

2018 E-Discovery Year in Review

Synopses of Significant Decisions Touching on Issues
Related to the Practice of Electronic Discovery

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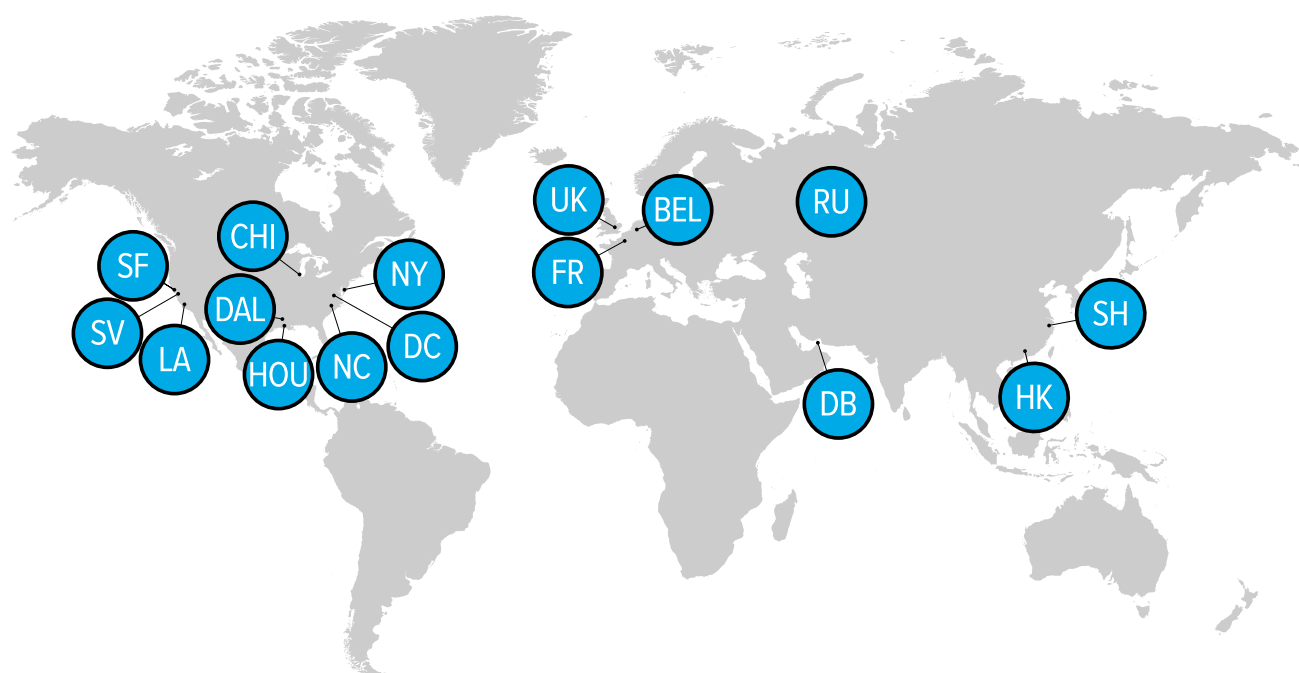
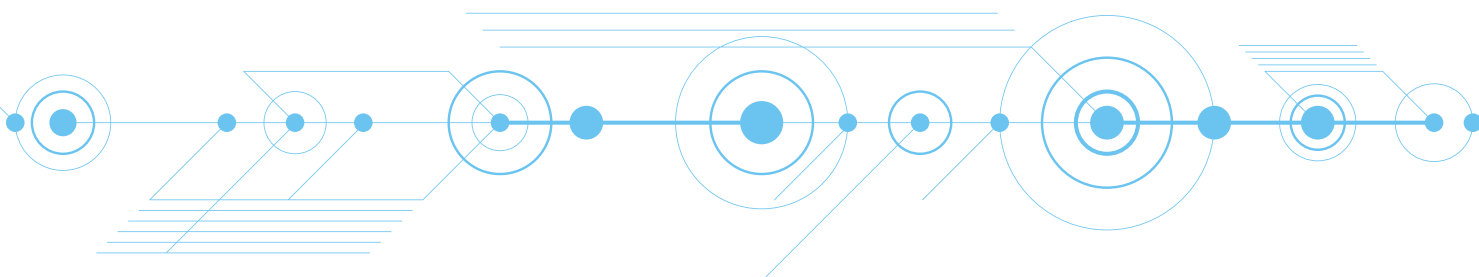


Table of Contents

1	Introduction
2	Scope of Discovery/Proportionality
12	Preservation, Spoliation, and Sanctions
27	Search and Retrieval
35	Rule 34
37	Meet and Confer/Cooperation
38	Cross-Border Issues
43	Privilege & Waiver
47	Rule 26(A) Disclosures
49	Possession, Custody, or Control
51	Stored Communications Act
53	eDiscovery and Information Governance Practice
54	Index



Introduction



Winston & Strawn LLP's eDiscovery & Information Governance Group (the "eDiscovery Group") is pleased to present the following update on important electronic discovery decisions issued over the course of the past year.

In 2018, courts and litigants continued to grapple with how to apply the 2015 Amendments to the Federal Rules, including how the renewed focus on proportionality impacts discovery in civil cases and how best to encourage parties to comply with the changes to Rule 34.

The year also saw a number of cases addressing whether and how to validate production results given the increased focus on the use of predictive coding technologies and other analytical tools to address the review and production of the ever-growing volume of electronically stored information. In some instances, these validation protocols have been applied beyond the context of predictive coding to include search terms and even general validation of traditional linear review productions. Some of these decisions required the producing party to validate its search methodology and/or results in the absence of any asserted deficiency in production. These decisions ignore, or attempt to sidestep, the well-established principle under federal and state rules that the producing party is in the best position to determine what constitutes a reasonable inquiry and review of its documents and systems, and that absent a showing that such efforts are inadequate, courts and opposing parties are not empowered to interject themselves into the producing party's internal processes.

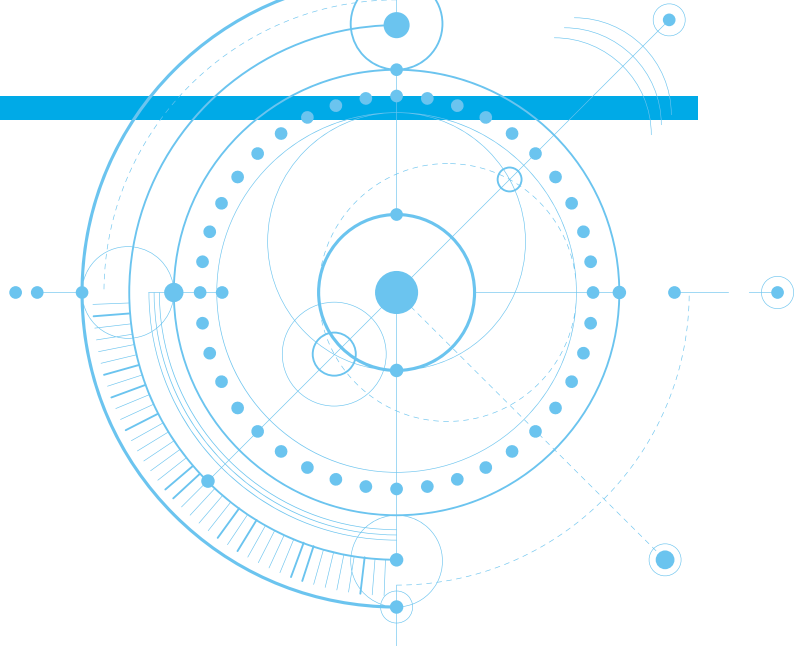
Data privacy and data security continued to increase in importance, both domestically and internationally. The implementation of the General Data Protection Regulation

in the European Union in May 2018, with its increased administrative fines, recordkeeping requirements, and focus on conducting privacy assessments and utilizing appropriate security measures has forced companies to reevaluate their procedures for handling personal data. Existing challenges to the use of standard contractual clauses, the EU-U.S. Privacy Shield, and decisions concerning the territorial scope of the Stored Communications Act have garnered significant attention, and led to the implementation of the CLOUD Act. In addition, certain states, including California, have undertaken efforts to strengthen protections for individual privacy, and we expect those efforts to continue.

For the upcoming year, we see continued focus on the use of advanced technologies for review and production, the growth of discovery of the Internet of Things, and the increasing importance of conducting both case and data assessments at a much earlier stage in the litigation lifecycle than has previously been the case in order to better predict/control costs and prepare for Rule 26(f) meet and confers.

The following summaries of select cases from the past year demonstrate the variety of approaches to, among other things, proportionality, the scope of discovery, Rule 37(e) and other sanctions, Rule 34 objections and responses, production format, cross-border discovery, privilege waiver, and the use of predictive coding technology and other search methods. We hope that you find these case summaries both insightful and helpful in your practice.

Scope of Discovery/ Proportionality



The 2015 Amendments to the Federal Rules of Civil Procedure refocused attention on the role of proportionality in discovery and noted that in some cases discovery of relevant information may not be proportional to the needs of the case. Since December 2015, many courts have sought to apply the proportionality factors to determinations of the appropriate scope of discovery in the particular case at issue. Under Amended Rule 26(b)(1), the scope of discovery is limited to documents and information that are both relevant to the claims and defenses in the specific matter and proportional to the needs of the case. The responsibility to ensure that discovery is proportional to the needs of the case is on all parties and the court. However, in recent practice, much of the effort to establish that certain discovery is disproportionate falls on the responding party or the judge, as requesting parties too often shoot for the moon. While in some cases the court can determine that specific requests are facially disproportionate, in other instances, the court looks to the producing party to demonstrate with specificity why specific requests are not proportional to the needs to the case. In these situations, most responding parties (including third parties) attempt to argue undue burden and/or cost. In such cases, the producing party needs to offer more than just boilerplate objections, and instead provide actual costs and/or realistic estimates. The need to comply with specific data privacy requirements, whether domestic or international, can also affect the proportionality analysis. In addition, there are certain types of discovery that are generally not proportional without a showing of a deficiency in the producing party's production, such as: (1) discovery-on-discovery; (2) unfettered direct access to the responding party's ESI; and (3) requests for searches all company databases

when the case involves only a narrow issue or specific set of custodians. Parties need to be aware of attempts to improperly expand the scope of discovery and/or the need to educate the court on the specific burden the producing party faces.

Bell v. Pension Committee of Ath Holding Co., LLC, Case No. 1-15-cv-02062-TWP-MPB (S.D. Ind. June 14, 2018). Magistrate Judge Matthew P. Brookman was asked to compel one of the plaintiffs to produce certain Facebook messages she exchanged with another plaintiff and a Facebook post relating to attorney advertising targeting members of the underlying pension plan. In opposing the motion, the plaintiffs argued that the Facebook messages constituted “instant messages” that were exempted from discovery by the parties’ stipulated ESI Order.

Although he reviewed the cases submitted by both sides concerning whether Facebook messages are more like e-mails, which the parties had agreed to produce, or instant messages, which they had not, Judge Brookman held that he did not need to make such a determination because the ESI Order did not prevent either party from “subsequently requesting that ESI identified [in the Order] be preserved and produced if specific facts demonstrate a particular need for such evidence that justifies the burden of preservation and retrieval.”

In granting the motion to compel production of the Facebook messages, Judge Brookman noted that the plaintiff’s testimony established the messages’ relevance to the parties’ claims and defenses, and that the plaintiff had not presented any evidence that it would be burdensome for the messages to be collected and

produced. However, Judge Brookman denied the motion to compel the production of the Facebook post. He noted that an attorney inquiry that the plaintiff had read in a local paper, without a more detailed explanation as to why it was important, was not relevant, and thus did not need to be produced.

Brewer v. BNSF Railway Co., No. 16-14-65-GF-BMM-JTJ, 2018 WL 882812 (D. Mont. Feb. 14, 2018). Judge Brian Morris reviewed the magistrate judge's findings and recommendations, which denied, among other requests, the plaintiff's motion to obtain discovery on the defendant's capability to search for, preserve, and produce ESI. The plaintiff argued that such discovery-on-discovery was within the scope of Rule 26(b)(1), and that the Sedona Conference Principles are not controlling authority.

Judge Morris disagreed with the defendant and upheld the denial. The court stated that the plaintiff's request still needed to be proportionate to the needs of the case, and found the *Sedona Conference Commentary on Defense of Process: Principles and Guidelines for Developing and Implementing a Sound E-Discovery Process persuasive*, noting that "[a] party should not be required to provide discovery about its e-discovery without good cause," and that "[a] party seeking discovery on discovery ('meta discovery') must show a specific deficiency in the other party's production." Ultimately, because the plaintiff did not show any deficiency in the defendant's production, Judge Morris denied the plaintiff's request as disproportionate to the case needs.

EEOC v. FedEx Ground Package Systems, Inc., No. 15-cv-256, 2018 WL 1441426 (W.D. Pa. Mar. 21, 2018). Judge Mark R. Hornak ruled that it was proportional to the needs of the case to require the defendant to search and review hundreds of thousands of emails, rather than exclude them from discovery. When the plaintiff requested the defendant search internal communications from 26 custodians, the defendant claimed that it would need to review more than 363,000 e-mails, which the defendant claimed was unduly burdensome because reviewing that much data "exceeds [the defendant's] internal capabilities."

The parties jointly conducted a review of statistically significant samples of the emails, after which the defendant characterized 8.3 percent of the e-mails as relevant, while the plaintiff claimed 15 percent were relevant. Judge

Hornak found that even an 8.3 percent responsiveness rate did not make the burden of reviewing the e-mails disproportionate to the utility of the information, noting that the parties had already anticipated that "this was going to be a big case," and that "part and parcel of that reality is that in big cases, there will likely be large amounts of potentially discoverable information, which means, for better or worse, a lot of work in identifying and producing it." Accordingly, Judge Hornak ordered the defendant to review the 363,000 emails and denied the defendant's request to shift the cost of that review to the plaintiff.

Delgado v. Tarabochia, No. C17-1822RSL, 2018 WL 2088207 (W.D. Wash. May 4, 2018). Judge Robert S. Lasnik was asked to quash the defendants' subpoena seeking the plaintiff's phone records, call and text message logs, as well as roaming data. After noting that discovery under Rule 26(b)(1) extends to nonprivileged material that is relevant to any party's claim or defense and proportional to the needs of the case, Judge Lasnik noted that "the question of whether the third-party information defendants seek is discoverable depends on a balancing of the defendant's need to obtain all relevant evidence with plaintiff's need for protection from far-reaching, burdensome, and invasive discovery." Judge Lasnik found that the plaintiff's pre-injury phone records were relevant, as the defendants had a need to confirm whether the plaintiff's injuries were caused by defendant's negligence and/or the vessel's unseaworthiness. He found that the plaintiff's privacy interests were not sufficient to outweigh the defendants' needs for the discovery. However, Judge Lasnik granted the defendants' motion to quash as to the plaintiff's pre-incident bank records, as the minimal relevance was outweighed by the outsized burden on the plaintiff. He also granted the motion to quash the request to produce the post-injury phone and bank records, as the requests for that information reflected nothing more than the defendants' hope that they would catch the plaintiff doing something the defendants thought the plaintiff should not be doing.

Firefighters Retirement System v. Citco Group Ltd., No. 13-373-SDD-EWD, 2018 WL 276941 (M.D. La. Jan. 3, 2018). Magistrate Judge Erin Wilder-Doomes denied the plaintiffs' motion to compel the defendant to send an e-mail to every individual in the defendants' subsidiary and affiliate companies inquiring about the recipients' personal knowledge of the issues in the lawsuit, so

that the defendant could then search across all of the network resources belonging to all of the companies where employees had answered in the affirmative. The dispute arose after the defendant's 30(b)(6) deponent had been ill-prepared to testify as to the processes used and custodians searched in complying with the plaintiff's discovery requests. Suspecting a deficiency, the plaintiff responded by seeking the defendant's help (the "all employees" email) in determining whether relevant data had been missed. In denying the motion, Magistrate Judge Wilder-Doomes noted that Rule 26(b)(1), with its emphasis on relevance and proportionality, governs the scope of discovery. She also noted that the court must limit discovery if: (1) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient and less burdensome; and (2) the party seeking discovery has had ample opportunity to obtain the information through discovery in the action. After noting that the parties had already agreed on 56 search terms and 21 custodians, Magistrate Judge Wilder-Doomes found that the plaintiff had failed to explain why these custodians and search terms were unreasonable or even to propose any additional custodians.

She also found that the request to e-mail all of the defendants' employees was unreasonable and that requiring the defendants to conduct electronic and hard-copy searches based on the responses the defendants received "raises proportionality concerns and, especially in light of the parties' previous agreements and efforts, would be unduly burdensome."

Forman v. Henkin, 30 N.Y.3d 656 (2018). The New York Court of Appeals was asked to compel the plaintiff to provide an "unlimited authorization to obtain plaintiff's entire 'private' Facebook account," because the defendant believed that the photographs and postings would be material and necessary to his defense. In the case, the plaintiff sought to recover for the injuries she suffered when she fell from a horse owned by the defendant, claiming to have suffered physical injuries, as well as cognitive deficits, memory loss, difficulty with written and oral communications, as well as social isolation. At her deposition, the plaintiff acknowledged frequently posting photos to her Facebook account before her injury and deactivating her account six months after the

injury, but she did not recall whether she had posted any photos during that six-month period. The trial court granted the motion to compel, but limited it to all pre-injury photographs on Facebook that the plaintiff intended to introduce at trial, all post-injury photographs that did not depict nudity or romantic encounters, the number of messages that were sent, and the total characters in each message, but not the content. On appeal, the Appellate Division denied the defendant's request for the post-injury photographs and the information regarding the Facebook messages, but required that the plaintiff produce the pre-injury photographs she intended to use at trial.

The Court of Appeals noted that under New York law, the general, broad right to disclosure is limited to three categories of privileged material: (1) attorney-client privileged communications; (2) work product materials; and (3) trial preparation materials. It also noted that in addition to these three categories, courts will balance the need for discovery against "any special burden to be borne by the opposing party." In this case, the Court of Appeals found that courts should balance the need for discovery against any specific privacy concerns raised by the account holder, and then issue "an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials." Noting that in personal injury cases, where photographic evidence could be relevant, courts should consider whether temporal limitations are appropriate. Ultimately, the Court of Appeals held that the trial court's decision was correct, and reinstated it. It found that there was a "basis to infer that the photographs [the plaintiff] posted after the accident might be reflective of her post-accident activities and/or limitations," and that the order was limited in temporal scope because the plaintiff had deactivated her account six months after the injury.

Garrett v. University of South Florida Board of Trustees, Case No. 17-cv-2874-T-23AAS, 2018 WL 4383054 (M.D. Fla. Sept. 14, 2018). Magistrate Judge Amanda Arnold Sansone was asked to compel the forensic examination of the plaintiff's computer and cell phone. The plaintiff alleged that she suffered a hostile education environment and that she was retaliated against after she reported that she had been sexually assaulted by a fellow student. The defendant claimed that the forensic examination of the plaintiff's computer was necessary because the plaintiff

admitted at her continued deposition that she had not deleted a recording of a conversation with one of the defendant's employees, as she had previously maintained.

In analyzing the defendant's request, Magistrate Judge Sansone noted that "[d]iscovery into electronically stored information, including forensic examinations, is subject to the scope of discovery under Rule 26(b)." She also noted that the Middle District of Florida's "Discovery Handbook" states that "[i]nspection of an opponent's computer system is the exception, not the rule and creation of forensic image backups of computers should only be sought in exceptional circumstances which warrant the burden and cost." Although she noted that the plaintiff's counsel's decision to wait until the discovery deadline to produce the recording was "inexcusable" given the relevance of the recording to the plaintiff's claims, Magistrate Judge Sansone found that the defendant's request for a forensic examination was disproportional to the needs of the case and the resolution of the specific discovery dispute, as the defendant offered no evidence that the plaintiff had defaulted on her discovery obligation (as the recording was produced before the discovery deadline had passed) and the defendant failed to offer any facts suggesting that the recording was altered.

Magistrate Judge Sansone also denied the defendant's request to conduct a forensic examination of the plaintiff's cellphone, but did order that the plaintiff produce all text messages between the plaintiff and one of the defendant's employees. Magistrate Judge Sansone noted that although the plaintiff had placed the accuracy of the text messages at issue, the defendant had not established that the discovery benefits of a forensic examination of the plaintiff's cellphone outweighed the impact on the plaintiff's privacy interests. She did, however, allow the defendant to reopen the plaintiff's deposition and required the plaintiff to pay 50% of the defendant's attorneys' fees associated with the motion to compel.

Gottesman v. Santana, No. 16-cv-2902 JLS (JLB), 2017 WL 5889765 (S.D. Cal. Nov. 29, 2017). In an action for copyright infringement, Magistrate Judge Jill L. Burkhardt was asked to compel the defendants to provide further responses to the plaintiff's discovery requests. The defendants objected to producing the additional information on the basis that they had entered into an agreement that limited the amount of financial information

that needed to be produced and because certain information for the eight-year period plaintiff sought was beyond the applicable statute of limitations. Magistrate Judge Burkhardt noted that the 2015 Amendments to the Federal Rules changed the scope of permissible discovery under Rule 26(b)(1), and that as a result, the discovery sought needed to be both relevant to claims and defenses in the case and proportional to the needs of the case. In granting the plaintiff's motion in part, Magistrate Judge Burkhardt found that the defendants did not demonstrate that the parties had a meeting of the minds concerning the alleged agreement that the defendants claimed allowed them to limit the production of financial information.

Noting that the parties had already asked the district judge to rule on the defendants' affirmative defense of the statute of limitations, Magistrate Judge Burkhardt declined to determine whether the statute of limitations precluded discovery into transactions outside that time period. She also noted that "[i]nformation prior to the applicable statute of limitations period could be relevant to Plaintiff's claims if it served as indirect evidence of the scope of a license Plaintiff provided to [the defendants] for the artwork at issue." The defendants argued that the plaintiff's requests were not proportional because the amount in controversy was minimal, that they had already incurred significant attorneys' fees in responding to the plaintiff's requests, and that it was unduly burdensome for the individual defendants to provide further responses. Magistrate Judge Burkhardt was not persuaded. She noted that the record contained the preliminary information on the amount at issue the defendants provided and noted that the plaintiff was seeking additional information in order to establish the amount in controversy. She was similarly not convinced that the fact that the defendants, as a whole, had incurred significant legal fees meant that any individual defendant was unduly burdened. Regarding the defendants' burden argument, Magistrate Burkhardt found that 15 of the defendants had not "put forth any specific evidence that it would be a burden for them to produce the requested information," and that, as a result, these defendants should produce the requested information.

Hinostroza v. Denny's Inc., Case No. 2:17-cv-02561-RFB-NJK, 2018 WL 3212014 (D. Nev. June 29, 2018). In this negligence case, the plaintiff alleged that she had suffered both physical and emotional injuries after she slipped and fell at one of the defendant's restaurants. Magistrate Judge

Nancy Koppe granted in part the defendant's motion to compel the plaintiff to produce, among other things, relevant information from "any social media account that she had used in the preceding five years." Magistrate Judge Koppe noted that, generally speaking, social media content is "neither privileged nor protected by any right of privacy." She also stated that social media information is "relevant to claims of emotional distress because social media activity, to an extent, is reflective of the individual's contemporaneous emotions and mental state." Magistrate Judge Koppe was careful to limit the required production to "all information that references the alleged incident, is relevant to Plaintiff's claims, and exhibits Plaintiff's emotional or mental state, expressions, and reactions to the alleged incident." She required that the plaintiff identify all social media platforms on which the plaintiff had an account and that plaintiff's counsel review "private, direct and public postings, communications, and messages, as well as photographs, which [the plaintiff] has posted, and in which she is tagged referenced or appears," on each of those platforms.

