The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

Attorney-Client Privilege/Work Product Decisions

Decisions Protecting Against Disclosure

No Waiver of Privilege Protection by Referring to Privileged Documents in Litigation

***In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015)**

In this False Claims Act lawsuit, a unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit held that the district court had committed clear and indisputable error in holding that defense contractor Kellogg Brown & Root (KBR) waived privilege and work-product protection over internal investigative reports. Judge James S. Gwin of the U.S. District Court for the District of Columbia had ordered KBR to produce documents pertaining to an internal investigation conducted by the company's legal department to investigate allegations of fraud — which the D.C. Circuit had previously held were protected by both the attorney-client privilege and work-product principles — on the ground that KBR had waived privilege by putting the contents of the materials at issue in the litigation. Specifically, Judge Gwin's ruling was based on his findings that: (1) a KBR witness testified that he reviewed the privileged documents in preparation for his deposition, and (2) KBR referenced the internal investigation in its motion for summary judgment in an attempt to seek an "inference" that the investigation had absolved the company of wrongdoing. The Court of Appeals rejected these findings. First, the court held that deposition testimony referring to investigative materials could not itself "place privileged materials 'at issue.'" Second, the court held that KBR did not state in its summary judgment motion that the investigation at issue found no wrongdoing, and no inference to that effect was warranted. Accordingly, the court granted KBR's petition for a writ of *mandamus* and vacated the order compelling production.

No Waiver of Privilege Protection by Citing Privileged Materials in IRS Submission

***United States v. Sanmina Corp. & Subsidiaries*, No. 5:15-cv-00092-PSG, 2015 WL 2412322 (N.D. Cal. May 20, 2015)**

Magistrate Judge Paul S. Grewal of the U.S. District Court for the Northern District of California denied the IRS' petition to enforce a summons seeking production of two memoranda prepared by counsel in the tax department of Sanmina Corporation and Subsidiaries (Sanmina). Sanmina had previously submitted a report prepared by its counsel to the IRS to substantiate Sanmina's claim of a worthless stock deduction. That report contained a footnote citing the two memoranda at issue. The IRS demanded the memoranda be produced, arguing that any privilege had been waived. The court disagreed. The court first determined that attorney-client privilege attached to the memoranda, which provided legal advice from the company's tax department counsel. The court then held that Sanmina's submission to the IRS of a report that mentioned the memoranda did not waive privilege with respect to the "subject matter" of the report because the report did not summarize or disclose the content of the memoranda. Similarly, the court found that the memoranda were protected work product and that the protection was not waived.

Public Relations Consultants' Communications With Hualapai Tribe Protected

***Grand Canyon Skywalk Development LLC v. Cieslak*, Nos. 2:15-cv-01189-JAD-GWF, 2:13-cv-00596-JAD-GWF, 2015 WL 4773585 (D. Nev. Aug. 13, 2015)**

The plaintiffs accused the defendants, including Scutari & Cieslak Public Relations, Inc., of conspiring to conduct a smear campaign falsely accusing the plaintiffs of breaching their contracts with the Hualapai Indian Tribe. The defendants asserted an advice-of-counsel defense, claiming they had acted on the advice of the tribe's counsel. The plaintiffs sought to depose a former attorney of the law firm assisting the tribe, but the law firm and the tribe moved to quash the subpoena. They argued that the attorney was protected by the tribe's sovereign immunity. They also argued that communications between the lawyer and the public relations firm were protected by attorney-client privilege. Magistrate Judge George W. Foley, Jr. of the U.S. District Court for the District of Nevada first held that tribal sovereign immunity did not bar enforcement of the deposition subpoena. As for attorney-client privilege, the court determined that the public relations firm "should be treated as [a] functional ... employee" of the tribe such that its communications with the tribe's attorneys were privileged. According to the court, it is important that a public relations consultant be able to receive confidential legal advice from the client's counsel in order to perform its duties on behalf of the client in accordance with that legal advice. The plaintiffs argued that even if attorney-client privilege applied, any privilege had been waived by the PR firm's assertion of the advice-of-counsel defense. The court, however, determined that only the tribe could waive the privilege. Since the tribe had not done so, the privilege was not waived.

Attorney-Client Privilege Applies Even if Nonlawyers Attend Meeting Where Legal Advice Is Given

***Yocabet v. UPMC Presbyterian*, 119 A.3d 1012 (Pa. Super. Ct. 2015)**

In this consolidated appeal of two medical malpractice cases, a panel of the Pennsylvania Superior Court (Bowes and Olson, JJ., and Strassburger, J., concurring and dissenting) reversed the trial court's order requiring defendant UPMC Presbyterian (UPMC) to produce materials relating to a board meeting. Before the trial court, UPMC had invoked attorney-client privilege on the grounds that one or more attorneys were present at the board meeting and that the "meeting was called in part to review what happened and seek legal advice." The trial court rejected this argument based on its review of the record, which showed that the company's executive vice president, a nonattorney, had presented information at the meeting. According to the trial court, even if "a lawyer for UPMC was present and offered legal advice, a nonlawyer's presentation to the Board of Directors meets none of the requirements for an attorney-client relationship." The court therefore ordered UPMC to produce the withheld materials. The appellate court disagreed with "the postulation that a corporate entity can obtain legal advice only when one of its high-ranking officials meets privately with counsel for advice on behalf of the corporation" and held that attorney-client privilege can apply to a meeting of a corporation's governing board with its executive vice president. The court, therefore, reversed the order to produce, and remanded to the trial court, directing that UPMC create a privilege log and the trial court review any documents identified on the log *in camera*.

