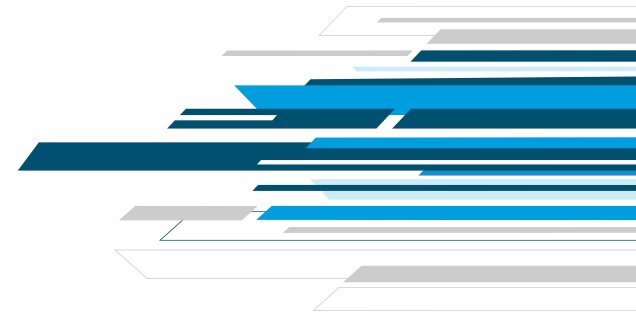


Introduction

The Winston & Strawn LLP [eDiscovery and Information Governance Group](#) (the “eDiscovery Group”) is pleased to be able to offer our insights into the decisions and developments that have taken place in the first quarter of 2019 in the e-discovery, information governance and privacy arenas. We hope that the following summaries and information will continue to aid your understanding of these important and rapidly evolving areas of law, and we look forward to helping you stay abreast of upcoming e-Discovery developments.

Over the course of the past three months, there have been a number of developments in the e-Discovery and privacy practices, including:

- [Courts are struggling to apply rules consistently when analyzing spoliation claims involving video evidence.](#) ▶
- [Courts continue to hold that a requesting party is not entitled to direct access to, or a forensic examination of, the producing party’s electronic systems without a showing that the producing party has engaged in evasive discovery conduct or a deficiency in the production.](#) ▶
- [The Middle District of Louisiana held that a defendant had possession, custody, or control of text messages that were stored with his service provider, even though the defendant no longer possessed the cell phone from which the text messages were sent or received and he no longer used the service provider’s services.](#) ▶
- [The Northern District of California held it is common practice to prohibit redactions of non-relevant information from produced documents, and that while there are situations where such redactions may be allowed, those situations are very limited.](#) ▶
- [The Northern District of Alabama reinforced past case law and the Committee Notes to the Federal Rules of Civil Procedure Rule 26\(f\), noting that preservation orders should not be routinely entered by courts.](#) ▶
- [Data protection authorities are starting to file complaints and, in some instance, levy fines against companies for violations of the GDPR.](#) ▶
- [U.S. senators recently introduced the “Commercial Facial Recognition Privacy Act of 2019”, which would prohibit the use of facial recognition software without consent.](#) ▶



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- The Public Comment period concerning the proposed amendment of Rule 30(b)(6) closed on February 15, 2019. The Committee received nearly 1,800 comments. ▶
- There has been continued consolidation of and funding for e-discovery service providers, including HackstackID's acquisition of eTERA Consulting and OpenText's acquisition of Catalyst. ▶



In our featured decision, Judge Joy Flowers Conti of the Western District of Pennsylvania reviewed a special master's recommendation to downgrade an existing Rule 502(d) order—allowing the producing party to claw back any privileged document that was produced—to convey only the protections of Rule 502(b), which would require that the producing party demonstrate that it took reasonable steps to prevent such production of privileged documents. Notably, the special master's recommendation flies in the face of the approach taken by the Sedona Conference and many courts in recommending that parties enter into Rule 502(d) orders as best practice. While Judge Conti did not make a final ruling on the issue, the issue is noteworthy as it appears to suggest that even when a Rule 502(d) order has been entered, the producing party must engage in some reasonable attempt to remove privileged documents from the production or run the risk of potentially losing the protections of Rule 502(d). Judge Conti's ultimate decision on this issue will bear watching, as will the question of whether other courts will follow the special master's line of thinking.

Featured Decision

In *Arconic Inc. v. Novelis Inc.*, 2019 WL 911417 (W.D. Pa. Feb. 25, 2019), the plaintiff sought to claw back privileged documents pursuant to the 502(d) protective

order entered in the case. After the defendant refused to return the documents, the dispute was sent to a special master who addressed both the specific documents at issue, as well as the broader privilege screening process used by the plaintiff. The special master held that the plaintiff was entitled to the protections of Rule 502(d) with respect to existing productions, but sought to impose a reasonableness standard akin to that pursuant to Rule 502(b) for all future productions. The special master based this recommendation on the conclusion that the plaintiff's use of search terms to identify privileged documents for review, instead of a pre-production privilege review of all potentially privileged documents, took unfair advantage of the Rule 502(d) protections, especially as the plaintiff had already clawed back 1,200 documents. The plaintiff objected to the special master's attempt to impose the reasonableness standard.