In re Broiler Chicken Antitrust Litigation, No. 16 C 8637, 2018 WL 3586183 (N.D. Ill. July 26, 2018). Magistrate Judge Jeffrey T. Gilbert was asked to impose a protective order that would exempt the defendant from certain of the plaintiff's discovery requests. The defendant argued that it had previously searched for and produced to the DOJ documents similar to those being requested by the plaintiff. The plaintiff noted that the time period for the defendant's custodial searches was narrower than the period at issue in the current action, and thus the defendant's searches did not capture all relevant documents. Magistrate Judge Gilbert noted that discovery under Rule 26 reaches all nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, and that Rule 26(c)(1) gives the court broad authority to enter a protective order limiting discovery to protect a party from, among other things, undue burden or expense. He also noted that Rule 26(b)(2) (B) allows the court to limit discovery if a party shows that it is not reasonably accessible due to undue burden on cost.

Applying Rule 26 to the case before him, Magistrate Judge Gilbert found that the defendant "has not done a good job of identifying or quantifying the burden in either time or cost" of complying with the plaintiff's requests. He noted that while the defendant had provided an overall

cost estimate of between \$1.2 million and \$1.7 million, the defendant had not itemized or broken down that estimate so that the court could understand its component parts. He also noted that this estimate was based on the costs of running the plaintiff's original search terms, and did not take into account the fact that the plaintiff had agreed to limit the categories of documents to be produced and offered to revise the search terms. Magistrate Judge Gilbert also pointed out that the defendant's estimate did not specify whether it was for the entire time period and/or whether the estimate included or excluded documents from the time period covered by the prior production to the DOJ. Ultimately, Magistrate Judge Gilbert found that the defendant could not satisfy the Rule 26(b)(2)(C) factors: (1) whether the requested information was unreasonably cumulative or duplicative; (2) whether it could be obtained from another, more convenient source; (3) whether the requesting party had ample opportunity to seek the discovery; and (4) whether the information was irrelevant or otherwise disproportional to the needs of the case.

Although he denied the defendant's motion for a protective order, Magistrate Judge Gilbert recognized that the parties would benefit from exploring whether there were ways to relieve some of the burden on the defendant, including excluding certain categories from review and continuing to confer on the specific search terms that could be used to further cull the set of documents subject to review.

In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation, MDL No. 2785, 17-md-2785-DDC-TJJ, 2018 WL 2445098 (D. Kan. May 31, 2018). Magistrate Judge Teresa J. James addressed a motion to compel a third party to produce documents relevant to the MDL's underlying claims for violations of antitrust laws. The third party objected to the subpoena and demanded it be quashed, arguing that the requests were overbroad and unduly burdensome, as they requested information going back over 10 years for multiple entities and custodians. The third party also objected because the subpoena was premature and duplicative, as the defendants would be able to produce the information requested.

Judge James granted the motion to compel, finding that the requests were not overbroad and unduly burdensome, as they directly related to the claims in the matter, and that

the subpoena recipient's objections were boilerplate and lacked specificity as to why the subpoena would cause burden. Even though the subpoena recipient submitted an affidavit supporting its claim of burden, Judge James found that the affidavit contained "nothing more than generalities and truisms" such as "review 'could take weeks'" and "document reviews can generate significant costs," and thus did not provide the court with an adequate basis to grant the objections. In addition, Judge James noted that at least some of the information sought would be unique to the third party, and that the third party could not know what documents the defendants may or may not produce in the litigation. However, the court did grant the subpoena recipient's request for cost-shifting and required the plaintiffs to pay for one-half of the costs of complying with the subpoena, as the subpoena was broadly seeking information from not only the subpoena recipient, but also other entities associated with it, and compliance would also require searches across a significant number of custodians. Curiously, even though the court recognized that responding to the subpoena would require a good deal of effort (and ordered cost-shifting), it denied the subpoena recipient's request to extend the document production deadline, and ordered production within 21 days of the order.

In re Morning Song Bird Food Litigation, No. 1:17-mc-00078-JMS-TAB, 2018 WL 1948807 (S.D. Ind. Apr. 25, 2018). Chief Judge Jane Magnus-Stinson of the Southern District of Indiana addressed the plaintiff's motion to compel two subpoena recipients to answer questions about their deposition preparation and/or to transfer the proceedings to the Southern District of California—where the court was addressing the underlying claims for violations of federal racketeering laws and state consumer protection laws. Judge Magnus-Stinson held that the plaintiff's motion to compel and/or transfer was appropriately made in the Southern District of Indiana, as that was the place where compliance was required. In ultimately ruling that it was appropriate to transfer the proceedings to the Southern District of California, Judge Magnus-Stinson noted that "some orientation to the scope of discovery under the Federal Rules of Civil Procedure is helpful to understanding the posture of the pending motions." She then explained that Rule 26(b)(1)'s focus on proportionality required the court to consider the totality of the circumstances, and that while non-party status is "a 'significant factor' in the proportionality analysis, non-

parties must still demonstrate 'significant expense' before receiving protection from discovery."

Judge Magnus-Stinson rejected the report and recommendation of the magistrate judge, finding that Rule 37(a) required the plaintiff to file its motion in the "court where the discovery is ... taken." She also found that the plaintiff's failure to comply with the Southern District of Indiana's local rule, which only "encouraged" counsel to speak with the assigned magistrate before making a discovery motion, did not preclude the court from hearing the plaintiff's motions. She did note, however, that parties to a deposition may find it useful to contact the court for an informal conference before filing a "miscellaneous matter." She also noted that should the non-parties "fail to establish their claims to privilege, the likelihood of eliciting evidence of bias deserves more serious consideration in the Rule 26(b)(1) proportionality analysis than the magistrate judge had previously afforded it, and that the court in the Southern District of California was in the better position to make such a 'discretionary and fact-intensive assessment[.]'"

Kennicott v. Sandia Corp., No. CIV 17-0188, 2018 WL 4148423 (D.N.M. Aug. 30, 2018). In this gender discrimination class action, Judge James O. Browning overruled the defendant's objections to the magistrate judge's order requiring the defendant to comply with the plaintiffs' discovery requests. Those requests sought all complaints the defendant has received about workplace sexual harassment, pregnancy bias, hostile work environment, and retaliation, even though the class alleged discrimination only with respect to pay, promotions, and job evaluations. In affirming the magistrate judge's order, Judge Browning observed that the lawsuit alleges that the defendant's "corporate culture" is "infected with gender bias," which is heightened by the predominance of men in the upper reaches of management. Judge Browning disagreed with the defendant that complaints related to claims of sexual harassment, pregnancy discrimination, hostile work environment, and retaliation "would not be helpful in proving pay discrimination" or the other forms of gender bias, observing that "[t]his case is—in a very general but very real way—about how Sandia Labs treats its female employees on a wide array of topics," and that "[p]roblems in one area may indicate that there are problems in other areas. Just because a document is about pregnancy discrimination does not mean that

the information it contains would not be helpful to the Plaintiffs in proving pay discrimination.” Accordingly, he agreed that evidence related to non-discrimination forms of gender bias is relevant to the plaintiffs’ claims, as “complaints by [defendant’s] female employees regarding pregnancy discrimination, sexual harassment, hostile work environment, and retaliation [are] relevant to Plaintiffs’ claim of gender discrimination, which discrimination according to Plaintiffs is most prominently manifested in pay, promotions, and performance evaluations.”

Mylan, Inc. v. Analysis Group, Inc., No. 18-mc-209-DDC-TJJ, 2018 WL 4063496 (D. Kan. Aug. 27, 2018). This action to enforce a Rule 45 subpoena arose from a lawsuit in which the plaintiff is defending against allegations that it violated consumer protection/unfair competition laws by creating illegal schemes that ultimately pushed a competitor to abandon the market now dominated by the plaintiff’s product. In its defense, Mylan has argued that Sanofi’s competing product “failed because Sanofi was unable to compete on the merits, including price, and not because” of unfair competition by Mylan. To help prove its claims, the plaintiff subpoenaed records from a third party, which had provided consulting services to the plaintiff’s competitor. In response to the subpoena, the third party produced materials that it sent to or received from the plaintiff’s competitor, but withheld internal data it relied upon but did not provide to the plaintiff’s competitor.

Magistrate Judge Theresa J. James acknowledged that while the information could be relevant to the plaintiff’s defenses, it was protected from disclosure by Rule 45’s protections for the opinion work product of an unretained expert or an “expert’s study that was not requested by a party” to the underlying suit. Judge James found that the plaintiff had not demonstrated a “substantial need” for the information, as its proffered use for the material was to show its competitor relied on the third party’s advice, which was a question of fact that did not encompass “information in [the third party]’s files that [third party] did not share with [plaintiff’s competitor].” Judge James therefore denied the motion to enforce production of the materials.

Nece v. Quicken Loans, Inc., No. 8:16-cv-2605-T-23CPT, 2018 WL 1072052 (M.D. Fla. Feb. 27, 2018). In a TCPA action against the defendant for failing to comply with the plaintiff’s revocation of consent to be contacted, Judge

Steven D. Merryday sustained the defendant’s objections to the magistrate judge’s order. The order required the defendant to produce documentation regarding “consumer requests made by similarly situated residential consumers that they not be contacted or that their prior consent be revoked.” It provided no guidance on what constituted a “similarly situated” consumer. Judge Merryday noted that the defendant submitted proof that compliance with the magistrate judge’s order would require dozens of employees to spend months on document review and would cost the defendant at least hundreds of thousands of dollars. He also noted that fact that there were myriad ways an individual could revoke consent to be contacted precluded an “automated” or “keyword” search to identify responsive documents. Accordingly, Judge Merryday found that the magistrate judge’s order was not proportional to the needs of the case.

New Falls Corp. v. Soni, Case No. 16-cv-6805 (ADS) (AKT) (E.D.N.Y. July 5, 2018). Magistrate Judge A. Kathleen Tomlinson was asked to compel a third party to produce documents relating to a note and guaranty the defendant claimed had been signed without his consent. After the plaintiff subpoenaed a third party affiliated with the defendant, the defendant moved for a protective order, claiming that the discovery sought was irrelevant and/or privileged personal financial data. In responding to the plaintiff’s motion to compel, the third party admitted that although it was aware of the existence of a flash drive which might contain relevant information, it could not produce the flash drive as it was not in the third party’s possession. Magistrate Judge Tomlinson stated that the logic underpinning the scope of discovery under Rule 26(b)(1), which applies to requests for production under Rule 34, “is helpful in determining the scope of [the third party’s] obligations under a Rule 45 document subpoena.” Magistrate Judge Tomlinson noted that Rule 34 requires a party to produce information that it has the legal right or practical ability to obtain, and that it was appropriate to apply the same standard in the Rule 45 subpoena context. Accordingly, she held that to the extent that the third party is “capable of obtaining documents responsive to Plaintiff’s subpoena, even if those documents are not in its immediate possession or custody,” specifically the flash drive at issue, it was required to obtain custody of such documents and produce them to the plaintiff.

North Shore-Long Island Jewish Health Systems, Inc. v. Multiplan, Inc., Case No. 12-cv-1633 (JMA) (AKT), 2018 WL 1515711 (E.D.N.Y. Mar. 28, 2018). Magistrate Judge A. Kathleen Tomlinson granted in part and denied in part the plaintiff's motion to compel the defendant to produce certain electronically stored information and for sanctions. Magistrate Judge Tomlinson had previously ordered that the defendant submit to a Rule 30(b)(6) deposition with respect to its claim not to have any documents responsive to the plaintiff's request for information concerning the defendant's profits from contracts between the parties. After learning from the defendant's designee that such information could be generated from the defendant's databases, the plaintiff renewed its motion to compel and moved for sanctions. The defendant objected to having to produce the requested information on several bases, including: (1) that the defendant would have to "create" documents in order to respond to the plaintiff's request; and (2) that the requested information would include any clients of the defendant and information related to healthcare providers other than the plaintiff.

Magistrate Judge Tomlinson found that the information about the defendant's profits was relevant to the claims and defenses, but held that the information relating to clients of the defendant that were unrelated to the plaintiff and information regarding other healthcare providers were not proportional to the needs of the case. With respect to the claim that the defendant would have to "create" documents in order to respond to the plaintiff's request, Magistrate Judge Tomlinson noted that while a party "should not be required to create completely new documents," courts regularly require a producing party to produce reports from dynamic databases. As such, she held that to the extent that the defendant could "input search parameters and produce varying configurations of the raw data," the defendant would be required to generate such reports. She did, however, note that the defendant could challenge any conclusions that the plaintiff derived from the raw data. Magistrate Judge Tomlinson held that sanctions based on the court's inherent powers were not warranted.

Ortolani v. Freedom Mortgage Corp., No. 17-cv-1462-JGB (KKK), 2018 WL 1662510 (C.D. Cal. Apr. 4, 2018). Magistrate Judge Kenly Kiya Kato applied the proportionality requirements imposed by Rule 26(b)(2) to the plaintiff's class certification discovery. Magistrate Judge Kato

noted that Rule 26(b)(2) provides that "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." In the case at hand, Magistrate Judge Kato held that the plaintiff's request for "[a]ll PAY RECORDS for all COVERED EMPLOYEES for the COVERED PERIOD" was disproportionate to the needs of the case. She noted that the records contain "substantial private information that Plaintiff has not established a need for at this time," and that the plaintiff had not made any attempt to "obtain the locations and relative commissions of the putative class members through less intrusive means." Magistrate Judge Kato also noted that the plaintiff had not "established that the discovery is likely to produce substantiation of the class allegations." As such, she denied the plaintiff's motion to compel production of these records without prejudice to raising it after the court decided the class certification motion.

Similarly, Magistrate Judge Kato also denied without prejudice the plaintiff's request to take 30 to 40 depositions beyond the ten allowed under Rule 30(a)(2). She found the proposed additional depositions were not proportional to the needs of the case, noting that the plaintiff had not tried to obtain the information through less-intrusive means and had not shown that the requested discovery was "likely to produce substantiation of the class allegations."

Par Pharmaceuticals v. Express Scripts Specialty Distribution Services, Inc., No. 17MC510, 2018 WL 264840 (E.D. Mo. Jan. 2, 2018). In this action to enforce a Rule 45 subpoena, the plaintiff sought patient prescription records covering a 15-year period from the "exclusive pharmacy that fulfills" prescriptions of a patented drug that the plaintiff is accused of infringing in an underlying litigation. The plaintiff argued that the records were necessary to show the "patents are invalid based on prior art" because they will show that patients were prescribed the patented drug along with the second compound before the patents were issued. The defendant objected "to the production of documents containing patients' confidential prescription records, arguing that the requested documents are irrelevant to the [underlying] litigation and production of such documents would be unduly burdensome" because it would require substantial "manual work," as all "15 years of confidential patient records ... are not available through database searches." Judge Ronnie L.

White was unsympathetic to the plaintiff's stated need for the requested discovery, finding "that the disclosure of confidential patient prescription records is not proportional to the needs of the underlying patent litigation." Whatever their relevance and value, Judge White found that compliance with the subpoena "would impose undue burden and expense on a non-party" to the underlying action, and denied the request to enforce the subpoena.

Physicians Alliance Corp. v. WellCare Health Insurance of Arizona, Inc., CA No. 16-203-SDD-RLB, 2018 WL 1704108 (M.D. La. Feb. 27 2018). Magistrate Judge Richard L. Bourgeois, Jr. was asked to compel the defendant to produce certain backup tapes that the defendant originally claimed were too burdensome to restore (between \$332,000 to \$584,000) and unnecessary as the defendant could already restore data for seven of the ten years covered by the backup tapes. In opposition to the plaintiff's motion, the defendant acknowledged that the true costs of restoring the backup tapes would be between \$7,000 to \$13,000 and that it could not produce all relevant data for the seven years in question.

Before starting his analysis, Magistrate Judge Bourgeois noted his displeasure with the defendant wasting the court's and the plaintiff's time by not having done reasonable due diligence on the availability and restoration costs of the backup tapes so that the issue could have been resolved earlier in discovery. Judge Bourgeois then conducted a proportionality analysis, finding that the discovery of the back-up tapes should proceed because (i) the issues in the litigation were important, with the damages around \$20 million; (ii) the plaintiff had minimal to no access to the information contained on the backup tapes; (iii) the defendant had plenty of resources to absorb the cost; and (iv) the data on the backup tapes was not expected to be duplicative of other discovery.

Shannon v. Honeywell Federal Manufacturing and Technologies, LLC, No. 14-CV-00787, 2018 BL 258755 (W.D. Mo. July 20, 2018). In this employment discrimination case, the plaintiff and defendant proposed competing sets of search terms during the meet and confer process. While the parties largely agreed on the terms, they disagreed on minor parameters, including whether certain terms and names would be run with "AND" or "OR" connectors. Unable to agree, the parties took the issue before

the court. Judge Greg Kays noted: (1) the defendant's preferred version of the "search resulted in 2,484 hits," but "yielded only twelve unique documents" that were relevant and not privileged; (2) the plaintiff's version yielded 7,746 hits during testing, and (3) the defendant estimated that it would cost an additional \$23,320 to review the additional documents returned by the plaintiff's search terms. Judge Kays considered the question under Rule 26(b)(1), and noted that the amount the plaintiff sought in damages exceeded \$100,000. He also observed that the defendant had "sole access to their ESI and there are no facts to suggest they do not have the resources to run the search and produce relevant documents." He therefore ordered the defendant to use the plaintiff's proposed terms at its own expense.

San Diego Unified Port Dist. v. Monsanto Co., No. 15-cv-0578, 2018 WL 3656298 (S.D. Cal. Aug. 2, 2018). Magistrate Judge Clinton E. Averitte held that the defendant could limit the temporal scope of documents produced in response to the plaintiff's discovery requests, as the time period the defendant proposed was the time period when the core of the plaintiff's allegations occurred. Magistrate Judge Averitte noted both that "[s]etting temporal limitations is one common way to cull down the universe of documents and decrease the burdens of discovery," and that "relevant information may be undiscoverable because 'the burden or expense of the proposed discovery outweighs its likely benefit.'" He also noted that the defendant had already produced over one million pages of responsive documents relating to the issues in dispute, which covered at least part of the time period the defendant proposed and a number of years thereafter. Given that the document requests accompanied the plaintiff's Rule 30(b)(6) notice, and that the defendant would need to prepare witnesses who were not employed (and perhaps not even alive) during the time period covered by the plaintiff's initial request, Magistrate Judge Averitte also found that the "relative cost of preparing deponents on a wide range of topics over a 50-year period militated in favor of the temporal limits proposed by the defendant."

Thompson Auto. Labs, LLC v. Illinois Tool Works, Inc., No. 15-cv-282-FL, 2017 WL 5617070 (E.D.N.C. Nov. 21, 2017). In a breach of warranty action, Judge Louise W. Flanagan was asked to compel the plaintiff to respond to the defendant's interrogatories concerning a software

warranty at issue. The plaintiff objected to the requested discovery on the grounds both that it was not relevant to the asserted claims and that the defendant should not be granted leave to amend because it had been aware of the proposed claims since September 2015 and discovery was set to close on December 22, 2017. Judge Flanagan found that the defendants had previously asserted a claim for breach of the software warranty provision and granted the motion to compel. In doing so, Judge Flanagan noted that “[r]elevance in the context of Rule 26 ‘has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’” She stated that the court “ordinarily does interpret ‘relevant’ very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.” Judge Flanagan recognized that the 2015 Amendments could be “construed as narrowing what qualifies as relevant,” but she relied on the Advisory Committee Notes’ reference to a “proper understanding of what is relevant to a claim or defense,” as license to resort to case law that predated the 2015 Amendments—i.e., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)—to support this broad approach to relevance. With this approach in mind, Judge Flanagan held that the defendant had alleged a breach of warranty claim, and that that claim extended to the software warranty. As such, she found that the defendant’s interrogatories were within the scope of discovery and required the plaintiff to respond to them.

U.S. ex rel. Proctor v. Safeway, Inc., No. 11-CV-3406, 2018 WL 1210965 (N.D. Ill. Mar. 8, 2018). In this *qui tam* False Claims Act case, Magistrate Judge Tom Schanzle-Haskins considered the relator/plaintiff’s motion to compel the defendant to review some 575,000 files it produced based on search term hits alone. Further, the plaintiff asked Judge Schanzle-Haskins to order defendant to re-produce in TIFF format hundreds of thousands of files it had previously produced in native format. Taking the latter request first, Judge Schanzle-Haskins refused to order the defendant to produce files more than once, even though the wording of the plaintiff’s requests suggested that they should have been produced as TIFF images in the first place. With respect to the unreviewed search hits, Judge Schanzle-Haskins ordered the defendant to review the documents to identify relevant files. Judge Schanzle-Haskins observed that “[a] party must make reasonable inquiry and certify that discovery is complete and responsive,” citing Rule 26(g)(1). Here, however, Judge Schanzle-Haskins found that the defendant’s keyword “search alone was not a reasonable inquiry under Rule 26(g).” As the defendant informed the court that it had started to analyze the 575,000 native files using Technology Assisted Review (TAR), Judge Schanzle-Haskins ordered the defendant to finish the TAR exercise and to identify relevant documents from its production within eight days of the Order.

Preservation, Spoliation, and Sanctions



The duty to preserve potentially relevant information arises when a party reasonably anticipates litigation. Parties should be cognizant that this duty applies to all forms of ESI likely to contain relevant information, including text messages, instant messages, and social media. Failure to take appropriate steps to preserve these forms of communications can lead to spoliation claims, curative measures, and/or sanctions. Importantly, while the Advisory Committee Notes to Rule 37(e) extend the notion of proportionality to preservation, parties and courts are still struggling to determine how best to approach proportionate preservation in live controversies. In addition, we continue to see courts wrestle with when and how to apply Rule 37(e), and when to rely upon their “inherent authority” to sanction a party for discovery abuses.

Overall, however, Rule 37(e) appears to have had its intended impact in terms of lessening the threat of or use of spoliation motions as a tactical weapon in the context of civil litigation. Courts are finally focusing on the predicates to the Rule that require, before sanctions/curative measures can be imposed, that: (i) there was a loss of ESI; (ii) the ESI is relevant and proportional to the claims and defenses; (iii) the party in question failed to take reasonable steps to preserve the ESI and (iv) the ESI could not be replaced from other sources. We have seen that courts are increasingly inventive in their use of “curative measures” short of “severe” sanctions. One important outstanding question is whether courts can, or should, apply the Rule 37(e) approach to spoliation of tangible things and/or hard-copy documents.

The following cases demonstrate the different approaches that courts took over the course of the past year with respect to sanctions.

Abdelgawad v. Mangieri, CA No. 14-1641, 2017 WL 6557483 (W.D. Pa. Dec. 22, 2017). Judge Cathy Bissoon was asked to impose an adverse inference due to the defendant’s spoliation of both ESI and paper bank records. The plaintiff alleged that the defendant had spoliated ESI when he provided a QuickBooks file that was not accessible and when he failed to preserve paper bank records. Judge Bissoon found that the defendant had not taken reasonable steps to preserve the QuickBooks files, as he made no effort to upload them to a remote server or download them to a separate hard drive. However, as she found that the plaintiff had not demonstrated that the defendant had acted with the requisite intent to deprive the plaintiff of the use of the files in the litigation, Judge Bissoon noted that she could not impose the requested adverse inference. She declined to impose any curative measures under Rule 37(e)(1) as the plaintiff had never asked for any.

With respect to the paper documents, Judge Bissoon noted that the defendant had spoliated evidence when he failed to preserve the documents, and then proceeded to analyze whether the spoliation factors, i.e.: (1) degree of the defendant’s fault; (2) degree of prejudice to the plaintiff; and (3) whether there is a lesser sanction available that avoids substantial unfairness and deters similar conduct by others, supported the award of sanctions. Judge Bissoon found that the defendant was minimally culpable for the loss of the records, as he misunderstood the extent of his obligation to secure copies of bank records that were not in his possession. However, she noted that the plaintiff’s failure to move the court for an order compelling their production prior to moving for summary judgment or to subpoena the bank for the same records counseled against the imposition of sanctions. She also noted that she could “not conceive of

a lesser sanction” that would be appropriate. Accordingly, Judge Bissoon denied the plaintiff’s request for an adverse inference for the spoliation of the paper bank records.

Bank Direct Capital Finance, LLC v. Capital Premium Financing, LLC, No. 15-cv-10340, 2018 WL 1616725 (N.D. Ill. Apr. 4, 2018). Magistrate Judge Jeffrey Cole was asked to sanction the plaintiff for its failure to preserve ESI. Magistrate Judge Cole found that the plaintiff had a duty to preserve the e-mails in question, failed to suspend its automatic deletion of e-mails, and falsely blamed its failure to preserve the e-mails on its decision to change archiving systems. Magistrate Judge Cole also noted that the ESI could not be restored or replaced through additional discovery.

