

# 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

## 5 / Spoliation Decisions

Decisions Imposing Sanctions

Decisions Declining Sanctions

## 8 / Discovery Cost/Scope Decisions

Bill of Costs

Decisions About Scope of Discovery

Other

## Attorney-Client Privilege/Work-Product Decisions

### Decisions Protecting Against Disclosure

#### Testimony on Same Subject Matter as Privileged Communication Does Not Result in Waiver Absent Evidence That Testimony Was Based on Privileged Information

*Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 885 F.3d 271 (4th Cir. 2018)

In an opinion authored by Judge Albert Diaz, a panel of the U.S. Court of Appeals for the Fourth Circuit held that the defendant in a contract action did not waive attorney-client privilege with respect to certain documents by providing testimony on the same general subject matter because the testimony itself did not reveal privileged communications. The plaintiff in the case alleged that the defendant wrongfully terminated a distribution contract with the plaintiff on the ground that the plaintiff distributed content over the public internet. The plaintiff sought production of certain documents that the plaintiff claimed were likely to show that the defendant already knew about the plaintiff's mechanism for distributing content when it entered into the contract. The defendant, however, asserted attorney-client privilege with respect to the documents, which were created at the defendant's attorney's request to inform legal advice regarding contract negotiations. The plaintiff moved to compel production of the documents before the district court, arguing that the defendant waived privilege with respect to any legal advice contained therein when the defendant's employees testified that they were unsure at the time of contracting if the plaintiff distributed content over the internet.

The lower court denied the motion, and the Fourth Circuit affirmed. According to the appellate court, while both the content of the privileged documents at issue and the employees' testimony related to the defendant's understanding of the plaintiff's content distribution system, the latter did not waive privilege with respect to the former because it was not privileged. As the court explained, Federal Rule of Evidence 502(a) provides for waiver of privileged communications where a party intentionally discloses other privileged "communications concerning the same subject matter that ought to in fairness be considered together." But in order to trigger waiver under the rule, the information disclosed must be privileged in nature. The court found that the simple fact

that the defendant may have sought and received legal advice regarding the plaintiff's distribution mechanism from its lawyers did not automatically mean that all information on the topic in its possession was based on legal advice. Because there was no evidence that the employees' testimony actually disclosed or was based on privileged information, waiver did not apply.

## **Documents Entitled to Work-Product Protection Where Party Relied on Email to Third-Party to Establish Anticipation of Litigation**

*Wilder v. World of Boxing LLC*, 324 F.R.D. 57 (S.D.N.Y. 2018)

Magistrate Judge Gabriel W. Gorenstein of the U.S. District Court for the Southern District of New York rejected the defendants' motion to compel discovery of eight emails discussing a boxing match doping incident, finding that the emails were entitled to work-product protection. The plaintiffs in the case, a professional boxer and his team, brought a declaratory judgment action against the team of another boxer, Alexander Povetkin, who failed a prefight drug test in violation of the parties' "Bout Agreement." When the fight was postponed, an attorney for the plaintiffs emailed the third-party escrow agent who held the "purse" (*i.e.*, winnings) for the bout, instructing the agent to "not disburse any funds unless and until it receives joint instruction from the parties or a non-appealable order from a court of competent jurisdiction." The plaintiffs' attorney then emailed the plaintiffs' team explaining Povetkin's doping violation and proposing a plan of action. Subsequently, various members of the team sent the eight emails at issue to one another, forwarding the attorneys' advice and discussing litigation strategy. The plaintiffs later brought suit seeking an order that they were entitled to the purse. During discovery, the plaintiffs produced and subsequently clawed back the eight emails, claiming work-product protection and attorney-client privilege.

The defendants argued against clawback on grounds that the emails were not attorney-client communications and that work-product protection did not apply because they were not created in anticipation of litigation. After conducting an *in camera* review, the court disagreed with the defendants, finding that the emails were entitled to protection because they were initiated by an attorney and specifically referenced potential litigation. While the court acknowledged that attorney-client privilege likely applied to protect the document, it focused its

analysis on work product. Specifically, the court relied on the attorney's email to the escrow agent — which noted a possible "order from a court" — as proof that the plaintiffs were anticipating litigation when the emails were sent. And while the court acknowledged that some members of the plaintiffs' team testified that they were not necessarily planning to bring suit at the time, the court concluded that the emails "were not something that would have occurred absent the potential for litigation."

