

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

Disclosure of Privileged Information to DOJ Under Nondisclosure Agreement Does Not Waive Attorney-Client Privilege

In re financialright GmbH, No. 17-MC-105 (DAB), 2017 WL 2879696 (S.D.N.Y. June 22, 2017)

Judge Deborah A. Batts of the U.S. District Court for the Southern District of New York denied a request filed by four German nationals seeking leave to obtain a document related to a law firm's investigation of the Volkswagen emissions irregularity issues. Volkswagen had previously retained the law firm Jones Day to conduct an investigation after the company received notice of investigations regarding emissions issues by the U.S. Environmental Protection Agency and the Department of Justice (DOJ). The German nationals sought to obtain and use the investigation materials and law firm's eventual report in lawsuits they planned to file against Volkswagen AG in Germany. The German nationals argued that even if the attorney-client privilege and/or work-product doctrine applied to the investigation materials, Volkswagen and/or Jones Day waived those privileges by disclosing them to the DOJ. The court disagreed, noting that Jones Day had entered into a nonwaiver agreement with the DOJ regarding privileged documents. The court held that disclosures made pursuant to nonwaiver agreements do not waive the protections of the work-product doctrine or attorney-client privilege. According to the court, there is a "strong public interest in encouraging disclosure and cooperation with law enforcement agencies," and "violating a cooperating party's confidentiality expectations jeopardizes this public interest."

Work-Product Protection Not Waived by Disclosure to Litigation Financing Firm or Inadvertent Production to DOJ

Viamedia, Inc. v. Comcast Corp., No. 16-CV-5486, 2017 WL 2834535 (N.D. Ill. June 30, 2017)

Judge Amy J. St. Eve of the U.S. District Court for the Northern District of Illinois denied the defendants' motion to compel the production of: (1) documents that the plaintiff disclosed to prospective litigation financing firms; and (2) documents that the

plaintiff inadvertently produced to the Department of Justice (DOJ) in connection with an investigation. The defendants did not dispute that the documents were privileged and/or protected by the work-product doctrine but asserted that the plaintiff waived the privilege through its disclosure to these third parties. The court disagreed. First, the court found that the plaintiff's disclosure of documents protected as work product to third-party litigation financing firms did not constitute waiver because disclosure did not make it substantially more likely that the protected information would fall into the hands of the plaintiff's adversaries. Second, the court found that the inadvertent disclosure of privileged documents to the DOJ did not waive privilege because the disclosure was unintentional, the plaintiff took reasonable steps to prevent disclosure of the documents and the plaintiff took prompt steps to rectify its inadvertent production.

Plaintiff Not Permitted to Depose Defendant's Litigation Support Specialist or In-House Counsel

Broyles v. Convergent Outsourcing, Inc., No. C16-775-RAJ, 2017 WL 2256773 (W.D. Wash. May 23, 2017)

Judge Richard A. Jones of the U.S. District Court for the Western District of Washington granted the defendant's request for a motion to quash deposition notices directed at the defendant's in-house counsel and a litigation support specialist. The plaintiff argued that the defendant, a collections agency, violated the Fair Credit Reporting Act by accessing her credit report despite knowing that her debts had been discharged in bankruptcy. The plaintiff argued that deposing the defendant's in-house counsel was necessary because the plaintiff anticipated that the defendant would raise an advice of counsel defense and because the lawyer's understanding of the defendant's debt collection policies was relevant to the issue of class certification.

Applying the test set forth in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), the court found that the plaintiff fell short of making the required showing of need for attorney testimony. As the court explained, the defendant had neither pleaded advice of counsel as an affirmative defense nor otherwise put the defense at issue. Further, the plaintiff failed to show that deposing the in-house counsel was "crucial" to her case or that no other avenues existed to obtain the information sought from in-house counsel. In addition, the court noted that the in-house counsel's knowledge on the topic squarely implicated attorney-client privilege. The court also found that the *Shelton* test applied to the litigation support specialist, and that the plaintiff failed to satisfy it because there was no evidence that the litigation support specialist had information that was crucial to the case and unattainable from other sources.

Decisions Ordering Disclosure

Public Disclosure of Findings of Investigation Conducted by Law Firm Waived Privilege Protection of Certain Communications, Work-Product Protection Over Names of Interviewees and Data

Doe v. Baylor University, No. 616-CV-173-RP, 2017 WL 3470943 (W.D. Tex. Aug 11, 2017)

Judge Robert Pitman of the U.S. District Court for the Western District of Texas held that Baylor University waived privilege protection with respect to its communications with a law firm the university hired to conduct an independent investigation of Baylor's institutional responses to allegations of sexual assault and other Title IX issues. According to the court, Baylor's communications with the law firm regarding the investigation were privileged because Baylor was clearly seeking legal advice regarding the extent of its legal obligations and liabilities when it engaged the law firm to conduct the internal investigation. The court held, however, that Baylor waived privilege protection by repeatedly releasing findings and conclusions made by the law firm. Specifically, Baylor released the law firm's findings of fact and recommendations to the public and also made certain disclosures regarding the results of the investigation in a related court case.

