

The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

1 / Attorney-Client Privilege/ Work-Product Decisions

Decisions Protecting
Against Disclosure

Decisions Ordering Disclosure

3 / Spoliation Decisions

Decisions Declining to
Impose Sanctions

Decisions Imposing Sanctions

6 / Discovery Costs/Scope/ Format Decisions

8 / Other Decisions of Interest

12/ Contacts

Attorney-Client Privilege/Work-Product Decisions

Decisions Protecting Against Disclosure

Collection of Materials Relied Upon by Witness Is Protected When Compiled in Anticipation of Deposition

Long v. Destination Maternity Corp., No. 15-CV-2836 WQH-RBB, 2017 WL 1807917 (S.D. Cal. May 5, 2017)

Judge William Q. Hayes of the U.S. District Court for the Southern District of California sustained the defendant's objection to an order by the magistrate judge requiring the defendant to produce "all documents that [its] 30(b)(6) witness reviewed, consulted, or glanced at during the course of her deposition." At issue was a binder that the defendant's witness had brought with her to her deposition, which contained certain relevant Bates-labeled documents and a document titled "Deposition Topics and Relevant Documents." The binder had been prepared for and sent to the witness in advance by outside counsel in order to facilitate its long-distance, predeposition communications with the witness, who resided in a different state. During the course of the witness' deposition, she referred to the documents in the binder, and the plaintiff's counsel asked the court reporter to mark the binder as an exhibit. The defendant objected and, following termination of the deposition, sent a privilege log to the plaintiff stating that the document was covered by attorney client-privilege and constituted attorney work product. The plaintiff argued that she was entitled to production of the binder pursuant to Federal Rule of Evidence 612 on the ground that its contents were used by the witness in her deposition. The magistrate judge sided with the plaintiff but the district court disagreed, finding that the materials in the binder were subject to protection because they were prepared by counsel in connection with litigation preparation. The district court also held that Rule 612 did not compel disclosure because the witness made only a limited reference to the binder while testifying, and her testimony did not identify any particular piece of writing upon which she relied.

Attorney's Impressions and Opinions in 'Investigatory Role' Protected by Privilege

Rattner v. Chubb Nat'l Ins. Co., No. 1:17-cv-00136-GBL-MSN, 2017 WL 1836444 (E.D. Va. May 8, 2017)

In this insurance dispute related to a home fire, Magistrate Judge Michael S. Nachmanoff of the U.S. District Court for the Eastern District of Virginia denied the plaintiff's motion to compel the production of certain documents on the defendant's privilege log that related to claim files, investigation files and related communications. The defendant asserted that these communications were privileged because they included documents containing the legal advice and opinions of the lawyer retained to investigate the cause of the fire and any wrongdoing. The plaintiff conceded that the defendant would not be required to disclose information and documents containing the lawyer's legal advice or opinions in her role as the defendant's lawyer, but asserted that the defendant must disclose the lawyer's impressions and opinions "in her investigatory role" because that information was "exactly the same as what a non-lawyer insurance adjuster" would develop during a claim investigation. The court ordered the plaintiff to identify from the defendant's log 10 sample documents for *in camera* review and, after reviewing them, found that they all had been properly withheld. According to the court, the facts learned by an attorney in the course of an investigation are properly withheld as privileged because a lawyer is ethically obligated to be fully informed of the facts of the case in order to render legal advice.

Decisions Ordering Disclosure

Conclusory Assertions of Privilege Fail to Justify Sealing of Documents

Utica Mut. Ins. Co. v. Munich Reins. Am., Inc., No. 6:12-CV-00196 (BKS/ATB), 2017 WL 1653608 (N.D.N.Y. Apr. 26, 2017)

Judge Brenda K. Sannes of the U.S. District Court for the Northern District of New York denied the plaintiff's motion to seal certain exhibits to its motions for summary judgment despite in-house counsel's sworn declaration attesting that the exhibits "reflect[ed] legal advice." The court found that such a conclusory assertion of privilege was not sufficient to overcome the presumption of public access to court documents. Specifically, the court noted that the plaintiff: (1) did not specify whether the exhibits were allegedly subject to the attorney-client privilege or constituted attorney work product; (2) did not indicate whether they were "intended to be, and in fact w[ere], kept confidential"; and (3) did not indicate whether they were fact or opinion work product.

Good Faith Defense Waives Privilege by Putting State of Mind at Issue

Welch v. Regions Bank (In re Mongelluzzi), No. 8:11-bk-01927-CED, 2017 WL 1843049 (Bankr. M.D. Fla. May 8, 2017)

Judge Caryl E. Delano of the U.S. Bankruptcy Court for the Middle District of Florida granted bankruptcy trustees' motion to compel the production of a bank's allegedly privileged documents. The trustees asserted claims based on the allegation that the bank had knowledge of a debtor's massive check-kiting scheme and devised a controlled exit strategy in order to reduce its financial exposure. The bank objected to several discovery requests seeking email communications relating to its alleged knowledge of the debtor's scheme, relying on the attorney-client privilege. The trustees asserted that the bank waived any privilege by asserting that it acted at all times in good faith, and thus put its subjective knowledge at issue. The court agreed and held that the bank waived any attorney-client privilege with respect to communications regarding the transactions at issue during the relevant time period by putting its "state of mind" at issue.