## **Materials Related to Investigation of Alleged Misconduct Conducted by Outside Counsel Entitled to Work-Product Protection**

*Lassiter v. Hidalgo Med. Servs.*, No. 17-CV-0850 JCH/SMV, 2018 WL 1891104 (D.N.M. Apr. 18, 2018)

Magistrate Judge Stephan M. Vidmar of the U.S. District Court for the District of New Mexico denied the plaintiff's motion to compel reports and factual findings from a sexual harassment investigation prepared by the defendant's outside counsel. The plaintiff brought suit against the defendant, her former employer, for sexual harassment and retaliation. In connection with the suit, the defendant hired outside counsel to investigate the sexual harassment claims made by three female employees, including the plaintiff. During discovery, the plaintiff moved to compel production of the "facts, complaints, recording(s) of interview(s), and accounts of witnesses" interviewed by outside counsel. The court denied the plaintiff's request for several reasons.

First, the court held that the investigation and related materials fell within the scope of work-product protection. Second, the court determined that the plaintiff could not establish a substantial need for the materials that could overcome work-product protection. According to the court, the defendant had disclosed to the plaintiff the names of the employees who had been interviewed, and therefore the plaintiff could obtain the same information by deposing those employees. The fact that such depositions would be costly was not sufficient to establish substantial need. Third, the court held that the plaintiff could not establish waiver. While the court agreed with the plaintiff that the defendant could not use the investigator's findings as a defense while simultaneously arguing the information was not discoverable, it found that there was no evidence that the defendant planned to rely on the reports as a defense in the instant litigation.

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## Materials and Communications Created by Nonattorney Employee in Connection With Litigation May Qualify for Heightened Work-Product Protection

*In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2018 WL 1162552 (E.D.N.Y. Feb. 26, 2018)

Judge Margo K. Brodie of the U.S. District Court for the Eastern District of New York affirmed Magistrate Judge James Orenstein's order upholding defendant Bank of America's claim of work-product protection with respect to documents at issue in an antitrust lawsuit brought by various merchants against various banks and credit card companies. The discovery dispute arose when Bank of America inadvertently produced — and then sought to claw back — certain “emails, PowerPoint presentations, handwritten notes, and graphs” authored by a nonattorney employee. 7-Eleven, a plaintiff in the suit, argued that the materials were business documents and therefore did not qualify as attorney work product and, in any event, work-product protection could be overcome by 7-Eleven's substantial need for the materials. The magistrate judge disagreed, finding that heightened work-product protection applied to the documents under Rule 26, precluding 7-Eleven from obtaining them even upon a showing of substantial need.

The district court affirmed. As an initial matter, the court held that the documents qualified as work product because the documents were prepared by the employee “within the framework” of a project that was “initiated by Bank of America's in-house counsel,” noting that the author of the documents testified that he prepared the materials at the instruction of counsel for purposes of litigation. Further, the court found that it had no basis to overturn the magistrate judge's finding that the materials were subject to “heightened protection” under Rule 26 as opinion work product. As the court explained, Rule 26(b)(3) affords heightened protection to the mental impressions of an “attorney or other representative concerning litigation.” Because 7-Eleven was unable to point to any relevant authority undermining the magistrate judge's finding that a company employee may qualify as a “representative” of an attorney for purposes of the rule, the court could not set aside the magistrate judge's opinion as contrary to law. The district court indicated, however, that it “may have rendered a different result, had it been conducting a *de novo* review of whether an employee is a *representative* within the meaning of Rule 26 (b)(3).”

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## Protective Order Allowing Liberal Clawback of Produced Documents Supersedes Federal Rules of Evidence Inquiry on Waiver

*In re Testosterone Replacement Therapy Prods. Liab. Litig.*, 301 F. Supp. 3d 917 (N.D. Ill. 2018)

Judge Matthew F. Kennelly of the U.S. District Court for the Northern District of Illinois allowed a plaintiff in a product liability action to claw back inadvertently produced documents pursuant to a protective order previously approved by the court, even though clawback would not necessarily have been permitted under the Federal Rules of Evidence. The documents at issue were emails from the attorney of one of the plaintiffs, Medical Mutual of Ohio, seeking information for litigation purposes and responses from nonattorney employees of the company that the plaintiffs inadvertently produced to the defendants and then subsequently sought to claw back. The court approved the clawback request for several reasons. First, the court held that the emails were privileged — including those exchanges that were between nonattorneys — because they generally reflected Medical Mutual of Ohio's attorneys' “legal thinking and forward-looking strategy for the present litigation” and “indicate[d] that legal advice was sought and obtained.” Second, the court held that clawback was permitted under the terms of the protective order negotiated by the parties and adopted in the case, which allowed the return of any inadvertently produced documents.

