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INTRODUCTION

Many of the significant trends we observed in last year’s Wilson Elser ESI Case Law Update continued to develop in 2012. Most importantly, litigants and the courts still struggle with the proportionality of requests for electronically stored information (ESI), and parties frequently call upon the courts to help contain the ever-increasing cost of e-discovery. Invoking The Sedona Conference® Cooperation Proclamation (10 Sedona Conf. J. 331 (2009)), courts expect the attorneys for all parties to work together early and in a meaningful way to anticipate and resolve complex e-discovery problems.

The reasonableness of parties’ preservation, collection and review methods remains the subject of considerable scrutiny. Taking their lead from Magistrate Judge Andrew Peck’s decision in Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012), many courts continue to adopt predictive coding – or computer-aided review – as an appropriate review methodology. As more courts look to statistics and algorithms to predict the responsiveness of discoverable materials, difficult questions arise about the reasonableness and reliability of traditional search methods, such as key-word searches and manual reviews.

Although emerging technologies continue to gain acceptance, some familiar e-discovery problems remain. Courts still grapple with the question of when a party’s failure to issue a written litigation hold may constitute negligence per se, and the scope of a party’s duty to preserve potentially discoverable materials continues to present challenges. The reasonableness of litigants’ collection and preservation efforts also consumes substantial judicial time and attention.

Judges must also answer important questions about the discoverability of social media content. Facebook, LinkedIn, Twitter and other resources are transforming how people and businesses engage the world around them. As Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223, 2011 WL 8956003 (Va. Cir. Ct. Sept. 1, 2011), revealed in last year’s Wilson Elser ESI Case Law Update, information posted on social media sites may impact litigation in explosive ways. As a result, discovery disputes about social media illustrate the inherent tension between reasonable discovery requests and litigants’ privacy concerns. Not surprisingly, courts resolve these issues in a variety of ways.

Each of these trends presents unique challenges and opportunities for 2013. Predictive coding promises to save time and money in the review of large ESI collections. But the quality of the end product depends heavily on the protocols used to produce it. Social media provides a unique insight into a party’s life, experiences and emotions. Unreasonable requests for social media, however, may intrude on a party’s privacy interests in embarrassing or irrelevant ways. Nevertheless, the most important of these trends is the courts’ continuing call for cooperation among parties and their counsel. For this reason, we begin our 2013 ESI Case Law Update with an example of how meaningful cooperation assists the court, defines the issues and advances everyone’s interests in the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1.
COOPERATION & PROPORTIONALITY


*Kleen Products* involved several consolidated class action cases alleging Sherman Act violations relating to the containerboard industry. Plaintiffs alleged that the defendants engaged in anti-competitive behavior to manipulate the supply and bulk price of their products. Following a decision to deny the defendants’ motion to dismiss, the defendants began meet-and-confer discussions with plaintiffs’ counsel to resolve issues relating to their initial requests for production and to draft an ESI protocol. As a result of their meet-and-confer sessions, the parties were able to resolve most but not all of their disputes.

Despite the lingering disagreements among counsel, Magistrate Judge Nolan commended the lawyers and their clients “for conducting their discovery obligations in a collaborative manner.” The court’s opinion quoted The Sedona Conference® Cooperation Proclamation’s crucial observation that the duty of lawyers to provide zealous advocacy and to conduct diligent and candid discovery are in conflict “[o]nly when lawyers confuse advocacy with adversarial conduct.” And, in an effort to promote the “paradigm shift” called for in The Sedona Conference® Cooperation Proclamation, Magistrate Nolan made several suggestions. She recommended starting the process early in the case, suggested that party liaisons may be appropriate in multiparty cases, and observed that discovery phases should be discussed and agreed to at the outset of discovery.

The parties’ cooperative efforts played a significant role in the court’s decision in one of the remaining disputes among the parties. During the meet-and-confer process, the plaintiffs complained that one of the defendants did not have an organization chart. Magistrate Judge Nolan suggested that one way to provide the plaintiffs more information about the company’s organizational structure
would be to serve a list of its litigation hold recipients. Within days of receiving this list, however, plaintiffs’
counsel served an interrogatory on the defendants seeking detailed information about the individuals
identified on the litigation hold list. Because the list had been disclosed for the purpose of providing plaintiffs
with more information concerning the defendant’s
organizational structure, Magistrate Nolan found that the follow-up interrogatory, based on that list, “violated the
spirit of cooperation” in a way that “could have a chilling
effect on both litigants and courts to engage in candid
discussions.”

The court also concluded that the interrogatory imposed
a disproportionate discovery burden. Magistrate Judge
Nolan cited the proportionality test in Rule 26(b)(2)
(C), which empowers the court to “limit discovery if it
determines that the burden of the discovery outweighs
its benefit.” The court observed that the Rule 26
proportionality test “provides the court significant
flexibility and discretion to assess the circumstances of
the case and limit discovery.” In this regard, the court
observed that the defendant did not “maintain any
single report” from which the requested information
could be obtained and that the information would be
difficult, “perhaps impossible,” to obtain.

Plaintiffs did not respond to the proportionality
arguments. Instead, they argued that a company-
generated document, a Rules Responsibilities and
Expectations (RRE) form, should be produced for each of
the litigation hold custodians. Magistrate Judge Nolan
concluded that the RREs were not necessarily responsive
to the interrogatory. Even so, the court found that the request was also disproportionate under Rule 26 and
that the plaintiffs could obtain the information through
less burdensome means.

