

The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

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Attorney-Client Privilege/Work-Product Decisions

Decisions Protecting Against Disclosure

Privilege Protects Documents Created During Internal Investigation Conducted at Request of General Counsel's Office

Johnson v. Ford Motor Co., No. 3:13-cv-06529, 2016 WL 1241538 (S.D. W. Va. Mar. 28, 2016)

Magistrate Judge Cheryl A. Eifert of the U.S. District Court for the Southern District of West Virginia held that documents related to an investigation of vehicle-owner experiences with respect to unintended acceleration conducted by defendant Ford's Automotive Safety Office (ASO) at the request of the Office of the General Counsel (OGC) were shielded from discovery pursuant to attorney-client privilege and the work-product doctrine. The plaintiffs had argued that documents related to the investigation were not subject to protection because, *inter alia*, the investigation was conducted by nonlawyers in the ordinary course of business. The court disagreed, finding that the documents at issue qualified as attorney work product because they were created in anticipation of litigation at the OGC's request and were used by Ford's attorneys in rendering legal advice to the company. In support of this finding, the court noted that the documents were created at a time when litigation related to unintended acceleration was already pending and the documents themselves indicated that the ASO's analysis was performed for the benefit of the company's lawyers. The court also held that the documents were subject to attorney-client privilege, noting that "communications during fact-finding investigations conducted" at the request of an attorney "in his or her legal capacity are protected." Further, there was evidence that both the OGC and ASO intended the communications to be confidential, with no indication that they were "disseminated beyond those Ford employees and consultants working directly with Ford's counsel."

Waiver of Attorney-Client Privilege Is Selective and Limited

Ingenito v. Riri USA, Inc., No. 11-CV-2569 (MKB) (RLM), 2016 WL 1642643 (E.D.N.Y. Apr. 25, 2016)

U.S. District Judge Margo K. Brodie of the Eastern District of New York denied the plaintiff's motion to reconsider its prior ruling affirming the magistrate judge's finding

that the defendants' voluntary disclosure of certain privileged emails did not result in a large-scale waiver of attorney-client privilege. In this employment law case, the plaintiff alleged pregnancy discrimination against her former employer and supervisor. In the course of the litigation, the defendants disclosed emails between the plaintiff's supervisor and the former employer's legal counsel to show that a plan to terminate the plaintiff was already underway at the time that the plaintiff informed her supervisor that she was pregnant. The plaintiff argued that this voluntary production of privileged materials "constituted a waiver of the attorney-client privilege" and moved to compel the defendants to produce all emails between the plaintiff's supervisor and the employer's attorneys related to the plaintiff's employment. The court rejected the plaintiff's argument and upheld the magistrate judge's finding that the defendants' voluntary disclosure of the emails was a selective waiver intended only to establish the timing of the decision to terminate the plaintiff. As such, it did not result in a subject-matter waiver for all communications relating more broadly to the reasons for the plaintiff's termination.

Decisions Ordering Disclosure

No Privilege Protection for Counsel's Communications With Public Relations Firm

Bloomington Jewish Educ. Ctr. v. Village of Bloomington, No. 14-cv-7250 (KBF), 2016 WL 1069956 (S.D.N.Y. Mar. 18, 2016) (to be published in the Federal Supplement)

U.S. District Judge Katherine B. Forrest of the Southern District of New York rejected a party's claim of attorney-client privilege and work-product protection with respect to its counsel's communications with a public relations firm. The plaintiffs alleged that the defendants, the Village of Bloomington and the Town of Mamakating, both in New York, had violated their rights under federal and state law through a pattern of concerted resistance to Hasidic Jews moving to the area. In connection with the suit, the plaintiffs subpoenaed documents from a public relations and communications strategy firm hired by the defendants in a related action. The defendants opposed the subpoena, arguing that the public relations firm was hired at the behest of counsel to assist in litigation strategy and communications between the defendants and the firm were therefore protected by the attorney-client privilege and work-product doctrine. In response, the plaintiffs argued that materials reflecting the defendants' actions, public relations strategy and factual basis for the related action were relevant to the plaintiffs' claims. The court sided with the plaintiffs and rejected the defendants' "sweeping and rather brazen" argument that all of their communications with the PR firm were protected from disclosure. For one thing, the court noted that the defendants had not collected, reviewed or logged the communications at

issue and therefore could not meet their burden of showing that those documents were entitled to attorney-client or work-product protection. Further, the court explained that privilege does not typically apply if the public relations firm provides "ordinary public relations advice" and that public relations advice generally falls outside of the work-product doctrine "even if it bears on anticipated litigation."