Burden on Defendant to Establish That Assertion of Good Faith Defense Does Not Waive Privilege

In re Namenda Direct Purchaser Antitrust Litig., No. 15 Civ. 7488 (CM) (JCF), 2017 WL 2226591 (S.D.N.Y. May 19, 2017)

Magistrate Judge James C. Francis IV of the U.S. District Court for the Southern District of New York denied the plaintiffs' motion to compel the production of certain privileged documents in an antitrust action against the manufacturer of patented Alzheimer's drugs. The plaintiffs alleged that the defendant improperly inflated the prices of its drugs by entering into patent litigation settlements that precluded generic drug manufacturers from selling generic versions for a certain number of years. The plaintiffs sought production of privileged materials related to those settlements, arguing that the defendant put the documents at issue by asserting that it believed in good faith that the settlement provisions were lawful. In opposition, the defendant argued that the plaintiffs' motion was part of a strategy to force the defendant to abandon its central defense. The court found merit in the defendant's argument but ultimately held that if the defendant injected its "subjective beliefs" about the legality of the settlements into its defense, it would be unfair to prohibit the plaintiffs from accessing privileged information necessary to test the veracity of those beliefs. The court held, however, that it could not determine — based on the record — whether such a waiver of the attorney-client privilege and work-product protections related to settlement materials had occurred. Accordingly, the court ordered the defendant to disclose any subjective beliefs it would

rely on in advancing its defense and to “back up with argument and evidence” its contention as to why those beliefs did not implicate privileged communications.

Public Disclosure of Law Firm Report Based on Investigatory Memoranda Results in Subject Matter Waiver

Banneker Ventures, LLC v. Graham, No. 13-391 (RMC), 2017 WL 2124388 (D.D.C. May 16, 2017)

Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia denied in part the defendant’s motion for a protective order precluding the production of witness interview memoranda on the grounds that they were protected by the work-product and attorney-client privileges. The plaintiff asserted claims for, *inter alia*, breach of contract against the defendant based on the breakdown of negotiations related to a development project. The memoranda had been drafted by the defendant’s attorneys two years after the breakdown of negotiations and summarized the attorneys’ interviews with several witnesses connected to the project, many of whom were current or former employees of the defendant. The defendant later adopted a resolution recommending the public release of an investigative report related to the project, which included references to the interview memoranda. The court found that work-product protection did not apply to the memoranda because two years had lapsed between the breakdown of negotiations and the defendant’s retention of the attorneys who had drafted the memoranda, indicating that they were not retained in anticipation of litigation despite the fact that litigation began shortly after they were created. Additionally, the court noted that although neither party disputed that the interviews conducted by the defendant’s attorneys were protected attorney-client communications, the plaintiff was correct that the defendant’s public release of a report referencing the interviews waived privilege with respect to the subject matter of the interview memoranda. The court did, however, hold that the defendant could redact information not covered by the investigative report from the memoranda prior to production.

District Court Erred in Granting Protective Order When Defendant Did Not Sufficiently Establish Attorney-Client Privilege Through Privilege Log Entries

Equal Emp’t Opportunity Comm’n v. BDO USA, L.L.P., No. 16-20314, 2017 WL 1746035 (5th Cir. May 4, 2017), *as revised* (May 8, 2017)

In an opinion authored by Judge Carl E. Stewart, the U.S. Court of Appeals for the Fifth Circuit held that the privilege log produced by the defendant in an Equal Employment Opportunity Commission (EEOC) action did not establish a *prima facie* case

of attorney-client privilege as to certain documents relevant to the EEOC’s employment discrimination investigation. The Fifth Circuit held that the district court, which had granted the defendant’s request for a protective order with respect to the document, applied an overly broad legal definition of attorney-client privilege. The Fifth Circuit noted, for example, that during a colloquy, the district court judge had stated that “[f]rankly, anything that comes out of that lawyer’s mouth is legal advice.” According to the Fifth Circuit, this was an “erroneous interpretation of the law” that warranted reversal. Additionally, the Fifth Circuit noted that there were a number of deficiencies in the defendant’s privilege log. First, some entries were vague and/or incomplete. Second, some entries failed to distinguish between legal and business advice. Finally, some entries failed to even establish that the communications were made in confidence and that the confidentiality had not been breached. Accordingly, the Fifth Circuit vacated the district court’s order and remanded.