In so holding, the court rejected the defendants' argument that Federal Rule of Evidence 502's waiver provisions — not the protective order — should govern. According to the court, the protective order “reflect[ed] the parties' intent to create their own guidelines” with respect to waiver and clawback issues, which is permitted under Rule 502. The court also rejected the defendants' argument that clawback was inappropriate under the terms of the protective order. The defendants had argued that the emails at issue were just a few of hundreds of documents marked as privileged that were turned over to them, most of which the plaintiffs never sought to claw back. Further, the defendants argued that the plaintiffs waited a week after the defendants used two of the emails at issue at a deposition to seek their return. While the court noted that these considerations would be relevant in performing a waiver analysis under Rule 502, they had no bearing under the protective order, which allowed for more liberal clawback of produced documents.

## Decisions Ordering Disclosure

### Production of Document Containing Mental Impressions of Former Counsel Constitutes Waiver of Work-Product Protection

*Walker v. White*, No. 16 C 7024, 2018 WL 2193255 (N.D. Ill. May 14, 2018)

Magistrate Judge Mary M. Rowland of the U.S. District Court for the Northern District of Illinois denied the plaintiff's motion for a protective order with respect to allegedly inadvertently produced documents authored by the plaintiff's former counsel. The plaintiff in the case alleged a Section 1983 claim on a theory that his 10-year incarceration was based on fabricated evidence. The plaintiff's original counsel in the case inadvertently produced a letter he had authored, which contained his mental impressions about the suit, as part of a 6,347-document production. The plaintiff subsequently changed attorneys and his new counsel sought to prevent the defendant from using the letter on work-product grounds. In ruling on the plaintiff's motion for a protective order, the court agreed that the letter constituted attorney work product even though it contained primarily factual information, because both fact and opinion work product are protected. In addition, the court noted that the letter also "clearly expresse[d] [the former attorney's] mental impressions, conclusions and legal theories about Walker's post-conviction claims."

Nevertheless, the court found that counsel's disclosure of the letter amounted to waiver under Federal Rule of Evidence 502 for several reasons. First, the plaintiff failed to provide any evidence that counsel's disclosure of the letter was inadvertent. Indeed, the plaintiff conceded that he did not know why his former counsel produced the document. In addition, the plaintiff failed to take "prompt and reasonable steps to rectify the disclosure" because the plaintiff waited 45 days after discovering that the letter had been produced to seek its return. Accordingly, the court held that work-product protection had been waived and denied the plaintiff's motion for a protective order with respect to the letter.

### Privilege Does Not Attach to Communications With Financial Analyst Hired at Recommendation of Attorney

*Williams v. Big Picture Loans, LLC*, Civil Action No. 3:18-mc-1, 2018 WL 1368271 (E.D. Va. Mar. 16, 2018)

Judge Robert E. Payne of the U.S. District Court for the Eastern District of Virginia denied a defendant's motion to quash on privilege grounds a subpoena served on a nonparty financial analyst firm. In the underlying Racketeering Influenced and Corrupt Organizations Act action, the plaintiffs alleged that corporate and individual defendants, including Matt Martorello, conspired to offer high-interest loans without a license to do so. During discovery, the plaintiffs subpoenaed documents sent by Martorello, then part owner of a nonparty company, to a financial analyst firm hired to provide a valuation for a debt instrument used in a corporate transaction at issue in the suit. Martorello moved to quash the subpoena, asserting that documents sent to the analyst were protected by privilege because he retained the analyst at his tax lawyers' recommendation for the purposes of aiding the attorneys' legal advice.

In finding that privilege did not apply, the court first considered whether Martorello could be considered a "client" of the analyst given that the evidence suggested that his nonparty company — not Martorello personally — hired the analyst. The court concluded that he could not, and therefore no privileged relationship could possibly exist between Martorello and the analyst. Further, the court held that privilege would not apply even if Martorello himself had retained the analyst because there was no evidence that the analyst's valuation services were performed primarily to allow Martorello's lawyer to give legal advice. According to the court, the case did not present a situation in which a specialist is retained by a party for purposes of providing technical services necessary for the party's lawyer to represent the client. Instead, Martorello retained the firm for a business purpose of providing valuation services, and the analyst interacted primarily with Martorello, not his attorneys. The court held that the mere fact that Martorello's attorneys recommended retaining a financial analyst in the first place "does not place a cloak of secrecy around all the incidents" pertaining to the analyst's work.