“the court ‘generally encourages parties in virtually all civil cases to **adopt Rule 502(d) orders because they generally save time and reduce disputes**’”

In reviewing the special master's recommendation, Judge Joy Flowers Conti noted both that the court “generally encourages parties in virtually all civil cases to adopt Rule 502(d) orders because they generally save time and reduce disputes,” and that the Sedona Conference “endorses adoption of a Rule 502(d) order as a ‘best practice.’” She also noted that the use of a Rule 502(d) order does not allow parties to engage in a “data dump” and shift the burden of determining whether privileged documents exist to the requesting party. As she lacked “sufficient information” to determine whether a retrospective privileged review by the plaintiff would be required and/or whether there was a need to impose

a Rule 502(b) standard, Judge Conti set an evidentiary hearing on the issue, requesting the parties to bring technical personnel to “address all aspects of the privilege reviews conducted in this case,” including: (i) the tools, procedures and search terms used to screen documents for privileged, (ii) why privileged documents were produced, (iii) the costs to do a re-review of productions for privileged documents, (iv) the costs to comply with Rule 502(b) for future productions, (v) plans to identify and resolve disputes on all inadvertently produced privileged documents to date, (vi) whether different technology tools or procedures can be and will be implemented for privilege screening moving forward, and (vii) information on costs defendants have incurred as a result of plaintiff’s production of privileged documents.

Practice Note: Rule 502(d) orders are commonplace, and can apply with equal force in situations where there is a “make available” production, and where as a matter of course there will inevitably be more privileged documents included in the production, as well as those where the producing party has conducted some level of privilege review. The best approach is to take steps to ensure that if a party is engaged in a “quick peek” or “make available” production this approach is conveyed to the opposing party. For situations where the producing party runs privilege screens, the best approach is to take efforts to ensure that the privilege screens are reasonably tailored to the specific case and that there is some process by which documents that hit on those screens are reviewed for privilege. Judge Conti’s decision seems to have been based, at least in part, on both the fact that there were large numbers of privileged documents in the plaintiff’s production and that the plaintiff had not provided an adequate explanation for how this happened.

Spoliation & Curative Measures

As video footage is electronically stored information it should be governed by Rule 37(e). However, not all courts have reached this conclusion. ***In Bland v. Sam’s East, Inc.***, 2019 WL 407406 (M.D. Ga. Jan. 31, 2019), Chief U.S. District Judge Clay Land sanctioned the defendant for its failure to preserve a witness statement and a surveillance video central to the plaintiff’s claims by awarding the plaintiff a permissive adverse inference about the contents of the statement and the video. The claims stemmed from the plaintiff’s reporting of an altercation at work in which he alleged another employee used racially tinged insults against the plaintiff, and plaintiff’s subsequent confrontation with his supervisor for failing to take any action about the incident, after which the plaintiff was terminated. In response, the defendant conducted an investigation, which included taking statements from witnesses, at least one of which was lost by defendant without explanation. In addition, the confrontation with the supervisor was captured on the defendant’s internal security cameras (without audio) and was reviewed by an “asset protection” manager, but ultimately was destroyed pursuant to the defendant’s 60-day retention policy.

In analyzing the spoliation claims, Judge Land implicitly found that Rule 37(e) did not apply to the lost video, although he acknowledged that he would have reached the same result under that Rule. Instead, Judge Land applied 11th Circuit law predicated an award of sanctions on the court’s inherent authority to manage litigation. He found that both the lost statement and video were destroyed after the defendant had reasonable notice of the plaintiff’s claims (the day after he was terminated, he informed the store manager they would “hear from” his lawyer, and the application for unemployment benefits he filed indicated he intended to sue the defendant), that the destruction of each was prejudicial to plaintiff’s case, and that both losses reflect “bad faith” by the defendant. On this latter point, Judge Land explained that a finding of bad faith requires the court to weigh “the degree of the spoliator’s culpability against the prejudice of the opposing party.” Here, the judge found that both pieces of evidence might have provided critical corroboration of key factual

issues, and that their loss impeded the plaintiff's ability to prove his case. Judge Land made no specific finding of negligence or intent on the part of the defendant to deprive the plaintiff of the use of the evidence, suggesting that here the degree of prejudice was enough to support a finding of "bad faith" and an adverse inference instruction.

“the duty to preserve does not extend indefinitely”

In *Aidoo v. Cela*, 2018 WL 6435650 (D. Conn. Dec. 7, 2018), Judge Victor A. Bolden denied the defendants' request to sanction the plaintiff for her failure to preserve a Toyota Corolla that was involved in an automobile accident on I-95. Judge Bolden noted that the plaintiff had worked with her insurer to preserve the vehicle long enough for both her own expert and the defendants' expert to examine the vehicle. Approximately three weeks after the inspection was conducted, the plaintiff's insurer sold the vehicle at auction, making it unavailable for further testing and examination. Judge Bolden noted that the standard in the Second Circuit for spoliation sanctions required a finding that: (1) the spoliating party had a duty to preserve the evidence; (2) the spoliating party destroyed the evidence with a culpable state of mind; and (3) the destroyed evidence was such that the trier of fact could find that the evidence would have supported the other party's claims or defenses.