Spoliation Decisions

Decisions Declining to Impose Sanctions

Extreme Sanction of Dismissal Not Warranted Where Plaintiff Discards Allegedly Defective Product Before Contemplating Design Defect Suit

Punch v. Dollar Tree Stores, Inc., C.A. No. 12-154 Erie, 2017 WL 752396 (W.D. Pa. Feb. 17, 2017), *report and recommendation adopted*, C.A. No. 12-154E, 2017 WL 1159735 (W.D. Pa. Mar. 29, 2017)

Magistrate Judge Susan Paradise Baxter of the U.S. District Court for the Western District of Pennsylvania denied the defendant’s request for summary judgment as a sanction for the plaintiffs’ alleged spoliation of the product that they claimed injured their minor son. The plaintiffs alleged design defect claims after their son was injured when he swallowed two button batteries that came with lighted tweezers the plaintiffs purchased from the defendant’s store. The defendant sought dismissal based on the plaintiffs’ failure to preserve and produce the tweezers at issue. The court, however, found that the defendant failed to prove a duty to preserve, bad faith on the part of the plaintiffs or prejudice to the defendant, all of which are required to impose such serious spoliation sanctions. According to the court, the child’s father did not have a duty to preserve the evidence at the time the tweezers were discarded because the father testified that he was not considering a lawsuit then and did not contact an attorney until two months later. In addition, the child’s father testified that he disposed of the tweezers to avoid any risk to his other children; the court therefore concluded that he did not “deliberate[ly] attempt to impede a potential defense.” Finally,

the court held that the drastic sanction of dismissal was not warranted because the plaintiffs alleged that all products in the same product line suffered from a common design defect. As the court explained, the degree of prejudice that results from the destruction of the product at issue is low in a case involving design defect allegations because similar products made by the defendant could be inspected and tested.

Disparity in Number of Emails Produced From Different Years Not Sufficient to Establish Spoliation Occurred

Ghorbanian v. Guardian Life Ins. Co. of Am., No. C14-1396RSM, 2017 WL 1543140 (W.D. Wash. Apr. 28, 2017)

Judge Ricardo S. Martinez of the U.S. District Court for the Western District of Washington denied the defendants' motion for sanctions based on the plaintiff's alleged spoliation of emails. The defendants presented a comparison of the total number of emails that the plaintiff produced for each year between 2009 and 2016 to demonstrate that the combined total of produced emails from 2009-13 was less than 10 percent of the combined total of emails from 2013-16. According to the defendants, this analysis suggested that the plaintiff likely destroyed emails prior to 2013. The court disagreed, finding that the simple fact that the plaintiff produced fewer emails from certain years, without more, does not establish that emails were destroyed. Moreover, the court noted that the plaintiff had used a different email account between 2009 and 2012, that all emails had been transferred to his new account in late 2012/early 2013 and that the plaintiff asserted that he never intentionally deleted an email or instructed anyone else to do so. Accordingly, the court found that there was no evidence that emails were intentionally destroyed. The court also rejected the defendants' argument that the plaintiff acted inappropriately in failing to collect documents in response to receiving a legal hold letter in connection with the litigation, noting that because litigation had not yet begun at the time the legal hold letter was sent, the plaintiff had no obligation to collect or produce documents at that time.

Adverse Inference Instruction Denied Where No Evidence That Evidence Relevant to Plaintiff's Claim Was Discarded in Bad Faith, but Loss of Evidence Admissible at Trial

Satterfield v. Chipotle Mexican Grill, Inc., No. 15 C 10308, 2017 WL 1283461 (N.D. Ill. Apr. 6, 2017)

Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois denied a request by the plaintiff in an employment discrimination action for an adverse inference

instruction based on the defendant's failure to retain the plaintiff's performance journal. The plaintiff alleged that she was prejudiced by her manager's destruction of the journal because it would have demonstrated her progress as an employee and supported her discrimination allegations. The plaintiff's manager testified that he did not realize that he was responsible for shipping the journal to a storage facility after the plaintiff's termination and that he discarded the plaintiff's journal about a year after she left the company to make room in his office, consistent with his general practice. Based on this testimony, the court rejected the plaintiff's argument that the journal was destroyed in bad faith, noting that there was no evidence that the defendant instructed the plaintiff's manager to destroy the journal. There also was no evidence to suggest that the plaintiff's manager was aware of the plaintiff's employment claims at the time the journal was discarded. The court also noted that the manager seemed to have treated the plaintiff's journal the same way he would treat other employees' journals, which also pointed to a lack of bad faith. Therefore, the court denied an adverse inference instruction. The court did, however, allow the plaintiff to introduce evidence at trial that the journal was discarded.