Magistrate Judge Nolan also evaluated the
proportionality of requests for additional custodians
from particular defendants. Quoting Magistrate Judge
John Facciola’s decision in U.S. ex rel. McBride v.
the court observed that “[a]ll discovery … is subject
to the court’s obligation to balance its utility against
its cost.” Although the record could not provide a
“precise calculation,” the court presumed, based on
the nature of antitrust litigation, that “the amount in
controversy is very large and that [d]efendants’ resources
are greater than [those of] [p]laintiffs.” The court also
observed the important public interest relating to claims
of collusion in the containerboard and corrugated box
industries. Because the proportionality factors did not
“overwhelmingly favor” either side, the court permitted
plaintiffs to obtain information from a limited number of
custodians.

Finally, plaintiffs requested discovery from the
defendants’ backup tapes. Magistrate Judge Nolan
relied on Rule 26(b)(2)(B) to resolve this dispute. This
rule provides that “[a] party need not provide discovery
of [ESI] from sources that the party identifies as not
reasonably accessible because of undue burden or
cost.” The court observed that “[c]ourts generally agree
that backup tapes are presumptively inaccessible.”
The defendants also showed that restoring the backup
tapes could cost each defendant between $200,000 and
$1,000,000. Accordingly, the court directed plaintiffs
to complete their first-level review and denied their motion
without prejudice.

Plaintiffs filed a Rule 72 objection to Magistrate
Judge Nolan’s rulings. Judge Leinweber overruled the
objections, but permitted limited discovery regarding
the RRE document. Kleen Products LLC v. Packaging
Corp. of America No. 10 C 571, 2013 WL 120240
(N.D.Ill.) (N.D. Ill. Jan. 9, 2013). In this regard, the district
court found that Magistrate Judge Nolan was clearly
erroneous in her conclusion that the RREs were not “job
descriptions.” As a result, the court concluded that these
documents were responsive to discovery relating to 21
named employees identified in plaintiffs’ second request
for production. Otherwise, Magistrate Judge Nolan’s
decision regarding the importance of cooperation and
proportionality remains intact.
TAXABLE & SHIFTING COSTS


Courts have consistently limited recovery of costs to the enumerated categories within 28 U.S.C. § 1920. Section 1920 includes recovery for taxable items such as “fees for printed or electronically recorded transcripts,” “fees and disbursements for printing and witnesses,” and “fees for exemplification and the costs of making copies” of materials that are necessary for the case. The question of how to apply § 1920 in e-discovery, however, appears to be the subject of some disagreement.

In *Race Tires*, the Third Circuit reduced the prevailing defendants’ claims for costs associated with production of ESI from $367,000 to approximately $30,000. The parties did not seek a cost-shifting protection order in advance of production. And defendants’ vendors’ invoices lacked specificity and clarity and included technical jargon that made it difficult for the court to determine what tasks had been performed.

The court evaluated recovery of taxable costs pursuant to seven categories of e-discovery activities. These categories, as identified by the plaintiff, included the following:

1. Preservation and collection of ESI
2. Processing the collected ESI
3. Keyword searching
4. Culling privileged material
5. Optical character recognition (OCR) conversion
6. Scanning and TiFF conversion
7. Conversion of videos from VHS format to DVD format.
Of these activities, however, the court only allowed taxable costs for the last two. Costs associated with these activities were deemed “costs of making copies of materials where the copies are necessarily obtained for use in the case” and were recoverable under § 1920. But the court also limited the amount that could be recovered for these items in a manner that substantially reduced the amount a prevailing party would be able to recover for the expense and burden of e-discovery.

Although processing and producing e-discovery may require vendor services and expertise that attorneys and paralegals are not capable of providing, the court was not persuaded that all such unavoidable vendor fees are taxable to the losing party. Just as “pre–digital era” production required numerous non-taxable steps – such as locating, collecting, reviewing and screening paper files and processing the same to produce a “smaller set of relevant documents” – according to the Third Circuit, several steps associated with the production of ESI should not be taxable. As a result, the court held in Race Tires that examination of documents and performance of keyword searches do not fall under the umbrella of “making copies” and are not taxable in the Third Circuit.

The Northern District of California construed § 1920 much more broadly in In re Online DVD Rental Antitrust Litigation, despite the “well reasoned opinion in Race Tires.” The court awarded the vast majority of costs, reducing the nearly $738,000 claim by only approximately $30,000. The court allowed costs for “TIFF conversion costs; copying/‘blowback’ costs purportedly not documented; document productions purportedly not delivered; [and] professional fees re: visual aids.” The court only disallowed three case-specific categories of sought costs. These consisted of costs for producing color presentation and slide documents in black-and-white format; re-stamping inadvertently produced documents; and expediting deposition transcripts. Citing the Ninth Circuit’s decision in Taniguchi v. Kan Pacific Saipan, Ltd., 633 F.3d 1218 (9th Cir. 2011), the Northern District of California relied on its broad discretion to interpret the scope of recoverable categories of expenses under § 1920.

In addition to the disagreement about taxable costs, courts continue to struggle with the unfairly disproportionate burden of e-discovery in asymmetrical cases. The Eastern District of Pennsylvania addressed this issue in Boeynaems v. LA Fitness International, LLC, 285 F.R.D. 331 (E.D. Pa. 2012). Boeynaems concerned the discovery required to support a request for class certification, where the discovery burden on the defendant was substantially greater than that on the plaintiff.

The court was not inclined to limit the defendant’s production simply because it had more documents than the plaintiff. Recognizing that both sides have an interest in limiting their respective costs and attempting to balance the inequities, however, the court commented that “discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case.” Noting that the defendant had already produced numerous documents and incurred substantial costs of pre-class discovery and noting that the plaintiff sought to obtain additional and substantial discovery, the court shifted the burden of future discovery to the plaintiff.