Given the circumstances of the case, Magistrate Judge Cole noted that the “final resolution of the question” of whether the plaintiff acted with the requisite intent to deprive “should be for the jury.” As such, he recommended that the jury be allowed to hear evidence of the plaintiff’s failure to preserve the ESI in question and be given the opportunity to “determine the reasons for the non-production, and the impact, if any, the non-production of the challenged e-mails has on the merit of the parties’ claims.” Alternatively, he noted that if the district court judge was not inclined to allow the matter to proceed to the jury, the court should “give a permissive spoliation instruction ... informing [the jury] of the destruction of the requested emails and that they could consider the deletion of the emails to be evidence (not conclusive of course)” in considering the parties’ claims.

Barbera v. Pearson Education, Inc., Case No. 16-cv-2533-JMS-DML, 2017 WL 6616586 (S.D. Ind. Dec. 28, 2017). Chief Judge Jane E. Magnus-Stinson was asked to overrule Magistrate Judge Debra McVicker Lynch’s decision to sanction the defendant for failing to preserve an e-mail exchange between one of the defendant’s executives and the plaintiff. Magistrate Judge Lynch imposed only curative measures under Rule 37(e) (i.e., requiring that certain facts about the e-mail exchange be accepted as true) because although the defendant had a duty to preserve the e-mail exchange and did not do so, Magistrate Judge Lynch found no intent to deprive. The plaintiff objected to the fact that Magistrate Judge Lynch noted that the plaintiff’s failure to print the e-mail exchange in question, despite having ample opportunity to do so, was further evidence that the defendant’s failure to preserve the e-mail exchange was not done with the intent to deprive the plaintiff of its use in the

litigation. Chief Judge Magnus-Stinson noted she was “not left with the definite and firm conviction that the Magistrate Judge made a mistake in finding no evidence that [the defendant] acted in bad faith or with the intent to deprive [the plaintiff] of use of the e-mail in litigation.” She also noted that because “[the plaintiff] has not identified and the Court has not found any evidence showing bad faith or intent to deprive,” the court was overruling the plaintiff’s objections to Magistrate Judge Lynch’s order.

Caltenco v. G.H. Food, Inc., No. 16 Civ. 1705, 2018 WL 1788147 (E.D.N.Y. Mar. 3, 2018). Magistrate Judge Vera M. Scanlon denied the plaintiff’s request to preclude the defendant from offering certain evidence at trial and for an adverse inference based on the defendant’s alleged spoliation of loose sheet records, an accountant’s summary and certain hard-copy notebooks. Magistrate Judge Scanlon noted that in order to establish spoliation a party must establish: (1) the party having control over the evidence had a duty to preserve it; (2) the party destroyed the records with a culpable state of mind; and (3) the evidence was relevant to the opposing party’s claim or defense such that the reasonable fact finder could find that it would support such claim or defense. Magistrate Judge Scanlon found that the defendant did not have the duty to preserve the information at issue or that the defendant’s behavior exhibited the requisite culpable state of mind. In addition, she noted that because the defendant acted “at most negligently by failing to preserve the documents,” the Court would not presume the information was prejudicial to the plaintiff. As the plaintiff did not offer extrinsic evidence sufficient to demonstrate any prejudice, sanctions were not appropriate.

Clientron Corp. v. Devon IT, Inc., 894 F.3d 568 (3d Cir. 2018). The Court of Appeals for the Third Circuit reversed the trial court’s order sanctioning the defendant’s principal by finding that he was liable as the alter ego of the defendant but limiting his exposure to \$737,000 (not the full \$6.5 million the plaintiff was seeking) plus attorneys’ fees. In addition, as the defendant had produced 93 boxes of irrelevant information without sorting the documents by topics or categories, never designated a Rule 30(b)(6) witness, and allowed its principal to continue deleting the business e-mails he sent and received from his personal e-mail account even after he knew the current dispute had arisen, the court imposed a monetary fine on the defendant, precluded the defendant from using evidence in support of one of its defenses, and ultimately

issued a permissive adverse inference against the defendant due to the discovery misconduct.

The Third Circuit reviewed the trial court's discovery sanction against the defendant's principal for abuse of discretion, vacating the decision because the trial court went beyond the permitted sanctions under Rule 37(b) in finding that the plaintiff could pierce the corporate veil and hold the defendant's principal personally liable. The Third Circuit noted that while the trial court has the discretion to impose appropriate sanctions, such discretion does not give the trial court carte blanche, as the sanction must be just and specifically related to the particular conduct and claim at issue. It held that Rule 37(b)(2) "certainly allows courts to adopt conclusions, presumptions, inferences, or evidentiary preclusion rules that operate within the confines of the claims and defenses the parties have already raised, but we cannot say that it authorizes courts to create new federal law remedies that liberates [sic] courts from those confines entirely." On remand, the Third Circuit noted that the trial court could impose a new sanction, and that "an adverse inference and/or the preclusion of evidence are potential options," and that by "allowing consideration of discovery misconduct within the merits analysis, such measures would ensure that the requisite nexus existed between the sanction imposed and the particular claims at issue."

Comlab Corp. v. Kal Tire, No. 17-cv-1907, 2018 WL 4333987 (S.D.N.Y. Sept. 11, 2018). Judge Katherine B. Forrest granted the defendant's motion for terminating sanctions based on the plaintiff's fabrication of e-mails and the wiping of its president's computer. The defendant admitted to receiving four invoices from the plaintiff, but could not find any evidence that it received the 16 additional invoices the plaintiff claimed to have sent. The plaintiff provided 13 hard-copy invoices as well as several e-mails the plaintiff claimed to have sent to the defendant. The defendant, who had enabled the "litigation hold" feature for its custodians' e-mail accounts in November 2015, meaning that all incoming and outgoing messages were preserved, could find no evidence of any of the e-mails that the plaintiff claimed to have sent beginning in December 2015. Although the defendant requested native versions of the plaintiff's e-mails in order to analyze the authenticity of the e-mails, two days before the deposition of its president, the plaintiff informed the defendant that it had wiped the president's computer, where the native e-mails allegedly existed, due to a computer virus.

Judge Forrest noted that she could impose sanctions based either on Rule 37(b) or the court's inherent powers. She also noted that the party seeking sanctions has the burden of proving spoliation by a preponderance of the evidence. Based on the facts before her, Judge Forrest found that the plaintiff had fabricated the e-mails, and, by wiping the hard drive, prejudiced the defendant's ability to defend itself. After considering whether an adverse inference or other less drastic sanctions were appropriate, Judge Forrest held that the plaintiff had acted willfully and in bad faith and as a result, "only dismissal will adequately deter" the plaintiff and restore the defendant to the position it would have been in but for the plaintiff's conduct.

EEOC v. GMRI, Inc., No. 15-20561-CIV-LENARD/GOODMAN, 2017 WL 5068372 (S.D. Fla. Nov. 1, 2017). In an employment discrimination case, Magistrate Judge Jonathon Goodman was asked to sanction the defendant for the alleged spoliation of: (1) e-mails; and (2) paper applications and interview booklets. In his analysis, Magistrate Judge Goodman reviewed the pre-2015 standard for awarding default judgments and adverse inferences, noting that the 11th Circuit required a finding of bad faith before imposing sanctions. In the case before him, Magistrate Judge Goodman found that it was "difficult to conclusively determine that the missing materials—paper applications, interview booklets, interview guides, and e-mails—would necessarily have helped" the plaintiff or harmed the defendant. He also noted that the defendant had a "logical argument that the missing materials were not critical or crucial to the [plaintiff's] case." Taking these two factors together, Magistrate Judge Goodman decided not to impose an adverse inference, as the plaintiff "ha[d] not met one of the critical prerequisites for a permissible adverse inference—that the missing or destroyed materials were crucial to [the plaintiff's] case." He did allow the parties to present competing facts and theories to the jury about the missing paper applications. In addition, given that Rule 37(e) applied to the failure to preserve e-mails, Magistrate Judge Goodman allowed the plaintiff to "argue to the jury that it may reach an adverse inference about missing ESI if (but only if) it concludes that [the defendant] acted in bad faith (i.e., 'with the intent to deprive' [the plaintiff] of the ESI's use in this lawsuit."

EPAC Techs., Inc. v. HarperCollins Christian Publishing, Inc., No. 12-cv-00463, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018). In this breach of contract case between a book printer and a publisher, the plaintiff sought monetary and adverse inference sanctions for three distinct losses of ESI and physical evidence by the defendants: (1) loss or destruction of 30,000–40,000 books printed by the plaintiff but alleged to be of deficient quality by the defendant and for which the defendant refused to pay, (2) detailed inventory data describing precisely the books received by the defendant, where they were stored, and their ultimate disposition (either destruction or sale), and (3) hundreds of thousands of emails hosted on a third-party server relying on Google/Postini cloud archiving, which were deleted due to a failure to suspend automatic deletion settings. Magistrate Judge Alistair Newborn, reviewing the findings and recommendations of the Special Master appointed in the case, found that Rule 37(e) applied to the lost warehouse and email data, but that the court would rely on its inherent authority to sanction the defendant for its loss of the physical books.

With respect to the books, Magistrate Judge Newman found that the defendant had negligently disposed of the books, entirely losing track of them and possibly even selling them. This loss caused substantial prejudice to the plaintiff, who was deprived of the physical evidence that would have established whether or not the books met the quality requirements of the contract. To remedy this prejudice, Judge Newman opted “to create a rebuttable presumption that establishes the missing elements of the plaintiff’s case that could only have been proved by the availability of the missing evidence,” awarding a permissive adverse inference that the jury may assume the missing books were of sufficient quality as to support the plaintiff’s claims.

With respect to the lost inventory and email ESI, Judge Newman found that the defendant failed to take reasonable steps to preserve the lost information, that only some of the lost ESI had been replaced from an alternative source, and that there could be no inference that the plaintiff acted with the requisite intent to deprive. Nevertheless, he found that both losses prejudiced the plaintiff’s case and that curative measures were appropriate, awarding a limited instruction describing what the lost inventory data might have shown, precluding the defendant from putting on evidence of customer complaints about the plaintiff’s books, allowing the plaintiff to re-depose custodians on issues raised in

the limited emails that were produced, and ordering the defendant to bear 75 percent of the Special Master’s fees and costs and 50 percent of the plaintiff’s costs and attorneys’ fees incurred in connection with the proceedings before the Special Master.

Franklin v. Howard Brown Health Center, No. 17 C 8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018). In this hostile work environment litigation, Magistrate Judge Jeffrey Cole observed that “the defendant has had to concede that, at the very least, it bollixed its litigation hold – and it has done so to a staggering degree and at every turn.” The plaintiff’s motion stemmed from the plaintiff’s request for all emails and text messages “that mention or concern the plaintiff in any way,” which, upon further correspondence, the plaintiff explained included “instant messages.” The defendant admitted that it had “instituted a litigation hold that covered all emails and instant messages relevant to plaintiff from then-current employees” around the time of plaintiff’s first statement that he intended to sue. “However ... no in-house or outside attorney or anyone in charge oversaw this; instead the defendant allowed employees to decide on their own what was relevant and what wasn’t.” Further, litigation counsel, in-house counsel, and the defendant’s IT administrators all evinced differing opinions on whether and how instant messages on defendant’s employees’ computers were saved, both before and after the purported litigation hold was implemented. The defendant’s counsel did not discover until three years into the litigation that instant message conversations were automatically sent to an employee’s Outlook folder, but expired after two years if the user (or administrator) did not take action to permanently save them. As such, by the time anyone involved in the litigation learned of this process, the relevant messages “were long gone.”

Judge Cole assessed plaintiff’s motion under Rule 37(e), finding that all of its pre-requisites were clearly established, but was unable to determine whether defendant or its employees acted with intent to deprive the plaintiff of relevant material in the litigation. Judge Cole commented that “[t]he trial court is generally in the best position to effect sanctions for loss or non-production of evidence as only the trial judge can see how the evidence unfolds and the import it has,” and suggested that “perhaps the jury might even be allowed to assess the evidence and, properly instructed, find the defendant acted intentionally.” He therefore recommended that Judge Marvin E. Aspen allow the parties

“to present evidence and argument to the jury regarding the defendant’s destruction/failure to preserve electronic evidence in this case” and to instruct the jury “as the trial judge deems appropriate” about the missing documents.

Folino v. Hines, No. 17-cv-1584, 2018 WL 5982448 (W.D. Pa. Nov. 14, 2018). Judge Cathy Bissoon granted the plaintiff’s motion for sanctions against a defendant who had factory reset two iPads and wiped all active data from a laptop shortly before turning the devices over to the plaintiff for a forensic examination. The case involved the plaintiff’s claim that the defendant in question and one other individual violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 when they accessed the plaintiff’s e-mail account without authorization. Judge Bissoon applied the analytical framework required by Rule 37(e), finding that there was a duty to preserve the electronically stored information in question, that the information was lost, and that it could not be obtained from another source. She then examined whether the defendant acted with the intent to deprive required for sanctions under Rule 37(e)(2). Judge Bissoon found that the fact the devices were wiped the day before the defendant agreed to produce them to the plaintiff, that only an intentional act could have factory reset the iPads, and that the defendant had control over the devices as they were in her home at the time the information was overwritten all supported a finding that the defendant acted with the intent to deprive the plaintiff of the use of the ESI in question in the action.

Judge Bissoon then noted that courts need to consider several factors in determining what sanctions are appropriate, including: (1) the degree of fault of the spoliating party; (2) the degree of prejudice to the moving party; and (3) whether lesser sanctions are appropriate. Applying these factors to the case at hand, Judge Bissoon found that the egregious nature of the defendant’s conduct “warrants the harshest sanction available: default judgment in favor of the plaintiff.” She noted that the spoliated evidence was critical as it was the “evidence which could determine who hacked Plaintiff’s computer and there is no other evidence that exists which prove liability for the underlying claim.” Judge Bissoon also found that no lesser sanction was available that would effectively deter or would be fair to the plaintiff as the destruction of the information in question was “the equivalent of the destruction of Plaintiff’s case and a flouting of the law.”

Gipson v. Management & Training Corp., No. 16-CV-624, 2018 WL 736265 (S.D. Miss. Feb. 6, 2018). Chief Judge Daniel P. Jordan III denied without prejudice the plaintiff’s motion for an adverse inference based on the defendant’s failure to preserve surveillance video footage, prison logbooks, and count slips. After noting that the surveillance footage probably “falls under Rule 37(e),” Judge Jordan noted that although the plaintiff had provided “some evidence concerning duty, proportionality, and intent, the issues would be easier to assess on a full record.” He also explained that, consistent with the Advisory Committee note to Rule 37(e), the court would at least consider allowing the jury to decide the intent issue. Judge Jordan explained that he would revisit the request for an adverse inference at trial.

GN Netcom, Inc. v. Plantronics, Inc., CA No. 12-1318, 2018 WL 273649 (D. Del. Jan. 3, 2018). In this latest episode in the drama of the defendant’s intentional spoliation of ESI, the plaintiff sought a new trial based on its contention that the court erred in issuing a permissive adverse inference rather than a dispositive sanction. Judge Leonard P. Stark denied the plaintiff’s motion, finding that the decision not to impose the requested sanctions did not constitute error, and even if it did, that “any such error did not substantially prejudice the plaintiff.” Judge Stark noted that the jury heard evidence about the defendants’ conduct and spoliation, and that the “relatively limited additional spoliation-related evidence” the plaintiff contends the jury should have heard rendered any error harmless. He disagreed with the plaintiff’s claim that the permissive adverse inference “did nothing to cure the prejudice” caused by the defendant’s spoliation, noting that the court had imposed a \$5 million fine, instructed the jury that the defendant had spoliated evidence, allowed the plaintiff to present a detailed recitation of the facts relating to the defendant’s spoliation, and allowed the plaintiff to present evidence throughout the trial concerning the defendant’s spoliation.

GoPro, Inc. v. 360Heros, Inc., No. 16-cv-01944, 2018 WL 1569727 (N.D. Cal. Mar. 30, 2018). Judge Susan Illston declined to issue terminating sanctions after it became clear that the defendant altered the transcripts of two Skype conversations between one of the defendant’s employees and the founder of one of the plaintiff’s subsidiaries. Specifically, the plaintiff accessed the conversations from the account of the founder of its subsidiary and found that the defendant’s employee had inserted two lines of text that were not contained in

the plaintiff's version of the conversations. Judge Illston noted that terminating sanctions are harsh penalties that "should only be imposed in extreme circumstances," including where the violation is due to the "willfulness, bad faith or fault of the party," and only after considering certain discretionary factors, including, among others, the availability of less drastic sanctions. Finding that the defendant deliberately altered the Skype conversations, Judge Illston declined to dismiss the case, noting that less drastic sanctions were available to remedy "any potential prejudice to" the plaintiff. Accordingly, Judge Illston ordered that the plaintiff was entitled to: (1) an adverse inference at trial about the nature of the defendant's conduct; and (2) reimbursement of the plaintiff's costs in retaining an expert to analyze the Skype conversations.

Gordon v. Almanza, No. 16-CV-00603, 2018 WL 2085223 (S.D. Iowa Mar. 5, 2018). Chief Judge John A. Jarvey declined to impose an adverse inference after the defendant truck driver failed to preserve his cellphone after an accident and his employer failed to produce certain bills of lading and driving logs for the driver in question. Although the cellphone data is unquestionably ESI, which would require that the court analyze whether the request for an adverse inference was appropriate under Rule 37(e), Chief Judge Jarvey instead analyzed whether he had the inherent power to sanction the defendants. He noted that in order to impose an adverse inference based on the court's inherent power, the court needed to make two findings: (1) that there was intentional destruction indicating a desire to suppress the truth; and (2) that there was prejudice to the other party from the spoliation. Chief Judge Jarvey found that truck driver's destruction of his cellphone when he threw it against the wall after a failed romantic encounter did not establish the requisite intentional destruction, and that the plaintiff was not prejudiced because the destruction of the cellphone did not prevent the plaintiff from "retrieving virtually all data needed to determine if [the truck driver] was on his cellular telephone" at the time of the accident. He also found that the failure to produce the driving logs and bills of lading was not sanctionable, because: (i) they were irrelevant to the question of the cause of the accident or the amount of damages; and (ii) there was no evidence that they were destroyed to "suppress the truth."

Hernandez v. City of Houston, No. 16-CV-3577, 2018 WL 4140684 (S.D. Tex. Aug. 30, 2018). Judge Kenneth M. Hoyt imposed an adverse inference on the defendant after it

became clear that the defendant had misrepresented its discovery efforts, violated the existing ESI order, failed to comply with the court's discovery orders, and intentionally destroyed relevant evidence. Specifically, Judge Hoyt noted that the defendant had unilaterally departed from the stipulated ESI order when it filtered the results returned by the parties' agreed-upon search terms using a further set of undisclosed terms developed solely by the defendant. He also found that the defendant intentionally destroyed evidence when it "failed to take reasonable steps to preserve data on hard drives" used by six former employees and then intentionally wiped the drives. As a result, no relevant information could be obtained from the drives. Judge Hoyt also found that the defendant had misrepresented both that a litigation hold had been issued (when it had not) and that the defendant needed to review 2.6 million documents, which it claimed would take over 17,000 hours, when there were only 78,702 documents that hit on the agreed-upon search terms. Judge Hoyt also faulted the defendant for misleading the plaintiff and the court when, before disclosing that it had wiped the custodians' hard drives, the defendant represented that there were no responsive documents on the hard drives. Judge Hoyt found that the defendant's conversations with certain of its employees, supported by unsworn affidavits, were "insufficient to establish the absence of responsive documents on the wiped hard drives." Judge Hoyt also noted that Rule 37(b)(2) allows a court to issue an order establishing contested facts as true in order to remedy the violation of discovery orders. He found that imposing such a remedy, *i.e.*, an adverse inference, was appropriate, as it cures the violation without inflicting additional costs on the parties.

Hernandez v. Tulare County Correction Center, No. 16-CV-00413, 2018 WL 784287 (E.D. Cal. Feb. 8, 2018). Magistrate Judge Erica P. Grosjean declined to sanction the defendants when they failed to preserve certain video footage and photographs relating to the incident in which the plaintiff was injured. The plaintiff had requested that the court impose a default judgment and award him monetary sanctions for the defendants' discovery failures. Magistrate Judge Grosjean went through the Rule 37(e) analysis, finding that the evidence existed, it should have been preserved, the defendant did not take reasonable steps, and the ESI could not be restored or replaced. She found that there was no intent to deprive the plaintiff of the use of the information, as the destruction of the photos and video footage was inadvertent at best. In addition, Magistrate Judge Grosjean

found that the plaintiff could not show any prejudice from the absence of the evidence, namely because the defendant did not dispute that it had done the things that the plaintiff complained about, and because the plaintiff had located eyewitnesses who had agreed to provide testimony in support of his case. Without the requisite prejudice and/or intent to deprive, Magistrate Judge Grosjean could not sanction the defendant or impose curative measures.

IBM Corp. v. Naganayagam, No. 15 Civ. 7991 (NSR) 2017 WL 5633165 (S.D.N.Y. Nov. 21, 2017). In an action to recover the value of certain restricted stock options, Judge Nelson Roman denied the defendant's motion for sanctions. The defendant sought to argue that the plaintiff did not consider the defendant's current employer a competitor, and he sought e-mails and other internal documents to prove this point. After learning that the plaintiff may not have taken steps to preserve certain e-mails relating to the defendant's departure from the plaintiff, the defendant moved for an adverse inference and the imposition of monetary sanctions. Judge Roman held that pursuant to Rule 37(e)(2), an adverse inference was not appropriate because the defendant could not show that the plaintiff had destroyed the e-mails with the intent to deprive the defendant of their use in the litigation. In addition, Judge Roman found that the defendant could not demonstrate the prejudice necessary to allow for the imposition of curative measures under Rule 37(e)(1). Notably, Judge Roman stated that "[w]hile Rule 37(e) does not necessarily place the burden of proving or disproving prejudice on any particular party, requiring the moving party to prove prejudice may be reasonable in situations where 'the content of the lost information is fairly evident, the information [] appear[s] to be unimportant, or the abundance of preserved information [] appears sufficient to meet the needs of all parties.'" Judge Roman noted that, despite having deposed the defendant's direct supervisor, the defendant offered no evidence that the spoliated e-mails "contained discussions of whether [the plaintiff] and [the defendant's current employer] are competitors." Similarly, the alleged spoliation of certain documents discussing the plaintiff's strategic plans for Australia and New Zealand were immaterial, as the plaintiff only needed to show that the defendant's current employer had "become[] competitive" with the plaintiff, and there was no specific geographic limitation.

In re Abilify (Aripiprazole) Product Liability Litigation, No. 16-MD-2734, 2018 WL 4856767 (N.D. Fla. Oct. 5, 2018). Magistrate Judge Gary R. Jones denied the plaintiffs' motion for an adverse inference and/or to preclude the defendant from introducing the lack of earlier evidence to challenge the plaintiffs' claims. The defendant admitted that between 2004 and 2006 it implemented an automatic deletion policy that ensured that e-mails were deleted 60 days after they were received. This policy was replaced in 2007 with a policy that preserved all e-mail communications going forward. Judge Jones noted that Rule 37(e) governed the plaintiff's request, and that in order to be entitled to sanctions the plaintiff needed to satisfy its four prerequisites (duty to preserve, lost ESI, failure to take reasonable steps, inability to restore or replace the ESI), as well as demonstrate either that the defendant acted with the intent to deprive or that the plaintiff was prejudiced. After reviewing the evidence presented by both sides, Judge Jones found that the defendant did not reasonably anticipate litigation between 2002 and 2006, rejecting the plaintiffs' attempt to find that industry-wide events created a duty to preserve. Judge Jones noted that such a theory was "highly problematic because it improperly places too much emphasis on events other than those generated by the plaintiff or those similarly situated to the plaintiff." He also rejected the plaintiff's claim that early scientific literature drawing connections generally between a different class of drugs and the plaintiff's claimed adverse effects should have put the defendant on notice of the need to preserve as early as 1995. Finally, he also rejected the plaintiff's claims that the defendant had regulatory or contractual duties to preserve the documents, finding in both cases that any duty that existed was not owed to the plaintiffs and thus could not serve as the basis for a duty to preserve in the case before him. Judge Jones therefore denied the plaintiffs' broad demand for an adverse inference sanction.