Employee Cannot Impliedly Waive Corporate Privilege by Asserting Advice-of-Counsel Defense

***United States v. Wells Fargo Bank N.A.*, No. 12-CV-7527 (JMF), 2015 WL 3999074 (S.D.N.Y. June 30, 2015)**

The United States brought a civil fraud action against Wells Fargo Bank, N.A. (Wells Fargo) and one of the bank's employees. The employee asserted an advice-of-counsel defense. In accordance with the principle that the advice-of-counsel defense waives privilege, the government sought to obtain discovery with respect to the advice the employee received. But because it was the employee — not the bank — who had relied on the advice-of-counsel defense, the court was required to examine "[w]hether an employee's intention to pursue an advice-of-counsel defense, without more, constitutes an implied waiver of the corporation's attorney-client privilege, even if the employee lacks authority to waive the privilege on behalf of the corporation, where the corporation has consistently asserted the privilege and where almost no privileged information has yet been revealed." Judge Jesse M. Furman of the U.S. District Court for the Southern District of New York held that an employee could not impliedly waive the corporation's privilege by asserting an advice-of-counsel defense. According to the court, "[h]olding otherwise would mean that almost *any* employee could waive the privilege," which would render the privilege "intolerably uncertain" and could incentivize "plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege." The court, however, noted that a failure by Wells Fargo to object to the disclosure of privileged information at trial could still waive the bank's privilege. The court also recognized the possibility that the employee's right to present a defense could overcome the corporation's right to maintain privilege.

Decisions Ordering Disclosure

No Privilege Protection for Internal Investigation Report by Outside Law Firm and Public Relations Consultants

***Fine v. ESPN, Inc.*, No. 5:12-CV-0836 (LEK/DEP), 2015 WL 3447690 (N.D.N.Y. May 28, 2015)**

The wife of a college basketball coach brought libel claims against ESPN for its reporting of sexual abuse allegations regarding her husband. After the case survived a motion to dismiss, the wife moved to compel discovery of information relating to the college's internal investigation of the abuse allegations and its communications with its public relations firm. Judge Lawrence E. Kahn of the U.S. District Court for the Northern District of New York affirmed the decision of Magistrate Judge David E. Peebles, which granted the motion to compel. The college argued that documents and notes related to its internal investigation were protected work product, but the court disagreed. The court found that the college frequently retained the law firm to handle investigations into employee conduct and there was "no indication that this investigation was conducted differently ... because of the prospect of litigation." Therefore, the college did not meet its burden of demonstrating that "the documents in question would not have been created in essentially similar form had the University not anticipated litigation." The court also rejected the college's claim of privilege as to its public relations firm's documents. The court determined that the communications were "merely helpful"; they were not provided in order to facilitate legal advice between the college and its attorneys. Therefore, they were not protected by attorney-client privilege.

Work-Product Protection Can Attach to Third-Party Reports Made at Request of Attorney or Client

***NL Industries, Inc. v. ACF Industries LLC*, No. 10CV89W, 2015 WL 4066884 (W.D.N.Y. July 2, 2015)**

In this Comprehensive Environmental Response, Compensation and Liability Act action, defendant Gould Electronics sought documents from third-party Advanced GeoServices Inc. (AGC), an environmental engineering firm that the plaintiff had hired to manage the cleanup of contaminated properties. The plaintiff asserted attorney-client privilege and work-product protection as to certain documents, including "internal comments on working drafts of legal position papers, communications between [the plaintiff], its consulting expert and its counsel to evaluate its legal options, and cover emails responding to specific information requests by [the plaintiff] or its counsel." The defendant argued that communication to and from AGC should not be considered privileged because AGC was not providing legal services; therefore, any privilege as to documents sent to AGC should be waived. Magistrate Judge Hugh B. Scott of the U.S. District Court for the Western District of New York agreed. The court found that AGC, which had been hired by the plaintiff and not its attorneys, was not a representative of the plaintiff's counsel. Therefore, AGC did not fall within the attorney-client privilege umbrella. Accordingly, any privilege over communications that were sent to AGC was waived, and the motion to compel production was granted. But the court reached a different result as to work product based on its belief that work-product protection can attach to reports of third parties made at the request of the attorney or the client where the purpose of the report is to put information obtained from the client in usable form. The court found that the plaintiff "retained both AGC, to guide it through the cleanup and to identify possible responsible parties and defenses for plaintiff and attorneys, and its attorneys to provide its legal defense and advocate for its claims." The court concluded that AGC prepared the materials for the plaintiff at the behest of counsel and held that the work-product privilege applied. The motion to compel these materials was therefore denied.

Employee Deposition Testimony Regarding Attorney Advice Waived Attorney-Client Privilege

***Whitney v. Franklin General Hospital*, No. C13-3048, 2015 WL 1879514 (N.D. Iowa Apr. 23, 2015)**

Chief Magistrate Judge Jon Stuart Scoles of the U.S. District Court for the Northern District of Iowa held that the deposition testimony of the hospital's CEO and its human resources manager waived the hospital's attorney-client privilege. The plaintiff alleged that she had been sexually abused while employed by the defendant. The deposed parties had testified that they sought the advice of the hospital's employment attorney, Gene La Suer, when considering whether to place the employee on extended probation, and that the hospital's counsel recommended the specific action taken. The plaintiff served a subpoena *duces tecum* on La Suer, and the defendants moved to quash the subpoena, asserting attorney-client privilege and the work-product doctrine. The plaintiff argued that the privilege was waived when the deponents testified, without objection, regarding the substance of La Suer's advice. The district court agreed. In the alternative, the court also held that the privilege would be waived by the defendants' "apparent intention to offer testimony that they conferred with Mr. La Suer before taking any action, presumably acted on his advice, and argue this is evidence of their good faith." Because the attorney-client privilege had been waived, the court ordered the hospital to produce its communications with La Suer that would otherwise be privileged. The court, however, denied the motion to compel production of materials that were properly withheld as work product.