Privilege Does Not Apply to Board Meeting Discussions Involving Counsel That Were Not Held for the Primary Purpose of Seeking Legal Advice

Kamenski v. Wellington Exempted Vill. Sch., No. 1:14-cv-01589, 2016 WL 1732872 (N.D. Ohio May 2, 2016)

Magistrate Judge Kathleen B. Burke of the U.S. District Court for the Northern District of Ohio denied the defendant school district's claim that attorney-client privilege prohibited discovery of discussions that occurred during a Board of Education meeting at which the defendants' counsel was present. The plaintiff, a former employee of the school district, alleged that during such a meeting, the board "discussed and decided that a derogatory and defamatory letter" should be sent to the plaintiff's new employer as retaliation against him. The plaintiff sought to depose a board member regarding what transpired at the meeting, and the school district sought a protective order, arguing that discussions at the board meeting were protected by attorney-client privilege because the board's attorneys were present at the meeting for the purpose of dispensing legal advice. The court rejected the defendant's argument that the mere presence of counsel in the room was sufficient to invoke the attorney-client privilege. According to the court, minutes of the meeting at issue established that the primary purpose of the discussion at the meeting was not to obtain legal advice, and therefore, the discussion was not subject to privilege protection.

Other Privilege Decisions

Due Diligence Documents Not Privileged, but Other Corporate Communications Subject to Protection

FTC v. Abbvie, Inc., No. 14-5151, 2015 WL 8623076 (E.D. Pa. Dec. 14, 2015)

U.S. District Judge Harvey Bartle III of the Eastern District of Pennsylvania both upheld and rejected various privilege claims asserted by the defendant health care companies in connection with a Federal Trade Commission action. For example, the court rejected one defendant's argument that the work-product doctrine prevented disclosure of documents created by nonattorney employees as part of the company's due diligence research in connection

with the possible acquisition of a competitor, which would involve acquiring the competitor's potential legal liability. The court found that the documents did not constitute work product because they were "created for the purpose of informing [the defendant's] business decision to acquire" the competitor and the documents would have been created to inform business decisions regardless of any potential litigation against the target of the acquisition. The court also rejected another defendant's privilege claims with respect to emails sent between its various outside counsel that described a meeting with a U.S. government official. According to the court, attorney-client privilege "does not extend to facts provided by an attorney that do not reflect client confidences." Thus, if an attorney "merely conveys facts acquired from persons or sources other than a client, the communication is not privileged." The court did, however, uphold the privilege claims with respect to emails in which counsel for one of the defendants communicated with patent consultants in an effort to obtain technical information counsel needed to provide legal advice on intellectual property issues. According to the court, "privilege protects 'an exchange of technical information necessary so that ... an employee c[an] secure legal services or legal advice' on behalf of the client corporation." In addition, the court found that "a party does not 'waive the privilege merely by revealing confidential communications to its own consultant.'"

Spoliation Decisions

Sanctions Denied

Adverse Inference Sanction Inappropriate Where Defendants Negligently Altered Property at Issue in Toxic Tort Case, but Prejudice to Plaintiffs Was Minimal

Trujillo v. Ametek, Inc., No. 15cv1394 GPC (BGS), 2016 WL 853052 (S.D. Cal. Mar. 4, 2016)