In analyzing the plaintiff's failure to continue to preserve the vehicle, Judge Bolden held that even though the vehicle was not in the plaintiff's possession or custody at the time that the insurance company sold it at auction, in the Second Circuit, the plaintiff still had the duty to preserve the evidence, or at least notify the opposing party that it was going to be destroyed. Judge Bolden found that the duty to preserve does not extend indefinitely and that the fact that the plaintiff had ensured that the defendant's expert had the opportunity to examine the vehicle before it was sold made the question of the

culpable state of mind a close call. He did not, however, need to decide the issue as he found that the defendants had not demonstrated that the spoliated evidence, i.e., the vehicle, would have supported the defendants' claim of operator error to the required extent. He noted that the defendants "have failed to lay the proper evidentiary foundation for this possibility, through expert testimony, or otherwise." Accordingly, there was no basis to impose sanctions on the plaintiff for the sale of the vehicle by her insurer.

Scope of Discovery

Rule 26(b)(1) limits the scope of discovery to information that is both relevant to the claims and defenses in the case and proportional to the needs of the case. In *Santana v. MKA2 Enterprises, Inc.*, 2019 WL 130286 (D. Kan. Jan. 8, 2019), Magistrate Judge Teresa J. James denied the defendant's motion to compel the plaintiff to produce his cellphones for inspection and copying; instead ordering the plaintiff to "produce complete copies of all responsive text messages to the extent they have not already been produced." In this employment discrimination case, the plaintiff alleged he was discriminated against, retaliated against, and terminated because of his race. The plaintiff objected to the defendant's request for production of all of the plaintiff's cellular phones, arguing that "this request seeks irrelevant information and is not proportional to the needs of this case."

Judge James found that the defendant's request was "broad in scope, requesting production of all Plaintiff's cell phones for inspection and copying, without any limitation on the data ultimately to be produced from the copy or image of the phone(s)." Citing the Advisory Committee Notes to Fed. R. Civ. P. 34(a), which acknowledges that requests for inspection "may raise issues of confidentiality or privacy" and exhorts courts to "guard against undue intrusiveness resulting from inspecting or testing such systems," Magistrate Judge James found that the request was "overly broad, unduly burdensome and not proportional to the needs and issues of this case." She also observed that "Defendant sets out no protocol or process through which the data it deems responsive

would be culled from the copy or image of the phone(s) and any unresponsive and/or privileged data removed or protected.” Magistrate Judge James noted that requiring the plaintiff to produce responsive text messages would give defendants the relevant information “through less invasive means,” and as such ordered plaintiff to produce the text messages.

“it is ‘**common practice within [the Northern District of California] to prohibit redactions for relevance.**’”

Courts generally frown upon unilateral relevance redactions made by a producing party. In *Plexxikon Inc. v. Novartis Pharmaceuticals Corp.*, No. 17-cv-04405-HSG (EDL) (N.D. Cal. Feb. 1, 2019), Magistrate Judge Elizabeth D. Laporte was asked to determine if a non-party should be allowed to make relevance redactions. The non-party, which was a competitor of the plaintiff, had unilaterally redacted documents to remove allegedly irrelevant, and/or competitively sensitive information before turning it over to the plaintiff. The plaintiff complained, arguing that the non-party had previously agreed to produce its documents without any relevance redactions, and instead use the parties’ stipulated protective order to designate sensitive documents as “Highly Confidential – Attorneys’ Eyes Only”. In resolving the dispute, Magistrate Judge Laporte noted that it is “common practice within [the Northern District of California] to prohibit redactions for relevance.” Judge Laporte stated that while there may be circumstances in which redactions are appropriate for non-parties, this was not one of those circumstances, as the non-party was covered by the parties’ stipulated protective order. Accordingly, Judge Laporte required the non-party to re-produce documents without any redactions based on relevance.

In *Seaside Inland Transp. v. Coastal Carriers LLC*, 2019 WL 507485 (E.D. Wash. Feb. 8, 2019), District Judge Salvador Mendoza, Jr., found that 7 of the 62 topics in the plaintiff’s 30(b)(6) deposition notice to the defendant were “unduly burdensome and not proportional to the needs of the case,” and thus beyond the scope of discovery under Rule 26(b)(1). The defendant had objected to 19 of the 62 topics because they sought information that was irrelevant to the action, beyond the “scope of knowledge” of the defendant, or were unduly burdensome and not proportional to the needs of the case. Judge Mendoza found that 2 of the 5 topics objected to on the basis of relevance were indeed not relevant to the litigation. With respect to the 4 topics objected to as seeking information beyond the defendant’s knowledge, Judge Mendoza found that “this is not an appropriate basis for a protective order,” and that instead the deponent “may truthfully respond that such information is unknown” during the deposition if the defendant “could not reasonable ascertain the information.”