The court found that these disclosures "were intentional and together provide substantial detail about both what Baylor and its employees told [the law firm] and what advice Baylor received in return." By contrast, the court held that some of the materials created by the law firm were also subject to work-product protection, to which broad "subject matter" waiver does not apply unless the attorney's work product was directly placed at issue in the litigation by the party asserting the privilege. As a result, in order to successfully re-urge waiver or necessity of work product to the plaintiffs' case in the future, the plaintiffs would have to make specific showings that Baylor used the investigation as part of its defense in the future, that the precise materials they sought had been previously disclosed, or that the plaintiffs had a need for them that was so substantial it could overcome work-product protection. The court also limited Baylor's application of the work-product doctrine, noting that Baylor made a limited waiver of work-product protection for names of individuals whom the law firm interviewed or the documents and data that Baylor produced to the law firm; it did so by releasing specific names of individuals that were interviewed and revealing specific sources of data reviewed by the law firm in its public disclosure of the investigation. Finally, the plaintiffs argued that they could not properly challenge Baylor's claim of work-product privilege

without a more detailed privilege log, but the court agreed with Baylor that much of its work product could not be itemized in a privilege log because doing so could reveal core attorney work product, such as litigation strategy. The court did, however, order Baylor to produce an itemized privilege log for attorney work product that was primarily fact-investigation oriented, to include interview recordings, notes and summaries; notes and summaries based on the review of documentary evidence; and any other documents that summarized or synthesized evidence, such as chronologies or timelines.

Attorney-Client Privilege Waived When General Counsel Forwarded Outside Counsel's Email to Defendant's PR Consultant

BouSamra v. Excelsa Health, 167 A.3d 728 (Pa. Super. Ct. 2017)

Judge Mary Jane Bowes of the Superior Court of Pennsylvania held that the defendant hospital waived attorney-client privilege protection with respect to an email sent from the hospital's outside counsel to the hospital's in-house counsel because the email was forwarded to a public relations firm. The plaintiffs, cardiologists who had staff privileges to perform procedures at the hospital, brought defamation actions based on the allegation that the hospital engaged in pretextual peer reviews — which stated that the cardiologists had performed medically unnecessary stenting procedures — in order to discredit the cardiologists. The hospital had also hired an outside public relations consultant to aid in publicizing the overstenting issues. In the course of discovery, the plaintiffs learned of a privileged email from the hospital's outside counsel that had been sent to an employee of the public relations firm and argued that it should be produced. The court agreed. According to the court, while the attorney-client privilege may apply to communications between an attorney and the attorney's agent, the public relations firm at issue was hired by the hospital, not the hospital's attorneys.

Further, the court held that the public relations firm did not qualify as the functional equivalent of an employee of the hospital because it was only hired to work on discrete projects and the hospital did not maintain control over the projects for which the firm was hired. The court also noted that the attorney's communications with the public relations firm were not necessary to the attorney's provision of legal advice and instead related only to the implementation of the legal advice. For all of these reasons, the court held that privilege was waived by virtue of disclosure to the public relations firm. Finally, the court held that work-product protection did not apply to the email because the attorney did not send it to the public relations firm for the purpose of preparing for litigation.

Company's Advice-of-Counsel Defense Waived Attorney-Client Privilege Such That Attorney Could Be Deposed

Reyes v. Collins & 74th, Inc., 2017 WL 2833450 (S.D. Fla. June 30, 2017)

Magistrate Judge Jonathan Goodman of the U.S. District Court for the Southern District of Florida held that the defendants waived the attorney-client privilege by asserting an advice-of-counsel defense to the plaintiff's Fair Labor Standards Act (FLSA) claim. The plaintiff filed an FLSA lawsuit against defendants in which he alleged that he was not paid sufficient overtime and used a three-year statute of limitations to calculate the amount he was allegedly underpaid. The defendants raised the affirmative defense that the plaintiff was limited to a two-year statute of limitations because the defendants did not "knowingly or willfully" disregard their obligations under the FLSA. In his deposition, one defendant stated that he relied in good faith on advice from counsel that he was complying with the overtime and minimum wage laws. The court held that the defendants waived the attorney-client privilege by going beyond mere denial of allegations and affirmatively asserting good faith based on the advice of counsel. As such, the plaintiff was entitled to take the defense counsel's deposition concerning the advice she provided to her clients and the information they gave to her that formed the basis for that advice. The court also held that the plaintiff had the right to redepose the defendants on the issues raised by the defendants' reliance on their attorney's employment-law advice.