Magistrate Judge Bernard G. Skomal of the U.S. District Court for the Southern District of California granted in part the plaintiffs' motion for spoliation sanctions based on the defendant's failure to confer with the plaintiffs before irreversibly altering the property at issue in the litigation. The plaintiffs alleged that the defendants' discharge of waste caused concentrations of toxic waste beneath an elementary school. After filing their complaint, the plaintiffs sent a preservation letter to the defendants' counsel, requesting that "current property conditions" be maintained at the elementary school until a meet-and-confer regarding testing and inspection could be completed. After an initial site inspection, sub-slab depressurization and air exhaust system units had been installed on the property, but the plaintiffs requested a meet-and-confer to ensure that air emission evidence could be gathered for the

litigation before the units were activated. The defendants nonetheless activated the units without first notifying or conferring with the plaintiffs. The court found that the defendants' actions were negligent, and "negligence is a sufficiently culpable state of mind in the context of spoliation sanctions." The court found, however, that the prejudice to the plaintiffs was "slight" because previous testing and sampling had been conducted at the site before the units were activated. Accordingly, the adverse inference sanction that the plaintiffs sought was inappropriate. Instead, the court ordered the defendants to deactivate the units so that the plaintiffs could perform additional testing and required the defendants to pay the costs and fees associated with bringing the motion.

Negligent Destruction of Evidence Does Not Warrant Adverse Inference Sanctions Under Amended Rule 37(e)

Living Color Enters., Inc. v. New Era Aquaculture, Ltd., No. 14-cv-62216-MARRA/MATTHEWMAN, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016)

Magistrate Judge William Matthewman of the U.S. District Court for the Southern District of Florida denied the plaintiff's motion for spoliation sanctions based on the allegation that the defendant knowingly deleted text messages potentially relevant to the suit. The court applied newly amended Rule 37(e) to the plaintiff's motion, in which the plaintiff sought an adverse inference instruction and monetary sanctions. The court explained that, under the amended rule, a court must consider whether electronically stored information (ESI) that should have been preserved was lost because a party failed to take reasonable steps to preserve it. If the answer to this question is no, then sanctions must be denied. If the answer is yes, the court must determine whether the party seeking sanctions has been prejudiced by the loss of materials. And if "more severe spoliation sanctions" — such as default judgment or an adverse inference — are sought, the court must also determine if the spoliating party acted with an "intent to deprive." The court held that, while the defendant had destroyed electronic evidence that he had a duty to preserve, sanctions were generally inappropriate because there was no evidence that the plaintiff had been prejudiced by the loss of the text messages insofar as the plaintiff failed to "explain[]" any direct nexus between the missing text messages and the allegations in its Complaint." Further, the court held that the plaintiff's request for an adverse inference was inappropriate because there was no evidence that the defendant acted with the "intent to deprive" the plaintiff of evidence. Instead, the defendant, a "relatively unsophisticated litigant," acted negligently, at worst. The court held that amended Rule 37(e) does not permit an adverse inference instruction or other severe sanctions based on mere negligence.

Sanctions Inappropriate Where ESI Is Recovered or Restored

Fiteq Inc v. Venture Corp., No. 13-cv-01946-BLF, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016)

Judge Beth Labson Freeman of the U.S. District Court for the Northern District of California denied the plaintiff's request for an adverse inference spoliation instruction based on the fact that an executive vice president for defendant Venture deleted emails related to the operating agreement between FiTeq and Venture at issue in the lawsuit filed shortly after that agreement was terminated. Venture argued that an adverse inference was not warranted because: (1) it had taken steps to find and produce the executive's emails from an old hard drive, (2) any emails lost were likely duplicates of those produced from other individuals' files, and (3) there was no evidence of intent to deprive FiTeq of information. In response, FiTeq argued that the number of emails recovered by Venture was too small to constitute involving the executive, who had a large role on the project. Applying the recently amended Rule 37(e), the court sided with Venture, finding that the plaintiffs failed to prove that other responsive documents ever existed and therefore could not establish that spoliation occurred.