In re Correira, No. 16-br-30728, 2018 WL 4027001 (N.D. Tex. Bankr. Aug. 21, 2018). Judge Stacey G.C. Jernigan sanctioned both the debtor and his long-time assistant for spoliating relevant evidence. The assistant testified during a Rule 2004 examination that she retained possession of one of the debtor's computers on which she had maintained a digital filing system, which included information concerning the debtor's finances. After her Rule 2004 examination and just after discussions concerning a consensual production of the computer collapsed, someone inserted USB drives into the computer in question and then proceeded to download and

run a computer wiping program to address the unallocated space. Thereafter, someone using the assistant's log-in credentials copied over 101 GB of movie files onto the hard drive, covering most of the space where any deleted files might have remained. Despite these attempts, after the creditor obtained the computer, it was able to find a number of live files relating to the debtor's assets.

Judge Jernigan sanctioned both the assistant and the debtor. Regarding the assistant, Judge Jernigan was compelled to use the court's inherent power to sanction, as neither Rule 37(e), which Judge Jernigan noted did not apply as the assistant was not a party when the spoliation occurred, nor Rule 45(g) applied. Finding that the assistant had reasonable notice and due process as to what was expected of her, the court found she acted in bad faith and required her to pay the legal fees incurred by the court-appointed trustee and those of another creditor upon whom the trustee relied for assistance. With respect to the debtor, Judge Jernigan found that Rule 37(e) applied, and that the debtor had the practical ability to obtain the computer from his assistant. She held that the computer should have been preserved, the debtor failed to take reasonable steps to preserve it, and that it could not be replaced or restored. Based on the circumstances of the case, Judge Jernigan found that the debtor acted with the intent to deprive the creditor and the trustee of the use of the information, which permitted the court to impose sanctions. As such, Judge Jernigan required the debtor to be jointly and severally liable with his assistant for the attorneys' fees incurred by the trustee and creditor. She also cautioned the debtor that unless he produced all responsive documents from his cloud account and the USB drives that had not previously been produced, she would issue an "appropriate adverse inference."

Industrial Quick Search, Inc. v. Miller, Rosado & Algois, LLP, No. 13 Civ. 5589 (ER), 2018 WL 264111 (S.D.N.Y. Jan 2, 2018). Judge Edgardo Ramos denied the defendants' motion for summary judgment and held that the plaintiffs' legal malpractice claims could continue, as there were material factual questions as to, among other things, whether the defendants properly advised the plaintiffs on their preservation obligations in a prior matter. In that matter, the plaintiffs had been sanctioned for spoliating evidence, which contributed to an adverse decision against them. The plaintiffs alleged that during the course of that

prior litigation, the defendants did not advise them of their duty to preserve evidence, including the need to issue a legal hold. In finding the malpractice claim could proceed, Judge Ramos stated that "counsel has an obligation to take reasonable steps to ensure the preservation of relevant information" and that "an attorney's failure to fulfill that 'obligation' falls below the ordinary and reasonable skill possessed by members of the bar."

Klipsch Group, Inc. v. EPRO E-Commerce Ltd., 880 F.3d 620 (2d Cir. 2018). The Second Circuit upheld the district court's award of sanctions for the defendant's spoliation of ESI. The district court had found that the defendant failed to issue a litigation hold, allowed custodians to delete thousands of documents, prevented its vendor from accessing certain data sources when it ran keyword searches, and failed to preserve instant messages sent by relevant custodians. The district court sanctioned the defendant, requiring the jury to find that the defendant had spoliated evidence at a time when it had the duty to preserve it, permitting the jury to infer that the spoliated evidence would have been favorable to the plaintiff, and requiring the defendant to pay the plaintiff's reasonable costs and fees associated with attempting to uncover the extent of the spoliation—which amounted to \$2.7 million.

The Second Circuit upheld the district court's factual findings concerning the defendant's spoliation. Notably, with respect to the failure to preserve the instant messages, the Second Circuit found that the fact that the defendant "did not have a software usage policy requiring its employees to segregate personal and business accounts or to otherwise ensure that professional communications sent through personal accounts could be preserved by the company for litigation purposes was the company's own error."

The Second Circuit also upheld the monetary sanction, over the defendant's objection that it was not proportionate to the amount of the infringing sales, which totaled roughly \$20,000. The Second Circuit noted that the sanction was "carefully limited to the costs [the plaintiff] incurred in direct response to [the defendant's] misconduct," and that it saw "no reason why the party required to undertake [expensive corrective discovery efforts] should not be compensated simply because it turned out that the obstructive conduct had hidden nothing of real value to the case." The Second Circuit also noted that "[t]hose costs must be placed on

the uncooperative opponent in order to deter recalcitrant parties from the cavalier destruction or concealment of materials that the law requires them to retain and disclose.”

Editors’ Note: This decision presents a number of challenges for e-discovery and information governance, and is a stinging reminder of the pre-2015 Amendments regime that governed spoliation sanctions. And while it must certainly be true that courts have an interest in deterring “recalcitrant parties from the cavalier destruction of concealment of materials that the law requires them to retain and disclose,” amended Rule 1 also places on both the parties and the court a responsibility to efficiently resolve cases. In light of that responsibility, we are hopeful both that future courts might not allow any party to run up a \$2.7 million legal tab in pursuit of spoliated evidence in a case with \$20,000 at issue, and that future parties might have the sense not to do so.

Knight v. Boehringer Ingelheim Pharmaceuticals, Inc., 323 F. Supp. 3d 837 (S.D. W. Va. June 19, 2018). In an unrelated litigation, the defendant was sanctioned in the Southern District of Illinois by Chief Judge Herndon for spoliation of evidence. Plaintiffs in the matter-at-hand made similar spoliation claims against the defendant and sought severe spoliation sanctions against the defendant based entirely upon Chief Judge Herndon’s findings in the prior case. Although Judge Robert C. Chambers stated that there may be situations where spoliation sanctions occurring in past matters may be acknowledged and applied in subsequent similar matters, he found that this was not one such matter, and denied the plaintiffs’ spoliation motion.

Judge Chambers stated that he was “troubled by the fact that the potentially sanctionable activity did not occur subject to this Court’s direction” and, thus, the court did not “observe firsthand the course of conduct that could justify sanctions.” In addition, Judge Chambers noted the parties had previously agreed to be bound by scope of discovery in the prior matter and the plaintiffs did not raise any concerns with this limitation at any point during discovery until the instant motion was filed. Judge Chambers found that the litigation tactic of remaining silent and not raising any concerns for two years was inappropriate, as parties should raise concerns immediately when they become known. Finally, as Rule 37 had been amended after the prior

decision, Judge Chambers applied Rule 37(e) and found no intent to deprive or provable prejudice to plaintiffs.

In addition to the relying on the prior sanctions ruling, the plaintiffs also asked for sanctions due to the defendant’s loss of emails during a transition from one legal hold system to another. Even though about a year’s worth of emails was lost for a particular custodian, the court found that the deletion was inadvertent, that there was no provable prejudice to the plaintiffs, and the defendant’s remedial efforts to locate and produce a copy of the custodian’s emails obtained through other employees’ email accounts showed there was no deprivation of relevant information.

Lawrence v. City of New York, et al., No. 15-CV-8947, 2018 WL 3611963 (S.D.N.Y. July 27, 2018). In this civil rights action, the plaintiff alleged that NYPD officers entered her home without a warrant, unlawfully detained her, caused damage to her property, and “stole” more than \$1,000 cash. Ten months after filing suit, the plaintiff produced 70 photographs that she alleged showed the condition of her home two days after the raid. The photos were provided digitally to plaintiff’s counsel, who saved them into a PDF document and applied Bates numbers to them. Two months later, during her deposition, the plaintiff asserted that the photos were taken by her son or a friend; although during a second deposition, she testified that she had taken most of them herself, her son had taken some, and none were taken by a friend. To clear up the ambiguity and establish a foundation for the photos, the defendant requested that the plaintiff submit for forensic examination the smartphones used to take the photos. The defendant ultimately agreed to accept “native” versions of the photos, including metadata. That metadata showed that 67 of the photographs had been taken in September 2016, immediately before plaintiff produced them to the defendant. In granting the defendant’s motion for terminating sanctions, Judge William H. Pauley, III, observed that Rule 37 (including subpart 37(e)) did not apply to the plaintiff’s actions, as that Rule “provides generally for sanctions against parties or persons unjustifiably resisting discovery. Here, [the plaintiff] did not fail to comply with discovery orders, to supplement an earlier response, or to preserve electronically stored information.” Instead, Judge Pauley described the “staged” photographs and the plaintiff’s statements about them as “an attempted fraud on this court.” Viewed through that lens, Judge Pauley invoked court’s “inherent power to sanction a party for bad faith litigation conduct” and dismissed the plaintiff’s claims. He noted that “[a]ny sanction less than

dismissal, such as a jury instruction, would be ineffective” at curing the plaintiff’s fraud and deterring further malfeasance.

Leidig v. Buzzfeed, Inc., No. 16-CV-542, 2017 WL 6512353 (S.D.N.Y. Dec. 19, 2017). In this defamation suit, the foreign plaintiff, a publisher of news stories via “several” websites and servers in Europe and Asia, alleged that the defendant had defamed it via an article published on the defendant’s site claiming the plaintiff had published numerous “fake” or “false” news stories. After filing suit, the plaintiff filed an initial disclosure indicating it had “taken down” some of the websites relevant to the defendant’s allegedly defamatory article, but promised to produce “screenshots of these websites as they appeared before they were taken down.” During discovery, the defendant requested the stories it had described as fake in its own article, as well as records relating to the plaintiff’s disabling of some of its websites. In response, the plaintiff failed to produce the promised screenshots, claiming they did not exist, and produced a number of other records with no metadata, metadata reflecting creation after the start of the litigation, or reflecting manipulation or summarization of underlying data that was not produced. The plaintiff further directed the defendant to search the Internet Archive (<https://archive.org>) to locate copies of its articles as they appeared on the plaintiff’s sites. Finally, during the course of discovery, the defendant also alleged that the plaintiff had failed to preserve and produce emails dating from several days after the plaintiff served its first cease and desist letter to the defendant. The defendant eventually sought spoliation sanctions related to the loss of the websites, loss of metadata for otherwise “produced” documents, and loss of emails. Magistrate Judge Gabriel W. Gorenstein analyzed the motion under Federal Rule of Civil Procedure 37(e). With respect to the lost emails, Judge Gorenstein found that the defendant had failed to demonstrate that any emails other than just one had been “lost,” and that the defendant was not in any event prejudiced by the loss of that email. With respect to the websites, Judge Gorenstein found that they were plainly relevant to the underlying case and were lost when the plaintiff was under a duty to preserve relevant information. Similarly, he found that the metadata was lost when it should have been preserved, and could have been critical to the defendant in showing that its article about the plaintiff was true. Both of these losses prejudiced the defendant, which could not be cured with additional discovery, such as from the Internet Archive, as the plaintiff made no “showing that the data generated from the website

is reliable, complete, and admissible in court.” To cure the prejudice to the defendant, Judge Gorenstein prohibited the plaintiff from relying on the dates indicated by the faulty metadata it produced while permitting the defendant to present evidence “regarding plaintiffs’ destruction of their metadata so that [defendant] may make arguments that the material presented was not created on the date claimed.” With respect to the websites, he permitted the defendant to admit evidence from the Internet Archive, but prohibited the plaintiff from challenging the admissibility of that evidence.

Lexpath Technology Holdings, Inc. v. Welsh, No. 17-2604, 2018 WL 3620479 (3d Cir. July 30, 2018). After a jury found for the defendant, a former employee of the plaintiff accused of misappropriating trade secrets, the plaintiff appealed. Among other grounds for the appeal, the plaintiff pointed out that the trial judge: (1) had failed to deliver to the jury a permissive adverse inference instruction that the judge previously had awarded to the plaintiff as a sanction for the defendant’s intentional spoliation of evidence; and (2) had declined to instruct the jury as a matter of fact or law that spoliation had occurred. Prior to trial, the judge had found that the defendant had run digital file destruction software, CCleaner, on a laptop owned by the plaintiff that the defendant had retained after resigning. Finding that this action had likely destroyed relevant evidence, the trial judge agreed to permit the plaintiff to present evidence of the destruction to the jury, and to instruct the jury that, if it found that evidence was destroyed, it could (but was not required to) presume that the evidence was unfavorable to the defendant’s case. However, during trial, the plaintiff presented testimony from a forensic expert who detailed the file deletion, after which the trial court concluded that a permissive instruction was not warranted because the plaintiff had not presented evidence that any relevant documents were missing from the defendant’s production. The jury found for the defendant on all counts. The plaintiff appealed the verdict on the grounds that the trial judge had abused his discretion by failing to instruct the jury that spoliation had occurred and to give the adverse inference instruction. The Third Circuit found that the trial court had not abused its discretion in either regard. First, it reasoned the jury was not bound to find as a matter of fact that evidence had been destroyed, and the trial judge had never promised to instruct the jury that such destruction had occurred—he merely agreed that the plaintiff could present evidence concerning the destruction to the jury (which the plaintiff did) and to instruct the jury that they could presume

any evidence destroyed was unfavorable. Second, the Third Circuit found that it was not an abuse of discretion for the trial judge to withhold the promised adverse inference instruction, as “it was within the Court’s discretion to revisit its prior ruling upon hearing the evidence presented at trial.... A trial judge has the discretion to reconsider an issue and should exercise that discretion whenever it appears that a previous ruling, even if unambiguous, might lead to an unjust result.”

Lokai Holdings LLC v. Twin Tiger USA LLC, No. 15-cv-9363, 2018 WL 1512055 (S.D.N.Y. Mar. 12, 2018). In this trade dress infringement case, Magistrate Judge Debra Freeman was asked to sanction the defendants for “intentional” destruction of relevant ESI. The spoliation claim arose when, during discovery, the plaintiff learned that the defendants possessed “very little” email evidence relevant to the plaintiff’s claims, even though the plaintiff had served a cease and desist letter on the defendants six months prior to filing suit. During that time, the defendants had continued their practice of “routinely” manually “clean[ing] out their mailboxes by deleting old e-mails ... [because] it was impossible for them to keep more than about one month’s worth of old emails in their mailboxes without running up against storage limits” imposed by their email storage provider. The plaintiff sought dispositive sanctions for the defendants’ spoliation of the lost emails, which the plaintiff characterized as an intentional attempt to destroy “documents critical to [plaintiff’s] prosecution of the matter.” Judge Freeman analyzed the plaintiff’s motion under Rule 37(e), which requires severe sanctions such as dismissal to be predicated on a showing of intent to deprive the requesting party of the lost ESI. Judge Freeman observed that, based on some examples of emails from the relevant time period that the defendants were able to produce, it was clear that material relevant to the plaintiff’s claims had been lost, and that the defendant had failed to take reasonable steps to preserve the missing data. Judge Freeman also agreed that the plaintiff had been prejudiced by the loss, noting that the small number of emails actually produced suggest that the lost emails “may have been valuable to [the plaintiff] in proving the elements of its claims.” She disagreed, however, with the plaintiff’s characterization of the defendants’ destruction as reflecting intent to deprive merely because the defendants’ employees manually deleted messages while under a duty to preserve. Judge Freeman rejected the invitation to assume, as the plaintiff suggested, that the defendants’ manual deletions

“selectively” targeted messages harmful to the defendants’ defense. Judge Freeman found that “the record lacks development in this respect,” and did not support a finding of intent to deprive based on “clear and convincing evidence.” Judge Freeman therefore denied the plaintiff’s request for terminating sanctions or an adverse inference instruction, and instead awarded the plaintiff its fees and costs and precluded the defendant from “offering testimony at trial as to the content of any unpreserved emails ... including testimony suggesting that such emails would have supported any elements of their defenses or counterclaims.”

Nunes v. Rushton, No. 14-CV-00627, 2018 WL 2208301 (D. Utah May 14, 2018). The plaintiff in this case sued the defendant for copyright infringement in August 2014. On summary judgment, the court previously had found that the defendant had infringed copyright elements of a novel; the parties therefore have proceeded to trial on the issues of whether the infringement was willful and the measure of damages. Relevant to those questions, the court also had found that the defendant had promoted her infringing work, and attempted to harm the plaintiff, by creating several “sock puppet” Google and Yahoo accounts, and then using those accounts to create secondary accounts at other sites, such as Amazon, where she posted positive reviews of her infringing work and negative reviews of the plaintiff’s original. Shortly after suit was filed, the defendant deleted the secondary “review” accounts, and a year after the suit was filed, the defendant deleted one of the primary Google sock-puppet accounts. She deleted the remaining Google and Yahoo accounts in early 2018, after the plaintiff had already subpoenaed records for those accounts from Google and Yahoo. The plaintiff moved for spoliation sanctions over the deleted primary accounts.

Judge Jill N. Parish credited the defendant’s answer regarding the latest deleted accounts, such that she believed Google and Yahoo had already collected the information for the plaintiff (they had not, but had advised that the defendant could recover the accounts and produce the information herself), finding no intent to deprive underlying the action. With respect to the August 2015 account deletion, however, Judge Parish reasoned that, “[g]iven that litigation had been pending for almost a year, that [defendant] was represented by counsel, and that [plaintiff] already had requested the production of documents associated with this Google account, the court infers that [defendant]’s August 12, 2015 deletion of one of

her Google accounts was done in bad faith.” Judge Parish also found that the deletion prejudiced the plaintiff because the documents it contained were “irretrievably lost.” Judge Parish therefore sanctioned the defendant with a permissive adverse inference instruction to the jury concerning the documents the lost account may have contained.

Schmalz v. Village of North Riverside, No. 13-cv-8012, 2018 WL 1704109 (N.D. Ill. Mar. 23, 2018). Magistrate Judge Mary M. Rowland was asked to sanction the defendants for failing to preserve text messages sent between two key defendants. Magistrate Judge Rowland noted that although the defendants had issued a litigation hold in September 2013, they failed to implement any measures to preserve text messages. She also noted that one of the defendants, who had purchased a new phone in 2014 and had upgraded that phone twice thereafter, could not locate the original phone and did not possess the text messages at issue on his current phone. The other defendant recycled his phone in April 2017 and did not retain any of the text messages at issue.

Magistrate Judge Rowland determined that the preamble to Rule 37(e) had been satisfied and then analyzed whether she would impose curative measures under Rule 37(e)(1) or sanctions under Rule 37(e)(2). Although she found that the defendants’ failure to take any measures to preserve the texts “was particularly troubling,” Magistrate Judge Rowland held that without a showing of intent to deprive the plaintiff of the use of the text messages, she could not impose sanctions. She did, however, find that the failure to preserve the text messages had prejudiced the plaintiff, and as such, decided to allow the parties to “present evidence to the jury regarding the destruction of the text messages and the likely relevance of the lost information....” She also awarded the plaintiff its reasonable attorneys’ fees associated with the motion for sanctions.

Shire LLC v. Abhai, LLC, No. 15-13909-WGY, 2018 WL 1419794 (D. Mass. Mar. 22, 2018). In this patent prosecution action, Judge William J. Young found that the defendant’s “discovery misconduct” so impacted the parties’ bench trial that monetary sanctions were warranted. Specifically, Judge Young found that the defendant had produced incorrect, but critical, testing data during discovery, and had failed to reveal the defect or correct it until only two days remained in the trial, despite detecting the problem and performing retesting more than a year prior to trial. Importantly, the

defendant had missed several opportunities to correct the data and its impact on the testimony of multiple deponents. Judge Young found this to have substantially wasted the time of the court and the plaintiff, and imposed an award of attorneys’ fees as a sanction. He eschewed the plaintiff’s claim for \$2.7 million in fees, covering virtually all fees incurred since the inception of the case. Judge Young found, instead, that it would be appropriate to compensate the plaintiff for its fees and costs “limited to (a) recovering for the time wasted dealing with [the defendant]’s inaccurate [testing] data, (b) discovering the litigation misconduct discussed immediately above, and (c) dealing with [the defendant]’s revised [testing] data,” and ordered the plaintiff to provide an accounting consistent with those parameters.

Singer Oil Co., LLC v. Newfield Exploration Mid-Continent, Inc., No. CIV-16-768-M, 2018 WL 2709882 (W.D. Okla. June 5, 2018). During discovery in this breach of contract case, the defendant issued an interrogatory seeking the identification of all persons having knowledge of any relevant facts in the case. The defendant also asked the plaintiff to produce any correspondence relating to the subject matter of the lawsuit. Discovery was provided, the case was tried, and the plaintiff won. After trial, the plaintiff filed a motion to recover attorneys’ fees, which showed that the plaintiff had frequently corresponded with numerous third parties directly related to the claims and defenses in the case, with two of those communications taking place even before the plaintiff served its discovery responses. Judge Vicki Miles-LaGrange sanctioned the plaintiff for violating Fed. R. Civ. P. Rule 26(g)(3). Judge Miles-LaGrange found that while the plaintiff may not have intentionally violated the rules of discovery, it was nonetheless a violation when it failed to disclose its correspondence with the third parties during the course of discovery, even though those communications would likely be projected by the work product doctrine. Since the lack of production of those documents or a privilege log for those documents had only a minimal, if any, impact on the case, Judge Miles-LaGrange ordered the plaintiff to pay the attorneys’ fees the defendant incurred for filing its motion and its reply.

Steves and Sons, Inc., v. JELD-WEN, Inc., No. 16-CV-545, 2018 WL 2023128 (E.D. Va. May 1, 2018). The plaintiff in this case sought remedies for anti-trust violations and breach of contract against the defendant, a manufacturer of “molded doorskins,” which the plaintiff purchased from the defendant. A year prior to the suit, the plaintiff had hired a

consultant to investigate the defendant's actual cost basis for the products the plaintiff purchased; the consultant was a former employee of the defendant who had access to the defendant's operations through relationships, and could therefore investigate the defendant's actual costs. Toward the end of the consultant's investigation, he advised that the defendant could retaliate against his actions by pursuing an action for misappropriation of trade secrets, and that he had recently testified in exactly such a suit by the defendant against another former employee. Accordingly, he advised that he and the plaintiff should take action to delete "from all of our email servers, programs, and folders all copies of every email and document we have exchanged to this point" and "all meeting notes." He proposed to then re-draft his reports to make them less actionable by the defendant. Despite this show of intention to cover their tracks, the plaintiff produced the consultant's email to the defendant during discovery, and Judge Robert E. Payne noted that "most or all communications between him and [plaintiff] appear to have been obtained through discovery." During his deposition, however, the consultant produced 16 pages of documents that were not previously disclosed and which detailed the work he had performed. The defendant thereafter counter-sued the plaintiff for misappropriation of trade secrets and moved for an adverse inference instruction as a spoliation sanction against the plaintiff based on the consultant's destruction of evidence.

Judge Payne considered the motion under Rule 37(e). First, he found that the plaintiff and the consultant were under a duty to preserve relevant information as of the date of the consultant's email advising the plaintiff to delete documents. Judge Payne reasoned that "a vague or far-off possibility of litigation is insufficient to trigger a duty to preserve," but that the consultant's awareness of a precisely similar action by the defendant "should have caused him to reasonably anticipate that [the defendant] would eventually bring suit against him... [and plaintiff] for the conduct alleged in the" email. However, Judge Payne next found that the defendant had not met its burden to show by clear and convincing evidence that the ESI it alleges the consultant had destroyed could not be restored or replaced. He observed that "this factor does not require that [the defendant] pursue every possible avenue for replacing or restoring the ESI, but it must show that it made some good faith attempt to explore its alternatives before pursuing spoliation sanctions," such as by "seeking a forensic examination in this litigation of [consultant's] several hard

drives." Judge Payne rejected the defendant's invitation to rely on an examination of the consultant's computer from a related litigation in another district, finding that "the precise meaning and consequences in the forensic examination remain unclear without further discovery, or testimony by the forensic examiner." Judge Payne therefore found the defendant had not carried its burden and denied the request for an adverse inference instruction.