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## Spoliation Decisions

### Decisions Imposing Sanctions

#### Second Circuit Upholds \$2.7 Million Sanctions in Case Worth \$20,000 Where Spoliation Was Willful and Egregious

*Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.*, 880 F.3d 620 (2d Cir. 2018)

In an opinion written by Judge Gerard E. Lynch, a panel of the U.S. Court of Appeals for the Second Circuit held that the district court did not abuse its discretion in imposing a \$2.7 million spoliation sanction to compensate the plaintiff for additional discovery that arose due to the defendant's misconduct in failing to preserve evidence. In the underlying dispute, the plaintiff Klipsch Group, an electronics manufacturer, sued ePRO, the parent company of an online retailer, for selling counterfeit versions of its headphones. The plaintiff moved for discovery sanctions, arguing that ePRO had failed to initiate a proper litigation hold or produce large quantities of relevant documents. The district court agreed and noted that the deposition testimony of ePRO's CEO had revealed that ePRO had not placed a litigation hold on much of its electronic data, including company emails, and that ePRO possessed transactional sales documents that it had failed to disclose. The court also pointed to evidence that ePRO had limited its own discovery vendor's access to its electronic data. Rather than impose sanctions, the district court allowed Klipsch to independently audit ePRO's computers, which revealed that ePRO had manually deleted thousands of files and emails shortly before the audit was scheduled. Based on this destruction of evidence, the district court found that ePRO had engaged in willful spoliation and imposed several sanctions, including an adverse inference instruction and a \$2.68 million award to compensate the plaintiff for its additional discovery efforts. Because the court viewed ePRO as a risk for dissipation of assets, it placed the \$2.68 million sanction as a restraint on ePRO's assets, and it added an additional \$2.3 million restraint to cover additional damages and attorneys' fees despite the fact that the court valued the case at \$20,000.

On appeal, ePRO's primary argument was that the sanctions were disproportionate to the value of the evidence uncovered by Klipsch during its audit, none of which was critical to the case. The Second Circuit rejected that argument and affirmed

the lower court's decision, noting that "[w]hen, as a result of an opponent's persistently uncooperative behavior, it appears reasonable *ex ante* to conduct expensive corrective discovery efforts, we see no reason why the party required to undertake those efforts should not be compensated simply because it eventually turned out that the obstructive conduct had hidden nothing of real value to the case." The court did, however, caution that the opinion should not be read "as condoning excessive and disproportionate discovery demands, countenancing the tactical use of discovery sanction motions to inflict gratuitous costs on adversaries, or derogating from the responsibility of district courts to ensure that litigation proceeds in a responsible and cost-efficient manner."

#### Adverse Inference Instruction Warranted Despite Lack of Bad Faith Where Litigation Was Anticipated and Spoliation Caused Prejudice

*Vargas Alicea v. Cont'l Cas. Co.*, Civil Action No. 15-1941 (PAD/BJM), 2018 WL 1441229, at \*1 (D.P.R. Mar. 21, 2018)

Magistrate Judge Bruce J. McGiverin of the U.S. District Court for the District of Puerto Rico held that an adverse inference instruction was warranted where a nurse at the defendant's clinic destroyed her notes pertaining to a fall the plaintiff took at the clinic. During discovery, the defendant produced an Adverse Event Form the nurse completed in front of her supervisor the day after the fall, but the nurse had discarded the notes she made about the plaintiff contemporaneously with the fall. The plaintiff sought spoliation sanctions, including an adverse inference instruction, based on the destruction of the note. The court granted the motion, finding that the defendant clearly knew there was a potential for litigation at the time of the fall because the nurse was required to come in early to complete an Adverse Event Form and was aware of the severity of the plaintiff's injuries, which required a hospital visit. The court also found that the notes were relevant to the plaintiff's claim, and their loss resulted in prejudice to the plaintiff's case, because they were the only contemporaneous documentation of the plaintiff's condition during and after the fall and may have contradicted the version of events set forth in the Adverse Event Form, which was completed the next day. Accordingly, while the court did not find evidence of bad faith, it nonetheless granted the plaintiff's request for an adverse inference instruction.

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## **Adverse Inference Instruction Granted Where Plaintiff Failed to Preserve Key Evidence at Fire Scene**

*Dyvex Indus., Inc. v. Agilex Flavors & Fragrances, Inc.*, Civil No. 12-CV-0979, 2018 WL 1070803 (M.D. Pa. Feb. 27, 2018)

Judge Malachy E. Mannion of the U.S. District Court for the Middle District of Pennsylvania granted the defendants' request for an adverse inference jury instruction where the plaintiff allegedly altered and removed evidence from a fire scene. In this product liability action, the plaintiff alleged that the defendants' defective fragrance oil caused a fire at the plaintiff's facility, and the defendants claimed that their representatives were unable to accurately examine the scene of the fire because the plaintiff failed to preserve key physical evidence. The court held that the plaintiff did have a duty to preserve, especially considering that the plaintiff's insurance company had specifically instructed the plaintiff not to move anything at the scene. In addition, although the court did not find evidence of bad faith, it concluded that the plaintiff was at fault because the plaintiff alone was in complete control of the fire site and had exclusive authority over whether the evidence would be preserved. The court also found that the defendant was at least somewhat prejudiced because the removed and altered evidence could potentially have pointed to alternative sources of the fire.