Request for Spoliation Sanctions Premature at Class Certification Stage

Wilson v. Conair Corp., NO. 1:14-00894 WBS SAB, 2016 U.S. Dist. LEXIS 72837 (E.D. Cal. June 3, 2016)

Senior Judge William B. Shubb of the U.S. District Court for the Eastern District of California denied the defendant's motion for an adverse instruction for alleged spoliation of evidence in a proposed class action case, which the defendant had raised in connection with its opposition to the plaintiff's motion for class certification. The plaintiff in the case alleged injuries arising from a defective curling iron produced by defendant Conair Corporation, a health and beauty supply company. The plaintiff sought to represent a class consisting of all persons who had purchased a Conair styling iron in California. The plaintiff alleged that she had called and texted customer service, friends and family on her cellphone about the issue with her curling iron. When asked about the cellphone at her deposition, plaintiff testified that she had since replaced the cellphone with an iPhone but still had the old phone in her possession. Defense counsel advised her to not destroy or do anything with the cellphone and to give it to her counsel. After the deposition, plaintiff asserted that she could not locate the cellphone after a reasonable search and believed she

had donated it or left it at a Verizon store. The defendant argued that the plaintiff's failure to retain the phone was evidence that she was not an adequate class representative and also requested spoliation sanctions based on the loss of the phone. While the court ultimately refused to certify the class, it also denied the defendant's request for sanctions. According to the court, it was premature to determine whether the phone calls and texts allegedly made from the cellphone would be relevant at such an early stage in the proceedings. The court indicated it would revisit the issue at trial and denied the motion without prejudice.

Sanctions Granted

Spoliation Sanctions Permitted Under 37(e)(1) Where Relevant Evidence Not Preserved, Request to Bar Spoliating Party From Presenting Evidence on Key Issues Denied

Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016)

Magistrate Judge Paul S. Grewal of the U.S. District Court for the Northern District of California granted a request for spoliation sanctions based on the destruction of documents related to a price discrimination suit. The plaintiff car dealership sued the defendant car manufacturer for price discrimination claiming that due to a new competing dealer, it was forced to offer cars at higher prices, resulting in lower sales volume. The defendant sought production of the plaintiff's internal emails and email communications with its customers, which the defendant claimed would be relevant to whether it was price or other factors that drove the plaintiff's customers to competing dealers. The plaintiff, however, had made no effort to preserve such emails — even after it sent a letter to the defendant threatening litigation. The defendant moved for spoliation sanctions under Rule 37(e)(1), arguing that it had been prejudiced by the loss of emails and asking the court to preclude the plaintiff from offering testimony or evidence on a host of issues relevant to its claims. The court agreed with the defendant that it had been prejudiced by the loss of materials and that some sanction was appropriate under Rule 37(e)(1). The court held, however, that the defendant's proposed remedy — barring the plaintiffs from presenting evidence on key issues — was “too stringent” and would “effectively decide the case.” Instead, the court held that the defendant may present communications post-dating the alleged price discrimination period as if they had occurred during that period and use the fact of the spoliation to rebut testimony from the plaintiff's witnesses. The court also awarded reasonable attorney's fees incurred by the defendant in bringing the motion.

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Adverse Inference Warranted Where Defendant Made No Attempt to Recover Destroyed Data

Internmatch v. Nxtbigthing, LLC, No. 14-cv-05438-JST, 2016 WL 491483 (N.D. Cal. Feb. 8, 2016)

Magistrate Judge Jon S. Tigar of the U.S. District Court for the Northern District of California granted the plaintiff's motion for spoliation sanctions where the defendants made no attempt to retrieve relevant electronic evidence that was allegedly destroyed by a power surge while the litigation was pending. In the course of litigation, the defendants informed the plaintiff that electronic copies of documents potentially responsive to the plaintiff's discovery requests had been irretrievably lost when a desktop computer containing the materials was damaged by a power surge. The affected desktop, which contained the only electronic version of the documents requested, had been discarded by the defendants. The plaintiff moved for spoliation sanctions, which the court granted. The court found that the defendants breached their duty to preserve evidence when they discarded the computer without making any attempt to retrieve the lost data or to determine whether the data was salvageable. The court also questioned whether the power surge that allegedly destroyed the materials actually occurred, finding the story "highly improbable" and "filled with inconsistencies." Nevertheless, the court held that the plaintiff's request for an entry of judgment was too harsh a sanction. Instead, the court found that the plaintiff was entitled to adverse inference instruction at trial and precluded the defendants from offering argument or testimony that the destroyed evidence supported their arguments. The court also awarded the plaintiff its attorneys' fees in connection with bringing the motion for sanctions.