Multiple Inadvertent Disclosures of Privileged Documents in Limited Production Waived Protection Despite Informal Clawback Agreement

Irth Solutions LLC v. Windstream Communications LLC, No. 2:16-CV-219, 2017 WL 3276021 (S.D. Ohio Aug. 2, 2017)

Magistrate Judge Kimberly A. Jolson of the U.S. District Court for the Southern District of Ohio denied the defendant's request to impose sanctions against the plaintiff and to compel the return of 43 privileged produced documents that the defendant claimed had been inadvertently disclosed. At the outset of the case, the parties had agreed to notify each other of any inadvertent production of privileged documents, that the party receiving such privileged documents would promptly destroy or return them, and that inadvertent disclosure would not operate as a waiver of privilege. In the defendant's first production, it inadvertently produced privileged documents containing advice and reference to in-house counsel. The defendant's counsel was in the process of preparing a privilege log 12 days later when she realized the mistake and contacted the plaintiff's counsel, requesting a claw-

back that same day. The plaintiff contested the defendant's ability to claw the document back. Six weeks later, the defendant once again produced the 43 privileged documents to the plaintiff. The defendant then moved to compel the return of all the inadvertently produced documents and requested sanctions. The court denied the motion, rejecting the defendant's argument that inadvertent disclosure never results in a waiver if a clawback agreement is in place. According to the court, to hold that a "clawback agreement always protects against waiver — regardless of its terms and irrespective of counsel's actions — is inconsistent with the underpinnings of Rule 502¹ and the attorney-client privilege."

The court then held that the defense counsel had not taken reasonable steps to protect against disclosure of privileged material. For one thing, the court found that the defendant's attorneys could not have undertaken any meaningful review of the inadvertently produced documents given that the materials were obviously privileged on their face. The court also noted the limited scope of the production, distinguishing it from a "massive document review[]" where inadvertent disclosure may be unavoidable, and focused on the fact that the same mistake was made again in the second production. Accordingly, the court held that the defendant had waived privilege with respect to the disclosed documents. The court, however, declined to find a subject matter waiver that extended to nondisclosed documents addressing the same issues as the documents that were produced. According to the court, such waiver only applies in very limited situations where a party "intentionally puts protected information into the litigation in a selective, misleading and unfair manner."

Spoliation Decisions

Decisions Declining to Impose Sanctions

Motion for Sanctions Denied Under Rule 37(e) Where Lost Evidence Available From Other Sources

Snider v. Danfoss, No. 15 CV 4748, 2017 WL 2973464 (N.D. Ill. July 12, 2017), report and recommendation adopted, 2017 WL 3268891 (N.D. Ill. Aug. 1, 2017)

Magistrate Judge Iain D. Johnston of the U.S. District Court for the Northern District of Illinois denied spoliation sanctions under Federal Rule of Civil Procedure 37(e) where the defendant employer in a retaliation suit deleted potentially relevant

¹ Under Fed. R. Evid. 502, inadvertent disclosure of privileged materials constitutes waiver unless: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

emails pursuant to company policy to destroy emails 90 days after termination. The plaintiff alleged that she was retaliated against after lodging a sexual harassment claim with one of her supervisors. At some time after the sexual harassment claim, but before the lawsuit was filed, both the plaintiff and her supervisor terminated their employment with the defendant and, in accordance with company policy, their emails were deleted after 90 days. The plaintiff filed a motion for spoliation sanctions alleging that both sets of deleted emails were relevant to her retaliation claim. Applying Rule 37(e), the court denied the plaintiff's motion because she could not show she was prejudiced by the loss of evidence. Specifically, the court noted that some of the emails at issue had been preserved from other sources, including emails to and from the human resources department discussing the plaintiff's sexual harassment claim. The defendant also preserved and produced emails between the plaintiff and her supervisor from other sources. Moreover, the court noted that the plaintiff had first-hand knowledge with respect to her own emails and could testify about them at a deposition or trial. In addition, the court noted that the plaintiff failed to show that the defendant destroyed emails with the intent to deprive the plaintiff of the discovery. Accordingly, the court denied the plaintiff's motion for sanctions. The court noted, however, that its denial of sanctions was not intended to condone the defendant's deletion of the emails at issue, which was both reckless and careless.

Adverse Inference Instruction Not Warranted Where Level of Intent Is Mere Negligence and There Is No Evidence of Prejudice

Eshelman v. Puma Biotechnology, Inc., No. 7:16-CV-18-D, 2017 WL 2483800 (E.D.N.C. June 7, 2017)

Magistrate Judge Robert B. Jones, Jr. of the U.S. District Court for the Eastern District of North Carolina denied the plaintiff's request for an adverse inference jury instruction based on the defendant's failure to preserve certain internet browser and search histories. The plaintiff owned stock in the defendant Puma Biotechnology, Inc. (Puma) and sought to be elected to the defendant's board of directors. The plaintiff alleged that Puma's CEO made a presentation to investors seeking to discredit his candidacy by making false and defamatory statements about the plaintiff's involvement in fraudulent acts related to a clinical trial. The plaintiff further alleged that Puma's CEO shared that presentation with all of the company's stockholders and published it on the company website. As a result, the plaintiff served written discovery requests seeking web browser and search histories for the individuals involved in drafting the presentation. In response, Puma informed the plaintiff that although it had issued a litigation hold notice, the notice did not cover web browser histories.