As for the objection that 10 of the topics imposed an undue or disproportionate burden on the defendant, Judge Mendoza agreed as to 7 of them. Judge Mendoza reasoned that these topics required the defendant to “research hundreds of different [freight] loads...the amount invoiced...the amount paid by the customers, the amounts paid to the carriers...records of [defendant’s] revenues going back to 2002” and make detailed calculations based on that research. Another request required the deponent to make determinations concerning “every bit of information” the plaintiff itself had produced to the defendant “regarding customers/shippers, freight loads, carrier costs, freight shipping pricing, carrier cost billing, marketing, and agent/employee retention.” Judge Mendoza found that the requests requiring extensive research and calculation would impose “onerous” burdens and that “any benefit is unlikely to outweigh the burden on” the defendant. He also rebuked the plaintiff for its request concerning its own produced materials, remarking that “surely [plaintiff] is better situated to know exactly what information it has provided to [defendant],” which he characterized “as an attempt by [plaintiff] to

force [defendant] to do the work that it already knows is too burdensome to do itself.” Judge Mendoza therefore granted in part the defendant’s motion for a protective order.

Search and Production

While cooperation can be helpful in defining reasonable scope of discovery, it is ultimately the producing party’s responsibility to engage in a reasonable search to identify and produce relevant documents. In *NuVasive, Inc. v. Alphatec Holdings, Inc.*, 2018 WL 6567888 (S.D. Cal. Dec. 13, 2018), Magistrate Judge Mitchell D. Dembin addressed the defendant’s motion to compel the plaintiff to provide further responses to certain of the defendant’s discovery requests. Notably, in response to the plaintiff’s objection to at least one request as vague and its offer to meet and confer with the defendant about the production of electronically stored information, Magistrate Judge Dembin noted that Principle Six of the Sedona Conference Principles states that “[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.” He also noted that the plaintiff was obligated to “search its data, collect and produce relevant, non-privileged information even without input from [the defendant],” and thus the plaintiff could not delay production because the defendant failed to offer search terms. He did note, however, that if the defendant refused to “participate in the process, any challenge it may raise to the reasonableness of [the plaintiff’s] search may be viewed with some skepticism.”

“the plaintiff could not delay production because the **defendant failed to offer search terms**”

In *Fishman v. Tiger Natural Gas, Inc.*, 2018 WL 6817291 (N.D. Cal. Dec. 28, 2018), the plaintiff asked the court to enter an order requiring a third party to search the defendant’s network for potentially relevant ESI. In support of its request, the plaintiff identified certain deficiencies in the defendant’s productions, including the fact that the defendant allowed two custodians to search the defendant’s “H drive” for potentially relevant documents without supervision, as well as the fact that the searches performed by these two individuals were under-inclusive and missed potentially relevant documents. The defendant sought to rectify this issue by running additional searches to identify missed relevant documents, producing those relevant documents, and agreeing to disclose the persons who searched each custodian’s folder on the “H drive” and identify what searches were run. The plaintiff argued that the defendant’s efforts to resolve the issue were insufficient and requested that the court require that an independent third party conduct a reasonable search of the defendant’s files for relevant documents. Although Magistrate Judge Thomas S. Hixson expressed sympathy for the plaintiff’s frustration with the defendant’s search process, he noted the plaintiff’s request was untenable, as it was an “extreme remedy” that was not appropriate for the matter, and that there was no other evidence that the defendant had omitted relevant documents from its production. Accordingly, Judge Hixson ordered the defendant to disclose the custodians and search terms used to see if any further issues existed.

Preservation

Courts continue to caution against the use of preservation orders. In *Scarborough v. Virginia College, LLC*, 2019 WL 121277 (N.D. Ala. Jan. 7, 2019), the plaintiff asked Chief District Judge Karon Owen Bowdre to enter a preservation order “out of an abundance of caution” because defendant had been placed in receivership estate, and as such, there was a possibility that potentially relevant information could be lost. Judge Bowdre denied the motion, stating that “courts rarely find such orders necessary because several laws impose the same preservation duties that a court order would impose.” Judge Bowdre noted, as a minimum,

that the Federal Rules of Civil Procedure creates a duty to preserve upon the filing of a lawsuit, and if that duty is violated, courts can sanction the deficient party, including by ordering adverse inference jury instructions. In addition, she noted that a number of statutes and regulations also require employers to maintain certain records, which might be relevant to the requested information.



Availability of Forensic Examination

Since December 2018, there have been several decisions involving requests to forensically image an opposing party's electronic devices. These decisions all upheld the standard that forensic examination by the requesting party is burdensome and involves legitimate privacy interests, and as such, forensic examinations should not be allowed unless the requesting party can show the producing party has engaged in evasive or incomplete answers or responses to discovery. In ***Eagle Air Med Corp. v. Sentinel Air Med. All.***, 2018 WL 6304835 (D. Utah Dec. 3, 2018), Magistrate Judge Evelyn Furse converted the plaintiff's motion for sanctions into a motion to compel, granted the motion, and ordered that the individual defendant provide his laptops to an independent computer expert for examination. Magistrate Judge Furse noted that the plaintiff had asked the court to: (1) order the defendant to submit his laptops for forensic examination so that the plaintiff could "ensure that all relevant information and documents have been produced;" (2) award plaintiff its reasonable attorneys' fees and costs in trying to obtain the documents at issue; and (3) extend the discovery period to allow the plaintiff to examine the laptops and conduct additional discovery, if needed. Magistrate

Judge Furse interpreted the plaintiff's request "as one for inspection," which she noted "is available as a remedy for evasive or incomplete answers or responses to discovery."