Manufacturer Found Responsible for Destruction of Evidence in Possession of Third-Party Dealers

Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2016 WL 2625010 (N.D. Ohio May 9, 2016) (to be published in the Federal Supplement)

Senior Judge James G. Carr of the U.S. District Court for the Northern District of Ohio granted the plaintiff's motion for sanctions and issued a mandatory adverse-inference instruction where the defendant failed to preserve key evidence in the case. The plaintiff in the suit, a battery manufacturer, contracted with the defendant golf-cart manufacturer to supply batteries for the carts. The batteries, however, could not hold a charge in the carts and the parties disputed who was responsible. More than three years into the litigation, the defendant's Rule 30(b) (6) representative disclosed at his deposition that the defendant

had not taken steps to preserve any of the batteries that formed the basis of the defendant's warranty counterclaims. Instead, the allegedly defective batteries, which were returned to third-party golf-cart dealers, were destroyed after 90 days pursuant to the defendant's company policy. In light of this disclosure, the plaintiff propounded additional discovery and ultimately moved for sanctions. In granting the plaintiff's motion, the court rejected the defendant's argument that the motion was untimely because it was filed after the close of discovery, finding that the plaintiff's late discovery of the issue and need to investigate further justified the belated filing. Further, the court held that the defendant could be sanctioned for the destruction of batteries in the possession of third-party dealers. The court agreed with the plaintiffs that the defendant should have obtained the batteries from the third-party dealers and preserved, at the very least, a representative sample. Finally, the court found that the defendant had engaged in "knowing spoliation" because it was on notice of the plaintiff's interest in the batteries, never disclosed the fact that dealers were destroying batteries and allowed the destruction to continue unabated. Accordingly, the court issued a nonrebuttable adverse inference instruction requiring the jury to infer that the lost evidence would have been helpful to the plaintiff.

Other Spoliation Decisions

Adverse Inference Sanction Issued Before Rule 37 Amendments Vacated Based on Changes to Rule

Nuvasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM(RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016)

Judge Barry Ted Moskowitz of the U.S. District Court for the Southern District of California vacated his prior order adopting spoliation sanctions in the form of an adverse inference based on the plaintiff's failure to preserve evidence. Judge Moskowitz had issued his spoliation order in July 2015, roughly five months before the Rule 37 amendments took effect. The defendants moved to vacate that order under Federal Rule of Civil Procedure 60(b) on December 10, 2015. The court held that the Rule 60(b) motion was timely because it was made within a "reasonable time" of the rule change. In addition, the court held that its spoliation order should be reconsidered in light of the new Rule 37(e)(2) because "[i]t is clear from the language of (e)(2) as well as the Committee Notes that the adverse inference instruction that the Court was going to give falls within the measures that are not permissible absent a finding of intent." Since the court's prior order did not make any finding that the plaintiff intentionally failed to preserve materials so that the defendants could not use them in the litigation, an adverse inference instruction was not appropriate.

Cost Shifting and Form/Format of Discovery Responses

Reproduction of All Documents in Native Format Unduly Burdensome, but Limited Reproduction Permitted

Spring v. Bd. of Trs. of Cape Fear Cmty. Coll., No. 7:15-CV-84-BO, 2016 U.S. Dist. LEXIS 47718 (E.D.N.C. Apr. 7, 2016)

Magistrate Judge James E. Gates of the U.S. District Court for the Eastern District of North Carolina granted in part and denied in part the plaintiff's motion for reproduction of ESI in its native format. The terms of the parties' discovery plan in the case, a breach-of-contract action, provided that ESI would be produced in the native format, but the defendant failed to produce more than 2,500 documents in that manner. The court agreed with the defendant that reproduction of all of these materials would be unduly burdensome, especially given that the plaintiff did not immediately object to the non-native format of the production. Also, the court noted that, in the time since the plaintiff raised the non-native production issue, the defendant had produced over 2,000 other documents in the native format with metadata. Accordingly, the court held that the plaintiff was permitted to identify those specific documents, or categories of documents, for which it desired metadata, and the defendant was required to reproduce those specific materials in the proper form.