Inadequate Privilege Log Leads to Grant of Motion to Compel Production

***Pacific Management Group v. Commissioner*, 109 T.C.M. (CCH) 1505 (2015)**

Judge Albert G. Lauber of the U.S. Tax Court granted the IRS' motion to compel production of documents because the petitioners' privilege log was inadequate. Before trial, the IRS had served a subpoena *duces tecum* on an attorney who had advised the petitioners for many years. The attorney appeared at trial and produced some documents but declined to produce others on the ground that they were protected by attorney-client privilege. The attorney supplied a privilege log of withheld emails; the log identified only the sender, recipients and the date of each withheld communication. It did not state the subject of any email, describe the contents of any email, indicate whether documents were attached to any email or describe the purpose for which any email or attached document was created. The court therefore could not determine which communications involved legal advice as opposed "to general business advice or transactional matters." The court held that the log was "plainly inadequate" and "fail[ed] to establish each element of the attorney-client privilege." Therefore, the motion to compel production was granted.

Privilege Can Be Waived by Placing Privileged Materials 'At Issue'

***UUSI, LLC v. United States*, 121 Fed. Cl. 218 (2015)**

Judge Mary Ellen Coster Williams of the U.S. Court of Federal Claims held that third-party defendant GHSP, Inc. (GHSP) waived attorney-client privilege as to two documents by placing confidential attorney-client communications on the same subject matter "at issue." UUSI, LLC sued the United States, GHSP, Inc. and Am General LLC, alleging that the engine starter of the U.S. Army's Humvees violated patents of its predecessor-in-interest, Nartron. GHSP filed a motion for summary judgment on laches and estoppel grounds. GHSP argued that the plaintiffs' delay in filing suit prejudiced it because the company it acquired, KDS Controls (KDS), never advised GHSP of these potential patent infringement claims, and GHSP's right to seek indemnification from KDS for alleged patent infringement had expired by the time the suit was filed. In support of its motion, GHSP submitted KDS founder Stanley Kasiewicz's affidavit, which stated that as a result of his discussions with his patent attorney, he had concluded many years ago that Nartron's infringement claims had no merit. The plaintiffs filed a motion to compel the production of two documents that covered the same subject matter as the attorney-client discussions mentioned in Kasiewicz's affidavit. The plaintiffs argued that GHSP had waived any privilege by placing these communications at issue. The court agreed. "Because GHSP affirmatively injected attorney-client privileged communications between KDS and its patent counsel on the merits of Nartron's infringement claims in pressing its laches defense, Plaintiffs deserve access to additional privileged communications on this same subject ..."

Company Representative Waived Privilege by Disclosing Substance and Content of Corporate Request for Legal Advice

***Trustees of Boston University v. Everlight Electronics Co., Ltd.*, Nos. 12-11935-PBS, 12-12326-PBS, 12-12330-PBS, 2015 WL 3407555 (D. Mass. May 27, 2015)**

In this intellectual property case, the corporate defendant's representative was questioned about any noninfringement or invalidity opinions obtained by the company as to the patent in suit. After conferring with counsel, the representative admitted that the company had prepared an analysis of its products, forwarded that analysis to its attorney and received an oral opinion from the attorney that the products did not infringe. On the grounds that this disclosure constituted a waiver of privilege, the plaintiffs moved to compel the company to produce all documents and communications regarding infringement and invalidity opinions issued by counsel. Chief Judge Patti B. Saris of the U.S. District Court for the District of Massachusetts held that the representative had waived the attorney-client privilege by disclosing the substance and content of the company's request for legal advice. Because the disclosure was made in the presence of counsel and after speaking with an attorney, the court further found that the waiver was deliberate. The court, however, declined to find that the disclosure constituted a complete subject-matter waiver. The court found that fairness did not require a subject-matter waiver because the company was neither making the communications an issue in the case nor trying to benefit from the disclosure by using it as part of an advice-of-counsel defense. The court therefore granted the motion to compel in part, ordering the production of all attorney-client communications relating to the noninfringement opinion provided by the law firm.

No Privilege Under Common-Interest Doctrine Where Parties Did Not Cooperate Toward a "Common Legal Goal"

***Fresh Del Monte Produce, Inc. v. Del Monte Foods, Inc.*,** **No. 13 Civ. 8997(JPO)(GWG), 2015 WL 3450045 (S.D.N.Y. May 28, 2015)**

In this trademark-infringement suit, the plaintiff and counterclaim defendant Fresh Del Monte Produce, Inc. (FDP), sought to compel defendant and counterclaim plaintiff Del Monte Foods, Inc. (DMFI) to produce certain communications between DMFI and its licensees, who were not parties to the suit. DMFI argued that the communications were protected by the attorney-client privilege and work-product doctrine pursuant to the "common interest doctrine." FDP countered that the common-interest doctrine should not apply because DMFI could not show that it shared a legal interest, as opposed to a merely commercial interest, with the licensees. Furthermore, FDP asserted that DMFI failed to meet the doctrine requirement that common-interest participants have a coordinated legal strategy. Magistrate Judge Gabriel W. Gorenstein of the U.S. District Court for the Southern District of New York focused on this second issue: whether there was actual cooperation toward a common legal goal. "There is no evidence that the licensees had any hand in formulating a joint legal strategy or that they had at any time agreed to pursue a common legal goal with DMFI," the court stated. Therefore, the court concluded that the communications at issue were not protected by attorney-client privilege. The court further found that the communications did not qualify as work product because DMFI did not meet its burden to establish that "the communications would not have occurred in essentially similar form even if counsel had not anticipated litigation."

