to sort through data, was an unacceptable format in violation of Rule 34. In response, the plaintiff offered the defendants access to their entire server under the theory that this would be the most efficient method of obtaining discovery. Although the defendants appropriately noted that an on-site examination of the server would be “painstaking and time consuming,” the court ruled that FRCP 34 does not require a party to alter its data from how it is kept in the usual course of business. The court also rejected the
defendants’ plea of inconvenience because they had not even attempted to inspect the servers.

Lastly, *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, 2016 LEXIS 7668 (D. Colo. Jan. 12, 2016), highlights the distinction in the new rules over a party’s obligation with respect to ESI and hard copy documents. Here, the plaintiff brought a motion to strike the defendants’ request for production as duplicative after having already produced a terabyte of ESI. While the court agreed that defendants did not make any attempt to tailor the discovery request to issues arising from this case, it also found plaintiff’s boilerplate objections (pointing toward the millions of pages they already produced without any guidance as to where responsive documents could be found) to be inadequate. The court explained that discovery objections under Rule 34 must be made with “specificity” and state whether any responsive materials are being withheld on the basis of the objection, as addressed below in greater detail.

Normally, there would be no obligation for plaintiffs to identify by Bates range where particular documents have been produced in response to a Rule 34 request. FRCP 34(b)(2)(E)(i) simply requires a party to produce documents “kept in the usual course of business” or to “organize and label them to correspond to the categories in the request.” On the other hand, under FRCP 34(b)(2)(E)(ii), if the request for production does not specify a form for the production, “a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonable useable form or forms.”

The court explained that the distinction between the two production procedures is “searchability.” Citing precedent from the District of New Mexico, Magistrate Judge Nina Wang wrote that “requesting parties could avail themselves of the guarantees of [FRCP 34(b)(2)] (E) (i) or (E)(ii), but not both,” when determining the form of production. *Anderson Living Trust v. WPX Energy Production, LLC*, 298 F.R.D. 514, 527 (D.N.M. 2014) (internal quotations omitted). As the drafters of the new rules foresaw, “the nimbleness of the current search functionality with ESI software … renders it unnecessary to make (E)(i)’s organization guarantees applicable to ESI.”

While there was no dispute that the plaintiffs produced their ESI in a usable, searchable form, the court considered the totality of circumstances in ordering the plaintiff to provide additional information about where in the production the defendants could find certain information. This included the volume of document production to date, the “asymmetry of information regarding the production between plaintiffs” and the duration of time the case had been pending. While the court declined to compel the plaintiffs to provide Bates range numbers for the responsive documents for every request for production, it permitted the defendants to identity 10 limited categories of documents already requested through the existing requests for production that the plaintiffs objected to as being duplicative, and required the plaintiffs to identify Bates ranges of responsive documents to those categories.

**COOPERATION**

Courts in 2016 continued to emphasize the importance of cooperation between parties to resolve discovery disputes. As one might expect, such disputes remain a constant cog in calendars around the country. Nevertheless, recent opinions indicate that failure to
cooperate will result in counsel’s forced compliance with the court’s terms, or worse yet, those of opposing counsel.

In *Babcock Power, Inc. v. Kapsalis*, 2016 WL 4944245, 10 (W.D. Ky. Sept. 15, 2016), the court explained that the duty to cooperate should begin at the “first try” as opposed to when one is faced with court intervention. “Doing so would avoid putting the Court in the position of having to fashion requests that take into consideration Rule 26 as well as the specific facts and circumstances of this case – a task that is typically better left to the parties.” Even so, the producing party must tailor a proper response, e.g., “no emails found” is not sufficient, per *Carter v. Cummings*, 2016 U.S. Dist. LEXIS 137118, 2 (W.D. Wis. Oct. 3, 2016). “They can be required to identify the steps they took to determine whether there are any responsive documents.” In *Carter v. Cummings*, counsel for the producing party had to incur additional expenses after the court directed that they “supplement their response to explain what they did before determining that there are no emails responsive to plaintiff’s request.”

This duty continues throughout the discovery process and requires the demanding party to work alongside opposing counsel in the production of the requested materials. *Pyle v. Selective Ins. Co. of Am.*, 2016 WL 5661749 (W.D. Pa. Sept. 30, 2016). In Pyle, the court reprimanded the plaintiff for a refusal to provide any ESI search terms to assist the defendant in responding to the plaintiff’s requests for information contained within various email accounts. “Plaintiff’s argument totally misses the mark; in fact, it borders on being incomprehensible … it is well settled by now that electronic discovery should be a party-driven process.” Moreover, this type of a dispute, i.e., regarding “search terms,” is one on which counsel should be able to “reach practical agreement” to obviate the court’s e-Discovery micro-management.