In addition, because Puma used Google Chrome as a browser, the web browser history was deleted every 90 days and was therefore unavailable. The plaintiff then filed a motion for spoliation sanctions. Under Federal Rule of Civil Procedure 37(e), the court found that the plaintiff failed to meet either the elements of prejudice or intent. First, the court found that the plaintiff simply made conclusory statements about how the browser and search histories would be important to his claims without explaining their relevance. In addition, the lost information was available through other forms of discovery because the plaintiff could seek information about internet searches by deposing the individuals who prepared the presentation. Finally, the court noted that at most, Puma's failure to include web browsers in its litigation hold was negligent, which did not support imposing sanctions under Rule 37(e).

Jury Instruction Warranted Despite Lack of Evidence to Demonstrate Intent or Prejudice

Montgomery v. Iron Rooster-Annapolis, No. CV RDB-16-3760, 2017 WL 1902699 (D. Md. May 9, 2017)

Magistrate Judge A. David Copperthite of the U.S. District Court for the District of Maryland held that an adverse inference instruction was proper where the plaintiff failed to preserve electronically stored information (ESI) on her cellphone. The plaintiff brought suit claiming unpaid overtime wages. The defendants' position was that the plaintiff was an exempt employee during the applicable time period because the plaintiff was acting as a manager. The defendants requested the text messages and other communications on the plaintiff's phone, which they alleged could have contained communications with other employees that would demonstrate her role as a manager. The plaintiff explained that she had problems with her phone, and when she turned it in to get an upgraded phone from Verizon, her text messages were not migrated to the new phone.

The court noted that the defendants neither presented evidence that the alleged texts actually existed nor inquired into any other employees' text messages in an effort to seek the lost communications from other sources. Moreover, the court found that the plaintiff did not act with the intent to deprive the defendants of the use of her phone but instead did not realize she needed to keep her phone. Nonetheless, the court ultimately held that the appropriate remedy was to give an instruction to the jury that the plaintiff failed to preserve ESI on her phone, and the jury could consider (1) whether the defendants could show that there were actual texts between the plaintiff and other employees during the relevant time period, and (2) whether there is evidence to suggest those communications would have been favorable to the defendants.

Decisions Imposing Sanctions

Adverse Inference Instruction Denied Due to Lack of Bad Faith, but Loss of Evidence Admissible at Trial

Mueller v. Swift, No. 15-cv-1974, 2017 U.S. Dist. LEXIS 112276 (D. Colo. Aug. 19, 2017)

Judge William J. Martinez of the U.S. District Court for the District of Colorado granted the defendants' motion for spoliation sanctions, in part, where the court found that although a sanction was warranted, the requested adverse inference instruction was too harsh. The defendant Taylor Swift alleged that the plaintiff, an on-air radio personality, inappropriately touched her during a photo opportunity, and the plaintiff was subsequently terminated. The plaintiff then brought suit against his former superiors and Taylor Swift for tortious interference with his employment contract. At the time of the plaintiff's termination, he recorded a conversation between him and his superiors, which Swift later requested in discovery. The plaintiff produced an edited recording and claimed that it was because the original recording was more than two hours long and contained unimportant information. In addition, the plaintiff claimed that the original full-length recording was unavailable because coffee spilled on his laptop, and the external hard drive where he kept a copy of the file was no longer working.

In analyzing whether a spoliation sanction was warranted, the court found that the plaintiff clearly had a duty to preserve the tape, which the plaintiff did not dispute. The court also concluded that the recording was clearly relevant to the plaintiff's tortious interference claims against his superiors because the statements made during the conversation would shed light on the cause of the plaintiff's termination. The court similarly concluded that the defendants were prejudiced by the loss of the recording, which could have allowed for better preparation of depositions and trial. With respect to culpability, the court declined to make a finding that the plaintiff acted in bad faith but recognized that the plaintiff's level of fault was higher than mere negligence. The court held that although the plaintiff did not intend to destroy the evidence, the plaintiff must be sanctioned for failing to prevent the loss of evidence despite knowing that the recording would be relevant to the litigation. Because the court did not find that the plaintiff acted in bad faith, the court rejected an adverse inference instruction but instead sanctioned the plaintiff by permitting the defendants to cross-examine the plaintiff about the record of spoliation of evidence in front of the jury.

Default Judgment Granted Where Defendants Intentionally Destroyed Thousands of Emails and Other Documents

OmniGen Research v. Wang, No. 6:16-CV-00268-MC, 2017 WL 2260071 (D. Or. May 23, 2017)