The court also observed that the plaintiff was represented by a successful law firm that had won many million-dollar cases. As a result, the court considered the firm’s ability to invest in discovery as part of its analysis. Absent compelling reasons to order otherwise, the court held that a plaintiff seeking extensive and expensive discovery while class certification is pending should share the costs of production. The court also established a procedure to allow the plaintiff to evaluate the costs of discovery prior to incurring those expenses.

Boeynaems and In re Online DVD Rental are encouraging signals that the courts appreciate the extraordinary potential expense of e-discovery as well as the unfair burdens parties, most frequently defendants, face in asymmetrical litigation. On the other hand, Race Tires is disconcerting. The court’s decision limited the defendant’s taxable recovery on an item of substantial expense that is a permanent feature of modern
e-DISCOVERY

civil litigation. By making e-discovery costs largely unrecoverable to the prevailing party, the Third Circuit created a disincentive for parties to litigate the merits of their claims, particularly in cases when one party’s e-discovery burden substantially exceeds another’s.

PREDICTIVE CODING

Beginning with Magistrate Judge Andrew Peck’s decision last year in Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012), federal and state courts have continued to embrace predictive coding, or computer-assisted review, as an approach to litigants’ e-discovery obligations. Predictive coding continues to promise improvements in reliability and cost-efficiency, as compared with manual reviews and traditional keyword searches. Nevertheless, courts continue to address questions about the parties’ choice of technology and how they chose to use it.

One of the most widely anticipated decisions in 2012 was the Southern District of New York’s ruling on the plaintiffs’ objections to Magistrate Judge Peck’s opinion in Da Silva Moore v. Publicis Groupe. Last year, Magistrate Judge Peck’s decision to approve the predictive-coding protocol in the DaSilva Moore case was featured in the Wilson Elser 2012 ESI Case Law Update. At that time, the plaintiffs’ objections to Magistrate Judge Peck’s decision were pending before District Judge Andrew Carter. Favoring the emerging technology, Judge Carter adopted Magistrate Judge Peck’s decision to approve the use of predictive coding and overruled the plaintiffs’ objections. Da Silva Moore v. Publicis Groupe, No. 11 Civ. 1279, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

Da Silva Moore involved a discrimination case in which the defendants proposed to use predictive coding to review more than three million electronically stored documents. Magistrate Judge Peck ruled that computer-assisted review was superior to available alternatives, such as manual review and keyword searching, and was warranted in the case given the large amount of ESI. The plaintiffs objected, arguing that predictive coding lacks “generally accepted reliability standards,” and that the use of predictive coding violates Rule 26 of the Federal Rules of Civil Procedure and Rule 702 of the Federal Rules of Evidence.

Judge Carter rejected the plaintiffs’ arguments, finding that the predictive-coding protocol approved by Magistrate Judge Peck contained standards for measuring the reliability of the process. For example, plaintiffs’ counsel could provide keywords and review the documents and the issue coding before the production was made. And if the plaintiffs determined that relevant documents were not being produced, the search methods could be reconsidered. Otherwise, the plaintiffs could raise their concerns with the court. Recognizing that “there is simply no tool that guarantees perfection,” predictive coding is preferable because manual document review “is prone to human error and marred with inconsistencies from the various attorneys’ determination of whether a document is responsive.”

The Delaware Chancery Court took matters a step further than Da Silva Moore. Instead of simply ruling on a party’s proposed protocol, in EORHB, Inc. v. HOA Holdings LLC, No. 7409-VCL (Del. Ch., Oct. 15, 2012), Vice Chancellor J. Travis Laster ordered, sua sponte during oral arguments on a motion for partial summary judgment, that both sides use predictive coding and the same vendor. The case involved a multimillion-dollar commercial indemnity dispute regarding, among other things, the sale of a “Hooters” restaurant. The judge opined that the parties “would benefit from using predictive coding … instead of burning lots of hours with people reviewing,” and ordered that the parties use predictive coding unless they could “show cause why this is not a case where predictive coding is the way to go.”

Additionally, in Global Aerospace, Inc. v. Landow Aviation, L.P., No. CL 61040, 2012 WL 1431215 (Va. Cir. Ct. Apr. 23, 2012), a Virginia state court judge issued an order approving the use of predictive coding for discovery. Specifically, the court allowed
the defendants to proceed with the use of predictive coding for “purposes of the processing and production of electronically stored information.” The order was entered “without prejudice to a receiving party raising with the court an issue as to completeness or the contents of the production or the ongoing use of predictive coding.”

Whether courts order predictive coding sua sponte, as in EORHB, or over the objection of a party, as in Da Silva Moore and Global Aerospace, such decisions implicate Principle 6 of The Sedona Conference® Best Practices Commentary on “The Use of Search and Information Retrieval Methods in E-Discovery,” which provides that “responding parties are best situated to evaluate the procedures, methodologies, and techniques appropriate for preserving and producing their own electronically stored information.” It is now even more important for parties and counsel to understand the implications of predictive-coding protocols not only because courts are becoming increasingly aware of the technology available to parties but also for the potentially significant cost savings.