Cooperation between the demanding and producing parties must continue until the dispute is fully resolved. In *Venturedyne, Ltd v. Carbonyx, Inc.*, 2016 WL 6694946, 3 (N.D. Ind. Nov. 15, 2016) the court noted the parties’ early collaborative efforts were thwarted by animosity that developed between counsel. “Before Carbonyx’s counsel cut off email contact with Venturedyne’s counsel, the parties appeared to be making progress toward an agreed list of search terms. This would have been the better solution and likely would have limited Carbonyx’s expenses in reviewing the results of the searches. But Carbonyx’s refusal to participate in that process now requires that the Court intercede.”

Further, personal differences are not a valid excuse for failing to make a good-faith attempt to resolve the matter beforehand. After all, courts will ultimately direct such a conference since the intricacies of the case are best known to the parties involved. *Cangelosi v. N.Y. Life Ins. Co.*, 2016 WL 4942010, 10 (M.D. La. Sept. 15, 2016). As the court explained, “without more information, and due to an apparent lack of cooperation between the parties, the Court cannot determine what further limitations are appropriate.”

Courts have generally allowed the producing party to make their own choice as to which ESI search method to employ. *Hyles v. New York City et al.*, 2016 WL 4077114, (S.D.N.Y. Aug. 1, 2016). In Hyles, Judge Andrew Peck acknowledged that cooperation principles “do not give the requesting party, or the Court, the power to force cooperation or to force the responding party to use
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TAR.” Though noting that TAR (technology-assisted review) was “cheaper, more efficient and superior to keyword searching,” he still honored the defendant’s freedom of choice to use the latter method. However, Judge Peck left open the possibility of subsequent forced use of TAR in the event that the plaintiff “later demonstrates deficiencies” in the defendant’s production.

This precise scenario occurred in Wallace v. Tesoro Corp., 2016 WL 7971286, 5 (W.D. Tex. Sept. 26, 2016) where the producing party was unable to “locate a single document” to respond to a central issue of the case. The court noted that the producing defendants “refused to employ a Boolean ESI search” and instead, have “utilized an ESI search methodology that was virtually guaranteed to avoid finding relevant ESI.” Interestingly, the court viewed their use of overly restrictive qualifiers to suggest “an unwillingness to cooperate to identify and fulfill legitimate discovery needs.” Thus, there appears to be some disagreement as to what the “duty to work together” truly entails.

In any event, 2016 demonstrated that courts continue to discourage the typical discovery mindset of aim high (i.e., the kitchen sink) and settle at what is fair (i.e., whatever you can get away with). On a cost-efficient basis, counsel is much better served to simply start with what is fair, which necessarily involves a collaborative effort with their opposition. After all, as courts have shown, parties will be compelled to respond to discovery eventually, it is just a matter of when this occurs and at what expense.

SEARCH METHODOLOGIES AND THE USE OF PREDICTIVE CODING

Search methodologies and the use of predictive coding (i.e., technology-assisted review, or TAR) in litigation continue to be an issue of contention and developing case law. One example is the decision in Dynamo Holdings Lt. P’ship v. Comm’r of Internal Revenue, 143 T.C. 183 (2014) (Dynamo I), in which the court revisited and expanded upon in its decision, Dynamo Holdings Lt. P’ship v. Comm’r of Internal Revenue, No. 2685-11 (T.C. Jul.13, 2016) (Dynamo II). In Dynamo I, the court endorsed predictive coding as “an expedited and efficient form of computer-assisted review that allows parties in litigation to avoid the time and costs associated with the traditional, manual review of large volumes of documents.” The court granted respondent’s motion to compel petitioners to produce backup tapes while permitting petitioners to respond using predictive coding but left open the issue of whether the resulting document production would be sufficient, expressly stating, “if, after reviewing the results, the respondent believes that the response to the discovery request is incomplete, he may file a motion to compel at that time.