Editors' Note: From the defendant's perspective, this motion must have seemed like a slam dunk. Judge Payne, however, took seriously the burdens placed on a moving party to satisfy the requirements of the preamble to Rule 37(e). However, other courts have not required as robust a showing that lost ESI cannot be replaced or restored as Judge Payne did here. Other than pursuing their own forensic examination of the spoliator's computer (rather than taking the short-cut of using one from a related action), it is hard to conceive of how a party in the defendant's position might have made a stronger showing that data it cannot know the exact nature and extent of was not available from other repositories in the possession of an intentional spoliator caught red-handed.

Trainer v. Continental Carbonic Products, Inc., Case No. 16-cv-4335, 2018 WL 3014124 (DSD/SER) (D. Minn. June 15, 2018). Magistrate Judge Stephen E. Rau declined to sanction the plaintiff for failing to preserve certain text messages and e-mails. Magistrate Judge Rau noted that in order to be entitled to sanctions, the defendant would need to show that the plaintiff had a duty to preserve the text messages and e-mails in question and either: (a) that the plaintiff deleted the texts and/or e-mails with the intent to prevent the defendant from using them in this action; or (b) that the defendant was prejudiced by the plaintiff's deletion of the texts and/or e-mails. Regarding the text messages, Magistrate Judge Rau held that the plaintiff did not have to preserve certain text messages because he had already produced them to the defendant in connection with an internal investigation and/or the defendant had already obtained other messages from another employee. In addition, Magistrate Judge Rau found that the defendant's request to compel the forensic imaging of the plaintiff's phone was not proportional to the needs of the case, as the messages in question were either only marginally relevant or had already been produced by the other employee. With respect to the e-mail messages,

Magistrate Judge Rau noted that the plaintiff had in fact preserved the e-mails, and that although they appeared to be incomplete, he found that the e-mails “can likely be used for their intended purpose—to show [the plaintiff] applied for other jobs.” As Magistrate Judge Rau found no evidence that the plaintiff acted with the requisite intent of preventing the defendant from using them in the litigation and no prejudice, sanctions under Rule 37(e) were not appropriate.

Vargas Alicea v. Continental Casualty Co., No. Civ. 15-1941, 2018 WL 1441229 (D.P.R. Mar. 21, 2018). In this personal injury action, the plaintiff brought a motion for sanctions against the defendants stemming from an employee’s destruction of handwritten notes taken contemporaneously with the plaintiff’s treatment. Plaintiff was receiving dialysis treatment in the defendants’ facility when he convulsed, fell, and had to be taken to a hospital. The employee—a nurse who was supervising the dialysis treatment—had taken a few notes concerning the treatments administered, the times they were administered, and the time of the fall. After relying on the notes to fill out additional forms and reports related to the accident, the employee had discarded the notes. Judge Bruce J. McGivern applied a two-factor test to determine whether sanctions were appropriate under the court’s inherent authority to control litigation: “the party who destroyed the document knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document’s potential relevance to that claim.” Judge McGivern found that the notes should have been retained as “it seems clear that there was a potential for litigation by” the next morning when they were discarded. Judge McGivern also found that the defendants should have known “from the nature of the missing document itself” that the notes were relevant to plaintiff’s accident and potential suit. Without assessing whether the defendants’ destruction of the notes was done negligently or in bad faith, Judge McGivern found that spoliation sanctions were warranted, and awarded the plaintiff an adverse inference instruction regarding the missing notes.

Waymo LLC v. Uber Technologies, Inc., No. C 17-00939, 2018 WL 646701 (N.D. Cal. Jan. 30, 2018). In this ongoing suit alleging misappropriation of trade secrets by a former employee of the plaintiff, Judge William Alsup considered whether several instances of spoliation by the defendant, or its predecessors in interest, warranted sanctions under Rule 37(e). The plaintiff alleged that the defendant had spoliated a variety of types of evidence, including “hundreds of text

messages among” key custodians and numerous emails and “Slack records,” all dating back to at least January 2016, when the defendant acquired a company started by the former employee, allegedly for the purpose of acquiring the plaintiff’s trade secrets. Judge Alsup found that the defendant had a duty to preserve relevant records as of January 2016, when it engaged counsel and actively took measures to structure its relationships and its transaction in such a way as to mediate a contemplated suit by the plaintiff. Judge Alsup found that this conscious structuring related to the transaction as a whole showed that the defendant actually foresaw this litigation, let alone did so reasonably. Noting that the defendant had conceded that the missing records could not be recovered, Judge Alsup considered their relevance to the case and the defendant’s state of mind concerning the destruction. He quickly found that any communications between the principal actors in the transaction are relevant, and held that the jury would assess whether the hundreds or thousands of missing records merely “involved innocuous business matters, not trade secret misappropriation.” With this in mind, Judge Alsup reserved judgment on “whether or not [defendant] spoliated evidence with the intent to deprive another party of its use in litigation, and further reserve[d] decision as to whether or not the jury will be instructed that it may or must presume the lost information was unfavorable to Uber.” Judge Alsup observed that facts related to both topics would invariably be elicited at trial, and held that he would “use this presentation of proof and any additional evidence on point to supplement the current motion record on the issue of intent for spoliation purposes.”

Worldpay, US, Inc. v. Haydon, No. 17-cv-4179 (N.D. Ill. Nov. 14, 2018). Judge John J. Tharp declined to impose any sanctions on a defendant for failing to preserve evidence relating to an internet domain established by the defendant. Judge Tharp found that while the plaintiff satisfied the preamble to Rule 37(e)—namely that the information was ESI, it should have been preserved, and it was lost and could not be replaced—the plaintiff was not entitled to an adverse inference because it had not demonstrated that the defendant acted with the required “intent to deprive” under Rule 37(e)(2). He also held that curative measures under Rule 37(e)(1) were not warranted as the plaintiff had not shown any prejudice flowing from the defendant’s failure to preserve the information in question. Judge Tharp noted that while the plaintiff had articulated what it hopes it would have found in the deleted information, it provided “little

reason to be confident that this information actually would have been found had the domain not been shut down.”

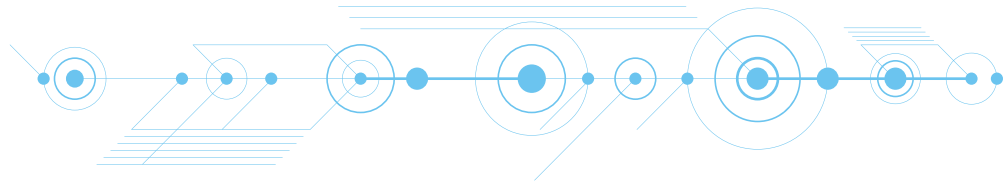
Judge Tharp noted that the parties disagreed as to whether Rule 37(e) provided the exclusive basis for the court to impose sanctions, with the plaintiff arguing that the court could also impose sanctions under its inherent powers. Judge Tharp agreed with the defendants that the Advisory Committee Notes to the 2015 Amendments to Rule 37(e) state that the amended rule forecloses reliance on inherent authority, but he noted that he did not need to answer the question because he declined to order sanctions under the court’s inherent authority.

Yoe v. Crescent Stock Co., No. 15-cv-3-SKL, 2017 WL 5479932 (E.D. Tenn. Nov. 14, 2017). In an action involving competing claims to ownership of certain intellectual property, Magistrate Judge Susan K. Lee was asked to sanction the plaintiff for failing to preserve a hard drive that purportedly contained information relevant to the plaintiff’s claims for damages. The defendant was seeking to limit the plaintiff’s ability to recoup any of the \$2 million they allegedly incurred in recreating the intellectual property relating to the technology at issue in the case—claiming that the spoliated hard drive had contained the information the plaintiff “recreated.” Magistrate Judge Lee applied the Rule 37(e) framework to this dispute, even though the spoliation allegedly occurred in 2013 and the case was filed prior to when the 2015 Amendments to the Federal Rules took effect. She began her analysis by walking through the preamble, finding that the specifics of the case met the requirements for moving to the next stage of the analysis, i.e., whether “remedial measures” and/or sanctions were appropriate under Rule 37(e)(1) or (e)(2). Magistrate Judge Lee found that although the plaintiff’s failure to take steps to preserve the information contained on the hard drive was “easily considered grossly negligent,” the defendants failed to show that the plaintiff acted with the intent to deprive the defendants of the information’s use in the litigation. She noted that the plaintiff had presented evidence that the individual who deleted the contents of the hard drive, and who provided IT support for the plaintiff, “did so mostly out of his own concern that [the defendants] might take actions against him personally for having and using the data.” Although she found that destruction of the contents of the hard drive could result in the imposition of remedial measures under Rule 37(e)(1), Magistrate Judge Lee noted that the defendants’ failure to seek such remedial measures

until late in the game complicated matters. As she had simultaneously ruled on the parties’ motions for summary judgment and it was unclear whether the plaintiff could in fact seek to recover the costs of “recreating” the intellectual property, Magistrate Judge Lee deferred ruling on what “remedial measures” were needed until after trial.

Youngevity International Corp. v. Smith, No. 16-cv-704-BTM-JLB (S.D. Cal. Dec. 4, 2017), ECF No. 288. In an action for breach of fiduciary duty and misappropriation of trade secrets, Chief District Judge Barry Ted Moskowitz denied the plaintiffs’ request for an adverse inference concerning the defendants’ destruction of numerous e-mails and other sources of information. The plaintiffs argued that the defendants had a duty to preserve the information and that the defendants’ failure to establish a legal hold resulted in the destruction of e-mails that were likely to contain evidence of the defendants’ tortious conduct. Although Judge Moskowitz noted that courts generally have two sources of authority to impose sanctions for spoliation of evidence: (1) under their inherent authority; and (2) pursuant to Rule 37 of the Federal Rules of Civil Procedure, he noted that the 2015 Amendments to the Federal Rules “forecloses reliance on inherent authority or state law” when the alleged spoliation concerns electronically stored information. Accordingly, Judge Moskowitz evaluated whether Rule 37(e) permitted the imposition of adverse inferences. With respect to certain defendants, Judge Moskowitz determined that individuals in question were not under a duty to preserve at the time they cleared the data on their company-issued computers. As such there could be no spoliation. With respect to certain other defendants, Judge Moskowitz found that the plaintiffs had not presented any evidence that information had been lost or destroyed, which precluded any award of sanctions. In addition, Judge Moskowitz noted that with respect to certain e-mails the plaintiffs claimed were lost, Rule 37(e) only applied if the lost or destroyed information could not be restored or replaced. Noting that the plaintiffs had not subpoenaed the defendants’ Internet Service Provider, Judge Moskowitz concluded that Rule 37(e) did not apply, as the plaintiffs had not “explore[d] whether [the defendant’s] emails are recoverable.” Judge Moskowitz noted that even if the plaintiffs could have showed that some information was lost, in order to be entitled to an adverse inference, the plaintiffs had to demonstrate that the defendants acted with the intent to deprive the plaintiffs of the use of the information in the action before him.

Search and Retrieval



Generally, the producing party is in the best position to determine the procedures, methodologies, and technologies appropriate for preserving, collecting, and reviewing its own documents in response to discovery requests. This concept has been enshrined in The Sedona Conference Principle 6 for nearly 15 years and endorsed by many federal judges. This is not to suggest that a producing party does not need to participate in meet and confers or to be prepared to discuss its overall process. But, as demonstrated below, courts often are called to wrestle with the practicalities of upholding this bedrock principle, while still affirming that cooperation in the discovery process is important and often may promote the court's interest in the speedy and efficient resolution of cases. In this context, we have seen a trend of decisions regarding whether and how to validate the sufficiency of the use of particular tools (e.g., predictive coding) or the overall sufficiency of a production. Some of these decisions have required validation not only in the predictive coding context, but also more broadly to search term validation and traditional document review and productions (e.g., *In Re Broiler Chickens Antitrust Litigation*; *City of Rockford v. Mallinckrodt*). We would respectfully suggest that some of these decisions may lead to future inappropriate, unnecessarily complex and burdensome validation protocols that may waste court and party time and resources, especially in the absence of any showing of a deficiency in production and, thus, stand in contrast with the meaning and operation of the Federal Rules. We would urge a producing party to carefully consider whether such protocols are appropriate and the potential undue burden some of them may present to the discovery process.

Allstate Insurance Co. v. Papanek, No. 3:15-cv-240, 2018 WL 300170 (S.D. Ohio Jan. 5, 2018). In a dispute over a terminated agency relationship, the defendant requested that the plaintiff produce “[a]ll telephones, computers, or other devices containing electronic communications, written communications, or telephonic messages of any sort... for” a series of the plaintiff’s employees that related to the agreement at issue. The plaintiff objected to the request as overly broad and unduly burdensome, and stated it would instead search for and produce responsive, relevant information within a narrowed scope. When the plaintiff produced no information from the identified employees, the defendant moved to compel production of “the responsive information” from the employees’ devices, or “the actual devices for forensic imaging and searching” by the defendants, including mobile phones and computers. The plaintiff countered that it had asked the employees to search their mobile devices for responsive information, and that the employees had found none, and further resisted the motion on the grounds that information on the employees’ phones and computers was “not reasonably accessible because of undue burden or cost” under Rule 26(b)(2)(B).

Magistrate Judge Michael J. Newman observed that the plaintiff “present[ed] no actual evidence regarding the alleged cost or burden imposed” by the request, other than to point out that one of the identified individuals was not an employee of the plaintiff. Magistrate Judge Newman also “question[ed] whether review by the individual employees themselves, rather than a review by counsel, is sufficient” to meet the plaintiff’s obligations under Rule 34. Judge Newman therefore ordered the plaintiff and its counsel “to conduct a reasonable search of the

devices of these employees for information responsive to Defendants' Rule 34 request and to provide Defendants with a supplemental response which includes a detailing of all efforts undertaken to search for responsive information." The plaintiff was also to describe "all efforts undertaken by [the plaintiff] to preserve ESI—including information contained on electronic devices used by employees—since the time this litigation was reasonably anticipated."

American Municipal Power, Inc. v. Voith Hydro, Inc., 17-cv-00708-ALM-EPD (S.D. Ohio, June 4, 2018). Magistrate Judge Elizabeth P. Deavers was asked to resolve the parties' dispute over the reasonableness of proposed search terms to identify potentially relevant documents. Judge Deavers denied the defendant's request that the plaintiff use the names of four hydroelectric projects at issue in the case as standalone search terms. Judge Deavers found the terms, by themselves, would result in over-inclusive results, since the only issue in the case related to the construction of the project power plants, and the search hits would result in the retrieval of documents covering a multitude of non-relevant project topics that span over ten years. Judge Deavers noted that the searches would significantly increase the cost of the case, including an estimated \$100,000–\$125,000 for additional privilege review. Judge Deavers also denied, as over-inclusive, the plaintiff's request that the defendant run combinational search terms without reference to the project names at issue. The plaintiff wanted the defendant to run search terms of: (i) employee and contractor names combined with (ii) common construction terms and names of hydroelectric parts. Judge Deavers noted this would return a substantial amount of confidential information related to other non-relevant projects the defendant has worked on, and thus, the burden of using the search terms outweighed the possibility for finding any additional relevant documents.

Carpenter v. United States, 585 U.S. ____, 138 S. Ct. 2206 (2018). The U.S. Supreme Court was asked to determine whether the government conducts a search under the Fourth Amendment when it accesses historical cell phone records that create a comprehensive picture of the defendant's past movements. After the government arrested four men suspected of robbing a series of Radio Shack and T-Mobile stores in Detroit, it obtained information from one of the four individuals that implicated a number of others. With that information,

the government obtained a court order pursuant to the Stored Communications Act that allowed it to access the cellphone records of the appellant and several others. This information included the cell site information for the appellant's cellphone at call origination and call receipts for a four-month period. In total, the government obtained 12,898 location points cataloging the appellant's movements during this period of time. The defendant was convicted after a trial where seven of the government's witnesses identified the appellant as the leader of the operation.

After the Sixth Circuit affirmed the appellant's conviction, he appealed to the Supreme Court. Chief Justice Roberts, writing for the Court, examined how best to apply the Fourth Amendment to the fact that it is possible to "chronicle a person's past movements through the record of his cell phone signals." After noting that using the cellphone data was similar to the use of a vehicle's GPS data the Supreme Court had addressed in *United States v. Jones*, Chief Justice Roberts wrote that "historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle," as such records track "nearly exactly the movements of its owner." Accordingly, Chief Justice Roberts found that the government had invaded the appellant's reasonable expectation of privacy when it accessed his historical cellphone data from the applicable carrier. He rejected both the argument that the appellant's location was fair game because it was a "business record" created by the wireless carrier, and the claim that the information had been "shared" by the appellant.

Finding that the government's conduct in obtaining the cellphone records amounted to a search under the Fourth Amendment, Chief Justice Roberts held that the government "must generally obtain a warrant supported by probable cause before acquiring such records." He did note, however, that there could be certain situations that may support a warrantless search of an individual's cell-site records.

City of Rockford v. Mallinckrodt ARD Inc., No. 17 CV 50107, 2018 WL 3766673 (N.D. Ill. Aug. 7, 2018). Magistrate Judge Iain D. Johnston was asked to settle the parties' dispute over whether the producing party should be required to test a sample of the documents that did not hit on any search terms to determine whether any additional search terms were needed. Specifically, the

plaintiff wanted to include a provision in the ESI protocol that would require the producing party to generate a random sample of documents that were not identified by the parties' agreed-upon search terms (the "Null Set") and review the sample and report on the number of responsive documents found. The parties would then be required to meet and confer to discuss whether any additional search terms were needed. The plaintiff's request came even though the parties had already agreed-to-agree on search methodologies and had negotiated a set of search terms, and had agreed to produce a search term hit report that included the number of hits and unique hits for each term, as well as the total number of documents that would be returned using the proposed terms. Magistrate Judge Johnston noted that this agreed procedure was reasonable and "fulfills the goals of Federal Rule of Civil Procedure 1," and that this was the "type of process courts routinely require, but see less often."

Magistrate Judge Johnston then analyzed whether requiring the producing party to test a sample of the Null Set for responsiveness satisfied the proportionality requirement of Rule 26(b)(1) and whether it was reasonable under Rule 26(g). Regarding the proportionality of the request, Magistrate Judge Johnston noted that while the defendants had argued that testing a sample of the Null Set would be unduly burdensome, they failed to offer any evidence to support this claim. Magistrate Judge Johnston reviewed the proportionality factors and found that they supported requiring testing a sample of the Null Set. Importantly, he noted that a separate proportionality analysis would be required to determine whether any additional discovery efforts would be needed based upon the results of the Null Set review, and made it clear that he would be receptive to requests for cost-shifting for such additional efforts.

Magistrate Judge Johnston next found that requiring the producing party to test a sample of the Null Set complied with Rule 26(g). He noted that "conducting a random sample of the null set is part of [a Technology Assisted Review] process," and that the defendants "provide no reason establishing that a random sampling of the null set cannot be done when using keyword searching." He also noted that sampling the null set when using keyword searching "was commonly used before the movement towards TAR." Accordingly, he found that "because a random sample of the null set will help validate

the document production in this case, the process is reasonable under Rule 26(g)."

Ultimately, Magistrate Judge Johnston required both that the producing party test a sample of the Null Set, and that the sample have a confidence level of 95% with a margin of error of +/- 2%. He ordered that any responsive documents uncovered in the sample set be produced, and that the parties should meet and confer to determine whether any additional actions were needed.

Editors' Note: Magistrate Judge Johnston's decision, while novel in its application of statistical sampling methods usually associated with Technology Assisted Review to manual review of documents that are excluded by the parties' agreed search terms, does not appear to have dealt with the true issue at hand. Remembering that the parties were in the process agreeing to search terms as part of their meet and confer negotiations, and had agreed to a set of terms but had disagreed only on whether they would engage in additional testing and negotiation, the question that should have been before the court was whether Rule 26(g) requires "something more" than simple agreement that terms are acceptable and that their results reflect a reasonable and proportional volume, or permits the judge to order "something more" in pursuit of the Rule's demand of a "reasonable inquiry." The producing party appears to have taken the wrong approach in objecting to the request, arguing that reviewing a 2,000 document sample was burdensome, instead of questioning whether Rule 26(g) demands scientific levels of validity or permits the court to substitute its judgment for what would constitute a "reasonable inquiry" before any documents have even been searched or produced.

Clark v. FDS Bank, Case No. 6:17-cv-692-Orl-41TBS, 2018 WL 5830421 (M.D. Fla. Nov. 7, 2018). Magistrate Judge Tomas B. Smith was asked to compel the defendants to produce information concerning the telephone calls the defendants made using an autodialing system. The defendants opposed the motion to compel, claiming that it was unduly burdensome because the defendants would have to access each account individually, scan the information into a searchable format, and then spend time reviewing the information for responsiveness and redactions. The defendants estimated that the cost of

the process would be between \$1.5 million and \$1.8 million. The plaintiff countered, offering the testimony of an individual who was familiar with similar autodialing systems and who said that the information the plaintiff was requesting could be exported in about an hour and at minimal cost to the defendant.

Magistrate Judge Smith found that the plaintiff's submission was "sufficient to persuade the Court that Defendants' business records may not be as difficult to search as they contend." After citing to the Sedona Conference's "Best Practices and Commentary on the Use of Search & Information Retrieval Methods in E-Discovery," Magistrate Judge Smith required the parties to hold a Rule 26(f) conference within 21 days of his order to "discuss how Defendants' business records will be made available for search and retrieval" by the plaintiff's expert. Magistrate Judge Smith was clear that he expected the plaintiff to identify the specific fields of information that she needed and to "agree to the use of anonymizers to conceal account holders' identities and other personal information ... [and] to agree to reasonable precautions to protect the integrity and confidentiality of Defendants' systems and procedures." Similarly, he expected the defendants to "agree on a reasonable methodology that gives [the plaintiff's expert] the access he needs to attempt to search and retrieve relevant information." Magistrate Judge Smith noted that, among other things, this might mean that the expert be given direct access to the defendants' systems and/or be given access to a mirror image of those systems. If the parties could not agree on an approach, Magistrate Judge Smith stated that he would hold an evidentiary hearing, hear from experts, and then "dictate the process and procedure to the parties."

Entrata, Inc. v. Yardi Systems, Inc., Case No. 2:15-cv-00102, 2018 WL 5470454 (D. Utah Oct. 29, 2018). Judge Clark Waddoups affirmed the magistrate judge's denial of the defendant's motion to compel the plaintiff to disclose the "complete methodology and results of [the plaintiff's] Technology Assisted Review (TAR) process." The defendant had argued that this information was necessary to "assess the adequacy of [the plaintiff's] document collection and review efforts and the completeness of [the plaintiff's] productions." The defendant also argued that its request for this disclosure was "fully supported by case law." The magistrate judge denied the defendant's motion, noting that the defendant had not "provided any specific

examples of deficiencies in [the plaintiff's] document production or any specific reason why it questions the adequacy of [the plaintiff's] document collection and review." The magistrate judge also stated that "[w]ithout more detailed reasons why production of [the plaintiff's] TAR information is needed the court is unwilling to order" the plaintiff to produce that information.

In affirming the magistrate judge's order, Judge Waddoups rejected the defendant's argument that the Federal Rules of Civil Procedure and case law required that the plaintiff, in the first instance, "provide transparent disclosures as a requirement attendant to its use of TAR" when reviewing documents. Judge Waddoups reviewed the cases cited by the plaintiff, including *DaSilva Moore, Rio Tinto*, and *Bridgestone Americas, Inc. v. Int'l Business Machines Corp.* He then stated "the court is persuaded that because it is 'black letter law' that courts will permit a producing party to utilize TAR, [the plaintiff] was not required to seek approval from the Magistrate Court to use TAR where there was never an agreement to use a different search methodology." Given the fact that the parties had agreed to an ESI order that required that concerns about the use of a specific search methodology be raised within 30 days of the date of the order, and the fact that the defendant waited until the last day of discovery to raise its concerns with the court, Judge Waddoups agreed with the magistrate judge's conclusion that the defendant "should have sought intervention long before the last day of fact discovery."