PRESERVATION & LITIGATION HOLDS


Another notable decision, the Second Circuit’s opinion in Chin v. The Port Authority of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012), appears to mark a departure from important earlier cases from district courts in that circuit. Specifically, in Chin, the Second Circuit held that the failure to issue a litigation hold was not gross negligence per se under the circumstances of the case. This appears to conflict with Judge Shira Scheindlin’s significant decisions in Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004), and Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), which adopted a more concrete test for a party’s preservation obligations.
The scope of a party’s preservation obligations was addressed in Haskins v. First American Title Insurance Co., No. 10-5044, 2012 WL 5183908 (D.N.J. Oct. 18, 2012). In that case, the District of New Jersey addressed the question of whether a party needs to preserve evidence in the physical possession of a third-party agent. Ruling that a party may have a duty to issue litigation holds and preserve information in the custody of a non-litigating third-party agent, the Haskins case could have broad implications in the e-discovery context.

**Apple Inc. v. Samsung Electronics Co., Ltd.**

Preservation of ESI played a significant role in last year’s historic patent litigation between Apple and Samsung. Apple requested an adverse jury instruction arising from Samsung’s alleged failure to preserve ESI. Specifically, Apple claimed that Samsung failed to disable the “auto-delete” function in its proprietary email system. Magistrate Judge Paul Grewal agreed and found that an intermediate-level adverse instruction would be an appropriate remedy. See Apple Inc. v. Samsung Electronics Co., Ltd., 881 F. Supp. 2d 1132 (N.D. Cal. 2012).

According to Magistrate Judge Grewal’s opinion, Samsung’s proprietary, default email system, mySingle, is a web-based system that stores incoming and outgoing email on company-wide servers, and it automatically deletes emails after 14 days. Employees can save any emails they deem necessary. They can also preserve all of their emails every two weeks through a manual archiving process. Therefore, it is within the employee’s discretion to save particular emails. Samsung also permits some employees to use Microsoft Outlook, which was not subject to routine deletion. Because the two systems archive emails differently, a significant “statistical contrast” emerged in the number of emails preserved from Outlook and mySingle users.

Samsung’s email storage system became particularly important when Apple met with Samsung on August 4, 2010, to present their complaints of patent infringements. About two weeks later, Samsung issued litigation hold emails, indicating that there was a “reasonable likelihood of future patent litigation between Samsung and Apple” and requiring certain individuals to preserve their emails. The auto-delete function was never disabled. As a result, preservation by mySingle users required manual archiving at least once every two weeks by each individual custodian. Outlook custodians, however, were not subject to routine deletion. In April 2011, when Apple commenced litigation, Samsung issued an expanded litigation hold to additional custodians. Again, because auto-delete remained operational, mySingle users were expected to archive their emails manually at least once every two weeks.

Magistrate Judge Grewal concluded that Samsung’s duty to preserve began in August 2010 when Apple representatives presented their complaints to Samsung. Although Samsung claimed that the duty to preserve did not begin until the lawsuit was filed in April 2011, the court found Samsung’s statement following the August 2010 meeting, indicating that “there is a reasonable likelihood of future patent litigation,” undermined Samsung’s own argument. As such, the court concluded that Samsung failed to perform any follow-up training or engage in any audit of employees’ compliance with the
litigation hold instructions. Ultimately, Magistrate Judge Grewal determined that Samsung acted with “conscious disregard” of its preservation obligations insofar as it failed to ensure compliance with the litigation hold instructions in light of its two-week auto-delete feature.

The consequences of Samsung’s failure to disable the auto-delete function on mySingle revealed a significant statistical discrepancy. Specifically, several mySingle recipients of Samsung’s litigation hold failed to preserve more than a few emails or documents. These employees included the head of Samsung’s product strategy team, a product designer, two senior managers, and the head of sales and marketing. In contrast, Samsung’s Outlook employees produced as many as 6,000 to 7,500 emails. Magistrate Judge Grewal could not “ignore the statistical contrast” in the number of emails produced by custodians using the two different systems.

As a result of Samsung’s failure to ensure compliance with the litigation hold and preservation of relevant emails on mySingle, Magistrate Judge Grewal concluded that an adverse jury instruction was appropriate. The court did not find that Samsung acted in bad faith, justifying a mandatory instruction that certain facts were deemed admitted and must be accepted as true. Instead, the court concluded that Samsung acted with “conscious disregard” of its obligations, requiring an intermediate-level adverse instruction, which advised the jury of a “mandatory presumption” against Samsung.

Apple did not escape criticism of its own preservation efforts. Unlike Samsung’s mySingle system, Apple did not use an auto-delete function. Instead, Apple employees received automatic email notifications when their accounts became too large. These notices would request Apple employees to reduce the size of their email accounts and encourage them to keep the accounts under certain quotas. Although Magistrate Judge Grewal found that the duty to preserve arose in August 2010, when Apple met with Samsung to discuss their infringement complaints, Apple did not issue any litigation hold notices until after filing its complaint in April 2011.

Immediately after Magistrate Judge Grewal found that Samsung’s conduct justified an adverse instruction, Samsung filed its own spoliation motion against Apple. Magistrate Judge Grewal denied Samsung’s motion as untimely, and Samsung proceeded to file objections to the district court. Judge Lucy Koh upheld the adverse inference instruction against Samsung, but she also found that Samsung’s motion for sanctions against Apple was timely and addressed its merits. See Apple Inc. v. Samsung Electronics Co., Ltd., No. 11-cv-01846, 2012 WL 3627731 (N.D. Cal. Aug. 21, 2012).

Judge Koh agreed with Magistrate Judge Grewal that the parties’ preservation duties arose in August 2010. As the plaintiff-patentee, she noted that it was Apple’s decision that was the “the determining factor in whether or not litigation would ensue.” Therefore, Judge Koh found that “Apple was on even greater notice than Samsung of the reasonable likelihood of litigation.” She determined that Apple did not issue any litigation hold notices until after filing its complaint in April 2011, and the district court observed that Apple did not issue litigation hold notices to several key custodians, “including designers and inventors,” until much later. Based on these findings, Judge Koh concluded that Apple, like Samsung, acted with “not just simple negligence but rather conscious disregard of its duty to preserve.”
Accordingly, Judge Koh determined that Samsung was entitled to an identical adverse-inference instruction against Apple. Samsung and Apple agreed, however, that if the court decided to issue identical adverse-inference instructions against both parties, then neither instruction should be given. As a result, at trial neither instruction was given.