In Dynamo II, the court held that petitioners’ responses were sufficient because under the Tax Court Rules and the Federal Rules of Civil Procedure, a responding party is not required to provide a perfect document response, but only a “reasonable inquiry” when submitting a response. Following the court’s 2014 decision, the parties generally agreed to and followed a framework for producing the ESI using predictive coding: (1) restoring and processing the backup tapes, (2) selecting and reviewing seed sets, (3) establishing and applying the predictive algorithm, and (4) reviewing and returning the production set. Seed sets of documents were
provided to the respondent, who then determined which documents were relevant in order to develop a predictive algorithm. After applying the predictive algorithm, petitioners produced a set of approximately 180,000 documents to respondent for review and included a relevancy score for each document. After review, respondent retained 5,796 documents and returned the remaining documents to petitioners. Respondent subsequently filed a motion with the court seeking to compel the production of documents responsive to a Boolean search that were not previously produced by the plaintiffs. Based on the factual and procedural history, the court denied respondent's motion, noting that in-person manual document review was not infallible – in fact, far from it – and that TAR should not be held to a higher standard than keyword or manual review and that petitioners had clearly engaged in a “reasonable inquiry” in providing their document production.

While predictive coding continues to grow as a judicially recognized, effective and cost-efficient discovery tool, courts have been careful not to mandate or force parties to use it. In *Hyles v. New York City et al.*, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016), previously referenced, Judge Peck held that a party cannot be forced to use TAR in responding to an adversary's request for ESI. Prior to expending significant sums in searching for responsive ESI, the parties sought a ruling from the court as to the proper search methodology, where the defendant wanted to use keywords and the plaintiff was requesting that it use TAR. The court, relying on the principles cited in the *Sedona Conference Cooperation Proclamation* and the belief that parties in discovery should cooperate, held that neither the requesting party nor the court has the power to force the responding party to use TAR. The court held that the defendant could use the search method of its choice, and if plaintiff later demonstrated deficiencies in the defendant’s production, the defendant may be required to re-do its search. The court's holding in *Hyles* affirms Principle 6 of The Sedona Principles by prohibiting a party from dictating the search method its adversary uses for its ESI production.

The decision in *Hyles* was followed in *In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.*, 2016 U.S. Dist. LEXIS 144925 (N.D. Cal. Oct. 14, 2016). In *Viagra*, the parties did not agree on the method to search for ESI. Relying on the court's “well-reasoned” holding in *Hyles*, the court found that “even if predictive coding were a more efficient and better method … it is not clear on what basis the Court could compel [the responding party] to use a particular form of ESI, especially in the absence of any evidence that [the responding party’s] preferred method would produce, or has produced, insufficient discovery responses.”

**SOCIAL MEDIA**

Social media remains a hot-spot on e-Discovery issues and as it becomes more prevalent, courts across the country continue to struggle to find the balance between privacy and the competing demands of full and fair discovery.

The production of social media information has been the subject of motion practice in many recent decisions. For example, in *In re Sorum*, 2016 Tex. Dist. LEXIS 9766 (Tex. Dist. Ct. Mar. 29, 2016), the court addressed a dispute over the relevancy of posts on Facebook. In *Babcock Power, Inc. v. Kapsalis*, 2016 U.S. Dist. LEXIS 166616 (W.D. Ky. Dec. 2, 2016), the court addressed
disputes over defendants’ use of LinkedIn. Most of the disputes focus on the scope of discovery demands and the courts’ continued observations that such discovery demands must be narrowly tailored and reasonable. For example, in Rhone v. Schneider Nat’l Carriers, Inc., 2016 U.S. Dist. LEXIS 53346 (E.D. Mo. Apr. 21, 2016), the court required that the plaintiff provide the defendant with a “Download Your Info” report from her Facebook account from the date of the accident to the present, as the defendant’s independent examination had already uncovered relevant information. Conversely, in Gordon v. City of N.Y., 2016 U.S. Dist. LEXIS 91035 (S.D.N.Y. July 13, 2016), the court denied the defendant’s request for ESI on social media accounts as the request was “not sufficiently targeted at eliciting relevant information.”

Courts have not given discovery on social networking sites any sort of special protection, but they have required that a discovery request seeking such material satisfy Rule 26’s proportionality requirement. In Scott v. United States Postal Serv., 2016 U.S. Dist. LEXIS 178702 (M.D. La. Dec. 27, 2016), the court ruled that while the social media information and postings sought were relevant to the plaintiff’s claims, the party found the requests over-broad, and required that social media activity be limited in time and related to the plaintiff’s physical injuries and physical capabilities. Similarly, the court denied the plaintiff’s request, in Abe v. N.Y. Univ., 32 N.Y.S.3d 506 (1st Dep’t June 21, 2016), for access to all the social media sites and private email accounts of certain individual defendants when a Facebook “friend” simply wrote “Hi” on a defendant’s “wall.”