Defendants Entitled to Costs for Scanning and Printing Documents After Prevailing in Suit

Lab. Skin Care Inc. v. Ltd. Brands, Inc., No. 06-60-LPS, 2016 U.S. Dist. LEXIS 42098 (D. Del. Mar. 30, 2016)

Judge Leonard P. Stark of the U.S. District Court for the District of Delaware ordered the plaintiffs in a patent infringement action to pay the defendants more than \$40,000 to cover their costs for converting document formats and printing documents in response to the plaintiffs' discovery requests after the defendants prevailed on the merits. In so doing, the court rejected the plaintiffs' argument that over two-thirds of the production costs the defendants sought related to the cost of making electronic copies and extra paper copies for the defendants' own use. According to the court, "[t]he costs Defendants incurred in scanning their paper documents ... were incurred as part of Defendants' effort to comply with the Default Standard for Discovery pursuant to which the parties were operating, which required production of electronically stored information." Additionally, the court found that the costs that the defendants incurred in Bates stamping the documents for production were reasonable and necessary because, given the large

volume of documents produced, the production would have been "entirely useless" without identifying numbers. Thus, the court held that the defendants had sufficiently supported their request for costs.

Other Discovery Decisions

Product Liability Defendant Entitled to Redact Irrelevant, Sensitive Business Information From Responsive Documents and Document Families

In re Takata Airbag Prods. Liab. Litig., MDL No. 2599 (S.D. Fla. Mar. 1, 2016)

In this product liability action, Judge Federico A. Moreno of the U.S. District Court for the Southern District of Florida adopted the defendants' version of the discovery proposal, which provided that the defendants could redact certain irrelevant information from responsive documents and withhold irrelevant parent documents from responsive document families. Citing Chief Justice Roberts' comments in the newly amended Rule 26(b)(1), which governs the scope of discovery, the district court noted that "a party is not entitled to receive every piece of relevant information" and "[i]t is only logical, then, that a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld." The court found that the defendants provided a persuasive reason to redact seven categories of information that did not relate to the product at issue — including nonpublic financial information, marketing and business strategy, other product information and information about non-U.S. products — from responsive documents and document families in the production. According to the court, the defendants had sufficiently demonstrated that disclosure of such matters could reveal competitively sensitive information to the defendants' competitors.

Request for Admissions Inappropriate Where Party Had Stated Lack of Knowledge on the Subject in Prior Discovery Responses

Morrison v. Quest Diagnostics Inc., No. 2:14-cv-01207-RFB-PAL, 2016 U.S. Dist. LEXIS 27861 (D. Nev. Mar. 3, 2016)

Magistrate Judge Peggy A. Leen of the U.S. District Court for the District of Nevada granted the defendants' motion for a protective order providing that they need not respond to any of the plaintiff's request for admissions. The plaintiff in the case alleged, *inter alia*, negligence, defamation and fraud against the defendants following an HIV misdiagnosis. The plaintiff served one of the defendants

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with a request for admissions regarding the testing of the blood specimen that led to the misdiagnosis, even though that defendant had previously answered interrogatories under penalty of perjury stating that he had no involvement in that testing. According to the court, Rule 26(g) “provides that by signing a discovery request, response, or objection, ‘an attorney or party certifies to the best of the person’s knowledge, information, and belief formed after a

reasonable inquiry’ the response is complete and correct as of the time made.” Thus, the court found that it would be “burdensome and harassing for [the defendant] to be required to admit or deny [a] request for admissions where he has affirmatively stated he has no knowledge of the subject matter on which Plaintiff seeks admissions” in a previous discovery response.

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