In ordering the forensic imaging of the defendant's laptops, Magistrate Judge Furse highlighted the fact that the defendant had begun the litigation by claiming that he did not keep "records of letters sent to clients and claiming that the database on which [the defendant] relied to provide advice had fallen victim to hard drive failure and was no longer in use." However, the defendant later admitted that he "recreated the database almost immediately and chose not to produce the documents because, in short, he did not think [the plaintiffs] deserved to have that information." Magistrate Judge Furse found that the defendants' discovery responses, meet and confer letters and deposition testimony could only result in one conclusion: that the defendants "intentionally attempted to avoid production of relevant, responsive, proportional discovery in this case." Accordingly, Magistrate Judge Furse held that the course of conduct in the case and the history of the individual defendant's computers "make an independent forensic examination of [the individual defendant's] laptop computers...necessary and proportional." She also awarded the plaintiffs \$3,000 and set forth the procedure pursuant to which the defendant would produce the computers for inspection, the parties would craft appropriate search terms, and the independent expert would examine the forensic images.

In ***Dufrene v. American Tugs, Inc.***, 2018 WL 6448838 (E.D. Cal. Dec. 10, 2018), Magistrate Judge David E. Knowles, III was asked to compel certain third party employees of the defendant to provide their cell phones to the plaintiff's expert, who would then image the phones and search the data contained in the images for responsive information. The defendant moved to quash the subpoenas to its employees, arguing that the subpoenas were vague and overbroad and they would improperly invade the employees' privacy, and in the alternative sought a protective order limiting the plaintiff's access to the defendant's cell phones. In its opposition, the defendant cited to the Advisory Committee notes to argue that there is a not a routine right of direct access to the defendant's

electronically stored information. Magistrate Judge Knowles noted that Rule 26(b)(1) of the Federal Rules of Civil Procedure sets forth the scope and limitation of discovery and that Rule 34(a) allows plaintiff to “inspect, copy, test or sample...electronically stored information.” He also noted that this right is “counterbalanced by a responding party’s confidentiality or privacy interests,” and that as a result “[a] party is therefore not entitled to a routine right of direct access to a party’s electronic information system, although such access may be justified in some circumstances.”

“[a] party is therefore not entitled to a routine right of direct access to a party’s electronic information system”

In the case before him, Magistrate Judge Knowles found that the third party’s privacy interests in the contents of their phones, together with the plaintiff’s overly broad request for “all cell phone information and data for a specific time period” weighed in favor of denying the plaintiff’s request for direct access. Instead, after noting that certain of the plaintiff’s requests were appropriately targeted, Magistrate Judge Knowles ordered that the defendant and its counsel should “cull the appropriate cell phones, e-mail accounts, and the like for responsive information and produce same after reviewing it for privilege.” He also ordered the defendant to log any information withheld on the ground of privilege and reminded that the defendant, and its counsel, that sanctions could be imposed if responsive information was withheld.

In *Par Pharmaceuticals, Inc. v. Quava Pharma, Inc.*, 2019 WL 959700 (D.N.J. Feb. 27, 2019), Magistrate Judge Douglas E. Arpert granted the plaintiffs’ motion to compel defendant to produce documents related to plaintiffs’

trade secret misappropriation claims, but denied plaintiffs’ request to conduct forensic imaging of plaintiffs’ ESI. The plaintiffs stated they needed the discovery to determine if defendants misappropriated other trade secrets not previously known by plaintiffs so that they could add these claims to the complaint. Defendants argued that this was simply a fishing expedition by plaintiffs to obtain confidential, competitively sensitive information, and as such, discovery should be limited to the plaintiffs’ known designations of trade secret misappropriations. Magistrate Judge Arpert noted that “the issue on this motion is not whether [the plaintiff] has identified allegedly misappropriated trade secrets. Rather, the issue is whether that identification should be fixed and final at this early state in the litigation.” Judge Arpert found that the discovery should be granted as the plaintiffs had already identified in its complaint a substantial number of trade secrets that were allegedly misappropriated, and as such, there was little risk in plaintiffs using the litigation for the sole purpose of engaging in a fishing expedition of its competitor’s information.

However, Judge Arpert denied plaintiffs’ request to forensically image the defendants’ ESI. Judge Arpert cited Comment 8.c. of the Sedona Principles, which noted that while forensic data collection is intrusive, it may be appropriate in theft or misappropriation of trade secrets matters. Even so, forensic data collection involves an “expensive, complex, and difficult process of data analysis that can divert litigation into side issues and satellite disputes involving the interpretation of potentially ambiguous forensic evidence.” Thus, “it should not be required unless circumstances specifically warrant the additional cost and burden....When ordered, it should be accompanied by an appropriate protocol or other protective measures that take into account any applicable privacy rights and privileges, as well as the need to avoid copying ESI that is not relevant.”