One of the biggest issues confronting courts today is the privacy implications of discovery demands on a party’s social media. While courts have held that social media content is not privileged or protected by any right of privacy, courts do not “generally endorse an extremely broad request for all social media site content.” For example, the court in Gondola v. USMD PPM, LLC, 2016 U.S. Dist. LEXIS 69667 (N.D. Tex. May 27, 2016), ordered the parties to meet and confer on a more limited scope for social media content. Similarly, the court in Cory v. George Carden Int’l Circus, Inc., 2016 U.S. Dist. LEXIS 87590 (E.D. Tex. Mar. 18, 2016), denied the defendant’s request for Facebook Message data, finding that even with the defendant articulating a strong reason, such a request was a “disproportional intrusion into Plaintiff’s privacy.” Courts also have limited a party’s request for multiple reviews of a person’s social media accounts, when no sufficient explanation is offered why an additional search “will result in the identification or production of additional responsive information.” Westmoreland v. Wells Fargo Bank NW., N.A., 2016 U.S. Dist. LEXIS 151444 (D. Idaho Oct. 31, 2016).

A means of compromise between unfettered access and prohibition of production of information on social media sites that has been used by the judiciary is the requirement that the producing party grant their adversary or simply their own counsel access to samples of each to determine relevancy. In Edwards v. City of Bossier City, 2016 U.S. Dist. LEXIS 94868 (W.D. La. July 20, 2016), the court ruled that while the plaintiff objected to certain requests for discovery of his social media as “an unreasonable invasion of privacy,” the plaintiff had to make his social media postings available to his attorney so that counsel could review them for relevance. Similarly, in Lewis v. Bellows Falls Congregation of Jehovah’s Witnesses, 2016 U.S. Dist. LEXIS 17869 (D. Vt. Feb. 11, 2016), the court ordered that the plaintiff’s counsel review the plaintiff’s entire
Facebook account to determine relevance of the material to the allegations and the request for damages.

The courts also are continuing to sanction or threaten sanctions and admonish parties that fail to produce social media data. For example, in Rhone v. Schneider Nat’l Carriers, Inc., 2016 U.S. Dist. LEXIS 53346 (E.D. Mo. Apr. 21, 2016), the parties were admonished by the court for failing to produce social media information and advised that failure to comply may result in sanctions.

One example of the court admonishing a party and imposing sanctions is Anderson v. CentraArchy Rest. Mgmt. Co., 2016 U.S. Dist. LEXIS 8938 (N.D. Ga. Jan. 26, 2016). In Anderson, the plaintiff failed to comply with not only discovery but also the court’s order to compel her to provide all responsive information and documents contained in her social media accounts. The court awarded attorneys’ fees to the defendant and sanctioned the plaintiff. The court specifically noted that “They have impeded the litigation of this case, evaded the discovery obligations necessary to reach a fair and just resolution, caused Defendant to bear expense it should not have to bear, and otherwise impeded the administration of justice. For this conduct, there must be a sanction and this sanction must be timely imposed and timely enforced.”

However, sometimes the inadvertent deletion of certain social media posts may not warrant sanctions. In Thurmond v. Bowman, 2016 U.S. Dist. Lexis 105573 (W.D.N.Y. Mar. 31, 2016), the court found that three posts on Facebook were deleted inadvertently and were not relevant to the litigation. It also noted that while the defendants thought more postings were deleted, it concluded that the plaintiff simply changed her settings and the other posts thought to have been deleted in the defendants’ sanctions motion were actually produced by the plaintiff. As the court found that there was no wholesale destruction of evidence in this case, but rather the deletion of three posts and a change of privacy settings, the request for sanctions and a preliminary injunction was denied.

**OBJECTIONS TO DOCUMENT DEMANDS**

In late 2015, substantial amendments were enacted to the Federal Rules of Civil Procedure that required changes to the approach of many practitioners to responding to discovery demands in federal litigation. During the past year several courts have reviewed parties’ responses to document demands under the new Rule 34 and commented on best practices. Specifically, courts emphasize that boilerplate objections are not acceptable under the new Rule 34. All objections must be stated with specificity. Furthermore, a party responding to a discovery demand must state whether any responsive materials are being withheld on the basis of any objection asserted. In this regard, some courts have held that identifying the parameters of the search that the responding party performed was sufficient to place the demanding party on notice as to the universe of documents searched and the searches performed.