Editors' Note: While other cases have involved stipulated protocols whereby the parties agreed to disclose specific information relating to the predictive coding process being employed, Judge Waddoups' decision is the first to address whether the Federal Rules of Civil Procedure require specific disclosures about the predictive coding process being contemplated and/or used. By finding that such disclosure is not required unless and until the requesting party can demonstrate a deficiency in the production, Judge Waddoups makes clear that Principle 6 of the Sedona Conference Principles is still the correct focus—i.e., that the producing party is in the best position to determine what steps and/or technologies will best allow it to respond to discovery requests. That said, we do not expect this to be the last time a requesting party seeks to compel the producing party to disclose the metrics and

methodologies used in connection with predictive coding. However, Judge Waddoup's insightful opinion can be cited in meet and confer negotiations and to other courts.

In re Broiler Chicken Antitrust Litigation, No. 16 C 8637, 2018 WL 1146371 (N.D. Ill. Jan. 3, 2018). In this anti-trust action, Magistrate Judge Jeffrey T. Gilbert issued an agreed order establishing the methodology the parties would use to search electronically stored information. The order stated that the parties would “endeavor to be reasonably transparent regarding the universe of documents subject to targeted collections or culling via search terms and/or” using TAR, and required producing parties to reveal extensive information about the methods and systems used to identify relevant documents.

Regarding the use of TAR, the order allowed the requesting party to specify a “limited number” of custodians for which the producing party would run TAR across their e-mails without first using any search terms to cull the data. In addition, to the extent that the producing party wishes to use TAR, the producing party would disclose the name of the TAR software and vendor, a general description of the TAR process to be used, a general description of the categories of documents to be excluded from the TAR process, and what quality control measures would be taken. The agreed order also allowed the requesting party to propose exemplar documents that the producing party would use to train the TAR tool.

The agreed order also provided that to the extent that a producing party used search terms to reduce the overall volume of documents that needed to be reviewed, the producing party would disclose the search software it intended to use, as well as, among other things: (i) any default stop words that the software would not search; (ii) whether searches can be run on metadata fields; (iii) whether the tool offers synonym searching; and (iv) whether proximity searches are subject to an evaluation order. The producing party would then propose an initial set of search terms, including semantic synonyms and common spellings, and contextual examples of false positives if the producing party wishes to adjust the terms to avoid such false positives. The requesting party then had a set period of time to provide any revisions to the proposed terms. The producing party then had a set period to object to any revised terms, and provide

“information sufficient to support its objections,” which could include the incremental number of false positives, among other things.

Notably, the agreed order required that the producing party “incorporate quality-control and quality assurance procedures to ensure a reasonable production consistent with the requirements of” Rule 26(g). Such quality-control measures included a sampling protocol, where the producing party’s document set was divided into three categories: (i) documents identified as responsive to at least one document request, not including non-responsive family members; (ii) documents coded non-responsive by a human reviewer, regardless of whether the documents were initially subject to TAR or search terms; and (iii) documents excluded from manual review as a result of the TAR process. The producing party would then randomly select 500 documents from the first category, 500 documents from the second category, and 2,000 documents from the third category. The 3,000 documents were then to be combined in a single set, and then coded by a subject matter expert, who would not be shown how the documents were initially coded. Specific information about the coding decisions would be provided to the requesting party, including a copy of each responsive, non-privileged document that was not previously provided. The parties were then required to meet and confer about the recall estimate and the “quantity and nature of the responsive documents identified through the sampling process,” and determine whether any further review and quality control process was needed.

Editors’ Note: The reaction to this ESI order within the e-discovery practice community has been varied and passionate. Notably, this was a protocol and order that the parties to the action—more than 30 of them—agreed to voluntarily in an effort to avoid potential disputes about discovery downstream. That said, we anticipate that requesting parties will cite this agreed order to claim, without support in the Federal Rules, that “cooperation” requires such disclosures. Several of the provisions of this order—including the prohibition on culling custodial datasets via search terms before applying TAR, and the requirement that documents reviewed manually and deemed not relevant must be subjected to random sampling—are potentially onerous and in contravention of Rule 26(b)(1). Simply put, there is no obligation under the

Federal Rules to produce irrelevant documents, and the requirement of proportionality will often counsel against requiring such sampling without a showing of production deficiencies. Accordingly, producing parties should carefully consider their obligations under the Rules and to their client before agreeing to any such disclosures or provisions when they are, inevitably, asked to do so.

Satmodo, LLC v. Whenever Communications, LLC, No. 17-cv-192, 2018 WL 3495832 (S.D. Cal. July 20, 2018). In this case alleging that the defendant engaged in a “click-fraud” scheme to prevent the plaintiff’s internet advertisements from appearing in response to internet searches, the plaintiff sought discovery that would identify every computer, server, phone, and other device of the defendant’s and demanded that the defendant submit numerous workstation computers and mobile devices for a forensic inspection by the plaintiff. The defendant countered that a complete accounting of all computers and devices was unnecessary, as a narrower inquiry would suffice. Notably, the defendant did not propose to perform its own forensic inspections and to turn over the results to the plaintiff. Magistrate Judge Nita L. Stormes rejected the defendant’s objections, finding that the comprehensive accounting was necessary to identify “the full universe of devices at issue and... [thus] a list of devices to inspect.” Magistrate Judge Stormes also found that forensic inspections of the computers in question were warranted, noting that “[w]here, as here, a defendant allegedly used the computer itself to commit the wrong that is the subject of the lawsuit, certain items on the hard drive may be discoverable.” She observed that the defendant enjoyed “sole and exclusive access to devices and control over the information they share,” and “that any burden and expense associated with the discovery is proportionate to the needs of the case, will be borne primarily by the Plaintiff, and will be important to the resolution of the issues.” She therefore granted the plaintiff’s motion to compel the inspections, but instituted stringent guidelines to address the defendant’s concern that substantial irrelevant information would be captured and transferred to the plaintiff.

United States v. Tolbert, No. 14-3761, 2018 WL 3611053 (D.N.M. July 27, 2018). In this criminal prosecution, the defendant sought to suppress evidence that was forwarded by his email provider, AOL, to the National Center for Missing and Exploited Children (“NCMEC”), after

AOL’s automated scanning systems detected the likely presence of child pornography in emails the defendant had sent using his AOL account. The entire process was fully automated, meaning no AOL employee opened or read the emails or attachments before AOL sent them to NCMEC (as required by 18 U.S.C. § 2258A). NCMEC opened the files to corroborate the AOL “tip,” and then forwarded the information to federal investigators, who secured grand jury subpoenas to obtain information to identify the defendant from AOL and his internet service provider. The defendant’s home was subsequently searched and he was arrested. The defendant argued that the Supreme Court’s decision in *Carpenter v. United States*, *supra*, demonstrated that law enforcement searches must be pursuant to a warrant or satisfy an exception to the warrant requirement, and that the grand jury subpoenas to AOL and the service provider did not meet any such exception. Judge Judith C. Herrera observed, however, that the Supreme Court, in *Carpenter*, had specifically distinguished the “high expectation of privacy in the exhaustive and revealing chronicle of [cell site] location information with the much lower expectation of privacy in some types of information voluntarily turned over to third parties, such as bank records and run-of-the-mill phone records.” Judge Herrera concluded that the information obtained by subpoena in this case—details about the account that were granted to the service providers by the defendant, such as methods of payment, billing addresses, physical connection addresses, IP addresses, and identifying information—“is much more like the bank and telephone records than the comprehensive, detailed, and long-term location information in *Carpenter*.” Judge Herrera therefore held that a warrant was not required to ascertain his identifying information, and denied the defendant’s motion to suppress the evidence.

Webastro Thermo & Comfort North America, Inc. v. Bestop, Inc., 2018 WL 3198544 (E.D. Mich. June 29, 2018). Magistrate Judge R. Steven Whalen was asked, pursuant to Rule 26(c), to issue a protective order “sparing [the plaintiff] from unduly burdensome email discovery” until such time as the defendant “propounds reasonable search requests containing appropriately narrowing criteria.” In granting the motion, Magistrate Judge Whalen noted that the parties had entered into a stipulated protective order that limited the scope of e-mail discovery to eight key custodians, with a total of 10 search terms per custodian and that the search terms were supposed to be “narrowly

tailored to particular issues.” Notably, the plaintiff submitted an affidavit that showed the total number of gigabytes and documents for each custodian that the defendant’s terms returned. After reviewing the defendant’s proposed terms, Magistrate Judge Whalen found that the “majority of [the defendant’s] search term[s] are overly broad, and in some cases violate the ESI Order on its face.” He also noted that the plaintiff had met its burden, as it had “sufficiently articulate[d] specific facts showing clearly defined and serious injury resulting from the discovery sought.”

Magistrate Judge Whalen noted that “all stakeholders in the system—judges, lawyers, clients, and the general public—have an interest in establishing a culture of cooperation in the discovery process,” and that “[o]ver-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge.” Accordingly, Magistrate Judge Whalen ordered that the parties “meet and confer in a good-faith effort to focus and narrow [the defendant’s] terms” so that the resulting documents would be limited to the issues in the case and would exclude ESI that “would have no relationship to this case.” As he required the defendant to reformulate its proposed terms to limit the burden on the plaintiff, Magistrate Judge Whalen denied the plaintiff’s request for cost-shifting, but cautioned that he could revisit the issue if the defendant did not reasonably narrow its requests.

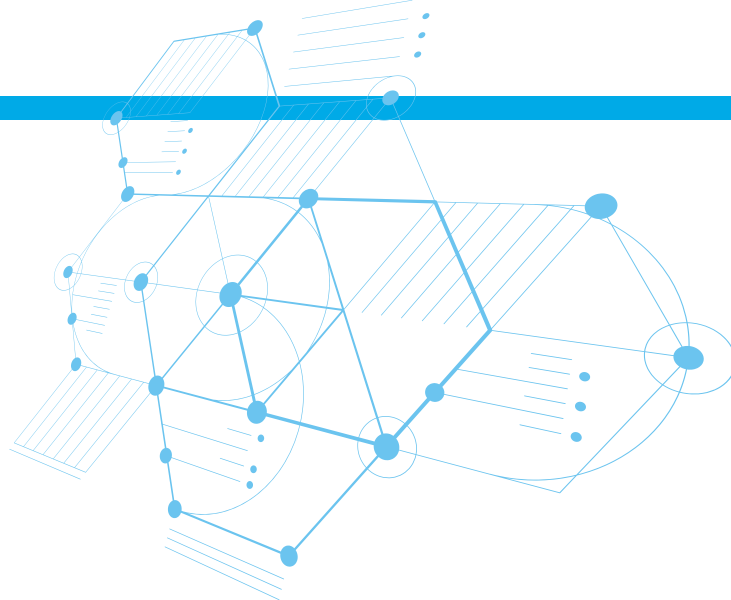
Winfield v. City of New York, No. 15-cv-05236, 2017 WL 5664852 (S.D.N.Y. Nov. 27, 2017). In this housing discrimination matter, Magistrate Judge Katharine H. Parker was asked to compel the defendant to provide random samples of categories of non-responsive documents, as well as certain other information about the defendant’s use of predictive coding, including the cut-off score used and the number of documents ranked responsive and unresponsive at each ranking. The plaintiffs complained both that the extracted text of certain documents that the defendant had withheld as non-responsive showed that the documents arguably were relevant to the plaintiffs’ claims and the fact that the defendant had released a number of documents from its privilege log demonstrated that the defendant had over-designated documents as non-responsive and privileged. While Magistrate Judge Parker noted that “[c]ollection, review, and production of ESI presents special challenges and requires ‘cooperation between opposing counsel and transparency in all aspects of preservation and production

of ESI,’” she also noted that the “producing party is in the best position to ‘evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.’” She stated that there “is nothing so exceptional about ESI production that should cause courts to insert themselves as super-managers of the parties’ internal review processes, including training of TAR software, or to permit discovery about such process[es],” absent evidence of good cause, such as “a showing of gross negligence in the review and production process, the failure to produce relevant specific documents known to exist or that are likely to exist, or other malfeasance.”

After reviewing an *in camera* submission addressing the defendant’s use of predictive coding, which included an explanation of the extent of the defendant’s seed set and the overall TAR process, Magistrate Judge Parker found that the defendant had not committed gross negligence. Magistrate Judge Parker did not completely disregard the plaintiffs’ concerns, as she noted that they had identified certain documents that should have been produced based on the extracted text the defendant inadvertently provided and that the search terms the defendant had used for certain custodians were unduly narrow. Accordingly, Magistrate Judge Parker required the defendant to: (1) produce a random sample of 300 non-responsive documents from the existing review of certain custodians’ files on an attorneys’ and experts’ eyes only basis; (2) to use the plaintiffs’ revised search terms for the specified custodians and then run any additional documents through the defendant’s predictive coding process; and (3) produce a random sample of 100 non-responsive documents from this population. To the extent that the plaintiffs had concerns after reviewing these documents, Magistrate Judge Parker required them to meet and confer with the defendant before bringing the matter to the court. Notably, Magistrate Judge Parker denied the plaintiffs’ request to obtain information on the ranking system used by the defendant during predictive coding (e.g., the cutoff score used). She found that the plaintiffs had “failed to explain why information about the [defendant’s] ranking system is needed,” particularly given the fact that the plaintiffs were already being allowed to review samples of non-responsive documents. Magistrate Judge Parker also noted that it was “unclear how this information [about the ranking system] is even potentially relevant to the claims and defenses in this litigation” as required by Rule 26.

Editors' Note: Magistrate Judge Parker's decision differs from the situation presented in Entrata, Inc. v. Yardi Systems, Inc. in that Magistrate Judge Parker was faced with evidence that the defendant's discovery efforts had excluded relevant documents and there was a need to ensure that the process employed had worked properly. The decision is notable because even in such a situation, the court did not require that the defendant produce the specific metrics used in the predictive coding process, only a sampling of the results.

Rule 34



Requesting and responding parties both have obligations to reasonably tailor discovery. Notably, the requesting party must certify that its requests are proportional to the needs of the case, and responding parties can no longer use general objections and must state with specificity the types of documents that are being withheld, if any. As a result, courts frequently find that “all-encompassing demands” such as “any and all” documents are not proportional to the needs of the case. Similarly, courts penalize responding parties that fail to provide the required information concerning what information is being withheld. In practice, there is no universal guide as to what level of specificity is required to satisfy Rule 34. What is known is that general boilerplate objections, such as “subject to the foregoing general objections [responding party] will produce non-privileged, responsive documents,” violates Rule 34’s specificity requirements. Given certain courts’ willingness to call attorneys and their clients to task for ignoring Rule 34’s requirements, we expect to see attorneys continue to transition away from the use of “kitchen sink” requests and general objections.

Halleen v. Belk, Inc., No. 16-CV-55, 2018 WL 3735579 (E.D. Tex. Aug. 6, 2018). Judge Amos L. Mazzant granted the plaintiff’s motion to compel the defendant to provide documents and complete answers to the plaintiff’s interrogatories. In his opinion, Judge Mazzant noted that Rule 34 requires that responses to discovery requests “state with specificity the grounds for objecting” to a request and “whether any responsive materials are being withheld on the basis of that objection.” Judge Mazzant found that the defendant’s responses to the plaintiff’s discovery requests were objectionable for two reasons: (1) the defendant asserted objections based on the

attorney-client privilege but stated that it did not need to provide a privilege log because it was not withholding any documents on the basis of privilege; and (2) the defendant included the boilerplate “subject to and without waiving these objections” language in its objections without specifying whether any documents were being withheld.

Judge Mazzant noted that the use of the “subject to” boilerplate “is not supported by the federal rules and goes against the purposes of a just, speedy, and inexpensive resolution,” and that in using such language, the defendant “fail[ed] to specify the scope of its answer in relation to the request.” As a result, Judge Mazzant stated that it was impossible for the plaintiff or the court to assess the sufficiency of the response. Accordingly, Judge Mazzant found that the defendant had waived its objections and would therefore need to provide amended responses. Similarly, Judge Mazzant noted that the defendant either needed to provide a privilege log for each assertion of privilege, or if there were no such assertions, the defendant had to file amended discovery responses “removing language stating or implying” that it was withholding documents on the basis of such privilege.

Holick v. Burkhardt, No. 16-1188-JTM-KGG, 2017 WL 5904033 (D. Kan. Nov. 30, 2017). Magistrate Judge Kenneth G. Gale overruled certain of the plaintiff’s objections to the defendant’s discovery requests and compelled the plaintiff to provide supplemental responses and produce any additional relevant documents. Magistrate Judge Gale noted that in violation of Rule 34(b) (2)(C), the plaintiff had not indicated in its responses what, if any, responsive documents he was withholding on the basis of those objections. Finding the dictates of Rule

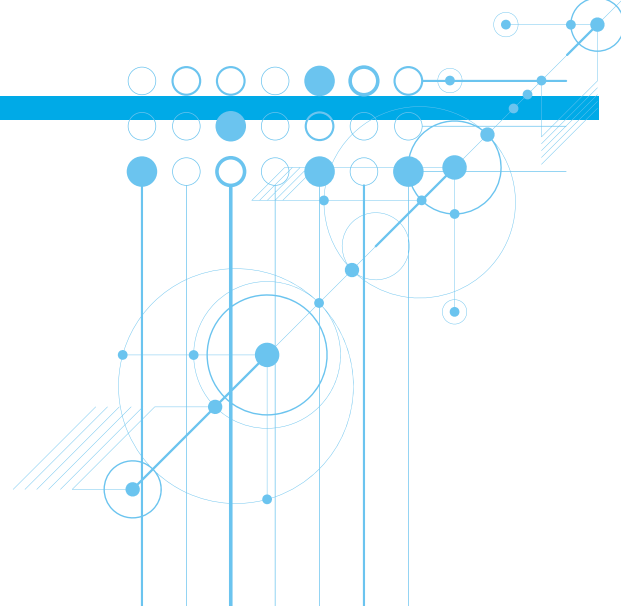
34(b)(C) unambiguous, Magistrate Judge Gale ordered the plaintiff to provide supplemental discovery responses that complied with Rule 34. With respect to the plaintiff's individual objections, Magistrate Judge Gale noted that the "party objecting to the discovery requests has the burden to substantiate them, unless the request is facially objectionable." For some of the defendant's requests, Magistrate Judge Gale noted that the request was facially overbroad and/or was not proportional to the needs of the case, while for others, he overruled the plaintiff's objections, finding the requests facially relevant and coherent.

Lopez v. Don Herring Ltd., No. 16-CV-2663, 2018 WL 3641688 (N.D. Tex. Aug. 1, 2018). Magistrate Judge David L. Horan engaged in a lengthy discussion of how parties should conduct discovery in light of the 2015 Amendments to the Federal Rules, including, among other things, that discovery requests should not include "all-encompassing demands" that do not meet Rule 34's particularity standard. He also noted that boilerplate general objections are prohibited by Rule 34, and that an objection must state "whether any responsive materials are being withheld on the basis of such objection." In the case before him, Magistrate Judge Horan noted that the plaintiff's use of general objections was "improper and ineffective," and took the opportunity to remind counsel that they "must cease and desist from making these free-standing and purportedly universally applicable 'general objections' in responding to discovery requests." He also noted that the plaintiff's response to individual requests, which were made "subject to" and "without waiving" the general objections, were improper. With this in mind, Magistrate Judge Horan overruled many of the plaintiff's objections to the defendants' requests.

Mitchell v. Universal Music Group Inc., No. 3:15-CV-174-JHM, 2018 WL 1573233 (W.D. Ky. Mar. 30, 2018). Magistrate Judge Colin Lindsay imposed stiff penalties on certain defendants for making "boilerplate" objections in response to the plaintiff's discovery requests. Magistrate Judge Lindsay found fault with many of the defendants' objections founded on the attorney-client privilege and the principle of proportionality. For instance, Magistrate Judge Lindsay noted that "[n]ot once in the eighty times defendants claimed that [the plaintiff]'s discovery requests were not proportional did they bother to explain how they were disproportionate." Worse, the defendants asserted objections based on the attorney-client privilege and work product doctrine a combined 60 times, but never produced a privilege log explaining which documents were being withheld. Magistrate Judge Lindsay also observed that the defendants' objections founded on privilege were so vague and non-specific that it was impossible for the court even to determine *whether* responsive documents were actually being withheld on the basis of privilege, or the basis of the privilege. As a result, the court found that the defendants waived all of their objections based on privilege and proportionality, and ordered production of all documents the defendants had withheld (or never reviewed) on those grounds.

On April 30, 2018, in ***Mitchell v. Capitol Records, LLC***, 2018 WL 2011934 (W.D. Ky. Apr. 30, 2018), Chief Judge Joseph H. McKinley, Jr. overruled most of the defendants' objections to Magistrate Judge Lindsay's opinion, finding that Magistrate Judge Lindsay's decisions with respect to the boilerplate objections and the waiver of the attorney-client privilege were "neither clearly erroneous nor contrary to law."

Meet and Confer/ Cooperation



Most, if not all, discovery disputes can be resolved through an effective meet and confer process. At a minimum, the required meet and confers allow the parties to identify those areas where they cannot agree and/or need the court's assistance. Ever more decisions demonstrate that courts expect and anticipate that parties will meet and confer in good faith in order to attempt to reach agreements on the scope of discovery and resolve/narrow discovery disputes.

Bradley v. County of San Joaquin, No. 17-cv-02313, 2018 WL 3416509 (E.D. Cal. July 13, 2018). Magistrate Judge Allison Claire was asked by the plaintiffs, pursuant to E.D. Cal. R. 302(c)(1), to compel the defendants to provide additional discovery responses and production of documents. Both parties had filed motions to compel discovery, with a joint statement on the discovery disputes due to the court on July 11. Throughout June, the defendants had raised concerns about the plaintiffs' discovery and met and conferred on those concerns. During that meet and confer process, the plaintiffs' counsel made generalized statements about its belief that the defendants also had discovery deficiencies. However, the plaintiffs neither identified to the defendants what their specific concerns about the defendants' productions were, but rather simply stated to the court that "[w]e met and conferred on our motion to compel."

Magistrate Judge Claire denied the plaintiffs' motion, stating that the plaintiffs had not met their burden to demonstrate that proper meet and confer discussions took place prior to the filing of their motion. In particular, the judge noted the bald assertion that "we met and conferred" was not enough, and, "[i]t is not enough that

plaintiffs put defendants on notice that their production was deficient – a meaningful meet and confer process necessarily includes a particularized explanation of the requesting party's concerns, such that the producing party has an actual opportunity of addressing the concerns and avoiding unnecessary discovery motions practice."

West Bend Mutual Insurance Co. v. Zurich America Insurance Co., No. 17 C 2598, 2018 WL 1736153 (N.D. Ill. Apr. 11, 2018). Magistrate Judge Jeffrey Cole chastised both parties for failing to make a good-faith effort to resolve their discovery dispute without the court's help. Judge Cole observed that, while the defendant had initially made "sweeping claims of attorney-client privilege and work product, and produced only heavily redacted documents," after the plaintiffs filed a motion to compel they "had more than a moment of self realization" and produced most of the documents previously withheld. He also observed, however, that the plaintiffs' motion "seemingly flies in the face of applicable law," seeking relief that the plaintiffs should have known was not available. Judge Cole opined that the parties should have been able to resolve these glaring issues without the court's intervention if they had attempted to confer more than just twice before running to court. He therefore scolded the parties for not complying with the Northern District of Illinois local rule that requires litigants to make such an effort, noting that "[l]ocal Rule 37.2 mandates, not discussions, but 'good faith' discussions.... Chatting for a bit about a dispute and maintaining an untenable position at worst or a tenuous position at best, is not engaging in a good faith meet and confer."

Cross-Border Issues



As information continues to spread across international boundaries and data protection laws in Europe and elsewhere increase in importance, courts must consider whether discovery under the Federal Rules is appropriate in a given context, and even if it is, to what extent such discovery needs to be limited. This analysis is not simple and requires courts to analyze the specific foreign laws and interests at play, and balance those interests against the interests of the U.S.

Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., No. 16-1220, 2018 WL 2973745 (S. Ct. June 14, 2018). In this price-fixing case, the Supreme Court held that U.S. courts “should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements.” The Supreme Court noted that Federal Rule of Civil Procedure 44.1 instructs that when determining the nature of foreign law, courts “may consider any relevant material or source ... whether submitted by a party or otherwise,” and that a court “may engage in its own research and consider any material thus found.” In the case at hand, the Second Circuit had previously held that certain statements made by the Ministry of Commerce of the People’s Republic of China concerning the actions of certain Chinese suppliers of vitamin C in fixing the price and amount sold to the United States were to be given conclusive effect, even though evidence to the contrary existed, including conflicting statements the Chinese government had made before the World Trade Organization. In discussing the appropriate weight to be given to a statement of the foreign government, the Supreme Court held that courts should consider: (1) the statement’s clarity, thoroughness and its support; (2) the

statement’s context and purpose; (3) the transparency of the legal system; (4) the role and authority of the official making the statement; and (5) the statement’s consistency with the foreign government’s past positions.

Corel Software, LLC, v. Microsoft Corporation, No. 15-CV-00528, 2018 WL 4855268 (D. Utah Oct. 5, 2018). In this case, the plaintiff accused the defendant of infringing a software patent. The parties presented dueling motions related to production of certain user “telemetry data” related to the functionality of the defendant’s software that plaintiff alleged to be infringing—plaintiff seeking an order compelling production, and defendant seeking a protective order barring it. The plaintiff sought production of raw telemetry data (regardless of its location or origin), “along with documents sufficient to identify the extent of any deleted telemetry data,” documents that describe the systems used to store, decode, and display the telemetry data, and depositions related to the use, storage, and deletion schedule of the data. The defendant described the documentation requests as irrelevant and the requests for raw telemetry data unduly burdensome. The defendant explained that, first, it had already produced four terabytes of responsive telemetry data and, second, that it would have to search through several *petabytes* of data to find several terabytes more of responsive data. Further, the defendant argued that the scope of the request brought it into “tension with [defendant]’s obligations under the European General Data Protection Regulation 2016/679 (‘GDPR’), which regulates (among other things) telemetry data and would require additional burdensome steps to anonymize the data” located in Europe before it can be produced. Magistrate Judge Paul M. Warner ordered production of the requested data, with the exception

of the plaintiff's request for documents "describing" the defendant's telemetry systems, which he characterized as subject to the deadline for fact discovery, which had already passed. But he ordered production of the raw telemetry data and the depositions. With respect to the raw data, Magistrate Judge Warner concluded the defendant's burden of complying with the GDPR was "proportional to the needs of case" under Rule 26(b)(1). He reasoned that the data sought is directly relevant to the claims and defenses in the case, that it is important to the plaintiff's claims, and that the defendant's resources "weigh against a finding that the information sought by [plaintiff] is unduly burdensome." On balance, "the benefit of producing the information sought by [plaintiff] outweighs the burden and expense imposed upon [defendant]." He therefore rejected the defendant's generalized concerns about the burden of complying with the GDPR and ordered production of the data.

Editors' Note: It is in many ways still too early to tell whether U.S. courts, broadly speaking, will be amenable to arguments that the burdens of complying with the GDPR erect barriers to compliance with discovery requests. This case, however, suggests that courts will take seriously the Rule 26(b)(1) proportionality factors—here, answering the plain burden of searching through petabytes of data and then anonymizing terabytes-worth of data points with a finding that the burden was not sufficiently supported by a showing of cost, and rationalizing that Microsoft had the resources to accomplish the discovery in either event. Litigants faced with the daunting prospects of complying with discovery in the shadow of the GDPR are well-advised to carefully demonstrate the costs they expect to bear in the process.

In re Accent Delight International, Ltd., Nos. 16-MC-125 / 18-MC-50, 2018 WL 2849724 (S.D.N.Y. June 11, 2018). Judge Jesse M. Furman was asked to allow the petitioner to: (1) use materials it had previously obtained pursuant to Section 1782 in connection with a pending criminal proceeding in Switzerland; and (2) obtain new discovery in aid of proceedings in Monaco and Switzerland. Notably, the petitioner had previously requested and obtained discovery pursuant to Section 1782 for use in proceedings in France and Singapore, but the court had entered a protective order barring the use of those materials in other

legal proceedings. Judge Furman noted that the petitioner had previously obtained the court's permission to use the discovery obtained pursuant to Section 1782 in connection with subsequent proceedings in Switzerland and the United Kingdom. He also noted that the court's prior ruling had allowed the use of these materials, unless the opposing party could show that the petitioner had acted in "bad faith." Finding no bad faith in connection with the current application, Judge Furman granted the petitioner's request to use the previously obtained discovery.

However, Judge Furman's decision with respect to the new discovery was more nuanced. He noted that while some courts had taken the position that Section 1782 could not be used to obtain discovery of documents located outside the United States, the Second Circuit had not ruled on the question. Judge Furman noted that the language of Section 1782 places no geographic limitation on the production of documents, and instead refers to discovery taken in accordance with the Federal Rules of Civil Procedure. Noting that there was no "per se" prohibition, Judge Furman did note that the location of the materials being sought would be "at most a 'discretionary consideration' to be weighed in assessing the 'alleged hardship and burden.'" Ultimately, Judge Furman found that the party from whom the discovery was requested was not a party to the foreign proceeding, that absent proof that the foreign tribunal would reject the evidence in question, it should be assumed that the tribunal would be receptive, and that the respondents had not made any arguments regarding whether this was an attempt to circumvent foreign restrictions. Regarding the fourth factor, undue intrusiveness and burden, Judge Furman limited the discovery to a specific subset of information where the respondent was involved in the sale, auction, or valuation of specific works of art. He found no basis to extend discovery beyond this narrowed scope, and by using such limitation, the requests were not "sufficiently 'intrusive or burdensome' to warrant rejection of the application." Judge Furman rejected the respondent's arguments concerning the application of the GDPR, stating that there was no reason to expect that many of the documents would contain personal information that required redaction, especially as the prior productions had "virtually no redactions."

In re: Application of Biomet Orthopaedics Switzerland GMBH Under 28 U.S.C. 1782 For An Order To Take Discovery For Use In A Foreign Proceeding, No. 17-3787, 2018 WL 3738618 (3d Cir. Aug. 6, 2018). The United States Court of Appeals for the Third Circuit vacated the trial court's denial of Biomet's request for discovery in aid of a foreign proceeding under 28 U.S.C. § 1782. Biomet had requested the court's assistance in obtaining documents that were produced in a prior related litigation for use in a German proceeding involving many of the same parties. The documents were being held by the law firms that represented the opposing party. The Third Circuit held that Biomet's request met the statutory requirements, as the request was made: (1) by an interested party; (2) for use in a foreign proceeding; and (3) the law firms that held the documents were persons who resided or were found in the Eastern District of Pennsylvania.

The Third Circuit then turned to the four discretionary factors that the Supreme Court had previously found applied to such requests in *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 259-63 (2004), namely: (i) whether the person from whom the discovery is sought is a participant in the foreign proceeding; (ii) the nature of the foreign tribunal and the character of the proceedings; (iii) whether the request conceals an attempt to circumvent restrictions imposed by the foreign country on obtaining evidence for use in such proceeding; and (iv) whether the request was unduly intrusive or burdensome. The Third Circuit found that the trial court's analysis under the *Intel* factors was "cursory and conclusory" and "relied on an incomplete understanding of the pertinent facts surrounding the German proceeding." Ultimately, the Third Circuit vacated the trial court's denial of Biomet's request and remanded the case to the trial court to conduct an analysis in accordance with the framework set forth in the Third Circuit's opinion, including consideration of whether a "more tailored request, and the imposition of conditions on the use of and access to information" could address both the trial court's concerns and those of the opposing party.

In re Levi Strauss & Co., No. 18-MC-80123, 2018 WL 3872790 (N.D. Cal. Aug. 15, 2018). Magistrate Judge Jacqueline Scott Corley granted the petitioner's request for discovery from a non-party in aid of two trademark infringement actions pending in Belgium. The petitioner was asking the court to allow it to subpoena the Internet

Archive (which operates the "Wayback Machine") for information on whether the alleged infringer had requested that its website be excluded from the Wayback Machine and any copies of the infringer's website that might still exist, even if they were hidden from public view. Magistrate Judge Corley went through the four statutory factors, finding that the petitioner had satisfied them. She noted that a litigant in a foreign action qualifies as an interested party, and that there is no requirement that a formal proceeding be currently pending, only that "a 'dispositive ruling' by a foreign adjudicative body is within 'reasonable contemplation.'"

Magistrate Judge Corley then analyzed the four discretionary factors. She found that because the Internet Archive was not a party to the Belgian proceedings, the petitioner could not obtain the requested information absent assistance under Section 1782. She noted that the petitioner's expert had been unable to obtain the requested information and that under Belgian law the petitioner could obtain the information and provide it to the expert—making it likely that the Belgian court would be receptive to an order issuing the subpoena and requiring its production. Magistrate Judge Corley also noted that the request did not appear unduly burdensome. However, because the plaintiff's request was made *ex parte*, which is common in Section 1782 applications, Magistrate Judge Corley noted that the Internet Archive could move to quash the subpoena if it believed that such action was necessary to protect its rights.

In re Schlich, 893 F.3d 40 (1st Cir. 2018). The Court of Appeals for the First Circuit denied the plaintiff's request for discovery pursuant to 28 U.S.C. § 1782 in aid of foreign proceedings before the European Patent Office (the "EPO"). The petitioner, a patent attorney for a genome editing company, sought discovery from a number of entities for use in proceedings before the EPO. The petitioner was seeking information concerning an inventorship study, as well as information regarding the assignment of the rights to the corresponding inventions. In opposing the petitioner's request, the entities submitted, among other things, a declaration from a former EPO official that discovery conducting these issues would not be considered relevant by the EPO.

The district court conducted the requisite statutory analysis under Section 1782: (1) does the person from whom the discovery is sought reside within the district; (2) does the request seek evidence for use in a foreign proceeding; (3) is the request made by any interested person; and (4) is the material sought not protected by a legally applicable privilege. It also weighed the four discretionary factors developed by the Supreme Court: (i) whether the person from whom the discovery is sought is a party to the foreign proceeding; (ii) the nature and character of the foreign tribunal and proceeding; (iii) whether the request is an attempt to circumvent the rules of the foreign tribunal; and (iv) whether the requests are unduly intrusive and/or burdensome. The district court found the petitioner had satisfied the four statutory requirements, but the first and second discretionary factors, i.e., whether the producing party is a party to the foreign proceeding (it was) and the nature and character of the tribunal and proceeding (EPO opposition proceeding, where the requested discovery was not relevant), weighed in favor of denying the request for assistance.

The First Circuit affirmed the trial court's denial of the request, noting that the trial court had appropriately considered whether the EPO would be receptive to the requested evidence, and concluded that it would not. The First Circuit noted that Section 1782 does not put the burden of proof on either the petitioner or the respondent(s), but allows them to present their evidence and allows the trial court to make the ultimate decision. Notably, the First Circuit stated that a trial court could be justified in denying the request even when all of the statutory requirements have been satisfied, as long as it determines that the discretionary factors favor denying the request.

Knight Capital Partners Corp. v. Henkel AG & Co., KGaA, No. 16-12022, 2017 WL 5898455 (E.D. Mich. Nov. 30, 2017). After the German defendant objected to the production of documents and information based on the German Federal Data Protection Act (the "German Data Protection Act") and sought a protective order that included certain "standard contractual clauses," Judge David M. Lawson analyzed whether existence of the German Data Protection Act prohibited the defendant from producing documents. Judge Lawson noted that the German Data Protection Act does not "bar the defendant from disclosing email communications and other business

records... principally because the Act contains an express exception to the broad prohibitions on personal data disclosure... '[when] the transfer is necessary... for the establishment, exercise or defence of legal claims.'" Judge Lawson also found after conducting a comity analysis that the *Aerospatiale* factors "weigh in favor of compelling the disclosure." Regarding the defendant's request that the plaintiff execute the standard contractual clauses, Judge Lawson held that the "proposed language [was] taken from extensive and apparently aspirational language propounded by the European Commission as guidelines for compliance ... where full compliance is required before any disclosure may proceed ... [but] full compliance with those aspirational conditions is not required, because the statute expressly permits disclosure under the litigation exception...."

Editors' Note: As the GDPR matures, and jurisprudence surrounding its application to, and effect on, U.S. litigations develops, we anticipate that parties may continue to request that the requesting party agree to the Standard Contractual Clauses ("SCCs") in order to make it easier to comply with U.S. discovery obligations. In such cases, the onus would be on the party seeking to use personal data in court filings to protect such data. In addition, as California and other states adopt data privacy regimes that incorporate protections similar to those in the GDPR, it should become easier to convince a U.S. court that the protections required by the SCCs should be incorporated into their protective orders.

Salt River Agricultural Improvement and Power Dist. v. Trench-France SAS, No. 17-cv-1468-PHX-DGC, 2018 WL 1382529 (D. Ariz. Mar. 19, 2018). In this decision involving the expedited discovery procedures involved in the Mandatory Initial Disclosures Pilot Program ("MIDPP") in the District of Arizona, Judge David G. Campbell held that the French defendant who had raised the issue of the French Blocking Statute was entitled to the protections of the Hague Convention on the Taking of Evidence Abroad. Notably, the defendant had explained that a significant amount of the discovery required by the MIDPP was also in the possession of its Canadian subsidiary, which was not subject to the French Blocking Statute. Judge Campbell conducted the "particularized analysis" required by the Supreme Court and found that

a number of the factors weighed in favor of using the Hague Convention, including: (1) the fact that the MIDPP required the production of all evidence relevant to the claims and defenses in the action, including those that were not highly important to the resolution of the case; (2) the breadth of the MIDPP's obligations were not the type of specific requests favored by the Hague Convention; (3) the use of the Hague Convention procedures would only delay discovery for about 60 days, and thus would allow the defendant to produce the required documents before the close of discovery; (4) France's interests in "controlling access to information within its borders and protecting its citizens from foreign discovery practices it deems antithetical to the French legal culture" outweighed U.S. interests that were not impaired by the use of the Hague Convention; and (5) the potential criminal penalty that could be imposed on the defendant.

Editors' Note: Many practitioners have experienced that it is generally a challenge to use the Hague Convention's processes for conducting international discovery. Discovery pursuant to the Hague Convention is often complex and time-consuming, engendering delay that courts generally do not welcome. This decision is therefore anomalous—particularly because it was also subject to the Arizona MIDPP, which requires speedy production of relevant data. Judge Campbell appears to have implicitly recognized that compliance with the MIDPP requirement to produce "all" relevant data is onerous, and does not appear to have been willing to subject the defendant to potential penalties in its home country over a fractional portion of marginally relevant discovery, even it meant non-compliance with MIDPP deadlines. Had the data in France been more critical to the plaintiff's claims, it is not hard to imagine that this decision could have come out differently.

Privilege & Waiver



The threat of revealing privileged communications, through inadvertence or otherwise, often shapes the approach to the identification and withholding of privileged documents. It also encourages parties to enter into clawback agreements pursuant to Federal Rule of Evidence 502(d). Despite the heightened importance, or maybe because of it, parties and courts deal with privilege concerns on a regular basis.

AbbVie Inc. v. Boehringer Ingelheim International GMBH, Case No. 17-cv-01065-MSG-RL, 2018 WL 2995677 (D. Del. July 14, 2018). Magistrate Judge Richard A. Lloret was asked to determine whether a slide deck prepared by the plaintiff in connection with its review and planning for its existing patent portfolio was privileged. Magistrate Judge Lloret cited the four factors needed in order for a particular communication to be protected by the attorney-client privilege: (1) a communication; (2) made between privileged persons; (3) in confidence; and (4) for the purpose of obtaining or providing legal advice for the client. He noted that in the context of communications with in-house counsel, where the business and legal functions can overlap, the question was whether the communication is “designed to meet problems which can be fairly characterized as predominantly legal.”

Here, the plaintiff had first produced an internal PowerPoint presentation discussing strategy and other matters concerning one of the plaintiff’s patents, and then later sought to claw back the presentation and produce a redacted version. Magistrate Judge Lloret engaged in a slide-by-slide review, examining whether the individual slides met the criteria for an attorney-client privileged communication. While he found that the majority of the

proposed redactions related to business concerns and were thus not privileged, Magistrate Judge Lloret held that the slides that discussed “patent strategy” and “patentability success scores” were privileged, with the “patentability success score” being “primarily a legal opinion.” He also found that the “total score” the plaintiff assigned to each patent was privileged because it would “reveal the patentability score.”

Basso v. New York University, No. 16-CV-7295, 2018 WL 2694430 (S.D.N.Y. July 27, 2018). In this case, Magistrate Judge Kevin N. Fox considered a challenge by the plaintiff to the defendant’s assertion of privilege claims regarding a series of emails. Judge Fox chastised the defendant for inaccurate or misleading descriptions of communications contained in its privilege log, noting that missives described in the log as “a single e-mail message” were in fact “e-mail message string[s] consisting of” multiple messages from different senders at different times. Magistrate Judge Fox found, after an *in camera* review, that the challenged “e-mails” did not accurately describe the series of messages contained in each document. For instance, in one document, Magistrate Judge Fox found that no privilege attached to a series of messages, described as “email discussion with counsel requesting advice” where messages were sent between the defendant’s “highest level administrators” with lawyers on the list of recipients, but none of the messages in the string actually solicited or conveyed legal advice. Likewise, in another document described as containing “comments” by in-house counsel, Magistrate Judge Fox found that it was not clear exactly which comments were provided by counsel, and that in any event, “none of the paragraphs provide legal advice.” The fact that the message was

sent from an attorney, with comments, did not create a presumption that those comments were legal in nature. Ultimately, Magistrate Judge Fox found that none of the challenged documents were privileged and ordered their production, along with all attachments.

BlackRock Balanced Capital Portfolio v. Deutsche Bank Nat'l Tr. Co., No. 14-CV-09367, 2018 WL 3584020 (S.D.N.Y.

July 23, 2018). Magistrate Judge Sarah Netburn found that the defendant “has waived its privilege claims with respect to all documents listed on its privileged log” after failing to provide sufficient descriptions of the documents it was claiming privilege over. Magistrate Judge Netburn observed that a litigant’s “obligation is to provide sufficient information so that [the other party] is able to assess the privilege fully,” and found that “repeated” failure to do so amounted to a waiver of the privilege claim. She also noted that *in camera* review revealed that “these deficient log entries often result in overly broad privilege assertions,” causing the defendant itself to retreat from its assertions in 35 percent of the records selected for *in camera* review. She ultimately found that a privilege log’s “purpose is to ensure that a withholding party can justify a privilege designation.” By “waiting until a document is challenged to review whether its privilege designation is correct,” the defendant “inappropriately shifts the burden to plaintiffs to challenge a privilege assertion when [defendant] should have established why a document was protected in the first place.” Magistrate Judge Netburn gave the defendant 30 days to make an application for reconsideration “on a document-by-document basis” as to only documents listed on the current log “with complete information—that is, the name of the author of the document, the name of any attorney, a clear description of the document, etc.”

Fairholme Funds Inc. v. United States, 134 Fed. Cl. 680 (Fed. Cl. 2017). Judge Margaret M. Sweeney was asked to compel the production of 1,500 documents the defendant was withholding pursuant to the deliberative process and bank examination privileges. The plaintiff requested access to the documents in question under the “quick peek” procedure authorized by Rule 502(d) of the Federal Rules of Evidence. In opposing the plaintiff’s motion to compel, the defendant noted that it had not consented to the “quick peek” procedure and had already in fact reviewed all of the documents in question for responsiveness and privilege. The defendant cited to *The*

Sedona Conference’s Commentary on the Protection of Privileged ESI, which notes that Rule 502(d) does not authorize courts to require parties to engage in a “quick peek.” The defendant also argued that the only decision it found requiring the use of a “quick peek” was one where the defendant’s privilege log was inadequate and the defendant had refused to cooperate with discovery.

Judge Sweeney ultimately required the parties to engage in a “quick peek.” She noted that while the plaintiff did not allege that the defendant had failed to satisfy its discovery obligations, the defendant did admit that its productions had been piecemeal. Judge Sweeney noted that a trial court has broad discretion to fashion discovery orders, and that if she were to deny the plaintiff’s motion, she expected that the plaintiff would file another motion asking the court to review all 400 documents *in camera*. Under these circumstances, Judge Sweeney found that the “use of a quick peek procedure is a much more viable and attractive option.”

Editors’ Note: We would not anticipate that this decision will have a broader application, or that it could be used to compel a producing party, over an objection, to allow a requesting party to root through the producing party’s ESI without a showing that the producing party’s production was deficient.

Heartland Consumer Products LLC v. Dineequity, Inc., No. 17-CV-01035, 2018 WL 3861648 (S.D. Ind. Aug. 14, 2018). The plaintiffs in this trademark infringement case asked the court to compel the defendant to produce nine emails that the defendant originally identified as privileged, since the defendant’s attorney was only present in the “CC” field of the privilege log, and it was unclear what the attorney’s role was in the communications. Magistrate Judge Tim A. Baker began his analysis by noting that just because an attorney is in the “CC” email field (as opposed to “To” or “From”) is not prima facie evidence that the email is not privileged. Judge Baker conducted an *in camera* review of the nine emails, and concluded that six out of the nine emails were entirely privileged, and the remaining three were partially privileged.

Magistrate Judge Baker found that the following types of communications were in fact privileged:

- Where the company's attorney asked an employee questions, and the employee relayed those questions to another employee to get answers.
- Where the company's attorney was involved in discussions on a topic, and those discussions were continued amongst non-attorney employees while the attorney was copied on those communications.
- Where two non-attorney employees were discussing a conversation one had with the company's attorney regarding an indemnity agreement, with the non-employee suggesting changes based upon the legal advice being discussed.


In re Testosterone Replacement Therapy Products Liability Litigation, 301 F. Supp. 3d 917 (N.D. Ill. 2018).

In this multi-district RICO litigation, one of the plaintiffs (a health plan) sought to claw back six of the more than 180,000 documents it produced to the plaintiffs on the basis that they were privileged and produced inadvertently. Defendants moved for an order barring the clawback, arguing that the documents were not privileged and, even if they were, the plaintiff had waived the privilege. Judge Matthew F. Kennelly denied the motion. The parties, Judge Kennelly observed, had included in their agreed protective order a provision addressing inadvertent production under Federal Rule of Evidence 502(d)—specifically, that “inadvertent or unintentional production may not be deemed a waiver in whole or in part of the Producing Party’s claim of privilege or immunity from discovery.” Finding, first, that the six documents were protected by the attorney-client privilege, Judge Kennelly next disagreed with the defendants’ argument that Rule 502(b), and not Rule 502(d), controlled whether the plaintiffs’ claim of privilege had been waived. Citing out-of-circuit cases, the plaintiffs argued that an order under Rule 502(d) could only “override” the “default” analysis under Rule 502(b) if the order “provide[s] concrete directives’ that correspond to each element of Rule 502(b),” and that, because the protective order in this case did not provide such “directives,” the mere invocation of Rule 502(d) did not “supersede” the application of Rule 502(b). Judge Kennelly disagreed, finding that the parties expressly agreed that questions of inadvertent waiver should be

“construed ... under Rule 502(d)” and even quoted the non-waiver language in the Rule. He found that these “drafting choices reflect[ed] the parties’ intent to create their own guidelines to address inadvertent disclosure and to avoid waiver-related litigation under Rule 502(b).” Further finding that “inadvertence” under Rule 502(d), absent a prescribed definition, asks only whether the producing party made “a knowing choice to produce documents” despite their privileged status, whether or not the party acted reasonably or negligently in allowing the production (a “distinct” inquiry under Rule 502(b)(2) from the question of inadvertence), Judge Kennelly found that the documents had been produced inadvertently and denied the motion.