In analyzing the matter at hand, Judge Arpert found that plaintiffs’ request for “full-blown imaging” of defendants’ ESI was not reasonably tailored, as it gave plaintiffs access to all of defendants’ ESI, whether relevant or not. Plaintiffs also did not offer any protocol or other protective measures

to reduce the risk of collecting irrelevant, competitive, or otherwise personally sensitive information. Ultimately, Judge Arpert denied the request without prejudice, leaving open the option for plaintiffs to renew the request later in discovery if needed.



Rule 34

Parties continue to (1) need to reasonably tailor discovery requests and responses, and (2) be chastised for evasive discovery conduct. In ***Gabiola v. Mugshots.com, LLC***, 2019 WL 426143 (N.D. Ill. Feb. 4, 2019), Magistrate Judge Jeffrey T. Gilbert chastised all parties for their failures to comply with the requirements of Federal Rules of Civil Procedure 33 and 34. Although the plaintiffs filed a Second Motion to Compel production from the defendants, Magistrate Judge Gilbert found that much of the motion was “boilerplate and...[did] not delve into details of the discovery requests [at issue].” In fact, the plaintiffs’ motion did not cite the scope of discovery under Rule 26 (i.e., relevant to the claims and defenses and proportional to the needs of the case) or even attempt to explain in many instances how the requested discovery met this standard. Judge Gilbert was no less pleased with defendants’ response to the motion, as it improperly incorporated general objections in all of its responses. Judge Gilbert struck the defendants’ general objections, but did allow them to serve amended responses that included specific objections to each response within 14 days of his order.

Judge Gilbert also denied several of plaintiffs’ request for production, stating that the court could not compel production “[w]ithout more explanation from Plaintiffs as to the propriety of these requests for production and why Plaintiffs need what appears to be at least potentially a

very large volume of documents...to discover or prove-up the claims they are asserting against Defendants...” He noted that “in some cases, Plaintiffs appear to be asking Defendants to produce nearly every document associated with their business, and it is not obvious to the Court why that is necessary in this case.” Judge Gilbert disagreed with the plaintiffs’ claim that the defendants had waived any applicable privileges because they had not produced a privilege log, finding that, because the defendants: (1) specifically asserted privileged in their objections and (2) objected to the relevant time period which plaintiffs sought documents, “it would have been wasteful for Defendants to produce a privilege log before the time period covered by Plaintiffs’ discovery was fixed.” Accordingly, Judge Gilbert did require the defendants to produce a privilege log within 14 days of substantial production completion.

In ***Wentz v. Project Veritas***, 2019 WL 910099 (M.D. Fla. Feb. 22, 2019), the parties had narrowed two discovery requests related to defendants’ affirmative defense through the meet and confer process. Following this, plaintiff’s counsel emailed defendants’ counsel to state that there were no responsive documents. Defendants subsequently identified through third party deposition testimony that plaintiff did have responsive documents, and filed a motion to compel and for sanctions due to plaintiff’s misleading discovery conduct. Plaintiff argued, among other things, that the documents were not relevant because defendant’s affirmative defense was meritless, the documents were protected from disclosure by attorney work product doctrine, and his counsel’s email to defendants stating he had no responsive documents was not an official discovery response.

Magistrate Judge Gregory J. Kelly rejected plaintiff’s arguments, granted the defendants’ motion to compel and sanctioned the plaintiff pursuant to Rule 37. Magistrate Judge Kelly noted that this was a discovery dispute, not a motion to determine if defendant’s affirmative defense is meritless, and as such, the requested discovery was relevant to the affirmative defense. Magistrate Judge Kelly held that plaintiff waived his work product claim since he did not make the claim in his objections and responses to the discovery requests. In addition, Judge Kelly also noted

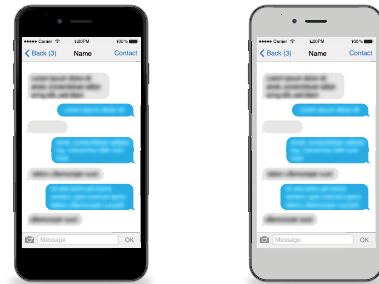
that plaintiff's counsel's email was essentially an extension of the plaintiff's discovery responses, as to find otherwise would "undermine the judicial efficiency that the good faith conference requirement in Rule 37(a)(1) promotes," and because the plaintiff knew the defendant would rely on the email. Accordingly, Judge Kelly ordered the plaintiff to provide full discovery responses, pay the defendant's attorney's fees incurred in bringing the motion, and file a certificate of compliance with the court.