In Rowan v. Sunflower Elec. Power Corp., No. 15-cv-9227, 2016 U.S. Dist. LEXIS 91109 (D. Kan. July 13, 2016), the court for the District of Kansas analyzed the requirements of the amended Rule 34 as they pertain to asserting objections based on privilege and work product when a party is withholding otherwise discoverable information on those grounds. Initially, in reviewing whether privilege objections were appropriate, the court held that attorney-client privilege may apply to emails transmitted between non-attorney employees of a corporation that are for
the purpose of obtaining legal advice. Rowan argued that the defendant Power Constructors, Inc. (PCI) waived privilege arguments with respect to documents that were responsive to three separate sets of document requests when privilege objections were asserted only in the amended responses but not the initial ones. The court noted that privilege objections must be expressly asserted in the written response to a request for the production, or any such objection may be deemed waived. Yet, the court found that PCI did not designate new documents as responsive in its amended privilege log, but only stated that documents previously identified as privileged may be responsive to additional document requests. As the number of documents withheld due to privilege remained the same, Rowan’s argument was rejected.

Finally, Rowan argued that PCI did not fully comply with the order of the court to review and amend its discovery responses and privilege log pursuant to the amended Rule 34 to state what was being withheld. The court emphasized, with reference to the Advisory Committee’s note to the 2015 amendment to Rule 34, that the new rules require the objecting party to “state whether any responsive materials are being withheld on the basis of that objection.” Because PCI stated the limits of its search for responsive documents, the court found that the requirements of Rule 34 were met.

The court in *Heller’s Gas, Inc. v. Int’l Ins. Co. of Hannover Ltd.*, 2016 U.S. Dist. LEXIS 71069 (M.D. Pa. June 1, 2016), in the context of reviewing discovery objections in an insurance case, reiterated that the party objecting to discovery must state the grounds for the objection with specificity. Furthermore, in reviewing a party’s privilege log, the court noted that the subject of the document being withheld must be provided in the log.

In *Duffy v. Lawrence Mem. Hosp.*, 2016 U.S. Dist. LEXIS 176848 (D. Kan. Dec. 21, 2016), the plaintiff moved to compel additional discovery from the defendant, claiming that the initial discovery responses were incomplete and that the objections asserted were “boilerplate.” In response, the defendant argued that they should not be required to produce additional discovery because of proportionality considerations. The court noted that the 2015 amendment to Rule 26(b) emphasized that considerations of both relevance and proportionality govern the scope of discovery. Relevance is still construed broadly, although, as the court noted, relevancy determinations are generally made on a case-by-case basis. With respect to proportionality, the court noted that this consideration is not new since various proportionality factors have been included in the Rules since 1983. The court emphasized that a shift of these factors (plus the addition of one new factor) back to Rule 26(b)(1) did not create a new burden on the party seeking discovery to affirmatively address all proportionality considerations. If discovery sought appears relevant, the party resisting discovery has the burden to establish the lack of relevancy by demonstrating that the requested discovery (1) does not come within the scope of relevancy as defined under FRCP Rule 26(b)(1) or (2) is of such marginal relevancy that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. Conversely, when the relevancy of the discovery request is not readily apparent on its face, the party seeking the discovery has the burden to show the relevancy of the request.
The Duffy court also rejected the responding party’s boilerplate “conditional objections,” which occur when a party asserts objections, but then provides a response “subject to” or “without waiving” the stated objections. The court noted that answering a request subject to an objection lacks any rational basis, because either there is a sustainable objection or not. Instead, as the court explained, Rule 34 demands (1) a statement that inspection or production will be permitted as requested, or (2) an objection. The Duffy court also rejected as improper the conclusory objections that certain requests were “overly broad,” “unduly burdensome” or “vague and ambiguous” that were not accompanied by facts justifying the objection or setting forth an assessment of the costs in time and/or money that the responding party would incur if it produced the requested discovery.

The court in Arenas v. Unified Sch. Dist. No. 223, 2016 U.S. Dist. LEXIS 143338 (D. Kan. Oct. 17, 2016), granted a party’s motion for a protective order based on the fact that the discovery objections were stated with specificity. The responding party objected to a demand for information concerning all employees or the party’s policies as applied to all employees as overbroad. The responding party explained that due to the number of employees involved and the number of locations, the response to the interrogatory would have required the responding party to review more than 1,700 personnel files and offered to limit the response to the interrogatory. The court agreed that such a limitation was reasonable.