No Sanctions for Loss of ESI Where Unclear if Lost Data Was Relevant and Is Available From Other Sources

Zamora v. Stellar Mgmt. Grp., Inc., No. 3:16-05028-CV-RK, 2017 WL 1362688 (W.D. Mo. Apr. 11, 2017)

Judge Roseann A. Ketchmark of the U.S. District Court for the Western District of Missouri denied the defendants' motion for spoliation sanctions in a case alleging wrongful retaliation and discharge for reporting wrongdoing. The defendant sought dismissal or an adverse inference instruction based on the plaintiff's failure to preserve a Facebook message with another employee, the plaintiff's work cellphone and five or six personal cellphones the plaintiff used during the relevant time frame. The court was unwilling to find that the defendants were prejudiced merely based on speculation that the lost material would have been relevant. Further, the court noted that the defendants could potentially obtain the material through additional discovery from the other employees involved in the communications. Accordingly, the court held that a finding of prejudice was premature, and therefore it need not determine whether the plaintiff's conduct was intentional or accidental. As a result, the court denied the defendants' motion for sanctions but issued orders allowing the defendants to discover additional records from the former employee with whom the plaintiff had communicated.

Decisions Imposing Sanctions

Adverse Inference Instruction Warranted Where Plaintiff Allegedly Tampered With Critical Piece of Evidence

Callahan v. Toys “R” US-Del., Inc., No. CV 15-02815-JMC, 2017 WL 2191578 (D. Md. May 18, 2017)

Magistrate Judge J. Mark Coulson of the U.S. District Court for the District of Maryland denied the plaintiffs’ motion for a new trial, finding, in part, that the court did not err in granting an adverse inference instruction based on the plaintiffs’ alleged tampering with the bicycle at issue in a product liability case. The defendant sought spoliation sanctions after its expert noticed during a second inspection of the bicycle that the orientation of the handlebars was significantly different from when he had first inspected it. The court concluded that the alteration to the bicycle was significant to the parties’ competing theories of causation and instructed the jury that it may infer that the handlebars were in a condition favorable to the defendants’ theory before the alteration. The district court then denied a motion for new trial, finding that the charge was appropriate. According to the court, the bicycle was the single most important piece of evidence in the case, and the plaintiffs should have known that they had an obligation to preserve it. In addition, because the bicycle was in the exclusive control of the plaintiffs and the changed condition of the bicycle was more favorable to the plaintiffs’ causation theory, the court found that the alteration was clearly an intentional act. The court also noted that the defendants were significantly prejudiced because, although their expert had photographs of the original condition of the bicycle, photographs are less persuasive than showing the jury the bicycle itself. Finally, the court held that the instruction was not erroneous because the jury was not required to make an inference or encouraged to speculate about the cause of the altered condition.

Rule 37(e) Does Not Apply to Cases Where Spoliation Is Alleged to Have Occurred in Violation of Retention Regulations Rather Than in Anticipation of Litigation

United States ex rel. Scutellaro v. Capitol Supply, Inc., No. CV 10-1094 (BAH), 2017 WL 1422364 (D.D.C. Apr. 19, 2017)

Chief Judge Beryl A. Howell of the U.S. District Court for the District of Columbia granted the plaintiff’s request for an adverse inference instruction where the defendant did not retain information critical to the plaintiff’s *qui tam* suit, which was based on the allegation that the defendant falsely certified that products it sold to the United States government only came from countries named in the Trade Agreements Act. In connection with the suit, the defendant had been served with subpoenas to obtain country

of origin (COO) information for its products. The defendant, however, had failed to retain historical COO data prior to 2009. The plaintiff sought spoliation sanctions and, in response, the defendant argued that the plaintiff could not meet the stringent standards for such sanctions under amended Rule 37(e). The court, however, held that Rule 37(e) did not govern the motion, noting that the plaintiff did not allege that the defendant had a duty to retain the missing COO information because litigation was anticipated, but rather that the defendant had a regulatory and contractual obligation to preserve such data. Accordingly, the court concluded that it had the inherent authority to grant spoliation sanctions, regardless of whether Rule 37(e)’s requirements were met. The court held that such sanctions were appropriate because there was evidence that the defendant intentionally overwrote the COO information despite clear regulations requiring its retention, and the plaintiff was within the class sought to be protected by those regulations. Finally, the court held that the COO information was clearly relevant to the plaintiff’s claims because it would help establish the origin of the defendant’s products. As a result, the court approved an inference that the unavailable COO information would show that the relevant products came from nondesignated countries.

Rule 37(e) Does Not Govern Request for Sanctions Based on Party’s Intentional Deletion of Audio Recording

Hsueh v. N.Y. State Dep’t of Fin. Servs., 15 Civ. 3401 (PAC), 2017 WL 1194706 (S.D.N.Y. Mar. 31, 2017)