In ***Herzig v. Arkansas Foundation for Medical Care, Inc.***, 2018 WL 6537134 (W.D. Ark. Dec. 12, 2018), Magistrate Judge Mark E. Ford granted in part the defendant's motion to compel the plaintiff to label the documents plaintiff had produced to identify the specific request to which the documents were responsive. The plaintiff had objected to doing so, arguing that the "nature of the documents produced clearly indicate and identify" the requests to which they were responsive and that defendant could, with little effort, quickly link the 70 documents provided to the specific request. After the plaintiff admitted that it also could quickly link the 70 documents to the requests, the court ordered that the plaintiff to "supplement their responses to [the defendant's] Requests for Production of Documents to designate or label all documents they have provided to correspond to the specific request(s) for production they are responsive to." Although Magistrate Judge Ford required the plaintiff to label its production, he denied the defendant's request to inspect the plaintiff's mobile phone. In his analysis, Magistrate Judge Ford noted that the defendant acknowledged that it had not served a Rule 34 request to inspect the phone, and was only making the request after it had received screen shots of one text message. Magistrate Judge Ford held that he could not, pursuant to Rule 37, "compel the production of something which has not first been sought pursuant to a request for production or inspection under" Rule 34.

Possession, Custody or Control

Courts continue to hold that a person has possession, custody, or control over text messages that may be stored by the person's service provider. In ***Hunters Run Gun Club, LLC v. Baker***, 2019 WL 507479 (M.D.

La. Feb. 7, 2019), the plaintiffs filed a motion to compel production of relevant text messages from a defendant who had allegedly sent text messages in furtherance of a conspiracy that harmed the plaintiffs' business. The defendant argued that he no longer had possession, custody, or control of the texts since he used a different service provider during the relevant time period and no longer had the phone from which he sent the text messages at issue. While the defendant did not object to plaintiffs' subpoenaing his former service provider for the records, he refused to provide written authorization allowing the service provider to release his records.



In resolving the issue, Magistrate Judge Erin Wilder-Doomes first asked whether the texts were relevant to the matter. Noting that the plaintiffs had already obtained from the service provider a log of text messages which included the sender and recipient phone numbers and the dates of the communications with other defendants right around the time the conspiracy was alleged to have occurred, Magistrate Judge Wilder-Doomes found that this was sufficient evidence that the texts were likely relevant. She also noted that this conclusion was supported by the fact that the defendant did try not to argue to the contrary. Magistrate Judge Wilder-Doomes then held that the texts were within the defendant's possession, custody, or control. She noted that while they were not within the possession or custody of defendant, he did have control over the texts because "by either granting or withholding [his] consent, [he] may determine who shall have access to them." In other words, the defendant could not "block production...simply by refusing to execute the required releases and/or refusing to request the records himself, particularly since [he] did not (and does not) object to

Plaintiffs subpoenaing his service providers for the records in the first instance.” As such, Magistrate Judge Wilder-Doomes ordered the defendant to either provide an executed release to the plaintiffs, or obtain and produce the relevant text messages himself.

Taxable Costs of Discovery

In *In re Wholesale Grocery Products Antitrust Litigation*, 2019 WL 413554 (D. Minn. Feb. 1, 2019), a prevailing defendant challenged the clerk of the court’s denial of ESI-related costs in the clerk’s final judgment. Judge Ann D. Montgomery noted that the Eighth Circuit had not addressed the issue of the extent to which ESI related charges are taxable under 28 U.S.C. § 1920, and determined that the precedent set in *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.* was sound and should apply to the current dispute. As such, Judge Montgomery found that ESI-related costs are taxable under 28 U.S.C. § 1920 to the extent such costs fall within the meaning of “exemplification” or “making copies”. With respect to specific ESI-related costs, the defendant sought reimbursement for: (1) processing-related costs, and (2) costs associated with converting files into usable formats for production purposes, including image conversion, scanning paper documents, and OCR. Judge Montgomery agreed that the costs associated with converting the files into usable formats fell within the purview of “making copies” for production and allowed the defendant to recover those costs. However, Judge Montgomery denied the processing-related costs as they “pertained to preliminary steps that were taken to produce the electronic discovery”, and not the actual productions themselves.

Privacy

Facial Recognition Privacy Bill Introduced

In a bipartisan effort aimed at addressing growing concerns over how facial recognition software and the data it generates will be used, United States Senators Brian Schatz (D) and Roy Blunt introduced a bill, entitled the “Commercial Facial Recognition Privacy Act of 2019” (the “CFRPA”), that would prohibit the use of facial recognition software without consent. The bill does make

exceptions for products and services for personal file management and/or photo or video storage, specific uses for journalistic media and theatrical release, security applications, and when there is an emergency involving imminent danger, among others. Under the CFRPA, the consent of the end users (those whose faces are being scanned) must be affirmatively made, and the person or entity using the facial recognition software/system needs to inform end users that facial recognition software is being used and provide materials that explain the capabilities and limitations of such software/system in terms that the end users can understand. Importantly, the CFRPA would require the individuals or companies using the facial recognition software/system to allow an independent third party to conduct reasonable tests of the software/system for accuracy and bias. The CFRPA would give the Federal Trade Commission (“FTC”) jurisdiction over enforcement of its provisions and would allow the FTC to pursue claims for unfair or deceptive trade practices under Section 18(a)(1)(B) of the Federal Trade Commission Act. If enacted, the CFRPA would preempt state laws to the extent that they are inconsistent with the provisions of the CFRPA, but would allow states to pass facial recognition that provided greater protections to end users.