In sum, the emerging case law is in line with our earlier predictions that the courts will reject boilerplate objections and place more emphasis on (1) supplying factual basis to each objection, if asserted and (2) identifying the limitations employed in the search for documents, or otherwise identifying the documents withheld. With respect to the documents withheld by privilege, the privilege log must state the subject of the document and be sufficient to let the requesting party determine from the face of the privilege log that the privilege would apply.

DUTY OF COMPETENCE/ETHICAL OBLIGATIONS

With the ever-increasing use of e-Discovery, practitioners need to be mindful of the wide range of pitfalls should they fail to familiarize themselves with e-Discovery practice. Since 2012, the Model Rules of Professional Conduct of the American Bar Association have made it clear that lawyers have a duty to be competent not only in the law and its practice but also in technology. More than 20 states have since adopted this duty of technological competence, which requires lawyers to keep abreast of the “benefits and risks associated with relevant technology...” See Comment 8 to Model Rule 1.1. Several recent decisions illustrate the importance of attorneys keeping current with the now not-so-recent developments in the field of electronic discovery.

The decision in Arrowhead Capital Fin., Ltd. v. Seven Arts Entertainment, Inc., No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016), involves imposition of significant sanctions on the defendant’s CEO. The outcome of this case should not be surprising to those familiar with the series of decisions in Zubulake v. UBS Warburg LLC, issued by Judge Scheindlin of SDNY in 2003−2005. In Arrowhead, the plaintiff alleged that the defendant purposefully hid witnesses, delayed and cancelled depositions, and entirely failed to set up a defensible process of preservation, review and production of documents in response to the plaintiff’s discovery requests. The court issued several orders compelling discovery from the defendant, with which the defendant did not fully comply. A five-hour contempt hearing was held by the court, during which the defendant’s CEO was questioned extensively about the defendant’s conduct during the discovery process. The court concluded that the defendant’s misconduct in this litigation was “as deep as it is wide.”

Significant for the purposes of the plaintiff’s sanctions application was that the defendant maintained “paperless offices,” with many of the requested documents stored on a server maintained by a third-party entity, Zed One. After the defendant’s failure
during the course of litigation to pay Zed One’s bills, the defendant was denied access to Zed One’s server and the plaintiff’s attorney and the court were not notified of this fact. The defendant allegedly scrambled to download all the responsive documents from the server but was not sure if they downloaded everything. The court also appeared incensed that the defendant’s CEO blamed his administrative assistant’s judgment and emotional state for failure to produce certain relevant documents.

Quite shocking to the court and the plaintiff’s attorney was the defendant’s outside counsel’s admission that he did not even review the documents provided to him by the client before producing it to the plaintiff’s counsel. This behavior quite clearly runs contrary to the lawyer’s duty to monitor the clients’ compliance with electronic data preservation and production under Rule 37(e).

The court imposed substantial sanctions:

- The defendant was precluded from litigating the issue of personal jurisdiction
- Spoliation instruction was issued
- Attorney’s fees were awarded to the plaintiff for preparation and participation in various discovery conferences
- The defendant was ordered to retain a second outside counsel to perform a thorough review of the defendant’s files and determine whether the defendant possessed additional discoverable information
- The defendant’s CEO was held to be in contempt of court, as the misconduct could not have occurred without his knowledge and consent.

The court also imposed moderate monetary sanctions on the outside counsel, after finding that counsel’s behavior in regard to depositions and asserting specious evidentiary objections in opposition to the plaintiff’s motion for summary judgment were in bad faith. While outside counsel was not sanctioned in this instance for his abdication of responsibility for the e-Discovery process, this should not be taken as license to neglect close supervision of preservation, review and production of discovery. Judge Failla also was critical of counsel’s designation of all documents as confidential (including press releases and publicly available SEC filings); untimely and improper objections to discovery demands; and padding document production with unresponsive documents.