Judge Paul A. Crotty of the U.S. District Court for the Southern District of New York granted the defendant’s motion for spoliation sanctions where the plaintiff intentionally deleted a recording of a conversation with human resources regarding her sexual harassment allegations against the defendant employer. During the plaintiff’s deposition, she admitted that she had recorded one of her conversations with a woman in human resources who, she alleged, had failed to take her allegations seriously, but that she had deleted the recording because it was not very clear. The defendant sought spoliation sanctions and the plaintiff subsequently produced a portion of the recording, asserting that her husband had recovered it from her hard drive. The court nonetheless granted the defendant’s motion for sanctions. In deciding whether sanctions were warranted, the court first found that Rule 37(e) did not govern the motion because that rule pertains only to circumstances where “a party failed to take reasonable steps to preserve” electronically stored information (ESI), not a situation where a party admits to intentionally deleting a recording. The court explained that the amendments to Rule 37(e) were meant to address concerns regarding the growth of ESI and the excessive cost and burden of preserving

data to avoid spoliation sanctions, none of which were relevant to the instant matter. Instead, the court analyzed the motion under its inherent power, finding that sanctions were appropriate because the plaintiff had an obligation to preserve the materials, the recording was destroyed with a culpable state of mind and it was relevant to the plaintiff's claims. The court also rejected the plaintiff's argument that sanctions were unwarranted because the recording was restored, finding that the produced recording was likely incomplete because it cut off mid-sentence and did not last as long as the actual conversation. As a result, the court found that an adverse inference instruction was appropriate.

Discovery Costs/Scope/Format Decisions

Courts Should Apply 'But-For' Test in Awarding Costs to Punish Discovery Misconduct

Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017)

In this product liability action against a tire manufacturer, the U.S. Supreme Court reversed sanctions against the manufacturer and its counsel for failing to disclose heat-test results. The parties settled the case on the eve of trial, after several years of contentious discovery during which the manufacturer's responses to discovery requests for internal test results "were both slow in coming and unrevealing in content." Some months later, the plaintiff sought costs from the manufacturer after learning that it had disclosed test results in another litigation that indicated that the tire at issue got unusually hot at highway speeds — but failed to produce that same information in this case. As a sanction for this discovery misconduct, the district court required the manufacturer to pay \$2.7 million — the entire sum the plaintiffs had spent in legal fees and costs since the defendant submitted its first incomplete discovery response. The U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court, however, reversed and remanded in a decision by Justice Elena Kagan, holding that a district court may only award fees that an innocent party would not have incurred but for the litigation misconduct. The Court found that plaintiffs could not demonstrate that the manufacturer's failure to disclose the heat-test results "so permeated the suit as to make that misconduct a but-for cause of every subsequent legal expense." Thus, the Court remanded and directed the lower court to apply to the appropriate test for sanctions.

Nonparty Could Not Establish That Costs Associated With Document Subpoena Were Significant to Warrant Cost Shifting in Light of Its Revenue

Balfour Beatty Infrastructure, Inc. v. PB & A, Inc., No. 16-cv-01152-WHO, 2017 WL 960776 (N.D. Cal. Mar. 13, 2017)

Judge William H. Orrick III of the U.S. District Court for the Northern District of California denied a nonparty's motion for costs in an action stemming from the defendant's alleged failure to properly design an access trestle for a transit center. Specifically, the nonparty sought \$25,309.76 incurred in responding to the defendant's document subpoena, which requested 12 categories of documents related to the defendant's work on the transit center during a particular time period. However, the court found that the amount was not sufficiently significant to warrant cost shifting pursuant to Rule 45. According to the court, the nonparty — a publicly traded company on the New York Stock Exchange with a revenue over \$17.4 billion in 2016 — had not established that it was unable to bear the costs. Additionally, the court noted that it was unclear whether all of the production costs resulted from compliance with the subpoena, as "the vast majority" of the produced documents were not limited to the applicable time frame or subject of the litigation. Finally, the court noted that although the nonparty did not have a financial interest in the outcome of the case, it was "not in the typical position of a completely uninterested nonparty," which would weigh in favor of cost shifting, because it was purportedly involved in the underlying acts that gave rise to the litigation.

When Cost Shifting Is Appropriate, Only Costs Associated With Restoration and Searching of ESI Should Be Shifted

Estate of Shaw v. Marcus, Nos. 14 Civ. 3849 (NSR) (JCM), 14 Civ. 5653 (NSR) (JCM), 2017 WL 825317 (S.D.N.Y. Mar. 1, 2017)

In this action brought by an estate against former counsel, Magistrate Judge Judith C. McCarthy of the U.S. District Court for the Southern District of New York granted the defendants' motion to shift some of the costs related to the forensic review of the plaintiff's computer onto the plaintiff. The court found that most of the factors delineated in *Zubulake* pursuant to Rule 45 weighed in favor of cost shifting, including the relevancy of the information contained on the computer to both parties' claims and the fact that there was no means to access the information other than by forensic examination. However, the court noted that as a general rule, when cost shifting is appropriate, only the costs of restoration and searching of electronically stored information should be shifted, not "any expenses incurred in the course of review." Thus, the court held that the plaintiff should pay for 70 percent of the forensic examination costs and the defendants 30 percent.