Judge Michael J. McShane of the U.S. District Court for the District of Oregon granted the plaintiffs' motion for a default judgment due to the defendants' intentional destruction of evidence. The plaintiffs brought suit against their former employee, Dr. Wang, for allegedly breaching his employment contract, stealing trade secrets and using them to create rival businesses. They also brought suit against his business associate and his businesses. The plaintiffs alleged that the defendants engaged in multiple acts of intentional spoliation, including making a desktop computer unavailable by donating it to Goodwill, deleting thousands of documents from Dr. Wang's personal computer and deleting relevant emails from his associate's iPad. They further alleged that these acts occurred after the defendants received preservation letters instructing them not to destroy any documents and after the court granted the plaintiffs' motion for a preliminary injunction and ordered the defendants to produce all electronic media in their possession. Moreover, Dr. Wang admitted during his deposition that he had deleted some files and documents from his computer before providing it to the plaintiffs, including the employee invention agreement he allegedly relied on to determine the restrictions on his use of work product. The defendants offered two arguments in response, both of which were rejected by the court. First, they claimed that the destroyed evidence was not relevant, but the court noted that the party responsible for destroying evidence cannot assert any presumption of irrelevance. Second, they suggested that their understanding of the English language may be the cause of the issues, but the court found that argument disingenuous since Dr. Wang earned his Ph.D. in the U.S. and worked for several years in the United States. As a result, the court granted the plaintiffs' motion for terminating spoliation sanctions and issued an order of default judgment.

Adverse Inference Instruction Warranted Based on Loss of Nonparty's Text Messages Under Defendants' Control

Ronnie Van Zant, Inc. v. Pyle, No. 17 CIV. 3360 (RWS), 2017 WL 3721777 (S.D.N.Y. Aug. 28, 2017)

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York held that the plaintiffs were entitled to an adverse inference instruction with respect to text messages that were not preserved and arguably under the defendants' control. The plaintiffs, a company producing a documentary about the band Lynyrd Skynyrd, brought suit against a former

member of the band, Artimus Pyle, and another company, Cleopatra Records, who were working together to produce an allegedly unauthorized documentary about the same band. The plaintiffs alleged that the defendants were violating a consent order that had been previously entered by Pyle and other surviving members of the band to restrict the use of particular names, images and likenesses associated with the band. Through the course of discovery, the plaintiffs requested text messages between Pyle and Jared Cohn, the writer/director Cleopatra Films hired. The plaintiffs filed a motion for spoliation sanctions after learning that Cohn had purchased a new phone after the lawsuit began and his text messages were not preserved.

In response to the plaintiffs' motion, Cleopatra Films argued that it could not be sanctioned for the destruction of text messages on Cohn's phone because he was technically a nonparty. However, the court found that while Cohn was a nonparty, his text messages were, practically speaking, under Cleopatra's control because Cohn was contracted by Cleopatra to work on the film, he worked closely with Cleopatra for at least a year and he had a financial interest in the outcome of the litigation. Moreover, the court pointed out that common sense indicated that given the pending litigation regarding Pyle's role in the film, the text messages between Cohn and Pyle clearly should have been preserved. Cleopatra also tried to argue that the plaintiffs could not show prejudice because the text messages were available from Pyle, but this argument similarly failed because the plaintiffs demonstrated that they had in fact repeatedly sought text messages from Pyle, to no avail. The court also rejected the suggestion that other produced documents rendered the messages cumulative because the text messages would uniquely point to the quality of interaction between Pyle and Cohn. Finally, the court found that Cohn's decision to purchase a new phone after the litigation began and not back up the text messages on his old phone was the kind of deliberate behavior that warranted sanctions. Therefore, the court granted the plaintiffs' request for an adverse inference instruction with respect to the missing text messages.

Discovery Costs/Scope/Format Decisions

Cost-Shifting Sanctions Were Appropriate Where Defendant Failed to Comply With Discovery Order

Bird v. Wells Fargo Bank, 1:16-cv-01130-DAD-EPG, 2017 WL 3085804 (E.D. Cal. July 20, 2017)

In this action, Magistrate Judge Erica P. Grosjean for the U.S. District Court for the Eastern District of California ordered sanctions against the defendant for its excessive delay in obeying an order compelling the production of its discovery. The court's

March 31, 2017, discovery order had required the defendant's production "on a rolling basis" and "to conclude no later than June 1, 2017." However, the defendant had failed to produce any electronically stored information (ESI) between the date of the discovery order and deadline. The defendant argued that it had told the plaintiff that it began the process of pulling documents immediately after the court's discovery order, but it took six to eight weeks "to pull ESI and ... to review and redact the emails." The court noted that not only had the defendant failed to seek or obtain a formal request for extension from the court, but its production of discovery in the case had also been generally "fraught with delays and obfuscation," which resulted in extending the discovery schedule "far beyond that initially contemplated." "[I]n light of the repeated issues with discovery," the court found that it could not "let the failure to abide by a clear court order go without any sanction." Accordingly, the court ordered the defendant to pay 50 percent "of the reasonable costs and attorney fees associated with the filing of the [plaintiff's] motion to compel and motion for sanctions."