Oracle America Inc. v. Google Inc., No. C 10-03561 WHA (ND Ca., Sept. 27, 2016), is a reminder to all lawyers that it is critically important to review document production. When a large volume of documents needs to be reviewed, an e-Discovery vendor can assist in setting up an effective review process that would perhaps avoid the embarrassing situation presented in this case. Oracle made a motion for a new trial in a high-exposure copyright infringement lawsuit involving Android, claiming that Google concealed certain records that would have been a “game changer” at trial. One of Google’s arguments at trial was that Android’s use of the copyrighted lines of code qualified as “transformative” under the fair use doctrine, as the code was designed for desktops and laptops whereas Android transformed the code to work on smartphones and tablets. Oracle accused Google of concealing evidence that allegedly would have shown that Google was planning to
implement Android on desktops and laptops, which would have been a “game changer” at trial. During oral argument on the motion, it was revealed that Google had produced at least nine documents concerning the allegedly concealed project, but that Oracle’s attorneys failed to review them! The court held that “Oracle should have known that items produced in response to its own document requests potentially contained information that supplemented Google’s earlier written discovery responses. Oracle’s failure to review [the documents] is its own fault.” Naturally, this ground for Oracle’s motion was denied.

With most e-Discovery-related decisions originating in federal courts, In re Eisenstein, 2016 BL 107979, Mo., No. SC95331, (4/5/16), is notable in that it comes from a state supreme court. It furthermore illustrates that a lawyer’s duty of competence is closely tied to other ethical duties. Justice Richard B. Teitelman wrote the majority opinion condemning ethical violations of an attorney, Mr. Eisenstein, who attempted to use hacked electronic records of his adversary’s client at trial. In the underlying divorce litigation, Mr. Eisenstein’s client, the husband, hacked his wife’s personal email account and obtained a list of direct examination questions, prepared by the wife’s attorney, and the wife’s confidential payroll records. Mr. Eisenstein then handed these documents to the wife’s attorney as exhibits during trial. An immediate court conference was called, during which Mr. Eisenstein admitted that he had viewed the information improperly obtained by his client and did not immediately disclose his receipt of this information to the wife’s attorney. Mr. Eisenstein also apparently had already used the improperly obtained payroll information during a pre-trial settlement conference. Finally, to add insult to injury, Mr. Eisenstein sent a threatening email to the wife’s attorney after the trial conference, cautioning her to “be careful what you say” or else she could make “a lifelong enemy.” This matter was brought before a disciplinary hearing panel (DHP) of the Office of Chief Disciplinary Counsel, which recommended an indefinite suspension of Mr. Eisenstein with no leave to apply for reinstatement for 12 months.

In reviewing the DHP’s recommendations, the Missouri Supreme Court held that Mr. Eisenstein violated multiple ethical rules when he knew that he had improperly received information from the husband and failed to notify the wife’s attorney in order to permit her to take protective measures. Mr. Eisenstein’s defense that it was not he but his client who obtained the information illegally was rejected by the court, which emphasized that a lawyer may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, and especially may not attempt to use illegally obtained documents. Mr. Eisenstein’s threatening of opposing counsel during the course of litigation was found to constitute conduct prejudicial to the administration of justice. The court sanctioned Mr. Eisenstein with indefinite suspension with no leave to reapply for six months. The dissenting opinion of Judge Paul C. Wilson agreed with the findings but would have imposed a more severe penalty.

CROSS-BORDER DISCOVERY (AND POSSESSION, CUSTODY OR CONTROL)

Cross-border discovery involves searches, preservation and exchange of documents and information located outside the borders of the United States for the purposes of U.S. litigation. Successful navigation of cross-border discovery challenges requires knowledge of the legal landscapes of the countries in which target discovery is located, as otherwise counsel and parties run the risk of civil and even criminal penalties for disregarding privacy and cross-border data transfer laws.
In matters involving “personal data” of the European Union’s (EU’s) subjects, U.S. litigants need to be familiar with the framework of the new General Data Protection Regulation (GDPR), which the European Parliament and Counsel agreed to in December 2016. The GDPR will replace the earlier Data Protection Directive 95/46/ec as of May 25, 2018, and will increase the level of data protection and uniformity of enforcement among EU member states. It imposes additional responsibilities on data controllers and processors, while at the same time prescribing an approved code of conduct or an approved certification mechanism. The GDPR contains the definition of “personal data breach,” which is a “breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed.” By comparison, the U.S. laws are typically limited to protecting information against fraud and identity theft. GDPR purports to have extraterritorial application, and may apply to U.S. companies that created and stored data on EU data subjects outside the European Union. GDPR also substantially increases penalties for violations of data protection laws, which can reach as high as 4 percent of a company’s annual global revenue. In light of the potential astronomical fine that may be levied against companies for the violation of the GDPR, practitioners must be vigilant in handling data for clients that have controls or process the personal data of EU citizens.