Although the spoliation issue resulted in a stalemate, Samsung’s and Apple’s experiences are not limited to large-scale, billion-dollar patent litigation. The court’s decision counsels against relying on individual custodians to manage their own ESI, especially when emails are deleted automatically or when custodians receive reminders encouraging them to limit the size of their own email accounts. An important lesson from the Apple v. Samsung spoliation decisions is to identify a party’s data-preservation policies as soon as possible and to tailor the preservation plan to meet the individual circumstances of the party’s operations and procedures.

Chin v. The Port Authority of New York & New Jersey

The Second Circuit’s decision in Chin v. The Port Authority of New York & New Jersey, 685 F.3d 135 (2nd Cir. 2012), held that the failure to institute a litigation hold notice is not gross negligence per se warranting spoliation sanctions, but rather only one factor in determining whether sanctions are appropriate. This decision appears to mark a departure from the Zubulake and Pension Committee decisions from the Southern District of New York.

Chin involved a lawsuit by Asian-American police officers employed by the Port Authority of New York and New Jersey. Plaintiffs sued the Port Authority under Title VII of the Civil Rights Act alleging that they were passed over for promotions because of their race. In the original district court action, the plaintiffs sought sanctions for spoliation against the Port Authority in the form of an adverse inference instruction due to the destruction of promotion records.

The records at issue were folders containing various materials, such as performance evaluations rating plaintiffs’ performance on a predetermined scale and personalized comments from the plaintiffs’ commanding officers. During discovery, the plaintiffs learned that the folders no longer existed. Although the Port Authority was on notice of its obligation to preserve evidence as early as February 2001 when the plaintiffs served their equal-employment charge, the Port Authority continued to destroy performance folders between February 2001 and August 2002. The Port Authority also claimed that its failure to preserve the folders was due in part to the September 11, 2001, attack on the World Trade Center, which destroyed its executive offices.

The court found that the evaluations by commanding officers were unique even though the majority of the records contained in the promotional folders were duplicated in other materials. At no time after becoming aware of its preservation obligations in 2001, however, did the Port Authority institute a litigation hold. As a result, the plaintiffs argued that the Port Authority’s failure to institute a litigation hold amounted to gross negligence, if not recklessness. The plaintiffs further asked the court to issue an adverse inference instruction to the jury, permitting the jury to infer that the destroyed evaluations “would show that the plaintiffs were evaluated with uniform outstanding marks on any performance evaluations that they received.” The district court refused to do so.

Citing Byrnie v. Town of Cromwell Board of Education, 243 F.3d 93, 109-110 (2nd Cir. 2001), the district court held that in order to show that spoliation warrants an adverse inference instruction to the jury, the plaintiffs needed to meet a three-part test. First, the plaintiffs needed to show that the Port Authority was under an obligation to preserve the records at the time they were destroyed. Second, the court required proof that the destruction was done with a “culpable state of mind.” Finally, the plaintiffs needed to establish that the destroyed records were relevant to the plaintiffs’ claims. The court found that the missing performance folders were, without dispute, relevant to the plaintiffs’
claims and destroyed at a time when the Port Authority was under an obligation to preserve the records. Accordingly, the district court’s analysis focused on the second issue: whether the Port Authority’s failure to institute a litigation hold and preserve the records demonstrated a culpable state of mind.

Under Second Circuit case law, courts have inferred a culpable state of mind for actions ranging from willful destruction in bad faith to simple negligence. Although the district court concluded that the Port Authority’s failure to take measures to preserve the contents of the folders was negligent, the court found that the failure to institute a litigation hold was not gross negligence per se. Specifically, the district court found that the performance evaluations, although a factor in the promotions process, were not the only factor. The court held that because the plaintiffs were able to collect records regarding absences, discipline, awards, commendations, complaints and special assignments that enabled them to compare their qualifications with those of non-Asian officers, an adverse instruction was not warranted to restore the plaintiffs to the position they would have occupied but for the spoliation.

In 2012, on appeal, the Second Circuit affirmed. Judge Debra Ann Livingston specifically noted that the decision to award sanctions against a party for spoliation is entirely within the district court’s discretion. Judge Livingston pointed out that even if the Port Authority acted with gross negligence when it destroyed relevant documents, district courts, using their discretion, must review the appropriateness of sanctions on a case-by-case basis. However, beyond simply affirming that the district court did not abuse its discretion in refusing to issue the adverse inference instruction, Judge Livingston specifically rejected the plaintiffs’ contention that the failure to institute a litigation hold constituted gross negligence per se. Instead, Judge Livingston noted that, “the better approach is to consider the failure to adopt good preservation practices as one factor in the determination of whether discovery sanctions should be issued.”

Although Chin presents unique circumstances, the Second Circuit’s decision appears to reflect a departure from notable authority in the Southern District of New York. Specifically, after her 2004 opinion in Zubulake, 229 F.R.D. at 422, Judge Shira Scheindlin wrote that litigants in the Southern District of New York were on notice that the failure to issue a written litigation hold notice after the duty to preserve attaches would constitute gross negligence per se. See Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 465, 471, 476-477 (S.D.N.Y. 2010). The Second Circuit’s
decision in Chin, however, stops short of adopting an absolute bright-line test regarding the consequences of failing to issue a written litigation hold. This is not to suggest, however, that litigants should overlook the crucial step of issuing written litigation hold instructions and taking appropriate steps to ensure compliance as soon as the duty to preserve is triggered.