Complaints Filed Against Companies for Violations of the GDPR

On January 18, 2019, noyb.eu—a privacy watchdog group founded by privacy activist Max Schrems, who initiated the proceedings that toppled the EU-US Safe Harbor provisions in 2016—filed complaints with Austrian data protection authority against Apple, Google (YouTube), Amazon, Netflix, Spotify, SoundCloud, DAZN, and Flimmit, alleging violations of the EU General Data Protection Rules (GDPR). Specifically, the complaints allege that the targeted companies violated the GDPR’s Article 15 guarantee of a user’s “right of access” to a copy of all raw data that a company holds about the user, information about the sources and recipients of the data, the purpose for which the data is processed, and information about where the data is stored and for how long. According to the complaints, the infringing companies provided incomplete, incomprehensible, or unstructured data in

response to user inquiries, or provided no response at all. If successful, the named companies faced up to a maximum of €18 billion in penalties.

France's Data Protection Authority Fines Google for GDPR Violation

On January 21, 2019, France's data protection authority (CNIL) levied a €50 million fine on Google for infringement of the E.U. General Data Protection Rules (GDPR). CNIL said it found two types of violations of the GDPR based on complaints filed by privacy watchdog group noyb.eu: one for lack of transparency about information collected and processes, the another for not having a legal basis to process user data for personalized advertisements. "Despite the measures implemented by Google (documentation and configuration tools), the infringements observed deprive the users of essential guarantees regarding processing operations that can reveal important parts of their private life since they are based on a huge amount of data, a wide variety of services and almost unlimited possible combinations," CNIL said. It also found that Google's infringement was not a "one-off, time-limited" incident. Google indicated in a statement that it is considering its response to the order, which can be appealed.

Status of Proposed Amendment to Rule 30(b)(6)

In August 2018, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("the Committee") published for public comment a draft amendment of Federal Rule of Civil Procedure 30(b)(6). Since approximately April 2016 the Advisory Committee on Civil Rules to the Committee had been exploring feedback from practitioners about some of the pain and abuse associated with corporate designee depositions under the current rule. This included multiple hearings and many letters of comment from individual lawyers as well as from notable and credible associations such as the American Bar Association Section of Litigation, Lawyers for Civil Justice, and DRI. Many of these comments described substantial problems with current practice, including but not limited to:

1. Inadequate notice in view of the number/breadth of topics noticed;
2. Inadequately defined or overly broad scope of the noticed topics;
3. No limits on the number of topics that may be noticed;
4. No limit on the amount of time that 30(b)(6) depositions may take;
5. No mechanism for objecting to a 30(b)(6) notice, and only post-answer resolution of objections raised during the deposition;
6. Clarification whether 30(b)(6) depositions count against a party's permitted number of depositions;
7. Clarification whether 30(b)(6) deponents must reveal what materials they reviewed to prepare to give testimony.

However, in response to this feedback, the Advisory Committee attempted to avoid future conflicts that might arise from more specific prescriptions, limitations, and dispute resolution mechanisms, and instead advanced an amended Rule that imposes an obligation to "promptly" meet and confer after the receipt of a notice "about the number and description of the matters for examination and the identity of each person the organization will designate to testify," "continuing as necessary."

The Public Comment period concerning the proposed amendment closed on February 15, 2019. The Committee received nearly 1,800 comments, many of them opposed to the amendment's inadequate revisions, which have the potential to increase gamesmanship over the identities of deponents while doing little to stem current abuses. In response, the Committee dropped the requirement to meet and confer over the identity of the witnesses. However, the Committee has now approved requiring: (1) the parties to meet and confer in good faith about the matters for examination; and (2) that the subpoena inform the recipient of its duty to meet and confer. The Judicial Conference Committee on Rule of Practice and Procedure ("Standing Committee") will consider the proposed amendment in June. If everything progresses as anticipated, the amended Rule 30(b)(6) will take effect December 1, 2020.

Recent and Upcoming Speaking Events

March 4, 2019: Matthew Poplawski, “EDRM Releases TAR Guidelines” (Duke Law School / EDRM Webinar).

April 26, 2019: John Rosenthal, “Annual Case Law Update” at the ABA eDiscovery Conference in Chicago.

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Past Publications and Events

January 2019: John Rosenthal, Chris Costello, Matthew Poplawski & Jason Moore, 2018 E-Discovery Year in Review, Winston & Strawn LLP Publication

January 2019: Matthew Poplawski, Technology Assisted Review (TAR) Guidelines, Bolsch Judicial Institute/Duke Law/EDRM

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