ESI Cost Shifting Appropriate in Single-Plaintiff Employment Discrimination Action

Bailey v. Brookdale University Hospital Medical Center, No. CV 16-2195(ADS)(AKT), 2017 WL 2616957 (E.D.N.Y. June 16, 2017)

Magistrate Judge A. Kathleen Tomlinson of the U.S. District Court for the Eastern District of New York ordered the defendants in an employment discrimination action to bear 40 percent of production costs for the plaintiff's electronically stored information (ESI). The parties in this single-plaintiff employment suit initially agreed — through the meet-and-confer process — to the terms of production, including the production of ESI. After the court approved the terms of the production, the plaintiff submitted an affidavit of economic hardship, noting that producing discovery in the format agreed upon by the parties would cost the plaintiff, an individual, approximately \$2,000 to \$3,000. According to the plaintiff, although he earned \$90,000 per year, such an expense posed a "severe financial hardship" because he was the "only working member of his family" and had several financial obligations — including child support, day care and mortgage payments. In considering the plaintiff's argument, the court noted it was skeptical of amending the agreed-upon order and considered whether the plaintiff's complaint was a case of buyer's remorse about a protocol to which he had agreed. Upon reviewing the agreed-upon terms, however, the court found that the protocol "appears to have been drawn for use in corporate settings as opposed to the single plaintiff employment discrimination case at issue here." The court also noted that the plaintiff's counsel "did not engage in meaningful discussions with his client regarding the terms of the proposed agreement

and what costs might be incurred by producing the information in the format Defendants sought." Ultimately, the court found, the plaintiff's counsel agreed to an overly complex discovery plan that was burdensome to the client and the client's financial limitations. Accordingly, the court ordered partial cost shifting, with 40 percent of the production costs for the plaintiff's ESI borne by the defendants and 60 percent assessed to the plaintiff. In addition, the court found that the plaintiff's costs should be borne by the plaintiff's counsel instead of the plaintiff.

All E-Discovery Costs May Not Be Recoverable by a Prevailing Party

Vehicle Market Research, Inc. v. Mitchell International, Inc., No. 09-2518-JAR, 2017 WL 2734588 (D. Kan. June 26, 2017)

In this action seeking royalties under a software development contract, Judge Julie A. Robinson of the U.S. District Court for the District of Kansas granted the plaintiff's objection to the clerk's order awarding all e-discovery costs to the prevailing defendant. The plaintiff argued, *inter alia*, that "most of the costs associated with [the defendant's] e-discovery [were] not allowable copy costs" pursuant to 28 U.S.C. § 1920. The court noted that the U.S. Court of Appeals for the Tenth Circuit had not yet determined whether e-discovery costs were recoverable under the 2008 amended version of Section 1920, but that several circuit courts had followed the U.S. Court of Appeals for the Third Circuit's decision in *Race Tires America, Inc. v. Hoosier Tire Corp.*, 674 F.3d 158 (3d Cir. 2012), which only authorized the award of costs for "making copies" — *i.e.*, scanning hard-copy documents, converting native files to TIFF format and transferring VHS tapes to DVD. According to the court, the Tenth Circuit would likely "follow the lead of the other circuit courts that have considered this issue, which have refused to endorse an interpretation of the statute that all costs associated with the collection and production of ESI are recoverable." Thus, the court agreed that all processing costs should not be recoverable, contrary to the defendant's assertion, and granted the plaintiff's objection to the clerk's award of costs for the entire sum of e-discovery services.

Although Rule 24 Permits Parties to Specify Format for ESI Production, Privacy Concerns Should Be Considered

In re Cook Medical, Inc., IVC Filters Marketing, Sales Practices & Product Liability Litigation, No. 1:14-ML-2570-RLY-TAB, 2017 WL 4099209 (S.D. Ind. Sept. 15, 2017)

In this dispute arising from a product-liability action regarding an implanted medical device, Magistrate Judge Tim A. Baker of the U.S. District Court for the Southern District of Indiana denied the defendant's request to require the plaintiff to produce

responsive e-discovery regarding “various social media data” in native file format. The request included social media data regarding, among other things, the plaintiff’s travel to and from her vacation home in another state, her relocation to a new city and her hobbies. The plaintiff had previously provided the defendants with a “PDF of some of the requested information” and objected that “both the scope of the requests and the nature of the native file format” invaded her privacy. The court noted that although Rule 24 permitted parties to specify the format in which electronically stored information (ESI) was produced, the “2006 amendment [only] emphasize[d] the importance of providing ESI in the requested format to avoid data processing issues.” Here, the issue was whether the requested format was too intrusive, not whether it would be more easily processed.

Further, the court noted that native files “contain[ed] considerably more information [than PDF files],” such as metadata, which “gives the who, what, when, where, and how of the making of a post, including metadata from non-parties.” The court did not order the plaintiff to produce any metadata immediately, finding that the defendants had not made a sufficient showing of need for native file format for social media posts, which the plaintiff had already produced in PDF format. However, the court explained that the defendants could make requests for specific native file posts. To be entitled to native files, the defendants needed to identify the specific posts for which metadata was requested and make a demonstrated showing of the posts’ relevance (“For example: ‘Post by Plaintiff on DD/MM/YYYY at HH:MM beginning, ‘Today, I traveled ...’ Cook Defendants seek this data because Plaintiff’s expert, Ms. Levy, expressly relies on the metadata associated with this post on page XX of her report.”).