**Haskins v. First American Title Insurance Co.**

The District Court of New Jersey addressed the significant question of whether a party has a duty to preserve materials in the possession of a non-party agent in *Haskins v. First American Title Insurance Co.*, No. 10-5044, 2012 WL 5183908 (D.N.J. Oct. 18, 2012). Specifically, the Court found that an insurance company had a duty to issue a litigation hold to its independent title agents because litigation was reasonably foreseeable and the duty to preserve extends to third parties, as long as the documents are “within a party’s possession, custody, or control.” Although it did not have physical possession, the insurance company controlled the agents’ documents because it had “the legal right or ability to obtain the documents from [the agents] upon demand.”

A class of New Jersey homeowners who had refinanced their home mortgages sued First American Title Insurance Company for its alleged scheme to overcharge for title insurance when they refinanced. During discovery, the plaintiffs sought access to closing documents that were not physically held by First American but by its independent title agents. Because Rule 34(a) permits a requesting party to seek access only to documents that are within another party’s “possession, custody, or control,” the court considered whether that “control” extended to documents in the hands of the independent title agents.

The court held that control exists when “a party ‘has the legal right or ability to obtain the documents from another source upon demand,’” and that “a party is not required to have physical possession of documents for control to be present.” Based on these findings, the court highlighted the specific language in contracts between First American and its independent title agents that conferred control upon the company. Specifically, these agreements required the agents to “make all Documentation available for inspection and examination by COMPANY at any reasonable time” and to “permit First American to examine, audit and copy all financial information and records upon reasonable prior notice.”

That some of the contracts contained language indicating that the files were the agent’s property did not negate First American’s “continued right of access to and use of its agents’ files” or disrupt its control “of the files within the meaning of Rule 34.” Moreover, any attempted argument by First American that it could not “force” its agents to comply with the company’s production request would be without merit because “First American [could] claim that the agent breached its contract if the agent [did] not produce the requested files.”

Concluding that First American possessed control over the agents’ documents requested by the plaintiffs, the court considered next whether First American had a legal obligation to issue a litigation hold ordering its agents to preserve requested documents. Because the “duty to preserve documents arises when a party ‘knows or reasonably should know’ that litigation is foreseeable,” and because the duty extends even to third parties, as long as the documents are “within a party’s possession, custody, or control,” First American, which was already engaged in litigation with the plaintiffs, had a duty to issue the litigation hold to its
independent title agents. Therefore, the court ordered First American to send requests for copies of closing documents to its independent title agents who had closing documents that the parties had agreed would be produced. The court further ordered First American to issue a litigation hold to its agents to preserve the documents requested by the plaintiffs.

Haskins could have broad implications for corporate defendants. This decision raises important questions about the litigant’s duties to preserve materials and its potential liabilities for destruction of those materials. Viewed outside of the insurer/agent context involved in Haskins, this decision could have important consequences for litigants using third-party vendors to store data in terms of their potential duties to preserve information entrusted to others. Haskins also raises the possibility of discovery sanctions being issued against a party arising from a non-party’s handling of discoverable information. As a result, it will be important to obtain an in-depth understanding of a party’s outsourced data management and the implications it could have on a case as soon as the preservation duty is triggered.

**Reasonableness of Search**


*National Day Laborer* involves a Freedom of Information Act suit against several government agencies as part of a campaign to end the Secure Communities program. Secure Communities is a federal immigration enforcement program launched in 2008, which mandates that fingerprints of individuals booked into custody by local law enforcement agencies be sent to the Department of Homeland Security to be checked against immigration records. The plaintiffs, pursuant to the Freedom of Information Act (FOIA), sought records from the government concerning whether and how local law enforcement agencies may “opt-out” of the Secure Communities program.

Judge Scheindlin’s opinion dealt with cross motions concerning the adequacy of records searches conducted by the government pursuant to FOIA. The government defendants argued that the searches satisfied their obligations, and the plaintiffs argued that the searches were legally inadequate. Judge Scheindlin’s opinion made two broad inquiries: (1) whether the government agencies appropriately identified custodians who were likely to possess responsive records and (2) whether the agencies’ affidavits describing their records searches sufficiently demonstrated the adequacy of the searches performed. The court noted, “The failure to actually uncover all documents is not fatal to the adequacy of the … search; but the failure to design a search that is reasonably calculated to uncover all documents is fatal.” She also observed, however, that the adequacy of these search efforts must be evaluated on a case-by-case basis.

Concerning the first inquiry, whether the agencies adequately identified appropriate custodians, Judge Scheindlin evaluated the efforts of each agency individually, finding some in compliance and ordering
searches of additional custodians for those that were not. Her decision makes two important points regarding the identification of custodians. She noted that litigants must do more than just search those custodians who are “most likely” to have responsive records; they must search all locations “that are reasonably likely to contain [relevant] records.” She also stated, however, that litigants conducting searches of their own records are naturally more familiar with their records than the opposing party or the court, so they are entitled to some degree of deference regarding their determination of search locations.