While several commentators are hopeful that the GDPR will make it easier to navigate the framework of EU privacy laws, the GDPR presents potential conflicts with the U.S. evidence preservation requirements, just as with current European data protection laws. Significantly, under the GDPR an EU data subject will continue to have a right to require a data custodian organization to delete or transfer their data. At the same time, a U.S. judge may impose conflicting obligations on the custodian company, requiring it to preserve information or face sanctions. GDPR further states that orders of non-EU courts requiring transfer of disclosure of personal data are not recognized unless such orders are based on an international agreement. Attorneys working on litigation matters involving EU data must be familiar with the requirements of GDPR to avoid conflicts with U.S. court orders early on, perhaps by showing that a U.S. party does not have custody or control over the documents sought in discovery.

On July 12, 2016, the U.S. Department of Commerce and the European Commission adopted an EU-U.S. Privacy Shield Framework designed to permit U.S. companies to comply with the EU data protection requirements when they must effect an “onward transfer” of data to the United States. U.S. companies may sign up voluntarily if they wish to be able to process the data of EU data subjects in the United States. Companies must then self-certify annually that they meet the requirements of Privacy Shield, display a privacy policy on their website and reply promptly to any complaints. Once a company has signed up, compliance with Privacy Shield’s principles is mandatory and is enforced by the U.S. Federal Trade Commission.

Russia’s Federal Law on Personal Data is similar to the regime established in the European Union (although less interpretation is available); it also regulates cross-border data flows. Personal data is defined broadly and includes categories such as family and financial status, education, occupation and income. To transfer personal data outside Russia, data operators must ensure that the rights of the data subjects are adequately
protected in the receiving foreign country. Countries that are signatories to the Strasbourg Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 2005 are considered to provide sufficient protection to the rights of Russian data subjects; the United States is not one of the signatories of the Strasbourg Convention. Cross-border data transfers to countries that do not provide “adequate protection” to the rights of data subjects are allowed only in limited circumstances, which include the data subject’s consent; protection of the data subject’s life, health or vital interests; or performance of the contract to which the data subject is a party. Practically speaking, absent an international treaty or agreement, Russian entities are not obligated to respond to foreign e-Discovery requests.

As illustrated, cross-border discovery places additional burdens on counsel in the U.S. litigation. If discovery reasonably cannot be obtained from an overseas entity, it is up to counsel to demonstrate such to the court. One of the guiding U.S. discovery principles is that a party is not obliged to produce documents that it does not possess or cannot obtain. In the context of e-Discovery, the court in Grayson v. Gen. Elec. Co., 2016 WL 1275027 (D. Conn. Apr. 1, 2016), conducted a fact-specific inquiry into whether GE and Samsung Korea, an overseas manufacturer for GE, had the type of a relationship that allowed GE “practical ability” to obtain Samsung Korea’s documents for the purposes of responding to discovery. The court noted that this inquiry went “beyond the particular form of the corporate relationship and instead looked at “the nature of the transactional relationship between the entities.” GE showed that Samsung Korea was a completely different entity; GE was not a parent of Samsung Korea and did not have any ownership interest in it. The court noted, however, that even where there is a parent/subsidiary relationship between entities, the courts look for a “showing that the two entities operate as one, demonstrated access to documents in the ordinary course of business, and an agency relationship.” The court also stated that the contractual agreement between the defendant and manufacturer was insufficient to create control on the defendant’s behalf and denied the plaintiff’s motion to compel.

For counsel facing cross-border discovery challenges, it is vital to understand the scope of data protection laws of the target country, which may involve retaining local counsel and e-Discovery vendors. Counsel should furthermore be prepared to discuss discovery challenges with their clients very early in the litigation, and keep the court abreast of these challenges so as not to inadvertently become bound by a discovery order that is costly or impossible to comply with as a result of failure to advise the court of the challenges. At the early stages of litigation, it may be easier to limit the scope of discovery or shift some of its costs to the party seeking discovery. Importantly, documents and data that are potentially implicated by a discovery order may need to be reviewed within the target country, as cross-border data transfers may trigger the protections of the data privacy laws. Cooperation with opponents in litigation and securing consents of data subjects whenever possible is good practice.

CONCLUSION

As technology continues to develop, the world continues to shrink and e-Discovery will likely become more of a global practice. With increasing complexity, clients will look more to the attorneys to guide them through the process to avoid the pitfalls highlighted in cases cited in this update. It behooves even the casual practitioners in e-Discovery to educate themselves in the latest development in the area to fulfill their ethical responsibility of providing an adequate representation.
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