Information About Search Terms Used to Identify Responsive Discovery Not Protected Attorney Work Product

***Burd v. Ford Motor Co.*, No. 3:13-cv-20976, 2015 WL 4137915 (S.D. W. Va. July 8, 2015)**

In this product liability litigation, the parties became involved in a dispute regarding the adequacy of Ford's document production. The plaintiffs asserted that Ford had been inappropriately secretive with respect to its document collection practices and that the limited number of email documents produced suggested that relevant documents were being inappropriately withheld. Accordingly, plaintiffs sought a Rule 30(b)(6) deposition of a Ford corporate representative regarding discovery issues and the adequacy of Ford's production. Ford opposed the request on a number of grounds, one being that the deposition would invade the company's protected attorney work product. Specifically, Ford argued that proposed deposition topics related to the identity of selected document custodians and search terms used would invade the mental processes of the corporate counsel who selected the custodians and advised employees on what search terms they should use in searching their own documents. The court rejected this argument, holding that the identity of document custodians and discovery search terms go "to the underlying facts of what documents are responsive to" document requests "rather than the thought processes" of counsel. Because the court concluded that "the search terms used by the custodians and the names of the custodians that ran searches [could] be disclosed without revealing the substance of discussions with counsel," work-product protection did not apply. Further, the court was not moved by Ford's argument that the deponent most qualified to address these issues would be an attorney — and attorney depositions are disfavored. According to the court, Ford's practice of allowing employees to search their own documents made it unnecessary for a lawyer to testify, and Ford "cannot avoid a legitimate area of inquiry simply by selecting an attorney as its corporate designee."

Other

Privilege Log Entries Must Contain Sufficient Information for the Court and the Opposing Party to Evaluate the Propriety of a Privilege Claim

***United States v. Louisiana*, No. 11-470-JWD-RLB, 2015 WL 4619561 (M.D. La. July 31, 2015)**

Magistrate Judge Richard L. Bourgeois of the U.S. District Court for the Middle District of Louisiana granted the United States' motion to compel a proper privilege log and ordered the defendant Louisiana Department of Health and Hospitals (DHH) to reassess its claims of privilege after finding that DHH's privilege log was deficient under Federal Rule of Civil Procedure 26. The court found that the descriptions of log entries, such as "NVRA," "RE: FYI," and "Voter Registration Form" lacked "sufficient detail for either the Court or the United States to evaluate the applicability of the attorney client privilege or work product doctrine." The court also criticized the log's failure to identify senders and recipients or explain the role of those senders and recipients who were identified. In addition, the court reviewed the documents described in the 40 challenged privilege log entries and determined that the "overwhelming majority" of the documents at issue were not even privileged to begin with. The improperly withheld documents included a published policy and an email that specifically stated that the content had been sent to a news station. Although the court concluded that DHH had acted unreasonably in preparing the log and asserting privilege, it declined to find a complete waiver of privilege as to the 13,000-plus withheld documents due to the relatively limited scope of the court's 40-document review. Still, the court warned DHH that a subsequent finding of deficiency or unreasonable assertion of privilege could result in an order of production as to all documents being withheld.

Complete Re-Review of Documents and Attorneys' Fees Appropriate Where Materials Are Over-Designated as 'Highly Confidential'

***Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV-GOODMAN, 2015 WL 4430955 (S.D. Fla. July 20, 2015)**

Judge Jonathan Goodman of the U.S. District Court for the Southern District of Florida held that the plaintiff in this antitrust suit acted inappropriately in designating almost all of its documents as "highly confidential" and "attorneys eyes only" pursuant to the parties' stipulated confidentiality order. The plaintiff admitted that it had been overinclusive in designating approximately 95 percent of the documents in its forensic production (and approximately 91 percent of all produced documents) as highly confidential but argued that the mistake had been the result of the compressed discovery deadline and largely the fault of its vendor. The plaintiff also argued that the defendant's request for a complete re-review of its production was overly burdensome and instead advocated for a targeted re-review of only those documents the plaintiff specifically identified as having a basis to challenge. The court rejected this proposal. According to the court, the plaintiff "cannot avoid its discovery obligations by shifting blame to the third party it hired" to review its documents. Further, the court held that requiring the defendant to spend time and resources identifying which documents were inappropriately designated would unfairly punish the defendant for the plaintiff's mistake. Thus, the court issued an order allowing the defendant to use all of the documents previously designated as highly confidential, except for those documents that the plaintiff redesignated, on a document-by-document basis, as highly confidential within 10 days of the order. In so doing, the court acknowledged that this was an "extremely tight deadline" that would likely require the plaintiff's attorneys to work nonstop to meet. The court also ordered the plaintiff to pay the defendant $25,000 for costs associated with litigating the overdesignation issue.