‘Egregious’ E-Discovery Violations Warrant Sanctions of Attorneys’ Fees Pursuant to Rule 37

Young v. Act Fast Delivery of West Virginia, Inc., No. 5:16-CV-09788, 2017 WL 3444797 (S.D.W. Va. Aug. 10, 2017)

Magistrate Judge Omar J. Aboulhosn of the U.S. District Court for the Southern District of West Virginia granted the plaintiff’s petition for Rule 37 sanctions for discovery violations in this wage-and-hour action. The plaintiff had previously moved to compel the production of certain e-discovery following the defendant’s “outright failure” to respond to the plaintiff’s discovery requests and inability to ensure that its eventual production — totaling more than 14,000 pages — was responsive to the plaintiff’s requests and not deficient. Further, the court noted that although the defendant eventually produced discovery following the plaintiff’s motion to compel, the defendant had “patently disregarded” the court’s order to produce in “native format,

un-redacted, as generated in the normal course of business,” and wholly failed to advise that it pulled certain responsive documents — which were attachments to other responsive documents — from production. Furthermore, the defendant “represented to this Court that certain ESI documents were pulled that were non responsive,” but the plaintiff “was forced to expend considerable time to ascertain that [the defendant] made a false statement in open court to that end.” Accordingly, the court granted the plaintiff’s request for attorneys’ fees. In the court’s words, the defendant’s conduct “was egregious” and “such conduct cannot, and must not, be overlooked or excused by the Court” because “[i]f all litigants conducted themselves in the same manner ... litigation would become exponentially more expensive.”

Taxation of Costs to Convert Document for Production but Not Bates-Stamping Are Recoverable Pursuant to 28 U.S.C. § 1920

Imperium IP Holdings (Cayman), Ltd. v. Samsung Electronics Co., No. 4:14-CV-371, 2017 WL 4038886 (E.D. Tex. Sept. 13, 2017)

In this patent infringement action, Judge Amos L. Mazzant of the U.S. District Court for the Eastern District of Texas granted the prevailing plaintiff’s motion for taxation of costs to convert documents for production to TIFF format but denied taxation of costs to bates-stamp the documents. The court first noted that its e-discovery order requiring the produced documents to be in TIFF format and bates-stamped did not alone entitle the plaintiff to these costs. Rather, the court had to determine whether converting documents to TIFF format and bates-stamping constituted “making copies” pursuant to 28 U.S.C. § 1920. Citing other cases from the Eastern District of Texas, the court found that file conversion was a form of copying and thus any costs related to converting documents to TIFF format were recoverable “because the documents were necessarily obtained for use in the case.” However, the court found that bates-stamping was not recoverable because “stamping documents with unique numbering cannot be considered ‘making copies,’” regardless of the e-discovery order.

‘Aggressive’ but ‘Not Unreasonable’ Timetable to Produce ESI May Be Warranted

Rabin v. Pricewaterhousecoopers LLP, No. 16-cv-02276-JST, 2017 U.S. Dist. LEXIS 125404 (N.D. Cal. Aug. 08, 2017)

In this employment discrimination action alleging that the defendant maintained a policy of hiring and giving preferences to younger job applicants and employees, Judge Jon S. Tigar of the U.S. District Court for the Northern District of California

ordered the production of the defendant's electronically stored information (ESI) discovery to begin on a rolling basis within the month and completed within two months using technology-assisted review (TAR). Under the TAR process, software that applied linguistic and statistical modeling was used to both review the set of documents culled in by the search terms and identify responsive documents. The TAR model was iteratively refined and checked for accuracy using input from expert reviewers, and the plaintiffs wanted ESI discovery to begin on a rolling basis at the same time that the refining and checking process was occurring. The defendant argued that "the various 'in-depth steps'" required to implement the TAR process made the plaintiffs' time frame "unreasonable." The defendant instead sought to begin the production four months later. The court noted that while the process was "complicated," it was "not convinced" that such a delay was warranted. According to the court, there was no "persuasive evidence that the development of the TAR models [would] take months, rather than weeks." Although the court "realize[d] that the TAR process requires attorney review of a few thousand documents," "with appropriate resources devoted to this matter, there [was] no reason why that task [could not] be completed within the next few weeks." Accordingly, while the court found the plaintiffs' proposed discovery timetable to be "aggressive," it was "not unreasonable."

Additional Discovery Not Warranted Where Movant Offers Only 'Speculation' That Additional Responsive Documents Were Not Produced

Mirmina v. Genpact LLC, No. 3:16CV00614(AWT), 2017 WL 3189027 (D. Conn. July 27, 2017)

Magistrate Judge Sarah A.L. Merriam of the U.S. District Court for the District of Connecticut denied the plaintiff's motion to compel additional electronically stored information (ESI) searches. The plaintiff asserted that the defendant had not produced all documents responsive to the initial discovery protocols, instead relying on an employee familiar with the underlying claims to search her own emails for documents responsive to the request. The defendant responded that the search was supervised by counsel and filed an affidavit from its in-house counsel detailing the steps to preserve ESI. In-house counsel: (1) issued a timely and detailed litigation hold to potential custodians of ESI, directing the preservation of any records and documents that might pertain to the plaintiff's claims; (2) gave instructions to the ESI custodians regarding searches and specific search parameters; (3) explained the importance of a thorough search to the ESI custodians; and (4) provided guidance when questions arose during the search. The results of the searches were forwarded to outside counsel, who processed the documents. Based on these

representations, the court was satisfied by the steps taken to comply with the discovery requests and concluded that the plaintiff's assertion that not all relevant documents had been produced was based on "nothing but speculation."