Costs of Searching Requested ESI Stored as Pictorial Images Not Excessive

Hawa v. Coatesville Area Sch. Dist., No. 15-4828, 2017 WL 1021026 (E.D. Pa. Mar. 16, 2017)

In this discrimination and retaliation action arising out of the plaintiffs' employment with the defendant school district, the defendant sought to be relieved of all or, alternatively, 80 percent of certain electronic discovery costs. The discovery at issue involved searching the hard drives of computers used by the plaintiffs during particular time periods of their employment, as well as a database that contained backup emails. The requested materials were stored as pictorial images on the hard drives and database and therefore were not searchable by word searches, making it costly to search for relevant terms. Magistrate Judge Marilyn Heffley of the U.S. District Court for the Eastern District of Pennsylvania denied the defendant's motion for costs. According to the court, the plaintiffs had "pared down" their requests so as to require searches of only those sources that were likely to lead to the discovery of relevant information. In addition, the court noted that the defendant had "much greater resources" to pay for the discovery than the plaintiffs. Finally, the court found that the projected cost of the production, which was in the range of \$14,000 to \$25,000 plus hosting fees, was not excessive in comparison to the amount in controversy in the case, which included lost wages and benefits, future earnings, emotional distress, punitive damages, and statutory attorneys' fees and costs.

Production of Past Complaints Against Defendant Stored on Database Not Unduly Burdensome Where Only Readily Accessible Materials Requested

Bratcher v. Navient Sols., Inc., No. 3:16-cv-519-J-20JBT, 2017 WL 895739 (M.D. Fla. Mar. 2, 2017)

Magistrate Judge Joel B. Toomey of the U.S. District Court for the Middle District of Florida granted the plaintiff's motion to compel certain electronically stored information (ESI) in an action alleging violations of the Telephone Consumer Protection Act, among other claims. The plaintiff alleged that the defendant used an automatic telephone dialing system to call her cellphone more than 100 times between 2015 and the time the lawsuit was filed, without her permission and after she repeatedly requested that the defendant stop. The plaintiff sought production of any formal or informal complaints regarding the defendant's practices that were lodged during the past two years, "readily accessible" and stored on the defendant's database. The court agreed that the requested ESI was relevant to show the nature of the defendant's violation, as well as whether it was willful or

knowing. Additionally, the court noted that the defendant did not make a sufficient showing that the production would be unduly burdensome, especially given that the plaintiff only requested ESI that was "readily accessible" to the defendant.

Defendant Ordered to Use Plaintiff's Specified Search Terms in Searching ESI

Ball v. Manalto, Inc., No. C16-1523 RSM, 2017 WL 1788425 (W.D. Wash. May 5, 2017)

In an employment action involving claims for wrongful termination, Chief Judge Ricardo S. Martinez of the U.S. District Court for the Western District of Washington granted the plaintiff's motion to compel the defendant to answer certain (electronically stored information) ESI discovery requests by searching materials using specific search terms identified by the plaintiff. The defendant had initially refused to search its ESI with the plaintiff's proposed search terms and had produced relevant ESI identified using its own devised search protocol. The plaintiff argued that the production contained discrepancies and inadequacies and therefore its own identified search terms should be used. The court agreed and compelled the defendant to use the plaintiff's terms. According to the court, the defendant failed to present any evidence that it had produced all of the ESI responsive to the discovery requests or to otherwise explain why the plaintiff's requested search terms were inappropriate.

Document Production Was Not 'Data Dump' in Violation of Rule 34 When Documents Were Produced in PDF Format and in Data Order

TetraVue, Inc. v. St. Paul Fire & Marine Ins. Co., No. 14cv2021-W (BLM), 2017 WL 1008788 (S.D. Cal. Mar. 15, 2017)

In this insurance action alleging breach of duty to defend, Magistrate Judge Barbara L. Major of the U.S. District Court for the Southern District of California rejected the defendant-insurer's argument that the plaintiffs' supplemental production constituted a data dump of electronically stored information (ESI) in violation of Rule 34. In support of its motion, the defendant noted — by way of example — that one subcategory of the produced documents contained more than 10,600 documents, comprising almost 82,000 pages, and the plaintiffs did not provide any "meaningful index" to locate responsive documents in that category. The defendant also argued that the plaintiff had failed to establish that the documents were produced in the format maintained in the ordinary course of business. The court disagreed and found that the production was adequate pursuant to Rule 34. The court explained that the plaintiff produced the ESI in PDF format — which was "one

The E-Discovery Digest

of the recognized, well-established procedures in modern day litigation practice” — in date order. According to the court, the defendant could organize, index and search the data with little effort, and had already started doing just that.