In determining the appropriate sanction, the court noted that both the culpability and prejudice elements were mitigated because the plaintiff did preserve most of the fire scene and the defendant had access to photos that the fire marshal had taken directly after the fire. Therefore, the court denied the defendant's request for dismissal but granted the request for an adverse inference instruction that the jury may infer that, if the defendants had been allowed to inspect the unaltered fire scene, the additional evidence would have been unfavorable to the plaintiff.

## **Decisions Declining Sanctions**

### **Adverse Inference Instruction Denied Where Allegations of Bad Faith Destruction Based Entirely on Speculation**

*Gordon v. Almanza*, No. 4:16-cv-00603, 2018 WL 2085223 (S.D. Iowa Mar. 5, 2018)

Chief Judge John A. Jarvey of the U.S. District Court for the Southern District Court of Iowa denied the plaintiffs' request for an adverse inference instruction where there was no real evidence of bad faith on the part of the defendant and the plaintiffs were not prejudiced by the loss of evidence. The

plaintiffs initially brought suit over a tractor-trailer collision and the parties disagreed about the cause of the collision. The defendant insisted that the collision occurred because he took his eyes off of the road when he placed his drink in a cupholder, but the plaintiffs argued that the accident occurred because the defendant was using his cellphone while driving. The plaintiffs requested an adverse inference instruction based on the defendant's spoliation of: (1) the defendant's cellphone, (2) the defendant's driving logs, and (3) a copy of the defendant's driver's manual. As a preliminary matter, the court held that under U.S. Court of Appeals for the Eighth Circuit law, an adverse inference instruction can only be imposed if there is evidence of intentional destruction indicating a desire to suppress the truth as well as a finding of prejudice to the opposing party. With respect to the cellphone, the defendant maintained that the cellphone was destroyed because he had thrown it against a wall after a failed romantic encounter.

Although the plaintiffs argued that the defendant destroyed the phone intentionally to avoid its production in litigation, the court found that this argument was based purely on speculation. Moreover, the court concluded that the plaintiffs were not prejudiced by the loss of the phone because records from Verizon and Facebook verified that the defendant was neither calling anyone nor using his Facebook app at the time of the crash. The court also denied sanctions based on the alleged spoliation of the defendant's logs and manual, finding that there was no evidence that they were intentionally destroyed. The court rejected the plaintiffs' arguments that the logs and manual would point to the defendant's history of distracted driving and overall credibility, finding that the documents were largely irrelevant to the plaintiffs' claims.

### **No Spoliation Sanctions Where Allegedly Spoliating Party Did Not Have Duty to Preserve**

*Caltenco v. G.H. Food, Inc.*, 16 Civ. 1705 (LDH)(VMS), 2018 WL 1788147 (E.D.N.Y. Mar. 7, 2018)

Magistrate Judge Vera M. Scanlon of the U.S. District Court for the Eastern District of New York denied the plaintiff's request for an adverse inference instruction where the plaintiff was unable to establish that the defendants had a duty to preserve the evidence that was lost. The plaintiff brought suit alleging that the defendants had violated labor laws by failing to pay overtime and minimum wage, and the parties disagreed about how many hours the plaintiff worked during his employment. The defendants produced photocopied pages of the notebook that the

plaintiff had signed each time he was paid, which confirmed the date of payment and the amount paid. The produced pages also reflected the time the plaintiff began and ended work each day. The plaintiff argued that the defendants had fabricated the pages because the original pages he saw did not list his hours in this manner. The plaintiff requested the original notebook as well as other papers on which the defendants had recorded information about employee hours. The plaintiff also requested the metadata underlying a summary of hours and wages that the defendants' accountant prepared to support the defendants' argument about the number of hours the plaintiff worked. In response, the defendants asserted that the notebook and loose sheets were misplaced during an office move, and that they did not have metadata for the accountant's summary.

Based on the loss of these materials, the plaintiff filed a motion for spoliation sanctions. The court denied the motion because the defendants did not have a duty to preserve any of the allegedly spoliated materials. According to the court, the defendants' duty to preserve was not triggered until the litigation began and there was no evidence the loose sheets or metadata were in existence and within the defendant's control at that time. In addition, the court found that the defendants were not under a continuing obligation to preserve the original version of the notebook after making photocopies because there is generally no obligation to preserve identical copies of the same document. Further, the court found that even if the defendants had a duty to preserve, the plaintiffs were unable to prove a culpable state of mind or prejudice. Because the defendants did produce photocopies of the notebook, their failure to preserve other related documents during an office move did not constitute gross negligence or bad faith. With respect to prejudice, the court noted that although the plaintiff had theories about what the original notebook and loose sheets would prove, the plaintiff had not offered sufficient evidence that the documents were reasonably likely to support the plaintiff's theory that the defendants had fabricated the hours information on the photocopied pages. Therefore, the court denied the plaintiff's request for spoliation sanctions.