Request for Text Messages and Emails Must Be Relevant to Issues Presented and Not Overly Broad

Tingle v. Hebert, 2017 U.S. Dist. LEXIS 88936 (M.D. La. June 8, 2017)

Magistrate Judge Erin Wilder-Doomes of the U.S. District Court for the Middle District of Louisiana granted in part the defendant's motion to compel production of text messages and emails from the plaintiff, who alleged Section 1981 and 1983 retaliation claims related to his former employer, the former commissioner of the Louisiana Office of Alcohol and Tobacco Control (ATC). The defendant moved to compel the plaintiff to produce emails and text messages from the plaintiff's personal cellphone and email accounts as well as information the plaintiff deleted from his work cellphone prior to returning it to ATC. In a discovery conference, the plaintiff asserted that because he did not use his personal cellphone or personal email addresses for ATC business, the contents of any text messages or emails sent or received from those email accounts or that device were irrelevant and not discoverable. The defendant responded that the plaintiff's employment was terminated for nonretaliatory reasons, including the fact that the plaintiff sent a racially inflammatory text message to another ATC employee. Thus, the plaintiff's text messages and how the ATC came to acquire those messages were a central issue in this case. The defendant also asserted that the communications were relevant because he "believes Plaintiff has been and continues to communicate with current and former employees of the ATC, coaching them, and providing misinformation about Hebert and the ATC in an effort to stir employees up against Hebert and to bring litigation against the ATC."

The court found that the defendant's request for "all text messages" and "all electronic mail (e-mail) messages" exchanged between the plaintiff and any current and former ATC employee was overly broad and not proportional to the needs of the case. The court limited the request to those "that reference or discuss [defendant] or allegations of race discrimination at ATC." The court denied in full the request for deleted information from the ATC-issued phone because the plaintiff testified that the deleted information was not relevant, and he did not delete any communications between himself and ATC employees. The court found that if any such communications were found, they must be produced, but it refused to allow a "fishing expedition for racially inflammatory emails or text messages that Hebert believes may have been deleted from Plaintiff's ATC-issued cell phone."

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Texas Supreme Court Offers Guidance on Type of Production Required in E-Discovery

In re State Farm Lloyds, 520 S.W.3d 595 (Tex. 2017)

Justice Eva Guzman of the Texas Supreme Court delivered an opinion from the court denying a writ of *mandamus* by State Farm Lloyds, challenging an order to produce electronically stored information (ESI) in native format. The underlying actions involved several residential homeowner plaintiffs alleging underpayment of hail-damage claims against the same insurer, State Farm Lloyds, in separate proceedings. The Texas Supreme Court consolidated the *mandamus* petitions, challenging the trial court orders adopting a proposed protocol for electronic discovery. In the trial court, the plaintiffs sought ESI in native format. The defendant argued that producing the data in “static form” was more convenient and accessible because it already converted the data in its routine business practice. However, that conversion process strips metadata. The plaintiffs argued that the static data format would have less utility, would impede their ability to gain additional information from metadata and would be burdensome because it is significantly more expensive to store.

The trial court sided with the plaintiffs, ordering production in native format, and the defendant filed the writ of *mandamus*. The court construed Rule 192.4 of the Texas Rules of Procedure, which provides that the court must consider whether differences

in utility and usability of the form requested are significant enough — in the context of the particular case — to override any enhanced burden, cost or convenience. If the burden or cost is unreasonable compared to the countervailing factors, the trial court may order production in (1) the form the responding party proffers, (2) another form that is proportionally appropriate, or (3) the form requested if (i) there is a particularized need for otherwise unreasonable production efforts and (ii) the court orders the requesting party to “pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”

The court considered the following factors: (1) the likely benefit of the requested discovery; (2) the needs of the case; (3) the amount in controversy; (4) the parties’ resources; (5) the importance of issues at stake in the litigation; (6) the importance of the proposed discovery in resolving the litigation; and (7) any other factor bearing on proportionality. The court found these principles align with the electronic discovery practice in Rules 34 and 26 of the Federal Rules of Civil Procedure. The court ultimately articulated the guiding principles governing discretion over electronic discovery and “emphasiz[ed] that proportionality is the polestar.” However, it found that *mandamus* relief on the merits was not appropriate because both parties previously lacked the court’s views on the matter, and it denied the petition without prejudice for seeking reconsideration of the trial court’s determination consistent with the principles articulated in the opinion.

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