More important was Judge Scheindlin’s resolution of the second inquiry – whether the agencies were able to defend the adequacy of the actual searches they performed. Judge Scheindlin held that it is impossible for the court to evaluate the adequacy of electronic record searches without knowing what search terms were used, how search terms were combined, the search techniques implemented and the precise instructions given to custodians performing the searches. Judge Scheindlin rejected the agencies’ argument that custodians should be trusted to run effective searches of their own files. She found, instead, that most custodians were ill-prepared to run legally sufficient searches without oversight, noting that, “[s]earching for an answer on Google (or Westlaw or Lexis) is very different from searching for all responsive documents in the FOIA or e-discovery context.”

Judge Scheindlin stated that in order to demonstrate the adequacy of electronic searches, litigants, at a minimum, must record and report the search terms used, how the search terms were combined (e.g., what Boolean operators were used) and whether the full text of documents were searched. She further recommended that litigants identify what search fields were examined and any time frame limitations that were imposed. She also noted that litigants would be well served by running initial verification tests using their specifically documented search techniques to determine that the searches actually captured a universe of responsive documents. Finally, Judge Scheindlin proposed that, beyond keyword searches, parties can and should rely on latent semantic indexing, statistical probability models and machine learning tools to find responsive documents.

In ruling on the adequacy of the agencies’ searches in National Day Laborer, Judge Scheindlin held that the searches performed by the various government
agencies were largely insufficient. However, finding that an order requiring the agencies to repeat vast searches of their documents would be duplicative, costly and unlikely to produce substantial benefits to the plaintiffs or the public, Judge Scheindlin instead ordered the parties to work cooperatively to agree on search terms and protocols to execute a small number of targeted searches.

Judge Scheindlin’s opinion has several important implications for litigants. Much like the Southern District of New York’s 2011 opinion in *Pippins v. KPMG, LLC*, No. 11 Civ. 0377, 2011 WL 4701849 (S.D.N.Y Oct. 7, 2011), Judge Scheindlin’s decision in *National Day Laborer* highlights the need for early communication and cooperation with opposing counsel. Meaningful cooperation, as previously discussed in the *Kleen Products* case under the heading “Cooperation & Proportionality,” should facilitate identification of custodians and establish reasonable search protocols. Otherwise, the parties should seek early judicial resolution regarding the adequacy of proposed search protocols to avoid the potential expense of repetitive and unnecessary electronic discovery efforts.

Further, Judge Scheindlin’s opinion demonstrates the necessity for litigants to work with each other to fully and accurately document both the methods employed to identify relevant search locations and the methods employed to actually search for responsive materials. Specifically, parties and their attorneys need to have a common understanding regarding the search terms that were selected, how those terms were selected, the manner in which search terms were used, and how the methodology for searches was imparted to the individuals tasked with running the searches and preserving responsive materials.

**SOCIAL MEDIA**

Social media stands at the intersection of privacy concerns and the Federal Rules’ objective of promoting full and fair discovery. As a result of these competing interests, courts have addressed discovery issues relating to social media in a variety of ways. A common theme of these decisions, however, is that a party seeking disclosure of social media stands a much better chance if its demands are tailored to the relevant issues of the case.

In *E.E.O.C. v. Original Honeybaked Ham Company of Georgia, Inc.*, No. 11-cv-02560, 2012 WL 5430974 (D. Colo. November 7, 2012), the EEOC pursued claims for sexual harassment, hostile work environment and retaliation on behalf of a class of female employees. A discovery dispute arose when the defendant sought social media content relating to the individual plaintiffs. The defendant had already obtained social media content relating to one former employee, and the documentation contained a great amount of relevant information. This led the defendant to seek social media content for the entire class of plaintiffs. The court agreed that further discovery in this regard would be productive and granted defendant’s motion, in part.

Discoverable information is no less obtainable merely because it is stored in cyberspace and may require greater financial resources to retrieve. To the contrary, the fact that the requested information is stored on social media sites and accessible to others tends to defeat privacy objections and support production. However, the court in *Honeybaked Ham* was mindful
of the plaintiffs’ privacy concerns and developed a procedure to balance the individual plaintiffs’ privacy interests with the defendant’s right to discovery.

The parties were ordered to work together to create a questionnaire that would be distributed to the individual claimants and elicit potential sources of discoverable information. The claimants were then required to complete the questionnaire and produce relevant equipment and information, such as cell phones and access information for their respective social media websites and emails. At the parties’ shared expense, a special master with forensic expertise searched the phones, websites and emails and made a hard copy file of responsive information for an in camera review by the court. After its review, the court identified all information it deemed relevant for the EEOC, which was then required to conduct a privilege review, identify documents subject to a protective order and deliver the remaining documents to the defendant with a privilege log identifying any documents withheld.

The court in Thompson v. Autoliv ASP, Inc., No. 2:09-cv-01375, 2012 WL 2342928 (D. Nev. June 20, 2012), also sought to balance the litigants’ respective discovery and privacy rights. The court developed a procedure to achieve that balance, but involved itself in the review process to a lesser degree than the Honeybaked Ham court.

The plaintiff in Thompson claimed severe and debilitating injuries that were allegedly caused by the failure of her airbag to deploy during an automobile accident. The defendants were able to obtain information relevant to the claims of disability from the plaintiff’s social media website before she changed her privacy settings. The plaintiff then objected to requests for un-redacted copies of her social media content, claiming that the requests were impermissible attempts to engage in a fishing expedition and that the information sought was irrelevant. However, to ensure the plaintiff’s privacy, the court ordered the plaintiff to upload and produce the entire content of her social media sites to defendants’ counsel. Defendants’ counsel was not allowed to share the information with anyone other than necessary staff. Counsel was also not permitted to copy the information, and they were ordered to return the electronic storage device to plaintiff’s counsel upon completion of the discovery process. Moreover, defendants’ counsel was ordered to identify additional information from the sites it deemed discoverable. The parties were directed to identify any objection in a joint report containing their respective arguments. Upon receipt of the court’s responsive ruling, the court instructed the plaintiff to make a formal discovery response, at which time the defendant was ordered to return the electronic device containing the full content of the websites.