## **Spoliation Sanctions Denied Where Similar Data Was Available From Another Source**

*Barrett v. FedEx Custom Critical, Inc.*, No. 3:17-CV-62 (CDL), 2018 WL 1722385 (M.D. Ga. Apr. 9, 2018)

Chief Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia denied the plaintiff's request for spoliation sanctions where the plaintiff failed to show incurable prejudice resulting from the destruction of the data at issue. The plaintiff alleged that he was injured when he stopped to help a disabled motorist and a FedEx employee ran his tractor-trailer off the road and into the plaintiff's truck, causing a piece of the truck to break off and hit the plaintiff. At the time of the accident, FedEx used two computer systems to track its drivers and trucks: Omnitracs (which allows drivers to input their current driving status and hours worked) and Pro Detail (which tracks the GPS location of trucks and can be used to calculate drive time). The Omnitracs data was destroyed after 180 days because FedEx did not instruct Omnitracs to preserve it. The Pro Detail data, however, was preserved and showed the defendant's hours in the eight days preceding the accident. The plaintiff requested spoliation sanctions due to FedEx's failure to preserve the Omnitracs data, arguing that it was central to his allegation that the FedEx driver was impaired due to fatigue and FedEx knew or should have known that the defendant was unfit to be dispatched.

Despite the destruction of the Omnitracs data, the court concluded that the plaintiff did not establish incurable prejudice, because the Pro Detail data provided similar information that could be used to ascertain the truck driver's hours. The court noted that if the Omnitracs data had been the only information able to establish the driver's hours, the plaintiff would have a stronger argument for spoliation sanctions. But because other information on this issue existed, the court held that even if FedEx breached its duty to preserve the Omnitracs data, sanctions were not warranted.

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## Discovery Cost/Scope Decisions

### Bill of Costs

#### **The Costs of Creating and Using an Electronic Database in Lieu of Printing Electronically Stored Documents Is Not Taxable Under Section 1920**

*Gonzales v. Pan Am. Labs., LLC*, No. 3:14-cv-2787-L, 2018 WL 2321896 (N.D. Tex. May 4, 2018), *report and recommendation adopted*, No. 3:14-CV-2787-L, 2018 WL 2317749 (N.D. Tex. May 22, 2018)

Magistrate Judge David L. Horan for the U.S. District Court for the Northern District of Texas granted the plaintiff's objection to the defendants' bill of costs and motion for the court to review the costs in this employment discrimination action. The plaintiff asserted that the defendants' requested fees for the creation and use of an electronic database were not properly recoverable as taxable costs under 20 U.S.C. Section 1920 because it did not constitute "printing." The defendants responded that they used an electronic database in order to reduce costly printing, copying and paper production, and thus the expense fell within the category of recoverable printing costs. Noting that no circuit courts of appeal and few district courts have addressed whether electronic database costs are recoverable as "printing" costs, the court ultimately held that they were not. The court found that, in enacting Section 1920, Congress did not use language that would have included electronic data copying and storage within the definition of "printing." Additionally, the court noted that the ordinary meaning of "print" would not include such activity. The defendants alternatively requested the court to tax the costs that they would have expended in physically printing the electronically stored documents, but the court also denied that request. As the court explained, "[a] party's substituting one service for another service that is encompassed by Section 1920 does not make the substitute service's fees taxable where Congress has not clearly so intended."

### Decisions About Scope of Discovery

#### **Party Required to Perform Calculations Across Several Databases in Order to Obtain and Produce Responsive Electronically Stored Information**

*N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, No. CV 12-1633 (JMA) (AKT), 2018 WL 1515711 (E.D.N.Y. Mar. 28, 2018)

In this action by a health care facility operator against a preferred provider organization (PPO) alleging fraud, Magistrate Judge A. Kathleen Tomlinson of the U.S. District Court for

the Eastern District of New York granted the operator's motion to compel the PPO to produce certain electronically stored information (ESI). Specifically, the operator sought to compel the production of information related to the PPO's revenues and profits during the course of their business relationship. The PPO opposed the discovery, arguing, among other things, that producing the information would improperly require it to "create" new documents because its electronic systems "do not and cannot break down revenues for clients by provider or clients," and thus it "would have to perform calculations across multiple systems to create the information sought." According to the PPO, this "creation of new data from multiple sources using calculations" was beyond the scope of Federal Rule of Civil Procedure 34. The court disagreed, noting that while "a party should not be required to create completely new documents, that is not the same as requiring a party to query an existing dynamic database for relevant information." Based on the testimony of a corporate officer of the PPO, the court found that the PPO had "several tools at its disposal for the exploration of information stored in its databases," and "[t]hrough some combination of these tools," the PPO would be able to produce reports providing responsive information. Further, the PPO failed to contend that production would be too costly or burdensome.