Spoliation Decisions

Spoliation Sanctions Granted/Upheld

Default Judgment Upheld Where Party Admitted to Intentionally Dumping Crucial Documents

***Hess Corp. v. American Gardens Management Co.*, Nos. L-6375-10, L-1644-11, L-2864-12, 2014 WL 8773316 (N.J. Super. Ct. App. Div. May 8, 2015) (*per curiam*)**

A unanimous panel of the Superior Court of New Jersey (Reisner and Higbee, JJ.) affirmed the lower court's order dismissing the defendant's answer and defenses and imposing a personal judgment of approximately $3 million as spoliation sanctions. The defendant testified that he was aware that certain documents were intentionally "cleaned up" and admitted to having dumpsters brought on site for that purpose, but he took the position that he did not have a duty to preserve the evidence at issue and that the plaintiff was not prejudiced by the destruction of the documents. The court rejected his arguments. In addition to finding that the defendant "blatantly allowed the destruction of relevant evidence," the court also took into consideration the fact that the defendant had previously attempted to avoid producing documents by asserting the Fifth Amendment and claiming he was not in possession of relevant documents. The court rejected the defendant's argument that a lesser sanction was appropriate where the trial court conducted the necessary spoliation analysis and found that there was no lesser sanction to make the plaintiff whole, as the documents that were intentionally dumped were "crucial" to proving the plaintiff's allegations.

Adverse Inference Appropriate Where Party Instructs Employees to Destroy Relevant Documents

***HM Electronics, Inc. v. R.F. Technologies, Inc.*, No. 12cv2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015)**

Magistrate Judge Mitchell D. Dembin of the U.S. District Court for the Southern District of California found that the defendants and their attorneys engaged in sanctionable discovery practices and recommended that the judge grant the plaintiff's request for an adverse inference instruction. The court identified the following five sanctionable discovery practices: (1) certifying discovery responses as true with knowledge that they were not, or without conducting a reasonable inquiry, (2) failing to craft and implement a litigation hold, (3) sending an email to the defendant's sales force instructing them to "destroy" documents relevant to the litigation, (4) using limiting search terms, such as the word "confidential," to justify withholding documents during the production of electronically stored information (ESI), and (5) delayed production of a substantial volume of ESI due to failure to supervise the ESI vendor and perform quality control checks. Because there was evidence of intentional destruction of evidence the defendants knew was relevant, after a duty to preserve arose — which "threatened to interfere with the rightful decision of the case" — the court found that an adverse inference instruction was necessary because monetary sanctions alone would be insufficient. The court declined to hold the defendants in contempt of court, noting that the plaintiffs failed to show that the defendants possessed relevant documents that survived destruction and had not yet been produced. The court noted that it would reach the same result under the proposed amended Rule 37.

Existence of Spoliation Presented to Jury Where Credibility of Defendant Is at Issue

***Malibu Media, LLC v. Harrison*, No. 1:12-cv-1117-WTL-MJD, 2015 WL 3545250 (S.D. Ind. June 8, 2015)**

Adopting in part Magistrate Judge Mark J. Dinsmore's Report and Recommendation, Judge William T. Lawrence of the U.S. District Court for the Southern District of Indiana found that default judgment was not warranted as a spoliation sanction in this case because the defendant did not destroy his computer's hard drive in bad faith. The court found credible the defendant's testimony that the drive crashed in early 2013 and he recycled it because it was no longer usable. The fact that the defendant received notice of the lawsuit to which the computer was relevant in October 2012 weighed against a finding of bad faith, because "had [the defendant] truly wished to hid[e] adverse information, the Court finds it unlikely that [the defendant] would have waited nearly five months to destroy such information." While the magistrate judge found that an adverse inference was not warranted because the defendant's testimony was credible, Judge Lawrence held that the issue of spoliation was best left for the jury to decide. Thus, at trial the jury would receive an instruction that if it found that the defendant destroyed the hard drive in bad faith, it could assume the evidence on the drive would have been unfavorable to the defendant.

Adverse Inference Sanction Appropriate for Intentional Destruction of Documents and Failure to Implement Litigation Hold

***Clear-View Technologies, Inc. v. Rasnick*, No. 5:13-cv-02744-BLF, 2015 WL 2251005 (N.D. Cal. May 13, 2015)**

Spoliation sanctions in this case were justified where the defendants not only deployed "Crap Cleaner" software to destroy documents while a motion to compel was pending, but also lost media containing relevant documents, falsely certified that document production was complete and failed to take any steps to preserve or collect relevant documents for two years after reasonably anticipating litigation. In finding an adverse-inference spoliation sanction appropriate, Magistrate Judge Paul S. Grewal considered the high degree of the defendants' fault, the high degree of prejudice to the plaintiffs and the fact that any prejudice to the defendants from such sanction would not be substantially unfair because not only did the defendants withhold documents, they also discarded relevant evidence.

Presumption of Relevance Appropriate Where Destruction of Evidence Was Intentional

***Official Committee of Unsecured Creditors of Exeter Holdings, Ltd. v. Haltman*, No. CV 13-5475 (JS) (AKT), 2015 WL 5027899 (E.D.N.Y. Aug. 25, 2015)**

Magistrate Judge A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York recommended that the district court grant the plaintiffs' motion for spoliation sanctions, finding that the defendants, as officers and directors of Exeter, failed to ensure that emails were properly archived by their third-party email vendor or that backups of hard drives were properly stored and retained by a third-party vendor; and that defendant Haltman, president of Exeter, deleted thousands of files from Exeter's on-site hard drives over a two-year period after she was aware of impending litigation. The court found no evidence that the defendant or any other officer or director of the company took steps to implement a formal "litigation hold" or instruct third-party vendors to suspend their ordinary ESI destruction policies after the duty to preserve was triggered. The court found that the defendants' conduct, on balance, was intentional and in bad faith, particularly where affidavits from a forensic analyst who examined the defendants' hard drives created a strong inference that Haltman had intentionally destroyed documents. Because the court concluded that the defendants' culpability was predominately intentional and in bad faith, it applied a presumption of relevance and did not require the plaintiff to establish relevance through extrinsic evidence. The court found that an adverse inference was an adequate sanction for the defendants' spoliation.