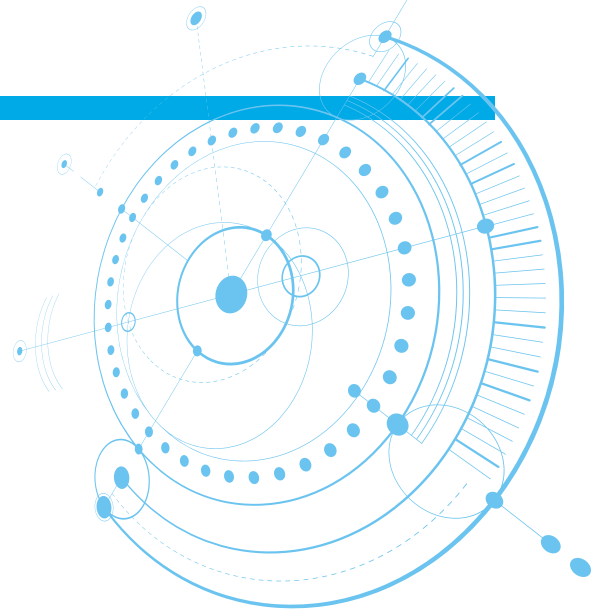
Kreuze v. VCA Animal Hospital, Inc., No. PJM-17-1169, 2018 WL 1898248 (D. Md. Apr. 20, 2018). Magistrate Judge Charles B. Day held that the plaintiff’s use of her work e-mail account to send attorney-client communications did not result in the waiver of the attorney-client privilege. Magistrate Judge Day noted that the defendant had an “Information Systems Policy” that put employees on notice that company e-mail accounts were “for official use” and that the company “reserves the right to monitor all such accounts.” However, he noted that he was required to apply a four-factor test to determine whether the use of the company’s systems waived the privilege. The four factors were: (1) whether the employer has a policy banning personal use of e-mails; (2) whether the employer monitors the employee’s use of e-mail; (3) whether third parties have a right to access the computer or e-mails; and (4) whether the employer notified the employee of the policy. Magistrate Judge Day applied these factors and found that the company did not ban personal use of its e-mail system, that the company did not actively monitor the plaintiff’s e-mail account during or after her employment, and that the plaintiff’s acknowledgment of the policy was made years before the e-mails were sent. As a result, Magistrate Judge Day noted that he was “comfortable preserving the attorney-client privilege on public policy grounds.”

Pinkham v. Coca-Cola Refreshments USA, Inc., No. 1:18-cv-01096-SEB-TAB (S.D. Ind. Aug. 13, 2018). At issue in this negligence case was the extent of the waiver over four witness videos, as the plaintiff showed portions of the videos at a settlement mediation. Magistrate Judge Baker quickly noted that the plaintiff waived the work product protection for those portions of the video that were shown at the mediation. Magistrate Judge Baker then analyzed



whether Federal Rule of Evidence 502(a) extended the waiver to the unseen portions of the videos. Rule 502(a) extends the waiver to undisclosed material “only if: (1) the waiver was intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.” Magistrate Judge Baker found that while the first two prongs supported finding that the plaintiff had waived the protection with respect to the unseen portions of the videos, the fairness prong required that the court find that no waiver occurred. Magistrate Judge Baker noted that the four witnesses were known and available to both the plaintiff and the defendant at all times, and that while the plaintiff spent the time and money to interview them, the defendant voluntarily chose not to do so. He found that under these circumstances, the court would not countenance the defendant’s attempt to save itself the trouble of interviewing the witnesses by enjoying the fruits of the plaintiff’s labor.

Rule 26(A) Disclosures



Several 2018 decisions remind parties of their obligations to timely make or supplement Rule 26(a) disclosures. This is a continuing obligation that, if ignored or otherwise neglected, can have negative consequences, at a minimum placing the party in a negative light before the court. Parties are best served to ensure that if they learn additional information and/or discover that additional responsive documents exist, such documents and information are disclosed to the opposing party in a timely manner.

Finch v. BASF Catalysts LLC, No. 16-CV-1077, 2018 WL 2770140 (M.D.N.C. June 8, 2018). Judge Catherine C. Eagles precluded the plaintiff from introducing evidence that she failed to disclose either in her Rule 26(a)(1) disclosure or before the time to disclose expert reports. The plaintiff, who filed a wrongful death action alleging that the defendants had exposed her husband to asbestos over the course of his employment, had an expert test her husband's work identification card for evidence of asbestos. Although the plaintiff listed the individual conducting the testing as a potential expert witness, she did not identify the possible subject of his testimony or disclose the existence of the husband's identification card. Nor did the plaintiff disclose the report the expert prepared by the deadline contained in the court's scheduling order. It was not until the plaintiff requested that the court impose sanctions against one of the defendants for failing to preserve records relating to sale of talc to her husband's employer that the plaintiff disclosed the existence of the expert report and the conclusions the expert reached with respect to the husband's possible exposure to talc.

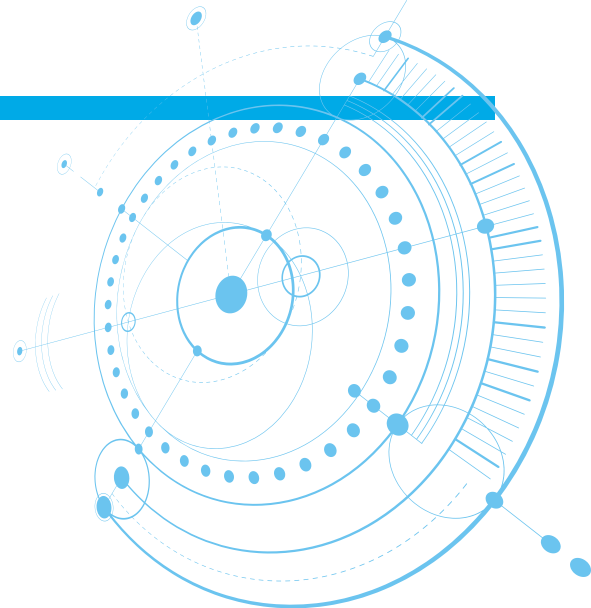
Judge Eagles granted the defendants' motion to preclude the plaintiff from relying on the expert's conclusions and his report. She noted that Rule 26(a)(1) requires that a party provide the name and contact information for each person likely to have discoverable information and to describe all tangible things that the party has in its possession that the party may use to support its claims. Judge Eagles explained that under Rule 37(c)(1), the failure to disclose evidence as required by Rule 26(a)(1) generally precludes the party from using such information on a motion, at a hearing, or at trial, unless the failure to disclose was "substantially justified or is harmless." Ultimately, Judge Eagles determined that the plaintiff's failure to disclose the existence of the expert, the identification card, and the expert's testing of the same was not substantially justified and was not harmless—as there was no opportunity for the defendant to depose the expert in question or the other experts that purported to have relied on the initial expert's reports and findings.

Judge Eagles also denied the plaintiff's motion for sanctions, finding that the defendant in question had no duty to preserve documents until 1986, when the first litigation concerning talc was filed, and that because the defendant only kept the records the plaintiff claimed were spoliated for three years, records regarding pre-1978 sales records to the employer did not exist in 1986. She also noted that the plaintiff could not prove that these documents would have been relevant to the plaintiff's case, or that the defendant willfully destroyed the evidence in question.

Karnoski v. Trump, No. C17-1297-MJP, 2018 U.S. Dist. LEXIS 43011 (W.D. Wis. Mar. 14, 2018). This was an action seeking an injunction preventing the Department of Defense from implementing a “ban” that would prevent transgendered citizens from joining and serving in the military and receiving medical care related to gender transitioning—specifically, the ban that was “announced” by President Trump via Twitter on July 26, 2017, and memorialized on August 25, 2017. In filing its Rule 26(a) initial disclosures, the government identified no “individuals likely to have discoverable information” or “documents, electronically stored information, [or] tangible things” that it might rely upon to support its claims or defenses. The government proffered as explanation that it could not know what individuals or documents it might rely upon “to defend a future policy that has yet to be announced” because the Department of Justice was still “undertaking a study of policies concerning transgender service members.” United States District Judge Marsha

Pechman disregarded this explanation, observing that “this case arises not out of any new policy that is in the process of being developed, but rather out of the *current* policy prohibiting military service by openly transgender persons” as announced on Twitter by the President. Accordingly, “Defendants cannot reasonably claim there are *no* individuals likely to have discoverable information and *no* documents relevant to their claims and defenses.... President Trump’s own announcement states ‘[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow ... [t]ransgender individuals to serve in any capacity in the U.S. Military.’” Judge Pechman thus found that the government failed to provide a sufficient initial disclosure under Rule 26(a) and ordered it to disclose information such as “[w]hich Generals and military experts were consulted” and “[w]hat information did they review or rely upon in formulating the current policy” within five days of her order.

Possession, Custody, or Control



It is axiomatic that a party is required to produce responsive, non-privileged documents that are within its “possession, custody, or control.” As technologies change, companies continue to move to allowing individuals to use their own devices to conduct business, and individuals communicate by non-traditional means, just what constitutes possession, custody, and control is changing and courts are struggling with the current legal framework of legal right vs. practical ability—a framework that is in bad need of revision to reflect how ESI is generated, communicated and stored.

Apex Colors, Inc. v. Chemworld International Limited, Inc., No. 14-CV-273, 2018 WL 1193657 (N.D. Ind. Mar. 3, 2018). Magistrate Judge Paul R. Cherry was asked to grant the defendants’ motion to compel production of certain documents belonging to a dissolved LLC from two of the LLC’s former members, as well as to require the forensic imaging of a computer belonging to the former members. As part of the dissolution process, the three members (plaintiff and its two former business partners) entered into a settlement agreement whereby certain documents and data in the possession of the two former business partners, including the computer at issue, became the property of the two former business partners. In response to a subpoena from the plaintiff, the former business partners agreed to allow the computer in question to be imaged, applied certain date filters relating to the time when the computer was used by the dissolved entity, and then produced the resulting data to the plaintiff. Later, the defendants sought to require the plaintiff to produce the entire forensic image, not just the data that the former business partners had produced to the plaintiff.

In denying the defendants’ motion, Magistrate Judge Cherry noted that Rule 34 provides that a party “may be compelled to produce electronically stored information ‘in the responding party’s possession, custody or control.’” He also noted that in the Seventh Circuit, “control” means the legal right to obtain the information. Magistrate Judge Cherry found that the plaintiff did not receive the full forensic image, and because it had already produced what it had received to the defendants, the plaintiff had complied with its obligations under Rule 34. With respect to the additional data contained in the forensic image, Magistrate Judge Cherry found that the plaintiff did not have “control” over the computer that was now the property of the plaintiff’s former business partners, and that the settlement agreement that made the computer the property of the former business partners was finalized “well before this litigation was instituted.” He also noted that to the extent the defendants wanted to obtain this information, they “should have sought the information from directly the [former business partners], rather than try to backdoor their request using the plaintiff.”

Hayse v. City of Melvindale, No. Civ. A. 17-13294, 2018 WL 3655138 (E.D. Mich. Aug. 2, 2018). Magistrate Judge Elizabeth A. Stafford was asked to compel the defendants to provide “any cell phones and other electronic devices that may contain any text messages” between or among a defendant and several city officials. Magistrate Judge Stafford noted that parties are required to produce information that is within their possession, custody, or control, and that control is interpreted to cover situations where the party has the legal right to obtain the evidence from third parties. In the case before her, Magistrate Judge Stafford found that the plaintiff had failed to make the

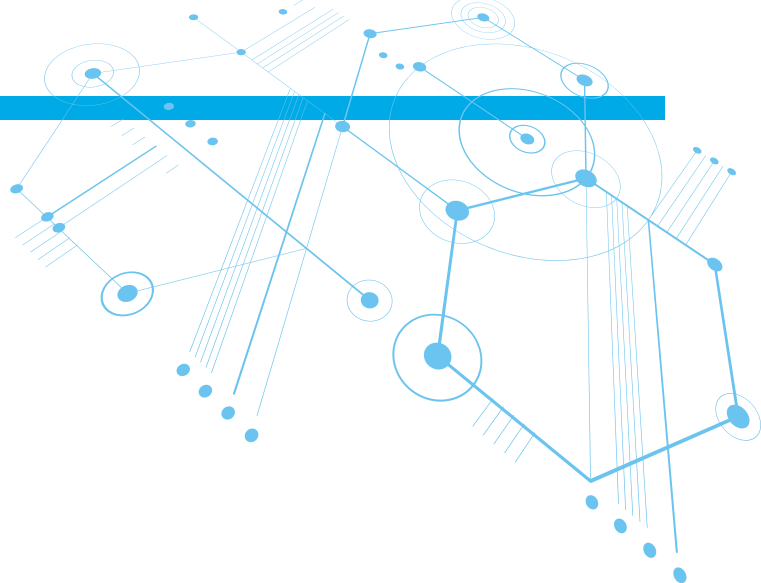
required showing that the personal devices of the non-party officials were within the city's possession, custody or control. She specifically noted that the plaintiff had made no showing that officials had given consent for the city to monitor their text messages or that the phones were actually owned by the city. With respect to the individual defendant, Magistrate Judge Stafford did not accept the defendant's argument that she did not have control over the text messages in question because the defendant no longer owned the phone and had switched service providers. Magistrate Judge Stafford ordered supplemental briefing on whether the defendant's prior service provider had a contractual obligation to provide copies of the defendant's old text messages upon the defendant's request, which would bring the text messages within the defendant's control.

Shenwick v. Twitter, Inc., No. 16-CV-05314, 2018 WL 833085 (N.D. Cal. Feb. 7, 2018). Magistrate Judge Sallie Kim was asked to settle several discovery disputes between the parties, one of which was the plaintiffs' request that the defendant search its custodial employees' Twitter direct messages for relevant communications. For non-party custodians, Magistrate Judge Kim rejected the plaintiffs' demand, as it found it violated the Stored Communications Act (the "SCA"), which prevents a court from enforcing subpoenas issued to a third-party electronic communications service or remote computing services provider. Noteworthy in her analysis was Magistrate Judge Kim's distinction between compelling a party to produce information in its possession, custody,

or control, as opposed to the party's individual custodians who are not parties to the litigation, who have separate privacy rights under the SCA over their personal social media communications. Magistrate Judge Kim observed that Twitter claimed "without opposition that it did not require its employees to use direct messages for communications." On this basis, she found that Twitter did not have possession, custody, or control over its employees' personal Twitter communications, even if related to their work for Twitter. As such, Magistrate Judge Kim found that she could not "compel Twitter, a party in this litigation, to produce protected direct messages of individual custodians who are not parties simply because Twitter is also the provider of the direct messaging service." She reasoned that because the SCA would bar her from enforcing a subpoena sent by the plaintiffs to a different service provider, other than Twitter, for direct messages belonging to these employees, she therefore could not order Twitter to produce like messages from its own direct messaging system.

The plaintiffs also asked the defendant to produce its legal hold notices for the matter, claiming they would not be privileged due to an ongoing threat of spoliation. Magistrate Judge Kim disagreed, noting that "preservation notices, if prepared by counsel and directed to the client, are protected by the attorney-client privilege." However, the plaintiffs' concerns of spoliation could be addressed by factually inquiring as to what efforts custodians have undertaken to collect and preserve information.

Stored Communications Act



Courts continue to be faced with questions regarding whether certain communications are properly within the realm of the Stored Communications Act (the “SCA”), and just what constitutes being retained “for backup protection.” The biggest development in this area was the passage of the CLOUD Act, which the Supreme Court found mooted Microsoft’s challenge to the extraterritorial application of the SCA. The overall impact of the CLOUD Act remains to be seen, but for SCA purposes, it is now clear that the government can obtain data stored overseas in certain circumstances.


Gonzales v. Uber Technologies, Inc., No. 17-cv-02264, 2018 WL 4616266 (N.D. Cal. Sept. 29, 2018). Magistrate Judge Jacqueline Scott Corley granted the defendant’s motion to dismiss the plaintiff’s claims under the SCA, 28 U.S.C. § 2701 et seq., and declined to exercise supplemental jurisdiction over the remaining state law claims. With respect to the SCA claims, the defendant argued that the information that the plaintiff alleged the defendant accessed without authorization was subject to the SCA because it was not being stored for “backup protection.”

After noting that the SCA provides a cause of action against anyone who without authorization accesses “a wire or electronic communication while it is in electronic storage,” Magistrate Judge Corley wrote that the SCA defines electronic storage to be: (a) any temporary, intermediate storage of such a communication incidental to the transmission of the communication; or (b) any storage of such communication by an electronic communication service for the purposes of backup protection. Magistrate Judge Corley found that the plaintiff’s allegations “did

not give rise to the inference that the data is stored for ‘backup protection’ for two reasons: (1) the allegations show that [the competing company] sent real-time and not historical geolocation data to the [fake accounts] created by [the defendant]; and (2) there is no allegation that [the defendant] accessed a separate copy of historical geolocation data that exists elsewhere or ever existed.” She also noted that there was no allegation that there was another copy of the data, which would suggest that the data being accessed by the defendant was being stored for backup protection.

United States v. Microsoft Corp., No. US 17-2. On April 17, 2018, the Supreme Court dismissed as moot a high-profile case over government access to emails stored overseas after both parties agreed that a new federal law stripped the case of any practical significance. The case stemmed from a federal drug-trafficking investigation and the Justice Department’s use of the 1986 Computer Fraud and Abuse Act, as well as the Stored Communications Act, to seek emails from an unidentified account kept on a Microsoft server in Ireland. During arguments in February, some justices suggested they would prefer letting Congress address the issue rather than resolving it based on a decades-old statute. The court had been set to rule by June 2018.

While the case was pending, Congress addressed the issue, passing the Clarifying Lawful Overseas Use of Data Act (the “CLOUD Act”). The new law, enacted March 23 as part of the Consolidated Appropriations Act of 2018, lays out rules for international data requests by law enforcement. Notably, it gives tech companies an easier way to navigate conflicts between government demands



and international data privacy requirements. The CLOUD Act makes clear that U.S. warrants apply extraterritorially and clarifies what data the government can access. It also sets up a process for companies to challenge U.S. warrants and notify foreign governments of the warrants so they can object. It also creates rules for American companies when they receive information requests from foreign governments.

eDiscovery and Information Governance Practice

Editors

Winston & Strawn's eDiscovery and Information Governance Group (eDiscovery Group) is one of the largest and most experienced in the United States. Our firm has built a full-service consulting practice providing services to our clients and case teams in the complex areas of e-discovery and information governance both within the United States and around the world.

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Our attorneys regularly deal with cross-border discovery, privacy, and data security issues, and handle a wide variety of information governance consulting and program design and implementation projects.



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Index

- AbbVie Inc. v. Boehringer Ingelheim International GMBH **43**
- Abdelgawad v. Mangieri **12**
- Allstate Insurance Co. v. Papanek **27**
- American Municipal Power, Inc. v. Voith Hydro, Inc. **28**
- Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co. Ltd. **38**
- Apex Colors, Inc. v. Chemworld International Limited, Inc. **49**
- Bank Direct Capital Finance, LLC v. Capital Premium Financing, LLC **13**
- Barbera v. Pearson Education, Inc. **13**
- Basso v. New York University **43**
- Bell v. Pension Committee of Ath Holding Co., LLC **2**
- BlackRock Balanced Capital Portfolio v. Deutsche Bank Nat'l Tr. Co. **44**
- Bradley v. County of San Joaquin **37**
- Brewer v. BNSF Railway Co. **3**
- Caltenco v. G.H. Food, Inc. **13**
- Carpenter v. United States **28**
- City of Rockford v. Mallinckrodt ARD Inc. **28**
- Clark v. FDS Bank **29**
- Clientron Corp. v. Devon IT, Inc. **13**
- Comlab Corp. v. Kal Tire **14**
- Corel Software, LLC, v. Microsoft Corporation **38**
- Delgado v. Tarabochia **3**
- EEOC v. FedEx Ground Package Systems, Inc. **3**
- EEOC v. GMRI, Inc. **14**
- Entrata, Inc. v. Yardi Systems, Inc. **30**
- EPAC Techs., Inc. v. HarperCollins Christian Publishing, Inc. **15**
- Fairholme Funds Inc. v. United States **44**
- Finch v. BASF Catalysts LLC **47**
- Firefighters Retirement System v. Citco Group Ltd. **3**
- Folino v. Hines **16**
- Forman v. Henkin **4**
- Franklin v. Howard Brown Health Center **15**
- Garrett v. University of South Florida Board of Trustees **4**
- Gipson v. Management & Training Corp. **16**
- GN Netcom, Inc. v. Plantronics, Inc. **16**
- Gonzales v. Uber Technologies, Inc. **51**
- GoPro, Inc. v. 360Heros, Inc. **16**
- Gordon v. Almanza **17**
- Gottesman v. Santana **5**
- Halleen v. Belk, Inc. **35**
- Hayse v. City of Melvindale **49**
- Heartland Consumer Products LLC v. Dineequity, Inc. **44**
- Hernandez v. City of Houston **17**
- Hernandez v. Tulare County Correction Center **17**
- Hinostroza v. Denny's Inc. **5**
- Holick v. Burkhardt **35**
- IBM Corp. v. Naganayagam **18**
- Industrial Quick Search, Inc. v. Miller, Rosado & Algois, LLP **19**
- In re Abilify (Aripiprazole) Product Liability Litigation **18**
- In re Accent Delight International, Ltd. **39**
- In re: Application of Biomet Orthopaedics Switzerland GMBH Under 28 U.S.C. 1782 For An Order To Take Discovery For Use In A Foreign Proceeding **40**
- In re Broiler Chicken Antitrust Litigation **6, 31**
- In re Correra **18**
- In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation **6**
- In re Levi Strauss & Co. **40**
- In re Morning Song Bird Food Litigation **7**
- In re Schlich **40**
- In re Testosterone Replacement Therapy Products Liability Litigation **45**
- Karnoski v. Trump **48**
- Kennicott v. Sandia Corp. **7**
- Klipsch Group, Inc. v. EPRO E-Commerce Ltd. **19**
- Knight Capital Partners Corp. v. Henkel AG & Co., KGaA **41**
- Knight v. Boehringer Ingelheim Pharmaceuticals, Inc. **20**
- Kreuze v. VCA Animal Hospital, Inc. **45**
- Lawrence v. City of New York, et al. **20**
- Leidig v. BuzzFeed, Inc. **21**

Lexpath Technology Holdings, Inc. v. Welsh **21**

Lokai Holdings LLC v. Twin Tiger USA LLC **22**

Lopez v. Don Herring Ltd. **36**

Mitchell v. Universal Music Group Inc. **36**

Mylan, Inc. v. Analysis Group, Inc. **8**

Nece v. Quicken Loans, Inc. **8**

New Falls Corp. v. Soni **8**

North Shore-Long Island Jewish Health Systems, Inc. v. Multiplan, Inc. **9**

Nunes v. Rushton **22**

Ortolani v. Freedom Mortgage Corp. **9**

Par Pharmaceuticals v. Express Scripts Specialty Distribution Services, Inc. **9**

Physicians Alliance Corp. v. WellCare Health Insurance of Arizona, Inc. **10**

Pinkham v. Coca-Cola Refreshments USA, Inc. **45**

Salt River Agricultural Improvement and Power Dist. v. Trench-France SAS **41**

San Diego Unified Port Dist. v. Monsanto Co. **10**

Satmodo, LLC v. Whenever Communications, LLC **32**

Schmalz v. Village of North Riverside **23**

Shannon v. Honeywell Federal Manufacturing and Technologies, LLC **10**

Shenwick v. Twitter, Inc. **50**

Shire LLC v. Abhai, LLC **23**

Singer Oil Co., LLC v. Newfield Exploration Mid-Continent, Inc. **23**

Steves and Sons, Inc., v. JELD-WEN, Inc. **23**

Thompson Auto. Labs, LLC v. Illinois Tool Works, Inc. **10**

Trainer v. Continental Carbonic Products, Inc. **24**

United States v. Microsoft Corp. **51**

United States v. Tolbert **32**

U.S. ex rel. Proctor v. Safeway, Inc. **11**

Vargas Alicea v. Continental Casualty Co. **25**

Waymo LLC v. Uber Technologies, Inc. **25**

Webastro Thermo & Comfort North America, Inc. v. Bestop, Inc. **32**

West Bend Mutual Insurance Co. v. Zurich America Insurance Co. **37**

Winfield v. City of New York **33**

Worldpay, US, Inc. v. Haydon **25**

Yoe v. Crescent Stock Co. **26**

Youngevity International Corp. v. Smith **26**