Employer in Wage and Hour Action Ordered to Produce ESI Relevant to Ascertaining Hours Employees Worked Remotely

Williams v. Angie’s List, Inc., No. 1:16-cv-00878-WTL-MJD, 2017 WL 1318419 (S.D. Ind. Apr. 10, 2017)

Magistrate Judge Mark J. Dinsmore of the U.S. District Court for the Southern District of Indiana granted the plaintiffs’ motion to compel certain electronic discovery related to their claims that the defendant-employer instructed the plaintiffs to underreport their overtime hours on their computerized time records. The defendants had already produced a variety of records regarding the plaintiffs’ hours, including TimeTracker records, badge-swipe data and work calendars. According to the plaintiffs, however, employees frequently worked from home and therefore at least some of their hours were not included in those previously produced records. The plaintiffs sought to compel “background data automatically recorded while they were working on Salesforce,” the sales platform used by the defendant, in order “to close the gaps.” The court agreed that these data were relevant and not unduly burdensome. According to the court, “[t]he fact that [the defendant] must pay for the extracting of this data is of no moment; quite frequently, retrieving and compiling electronic discovery costs substantial sums.” The court also denied the defendant’s request that the plaintiffs share the costs of this discovery, noting that the records were unavailable from other sources and the plaintiffs were not on a “fishing expedition.”

Party Required to Revise Discovery Responses to Comply With Rule 34’s 2015 Amendments

Fischer v. Forrest, Nos. 14 Civ. 1304 (PAE) (AJP), 14 Civ. 1307 (PAE) (AJP), 2017 WL 773694 (S.D.N.Y. Feb. 28, 2017)

In this copyright infringement action, Magistrate Judge Andrew J. Peck of the U.S. District Court for the Southern District of New York required the defendants to revise their responses to written discovery requests for electronically stored information (ESI) in order to comply with Rule 34’s 2015 amendments. The court found that the defendants violated amended Rule 34 in responding to the plaintiff’s requests for production in four ways. First, the defendants incorporated “General Objections” into each response. According to the court, general objections violate Rule 34’s requirement for specificity and should never be used “unless each such objection applies to each document request.”

Second, the defendants objected on the basis of nonrelevance to “the subject matter of the litigation.” The court disagreed, noting that “lawyers need to remove [this language] from their jargon” because the 2015 amendments limited discovery to material relevant to any party’s claim or defense. Third, the court found that the objection that the requests were “overly broad and unduly burdensome” was “meaningless boilerplate” that “tells the Court nothing.” Finally, the responses failed to indicate when the ESI would be produced. In its holding, the court noted that “[i]t [was] time for all counsel to learn the now-current Rules and update their ‘form’ files.”

Party Required to Produce ESI in Native Format After Failing to Timely Object

Morgan Hill Concerned Parents Ass’n v. Cal. Dep’t of Educ., No. 2:11-cv-3471 KJM AC, 2017 WL 445722 (E.D. Cal. Feb. 1, 2017)

Judge Allison Claire of the U.S. District Court for the Eastern District of California granted a motion to compel the production of materials in native format in a case involving allegations that the defendant violated the Individuals With Disabilities Education Improvement Act through its alleged systematic failure to provide free public education to children with disabilities. The plaintiffs specifically requested that the defendant produce certain emails in native format with all metadata attached. The defendant did not object to the request but nevertheless produced the materials in load format. The plaintiff thus sought to compel the defendant to reproduce the materials in native format with all metadata attached, which the district court granted. Although the defendant argued, *inter alia*, that reproducing the documents would be unduly burdensome, the court noted that it was “a problem of [the defendant]’s own making” by failing to timely object to the format request. Additionally, in response to the defendant’s argument that the metadata was irrelevant, the court noted that the metadata could not be redacted or withheld because a native file production necessarily includes all metadata fields in every document.

Other Decisions of Interest

Expedited Discovery Denied Where No Good Cause for Abbreviated Schedule

Rockwell Med., Inc. v. Richmond Bros., No. 17-10757, 2017 U.S. Dist. LEXIS 57313 (E.D. Mich. Apr. 14, 2017)

In this securities action, Judge Robert H. Cleland of the U.S. District Court for the Eastern District of Michigan overruled the plaintiff’s objections to the magistrate judge’s denial of its motion for leave to conduct expedited discovery prior to a preliminary

injunction hearing. Specifically, the plaintiff had requested an order directing the defendant to respond to five discovery requests related to the production of electronically stored information and undertake four depositions within 15 days of service of the requests, arguing that the discovery was relevant to whether a preliminary injunction was warranted. The magistrate judge had held that the plaintiff failed to show good cause for its broad requests in advance of the normal Rule 26(f) conference or preliminary injunction hearing, explaining that the requests were not limited to relevant documents and that a proposed 15-day deadline for depositions was “vexatious and harassing.” The district court agreed, noting that benefit of a discovery request must be proportionate to the burden of compliance. According to the court, the plaintiff was not entitled to disregard the proportionality requirement of Rule 26 merely because a motion for a preliminary injunction was pending.