Spoliation Sanctions Warranted Based on Evidence Produced by Nonparties During Discovery

***Kan-Di-Ki, LLC v. Suer*, No. 7937-VCP, 2015 WL 4503210 (Del. Ch. July 22, 2015)**

In bringing its motion for spoliation sanctions, the plaintiff relied on text messages and emails received from nonparties during discovery that were not produced by the defendant. The defendant argued that he did not produce the text messages at issue because he lost his cellphone in March 2013, after the duty to preserve attached on April 4, 2012, and that emails produced by third parties were deleted in the ordinary course of business between January and mid-April 2012. Vice Chancellor Donald F. Parsons, Jr. of the Delaware Court of Chancery found that the defendant was at least reckless with respect to his duty to preserve potentially relevant documents, as he intentionally deleted emails as late as April 2012. Additionally, the loss of the defendant's cellphone in March 2013 — after the plaintiff's request for the production of relevant documents, including text messages, in December 2012 — may not have been with a bad motive, but it was at least reckless where there was no explanation given as to what actions the defendant took after April 2012 to attempt to preserve any information on his phone prior to losing it. The court declined to grant the plaintiffs' requested sanctions — finding that the defendant breached the parties' contract and categorically disregarding the defendant's testimony as not credible — holding that such broad inferences were not justified and instead drawing more narrowly tailored evidentiary inferences in favor of the plaintiffs and granting reasonable attorneys' fees and expenses.

Spoliation Sanctions Denied/Reversed

No Duty to Preserve Emails of Nonparty Employee of Separate Government Agency

***Wandering Dago Inc. v. New York State Office of General Services*, No. 1:13-CV-1053 (MAD/RFT), 2015 WL 3453321 (N.D.N.Y. May 29, 2015)**

In this case, a nonparty's emails over 90 days old were destroyed pursuant to New York state's email retention policy in October 2013. Rather than seeking to hold the nonparty responsible for the loss of documents, the plaintiff sought an adverse-inference instruction against the named defendants and their counsel, lawyers in the office of the attorney general (AG). The plaintiff argued that as a representative of the state of New York, the AG had reason to know at the inception of the litigation in August 2013 that the third party, who was an employee of the state government, was relevant to the litigation and that his emails ought to be retained, despite the fact that his documents were not subpoenaed until July 2014. In order for an adverse-inference instruction to be imposed, however, a party must have had control over the evidence and an obligation to preserve it at the time it was destroyed. Magistrate Judge Randolph F. Treece of the U.S. District Court for the Northern District of New York held that the defendants did not have the "legal right, authority, or practical ability" to control the documents of other New York government employees, noting that state agencies, for most purposes, "are separate and distinct organs" and that requiring each agency to institute a litigation hold every time a party contemplates or commences litigation against another agency would "paralyze the State." Accordingly, the adverse-inference instruction was denied.

In Third Circuit, Spoliation Requires More Than Mere Negligence

***Giuliani v. Springfield Township*, No. 10-7518, 2015 WL 3604343 (E.D. Pa. June 9, 2015)**

Judge Thomas N. O'Neill, Jr. of the U.S. District Court for the Eastern District of Pennsylvania denied the plaintiffs' motion for spoliation sanctions for the defendants' destruction of documents related to civil rights litigation arising from the plaintiffs' land development applications, holding that it was now settled in the U.S. Court of Appeals for the Third Circuit that "[o]rdinary negligence does not suffice to establish spoliation." At most, the court found that the defendants had lost or deleted relevant evidence as the result of "inadvertence, negligence, inexplicable foolishness, or part of the normal activities of business or daily living." Important to this finding was the defendants' credible assertion that they had no reason to anticipate litigation arising from the plaintiffs' land development application prior to the date on which they were served with the complaint, and the plaintiffs' lack of evidence to the contrary.

No Continuing Obligation to Retain Documents Relating to Litigation Investigation After Threat of Litigation Passes

***Charvat v. Valente*, No. 12 CV 5746, 2015 WL 4037776 (N.D. Ill. July 1, 2015)**

Magistrate Judge Mary Rowland of the U.S. District Court for the Northern District of Illinois held that plaintiffs bringing suit against defendant Carnival Corporation were not entitled to spoliation sanctions based on Carnival's routine destruction of files belonging to two company paralegals upon their departure from the company. There, the paralegals had been involved in an investigation conducted by Carnival's counsel in anticipation of potential litigation by the company against a third-party marketer. In subsequent, related litigation brought against Carnival by consumers, Carnival argued that certain communications by the paralegals related to the investigation were protected attorney work product. The plaintiffs then made spoliation allegations, arguing that other investigation-related communications by the same paralegals had been destroyed when the paralegals left Carnival shortly after the investigation concluded. The plaintiffs argued that Carnival could not simultaneously argue both that the paralegals' communications were work product created in anticipation of litigation and that Carnival had no duty to retain the paralegals' communications when they left the company. The magistrate judge disagreed. As she explained, the paralegals' communications qualified for work-product protection because, at the time they were made, Carnival anticipated potential litigation against the marketer — and that protection stays with the documents even after the prospect of litigation disappears. By contrast, the existence of a duty to retain the materials depended on whether litigation was expected at the time the communications were destroyed. Once Carnival concluded its investigation and decided not to bring suit, the threat of litigation passed. Thus, Carnival had no duty to retain the paralegals' communications when they left the company, and no finding of spoliation could result from the destruction of those materials.