In Robinson v. Jones Lang Lasalle Americas, Inc., No. 3:12-cv-00127, 2012 WL 3763545 (D. Or. Aug. 29, 2012), the court took a more hands-off approach, relying on counsel to meet their discovery obligations regarding social media. Robinson involved a motion to compel production of emails, text messages and social media content relating to the plaintiff’s emotional state and claims of emotional distress. The plaintiff agreed to produce social media content that referenced her “work-related emotions.” Relying on E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430 (S.D. Ind. 2010), a case in which discovery of social media was permitted to evaluate the plaintiff’s claims of emotional distress, the court required production of social media content even when the posts or items did not reference the events identified in the complaint.

The court in Robinson required production of emails and social media content for a specified period of time that “reveal, refer, or relate to: (a) any significant emotion, feeling, or mental state allegedly caused by defendant’s conduct; or (b) events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant’s conduct.” By expanding the scope of discovery, the court sought to bring out information that
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would establish the “onset, intensity, and cause of [the] emotional distress” as well as “information establishing the absence of plaintiff’s alleged emotional distress where it reasonably should have been evident.”

The court did not involve itself in the actual production process. Recognizing the impossible task of defining the scope of discovery with sufficient specificity to satisfy the responding party, the court left it to “counsel to determine what information falls within the scope of this court’s order in good faith and consistent with their obligations as officers of the court.” Because social media users may use privacy settings to prevent others from accessing content, however, the Robinson court’s approach of relying on the parties to identify and produce discoverable content lacks the same degree of accountability as a judicially supervised process.

Even if the Robinson court’s approach places too much faith in the parties to produce discoverable social media content, it is preferable to decisions disallowing broad requests for information designed to elicit information regarding a plaintiff’s emotional state. The plaintiff’s emotional state was also at issue in Mailhoit v. Home Depot U.S.A., Inc., 285 F.R.D. 566 (C.D. Cal. 2012), and the defendant sought the content of her social media sites. The court denied three of defendant’s four requests, agreeing with plaintiff that the requests were overly broad. The court concluded that a party seeking disclosure of social media content is not permitted to conduct a broad search of non-public information. Rather, it must make “a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence.”

Disagreeing with the approach in Simply Storage and Robinson, the judge in Mailhoit denied the defendant’s request for “any [social media content] that reveal, refer, or relate to any emotion, feeling or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer or relate to events that could reasonably be expected to produce a significant emotion.” The court deemed the requests overly broad, noting that the requests may elicit posted comments regarding “any emotion” that are entirely irrelevant such as “I hate it when my cable goes out” or any postings relating to the viewing of a football game, an “event” that could produce a “significant emotion” in some people. Similarly, the court denied a request for “third party communications to Plaintiff that place her own communications in context.” The request was premised on the initial demand that the court had already held
was overly broad, and the term “in context” was deemed “too vague.” Finally, the court denied a request for “any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff’s profile or tagged or otherwise linked to her profile.” The court rejected the argument that every picture of plaintiff over the seven-year period was relevant or would lead to the discovery of admissible evidence.

Of the four requests, the court only granted the defendant’s request for communications (1) between the plaintiff and any of the defendant’s former employees or (2) that referred to the plaintiff’s employment with the defendant or the lawsuit. The court deemed this request sufficiently and narrowly drafted.

Based on these recent cases, it is clear that the various courts’ approaches to the production of social media will continue to differ. Additionally, each court’s approach will depend on the facts of a particular case. Nevertheless, it is clear from these cases that parties seeking social media content need to be cognizant that they cannot expect courts to entertain favorably requests for open-ended or unrestricted access to the other side’s private social media content. Instead, demands need to be tailored for the facts of a particular case to ensure that they are reasonably calculated to obtain relevant information.

IMPRESSIONS & RECOMMENDATIONS

Last year’s e-discovery cases provided numerous lessons for parties and their counsel. Most importantly, courts continue to expect litigants to cooperate meaningfully in regard to e-discovery issues. Although a collaborative approach to e-discovery will not resolve all of the parties’ disagreements, it should save time and money, avoid costly mistakes as discovery progresses, and promote good will with opposing parties and the court.

As part of this collaborative approach, during the early stages of each case parties should evaluate the proportionality of discovery requests, the symmetry of the parties’ discovery obligations and cost-shifting issues. Reasonable and carefully tailored requests for production of social media content should also be discussed at the outset. If the parties are unable to reach an agreement on these matters during their initial meet-and-confer discussions, they should seek judicial involvement as soon as possible.

Key e-discovery decisions in 2012 also demonstrated that each case presents its own unique challenges. In each case, parties should tailor their review methodology to the circumstances of the particular litigation. This requires careful assessment of whether emerging technologies, such as predictive coding, would be more reliable and cost-efficient than traditional review methods. Either way, a well-planned search protocol to identify potentially responsive documents is crucial.

Additionally, parties should not take great comfort in the fact that some courts have indicated that failing to issue a litigation hold may not be gross negligence per se. The safest practice is to issue the written litigation hold in each instance when litigation becomes reasonably imminent. After issuing the litigation hold, continuing efforts must be made to ensure compliance. These efforts should include ensuring that auto-delete functions have been disabled for identified custodians. Based on Samsung’s and Apple’s experiences, relying on individual custodians to manage their own ESI is not the best approach to meeting a party’s e-discovery obligations.
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