Party Compelled to Write Computer Program to Identify Relevant Data

Meredith v. United Collection Bureau, Inc., No. 1:16 CV 1102, 2017 U.S. Dist. LEXIS 56783 (N.D. Ohio Apr. 13, 2017)

Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio granted a motion to compel filed by the plaintiff in a proposed class action. The plaintiff alleged that the defendant, a debt collection service, left multiple prerecorded “wrong number” voicemail messages for her without her consent in violation of the Telephone Consumer Protection Act. After a corporate representative of the defendant testified at his deposition that it would be possible to ascertain the recipients of these “wrong number” automated calls if the defendant were to write a computer program for that purpose, the plaintiff sought the production of this data. The defendant objected, arguing that Rule 34 only requires the production of electronically stored information as it is “kept in the usual course of business.” The district court disagreed and granted the plaintiff’s motion to compel production of the data. According to the court, it has been “long recognized that defendants may be required under the Federal Rules to create computer programs to search an existing database for relevant information.” Thus, the court ordered the defendant either to write the program that would produce the data for wrong-number calls or to produce the relevant portions of its database so that the plaintiff’s expert could write the program at the defendant’s expense.

Production of Random Sampling of Responsive Documents Is Appropriate Upon Showing of Undue Burden and Cost

Duffy v. Lawrence Mem’l Hosp., No. 2:14-cv-2256-SAC-TJJ, 2017 U.S. Dist. LEXIS 49583 (D. Kan. Mar. 31, 2017)

Magistrate Judge Teresa J. James of the U.S. District Court for the District of Kansas granted a motion for a protective order filed by the defendant hospital in response to the plaintiff’s request for a large number of patient records. The hospital noted that the plaintiff’s request sought information related to more than 15,000 patient records, which would take approximately 8,982 hours and cost \$230,000. The hospital asked that it instead be permitted to produce a random sampling of only 252 patient records. The court granted the defendant’s request to only produce a random sample of the records, holding that such sampling was “justified by the time and expense” associated with the full production. Additionally, the court noted the high likelihood of human error if the defendant were to manually search and review all of the records requested in the relatively short time allowed for discovery.

Egregious Conduct Warrants Substantial Monetary Sanctions

Shawe v. Elting, 157 A.3d 142 (Del. Feb. 13, 2017)

Justice Collins J. Seitz, Jr. of the Supreme Court of Delaware, writing for an *en banc* panel, affirmed the imposition of monetary sanctions totaling over \$7 million against a plaintiff who engaged in a variety of misconduct, including, *inter alia*, stealing the defendant’s computer for purposes of surreptitiously imaging it, monitoring the defendant’s personal emails with counsel and improperly destroying a cellphone and numerous documents subject to a litigation hold. The lower court had ordered the plaintiff to pay all fees the defendant had incurred in bringing the motion for sanctions, as well as one-third of all costs incurred in litigating the merits of the underlying case. The plaintiff appealed, arguing that the lower court erred in finding that the plaintiff acted in bad faith when he destroyed relevant evidence, imposed an improper criminal punishment for perjury without due process protections and gave an excessive and unjustified monetary award. The Supreme Court affirmed the award on appeal, noting that the plaintiff had deleted more than 40,000 files from his laptop despite two litigation hold notices and an expedited discovery order that permitted the defendant to conduct forensic discovery of the laptop. Additionally, the court found that the sanction was appropriate in light of the plaintiff’s other egregious conduct, including breaking into the defendant’s counsel’s office to steal her computer and remotely accessing the

defendant's computer at least 44 times on 29 different occasions. According to the court, "[e]ach form of [the plaintiff]'s misconduct prejudiced [the defendant]'s ability to fully develop the record for, and needlessly complicated the litigation of, the Merits Trial," justifying the award of costs.

Privilege Protections Waived by Placing Information on Publicly Accessible File-Sharing Site, but Opposing Counsel Should Seek Permission From Court Before Viewing It

Harleysville Ins. Co. v. Holding Funeral Home, Inc.,
No. 1:15cv00057, 2017 U.S. Dist. LEXIS 18714 (W.D. Va. Feb. 9, 2017)

Magistrate Judge Pamela Meade Sargent of the U.S. District Court for the Western District of Virginia denied the plaintiff's motion to disqualify the defendant's counsel on the grounds that he had improperly accessed a claims file containing privileged communications and attorney work product that the plaintiff had posted on Box.com, a file-sharing site, without password protec-

tion — but ordered monetary sanctions in the form of costs. Defense counsel obtained a link to the share site from a third party to the litigation, who had previously been given access to the site by the plaintiff before the privileged information had been uploaded to it. The defendant argued that its counsel had not acted inappropriately in viewing the materials because the plaintiff had waived any applicable privilege by placing the information on the site. The court agreed, holding that the plaintiff did not take reasonable steps to prevent disclosure of the privileged information or to rectify the situation once it became clear that privileged material was accessible through a public link. Nevertheless, the court admonished the defendant for downloading the file without first seeking a court determination about whether it was privileged. Although the court held that disqualification was too harsh a sanction for defense counsel's ethical lapse, the court required the defendant to bear the costs incurred by the plaintiff in moving for sanctions.

The E-Discovery Digest

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