No Spoliation Where No Duty to Preserve or Prejudice to Adverse Party, but Monetary Sanctions for General Discovery Abuses Still Appropriate

***In re Delta/Airtran Baggage Fee Antitrust Litigation*, No. 1:09-md-2089-TCB, 2015 WL 4635729 (N.D. Ga. Aug. 3, 2015)**

Senior District Judge Timothy C. Batten for the U.S. District Court of the Northern District of Georgia denied a motion for spoliation sanctions but awarded the plaintiffs almost $3 million for other discovery abuses by Delta in this multidistrict lawsuit. In rejecting the plaintiffs' fourth motion for spoliation sanctions, the special master found, and Judge Batten agreed, that Delta's receipt of a civil investigative demand from the Department of Justice did not trigger a duty to preserve backup tapes that was enforceable by the plaintiffs in this case. Additionally, Delta's belated document productions, while "careless and sloppy," did not warrant a finding of bad-faith spoliation. Critical to the court's rejection of spoliation sanctions was the court's finding that the plaintiffs failed to show prejudice, since most of the evidence at issue was eventually produced, albeit delayed and piecemeal. The court also held that the plaintiffs were not entitled to present evidence of Delta's alleged spoliation and other discovery abuses to the jury, noting that such evidence would create undue delay and the need for a "trial within a trial." The court did, however, impose almost $3 million in monetary sanctions for Delta's "non-spoliation" discovery abuses, both to compensate the plaintiffs and penalize and deter future discovery misconduct.

Spoliation Sanctions Not Appropriate Where Party Lacked Proof Evidence Was Destroyed

***Grove City Veterinary Service, LLC v. Charter Practices International, LLC*, No. 3:13-cv-02276-AC, 2015 WL 4937393 (D. Or. Aug. 18, 2015)**

In this breach-of-contract action, the plaintiffs alleged that defendant CPI, the plaintiffs' employer, engaged in spoliation of evidence by deleting defendant Baltzell's archived work emails when, after CPI updated its email platform after the start of litigation, many of Baltzell's archived emails could not be found and CPI's IT support did not assist Baltzell in locating them. Magistrate Judge John V. Acosta of the U.S. District Court for the District of Oregon denied the plaintiffs' motion for spoliation sanctions, finding that there was no evidence that emails were destroyed at all, let alone willfully, a requirement for the imposition of spoliation sanctions under Ninth Circuit law. Though the plaintiffs introduced a report of a forensic computer analyst in support of their position that CPI remotely accessed Baltzell's computer and deleted the emails, the court found that the report was based on circumstantial evidence and lacked data reports or other objective evidence. The court also emphasized the plaintiffs' failure to file a motion to compel or otherwise inform the court of the alleged spoliation after becoming aware of the issue nine months earlier.

Other

No Spoliation Where Earlier Revisions of Documents Destroyed Under Retention Policy, but Parties Allowed to Present Evidence of Failure to Retain Documents at Trial

***Ralser v. Winn Dixie Stores, Inc.*, No. 13-2799, 2015 WL 5016351 (E.D. La. Aug. 21, 2015)**

In this case, the plaintiffs in an employment discrimination suit sought an adverse jury instruction that the defendant engaged in spoliation when it failed to preserve and produce earlier revisions of a document relevant to the litigation. Judge Eldon E. Fallon of the U.S. District Court for the Eastern District of Louisiana held that, to obtain such spoliation sanctions, the plaintiffs must prove both a duty to preserve evidence as well as the intentional destruction of evidence. The court found that the document was not destroyed in bad faith, as it was not obvious that the defendant would need to preserve, or that she had access to, prior versions of the document. Even though prior versions of the document were destroyed during the course of the litigation hold, the court found that the fact that the document was destroyed under the defendant's normal retention policy "undermines a finding of bad faith because [the defendant's] failure to adjust the document retention system to comply with the litigation hold signified an omission, and not a commission." The court found that behavior amounted to negligence and not bad faith sufficient to impose spoliation sanctions in the form of an adverse instruction. However, Judge Fallon indicated he would allow the parties to admit evidence of "these discovery issues" at trial, including the defendant's negligent failure to comply with the litigation hold.

No Cause of Action for Intentional Spoliation Where Evidence Destroyed by Automated System in Ordinary Course of Business

***Van De Wiele v. Acme Supermarkets*, No. 13-5924 (CCC), 2015 WL 4508376 (D.N.J. July 24, 2015)**

Magistrate Judge James B. Clark, III of the U.S. District Court for the District of New Jersey rejected the plaintiff's motion to amend her complaint to add a cause of action for intentional spoliation of evidence, following the defendant's routine destruction of store surveillance tapes in this personal-injury action. The case turned on the fact that there was no duty to preserve at the time of destruction, one of the four factors that the Third Circuit considers when determining whether a party has engaged in spoliation. Even though the defendant "knowingly" destroyed the tapes by allowing them to be taped over in the normal course of business, there was insufficient evidence suggesting that the defendant's employees knew or anticipated that litigation would be forthcoming that would require the retention of the surveillance footage. The court held that destruction of evidence by an automated system, like the re-recording of videotapes in the normal course of business here, did not constitute bad faith for purposes of a spoliation claim.