#### **Production of ESI Not Too Burdensome Where Defendant Is Able to Provide Responsive Information in Limited Time Frame**

*Nicholes v. Combined Ins. Co. of Am.*, No. 5:16-CV-10203, 2018 WL 1098246 (S.D. W. Va. Feb. 28, 2018)

Magistrate Judge Omar J. Aboulhosn for the U.S. District Court for the Southern District of West Virginia granted in part the plaintiff's request to compel production of ESI in a proposed class action based on the defendant insurance company's allegedly fraudulent sale of insurance policies that provided no benefits to Medicaid recipients. The plaintiff in the action sought "[a]ll electronic files from every database used by [the defendant] that contains a reference or information related to Medicaid" during a four-year time period. According to the plaintiff, the information sought was relevant to class certification, including the issues of numerosity and class membership. The defendant objected to the request, arguing, among other things, that it was too broad and disproportionate to the needs of the case. Additionally, the defendant asserted that the various information technology systems and platforms it used were "very extensive and not amenable to simple search filters," making it difficult to provide responsive information.



The court rejected these arguments, noting that it was “interesting” that the defendant had previously indicated that it would be willing to produce information responsive to the request if the plaintiff limited it to a two-year time frame — as was the fact that the defendant had already prepared a spreadsheet that included the searchable filters that could be used to identify relevant files. According to the court, these actions by the defendant indicated that responding to the request would not be the “grand scale undertaking” represented by the defendant. As the court explained, “[t]hat Defendant was considering producing in response to this Request ... *if* Plaintiff limited her search to two years instead of four years ... belies Defendant’s assertion that an off-shore team is necessary to produce this information.” Accordingly, the court granted the motion to compel to the extent it sought information regarding West Virginia Medicaid recipients predating the filing of the lawsuit by four years.

## Requiring Company to Send Companywide Email Requesting Information Relevant to Lawsuit Would Be ‘Simply Unreasonable’

*Firefighters Ret. Sys. v. Citco Grp. Ltd.*, CIVIL ACTION No. 13-373-SDD-EWD, 2018 WL 276941 (M.D. La. Jan. 3, 2018)

Magistrate Judge Erin Wilder-Doomes of the U.S. District Court for the Middle District of Louisiana denied the plaintiffs’ motion to compel defendants in a securities/unfair trade practices action to provide more complete responses to discovery requests. The plaintiffs argued that because the defendants’ discovery responses “were incomplete and inaccurate,” the plaintiffs were left with “a flawed list of custodians” and were forced to conduct a “flawed electronic search for documents.” The plaintiffs therefore asked the court to require the defendants to send a companywide email asking all of its employees for any knowledge about facts relevant to the lawsuit. The magistrate judge denied the request, finding that “[p]laintiffs [sought] permission from this court to email everyone in every Citco entity to ask whether anyone employed by any Citco entity has knowledge relevant to this litigation, and thereafter require the Citco Defendants to conduct additional electronic and hard copy searches for documents.” The court held that this would “simply [be] unreasonable” and was essentially “a request for the Citco Defendants to ‘go back to square one’ of their document production efforts.” Further, the court held that such a large-scale search would raise proportionality concerns and would be unduly burdensome. Accordingly, the court denied the plaintiffs’ motion to compel.

## Third Party Not Required to Produce Patient Prescription Records in Patent Infringement Case

*Par Pharm., Inc. v. Express Scripts Specialty Distribution Servs., Inc.*, No. 4:17MC510 RLW, 2018 WL 264840 (E.D. Mo. Jan. 2, 2018)

Judge Ronnie L. White of the U.S. District Court for the Eastern District of Missouri denied a motion to compel compliance with a subpoena *duces tecum* issued by Par Pharmaceutical, Inc., the defendant in a patent infringement lawsuit, to Express Scripts Specialty Distribution Services, Inc., a pharmaceutical products distributor, who was not a party to the litigation. According to Par, Express Scripts maintained a database that included information regarding all patients who took, and physicians who prescribed, the drug at issue in the case, which Par argued was relevant to an issue in the case (*i.e.*, whether certain patents were invalid). Express Scripts objected to production of the database, arguing that the requested documents included confidential patient information that was irrelevant to the litigation and that production of such documents would be unduly burdensome. The court agreed with Express Scripts, holding that “the disclosure of confidential patient prescription records [wa]s not proportional to the needs of the underlying ... patent litigation,” and “compliance with such a broad subpoena would impose undue burden and expense on a non-party to th[e] case.” Thus, the court denied the motion to compel.