Cost-Shifting Decisions

Ordering Cost Shifting

Cost Shifting Appropriate Where Subpoenas Imposed Unreasonable Costs on Third Parties

***New Products Corp. v. Tibble (In re Modern Plastics Corp.)*, No. 09-00651, 2015 Bankr. LEXIS 2525 (Bankr. W.D. Mich. July 23, 2015)**

Bankruptcy Judge Scott W. Dales of the U.S. Bankruptcy Court for the Western District of Michigan found that both the plaintiff and its counsel had abused the subpoena power that was available under Rule 45 of the Federal Rules of Civil Procedure when the attorney served subpoenas *duces tecum* on nonparties, purporting to require the nonparties to produce documents covering nearly 10 years in only two weeks. The subpoenas sought an extremely broad reach of documents, and to maximize their reach, the plaintiff defined "document" to have the "broadest possible meaning," including "an extensive array of tangible documents and electronically stored information (ESI)." The ESI included a vast amount of emails, spreadsheets, databases and other documents. The court found that the burden imposed by these requests was undue and rejected the plaintiff's argument that the nonparties had created their own burden by continuing to gather documents in response to the subpoenas after they served objections under Rule 45. Following the guidance of Courts of Appeals that have considered cost shifting under Rule 45, the court held that "only two considerations are relevant to the cost-shifting inquiry: (1) whether the subpoena imposes expenses on the non-party, and (2) whether those expenses are 'significant.'" The court "must order the party seeking discovery to bear at least enough of the cost of compliance to render the remainder 'non-significant.'" In addition to holding that the subpoenas imposed an undue burden and that the plaintiff and its counsel took "no meaningful steps to mitigate the burden," the court found that the subpoenas imposed significant costs on the nonparties and shifted the costs to the plaintiff and its counsel. The court did add the caveat that, in light of the qualifications on cost shifting under Rule 37, only reasonable costs of compliance would be shifted under Rule 45. Finally, because the plaintiff's attorney had ignored his duty to minimize the burdens associated with the subpoenas and because the plaintiff's opposition to the nonparties' objections was not substantially justified, the court held both the plaintiff and its counsel jointly and severally liable for the costs of the nonparties' compliance.

Party Prevailing on Summary Judgment Entitled to Cost of Electronic Document Processing Costs

***Fitbug Ltd. v. Fitbit, Inc.*, No. 13-1418 SC, 2015 WL 2251257 (N.D. Cal. May 13, 2015)**

Judge Samuel Conti of the Northern District of California upheld a prior ruling granting the defendant in a trademark infringement suit, which had prevailed in obtaining summary judgment against the plaintiff, electronic document processing and other costs pursuant to 28 U.S.C. § 1920. That statute authorizes courts to tax "costs" and various "minor, incidental [litigation] expenses." The plaintiff sought a reduction of the amount owed, arguing in part that data processing costs were not covered by the statute and therefore were not taxable under it. The court disagreed. The court acknowledged that because Section 1920 was enacted in 1853, the statute obviously does not speak directly on the taxability of electronic discovery costs. The court noted, however, that a number of courts have analogized the language of Section 1920(4), which authorizes the taxation of "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case" to a variety of electronic discovery expenses. The court ultimately concluded that the statute allowed the defendants to recover the $30,000 spent on the "collection, scanning and conversion of documents, and related processes" necessary to prepare discovery documents for production in the format to which the parties agreed. The court also upheld the portion of its order requiring the plaintiff to pay the almost $5,000 the defendant spent converting document formats as required by the parties' agreement, as well as providing Bates numbers and confidentiality designations, preparing load files and loading the information onto physical media for delivery to the plaintiff.

Denying Cost Shifting

Cost Shifting Not Appropriate Where Producing Party Has Voluntarily Adopted ESI Storage System That Makes Information Difficult to Access

***United States ex rel. Guardiola v. Renown Health*, No. 3:12-cv-00295-LRH-VPC, 2015 U.S. Dist. LEXIS 112511 (D. Nev. Aug. 25, 2015)**

In this False Claims Act case, Magistrate Judge Valerie P. Cooke of the U.S. District Court for the District of Nevada granted the relator's motion to compel production of emails and denied the defendants' request that the relator share the cost of production. The defendants had adopted a new document retention policy from April 2011 to February 2013, which entailed storing emails on backup tape once they became six months old. They argued that this storage method made the emails from that period inaccessible because retrieving them would require hiring a third party for a cost of at least $248,000 including data processing and contract attorney review. The court found that the emails were, in fact, reasonably accessible because their retrieval did not involve an undue burden or cost. The court emphasized that undue burden is fact specific and no format is inaccessible per se. As for cost, the court rejected the argument that cost includes document review and storage and found that the cost was not undue given the context of the litigation. The defendants "in effect stored randomly hundreds of thousands of documents, no differently than if [they] had tossed files into banker's boxes without labels or organization." In the court's eyes, the defendant's use of such a sloppy system did not render retrieval of data from that system an undue burden or cost. The court then found that even if the emails had been reasonably inaccessible, good cause supported production of the emails. Finally, the court turned to the issue of cost shifting. The court held that cost shifting may be ordered only when the electronically stored information is "reasonably inaccessible due to undue burden or undue cost, but the requesting party nevertheless renders it discoverable under the relevant factors." Having found that the emails were reasonably accessible, the court determined that cost shifting could not be ordered in this case. Moreover, the court used the *Zubulake I* factors to find that even if the emails were not reasonably accessible, cost shifting was unwarranted. Only the far greater benefit of the emails to the relator than to the defendants supported cost shifting, but that one consideration was outweighed by every other factor.

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Contributors

Partner

Jessica D. Miller
Washington, D.C.
202.371.7850
jessica.miller@skadden.com

Counsel

Richard T. Bernardo
New York
212.735.3453
richard.bernardo@skadden.com

Nina Ramos Rose
Washington, D.C.
202.371.7105
nina.rose@skadden.com

Discovery Counsel

Giyoung Song
New York
212.735.2564
giyoung.song@skadden.com

Associates

Brian Baggetta
Senior Staff Associate / Washington, D.C.
202.371.7209
brian.baggetta@skadden.com

Brittany M. Dorman
New York
212.735.3485
brittany.dorman@skadden.com

Robin Shah
New York
212.735.3417
robin.shah@skadden.com