## Plaintiff in Personal Injury Case Must Produce Relevant Data From Social Media Accounts

*Forman v. Henkin*, 30 N.Y. 3d 656 (2018)

In an opinion by Chief Judge Janet DiFiore, the New York Court of Appeals held that the plaintiff in a personal injury action was required to provide the defendant with access to her relevant private social media posts, including photographs. The plaintiff in the case was a horseback rider who sued the owner of the horse she fell from while riding, allegedly causing spinal and traumatic brain injuries. At her deposition, the plaintiff stated that she previously had a Facebook account on which she posted “a lot” of photographs showing her pre-accident active lifestyle. The defendant sought an unlimited authorization to obtain the plaintiff’s entire “private” Facebook account, contending that the photographs and written posts were material to the action and necessary to his defense under New York law. In response to the defendant’s motion, the trial court directed the plaintiff to produce all private photographs posted before the accident that

she intended to introduce at trial; all private photographs posted after the accident that did not show nudity or romantic encounters; and authorization for records showing each time the plaintiff posted a private message after the accident and the number of characters or words in those messages.

The New York State Supreme Court Appellate Division, however, modified the order by limiting the required production to photographs and other posts that the plaintiff intended to introduce at trial and eliminating the authorization permitting the defendant to obtain data relating to postaccident messages. On appeal to the New York Court of Appeals, the defendant argued that the Appellate Division erred by employing a heightened threshold for production of private social media records. The high court agreed, noting that it was “unclear” what standard the Appellate Division applied but clear that it was a “heightened” standard for production of the private posts. The court elaborated that such a standard would “allow[ ] the account holder to unilaterally obstruct disclosure merely by manipulating ‘privacy’ settings.” Rather, the court held, the defendant only needed to satisfy the general discovery burden of showing that the plaintiff’s Facebook account was reasonably likely to yield relevant evidence. Concluding that the defendant had satisfied that burden in this case, the court held that the plaintiff was required to produce all social media information set forth in the trial court’s initial order.

## Other

### **Audio Recording Between Employee and Third Party Regarding Business Issues Properly Designated as Confidential**

*Alarm Grid, Inc. v. AlarmClub.com, Inc.*, No. 17-80305-CV-MARRA/MATTHEWMAN, 2018 WL 1175254 (S.D. Fla. Mar. 5, 2018)

In this copyright dispute before Judge William Matthewman of the U.S. District Court for the Southern District of Florida, the plaintiff challenged the defendant’s designation of an audio recording of a phone conversation as confidential. In the recording, an employee of the defendant called a copyright service agent in what the plaintiff asserted was an attempt to find out when the picture at issue in the suit had been posted on the

defendant’s website. The defendant produced the recording but marked it as “Confidential” pursuant to a protective order agreed upon by the parties. The plaintiff challenged this designation as improper. The court, however, held that the defendant had demonstrated good cause for keeping the recording confidential. According to the court, the defendant had an interest in keeping a recorded telephone conversation between its representative and the representative of another company private because it constituted “proprietary research, and technical marketing, and commercial planning,” and therefore its disclosure would harm the defendant.

### **New York State Courts Propose Rule Change to Speed Discovery, Reduce Costs in Complex Commercial Cases**

On March 8, 2018, the Commercial Division of the New York State Unified Court System proposed an amendment to Rule 11-e of the Rule of the Commercial Division, which governs responses and objections to document requests, that would encourage parties to consider the use of technology-assisted review (TAR) in appropriate cases to speed discovery and reduce its cost. The amendment promotes the use of “increasingly common discovery techniques such as keyword searching, concept searching, email threading, near-duplicate identification, clustering and predictive coding” in complex commercial cases. While the proposed rule encourages the use of TAR, it also notes that the amendment “does not prevent the requesting party from challenging those means as inadequate or a production as incomplete, nor does the proposed rule constrain in any way the presiding justice’s oversight of the disclosure process.” The New York City Bar Association (NYCBA) has submitted comments generally supporting the proposed amendment but has expressed a view that the substance of the proposed amendment should be adopted as best practices and guidelines set forth in an appendix to the Commercial Division Rules (or other resource for judges and practitioners), rather than as a formal Commercial Division rule. NYCBA also suggests the proposed amendment include a sentence stating that “the parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.” The public comment period for the proposed rule ended on May 15, 2018.

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## Contacts

### Partners

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

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

### Counsel

**Christopher D. Cox**  
New York  
212.735.2603  
christopher.cox@skadden.com

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

### Discovery Counsel

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

### Associates

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

**Kara E. Cheever**  
New York  
212.735.3557  
kara.cheever@skadden.com

**Brenna L. Frey**  
Washington, D.C.  
202.371.7176  
brenna.frey@skadden.com

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

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Skadden, Arps, Slate, Meagher & Flom LLP / Four Times Square / New York, NY 10036 / 212.735.3000