

## Bingham eDiscovery News

Bingham's eDiscovery Group is pleased to publish our next issue of *Bingham eDiscovery News*, a newsletter covering recent legal developments on electronically stored information (ESI) and other emerging eDiscovery topics. In this issue, we discuss recent cases addressing preservation, sanctions and cooperation. We also summarize key proposed amendments to the Federal Rules of Civil Procedure and suggest practical considerations for clients and their counsel.

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### PRESERVATION

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#### **Court Imposes Spoliation Sanctions for Plaintiff's Selective Preservation of Text Messages: *Calderon v. Corporacion Puertorriqueña de Salud*, No. 12-1006, 2014 WL 171599 (D.P.R. Jan. 16, 2014)**

In this sexual harassment case, an employee brought action against his company and its president for discrimination claims under Title VII. The plaintiff alleged receiving harassing text messages from defendants through an anonymous e-mail address, but admitted deleting certain text messages between himself and his alleged harasser. In response, defendants sought to exclude all texts messages sent between plaintiff and his alleged harasser, and further asked that the case be dismissed on account of plaintiff's selective preservation of text messages.

The produced record of plaintiff's phone calls and texts revealed that nearly 38 text messages sent between Feb. 4, 2011 and Feb. 7, 2011 — including plaintiff's responses — were missing. On Feb. 8, 2011, plaintiff forwarded certain messages from his alleged harasser to himself. On that same day, plaintiff submitted a sexual harassment complaint to his company. The court found plaintiff's behavior revealed he understood the relevance of those text messages to his claim, and that his deletion of certain messages indicated he felt those messages would not be beneficial to his claim.

The court found defendants were prejudiced because the deletion of text messages prevented a complete review of the conversations between plaintiff and his alleged harasser, and furthermore, defendants would be unable to offer evidence pertinent to their defense that they were not the source of the anonymous e-mail address. The court concluded that plaintiff's conduct established that he reasonably foresaw the possibility of litigation, and that spoliation had occurred. The court determined an adverse inference at trial was appropriate.

#### **Court Finds Adverse Inference Jury Instruction and Monetary Sanctions Warranted for Failures to Issue Litigation Hold and Preserve Employee Documents: *Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, No. 10-0541-GPC WVG, 2013 WL 6159177 (S.D. Cal. Nov. 25, 2013)**

In this patent infringement case, plaintiffs accused defendants of destroying documents and failing to implement an appropriate litigation hold and document retention policy. As a result, plaintiffs sought a default judgment, an adverse inference jury instruction, and financial sanctions against defendants.

The court first addressed defendants' failure to implement a timely litigation hold. In August and October 2008, plaintiffs sent defendants letters indicating they considered defendants' product a "knock-off" and that they intended to sue defendants for patent infringement if defendants moved forward with their plans to sell the product. Defendants, however, did not implement a litigation hold until 2010, when plaintiffs filed an action, stating they did not believe a duty to preserve arose prior to the filing of the action. The court rejected this argument, concluding a duty to preserve arose when they were notified of a potential lawsuit in 2008.

Next, the court addressed defendants' failure to preserve employee documents. Notably, one employee stated she intentionally deleted e-mails because she received them in high volume and no one instructed her to keep them. Although defendants stated all e-mails were automatically backed up to a server, it was later discovered that e-mails could be deleted from that server.

Agreeing with plaintiffs that defendants "did not take adequate steps to avoid spoliation of evidence after it should have reasonably anticipated this lawsuit," the court granted financial sanctions and recommended the use of an adverse inference instruction. However, despite finding defendants' conduct amounted to "gross negligence," the court found the conduct was not in bad faith and therefore denied default judgment for plaintiffs.

## SANCTIONS

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### **Judge Sanctions Law Firm for Discovery Breach in Apple-Samsung Litigation: *Apple, Inc. v. Samsung Electronics Co., Ltd.*, No. 5:11-cv-01846-LHK (N.D. Cal. Jan. 29, 2014)**

In this longstanding patent case, Quinn Emanuel Urquhart & Sullivan was sanctioned for a discovery breach that violated a court order protecting Apple's licensing terms with Nokia. The discovery breach occurred in March 2012, when a Quinn Emanuel attorney failed to redact the terms of the licensing agreement from an expert report. However, violation of the court order was not the sole issue. Referring to the associate's mistake as "not exactly a historical event," the court chastised the firm's subsequent handling of that mistake, writing: "when such an inadvertent mistake is permitted to go unchecked, unaddressed, and propagated hundreds and hundreds of times by conscious — and indeed strategic — choices by that associate's firm and client alike, more significant and blameworthy flaws are revealed."

Following the inadvertent disclosure of Apple's licensing terms to Samsung, the document in question circulated among Samsung attorneys and another outside law firm. The court determined that the document ultimately reached nearly 200 unauthorized persons. In December 2012, another Quinn Emanuel attorney caught the mistake and reported it to a more senior attorney, but no further action from the firm followed.

Stating the initial attorney's mistake was not the cause of "the cavalcade that followed," the court ordered Quinn Emanuel to cover expenses that Apple, Nokia, and their attorneys had accrued in litigating the issue of the leak, and further ordered attorneys from each company to send redacted documents to one another for approval in the future before circulating.

As of the date of this *News* issue, Nokia has requested a \$1.2 million sanction against Quinn Emanuel.

## COOPERATION

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### **Court Rules “Discovery About Discovery” is Permissible, but Warns Cooperation is Expected in the Future: *Ruiz-Bueno v. Scott*, No. 2:12-CV-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013)**

In this wrongful death case, plaintiffs moved to compel defendants to answer interrogatories about what actions defendants had taken to respond to plaintiffs’ discovery requests. Specifically, plaintiffs asked defendants: “1) what efforts they made to comply with plaintiffs’ previous discovery requests, and 2) what procedures or methods were used to search for responsive electronically stored information.” Following a review of FRCP 26(b)(1), the court determined “discovery about discovery” was permissible at times.

Addressing plaintiffs’ distrust of defendants’ diligence in producing relevant documents and defendants’ resistance to plaintiffs’ interrogatories, the court stressed the importance of cooperation. The court writes, “What should have occurred here is...once it became apparent that a dispute was brewing over ESI, counsel should have engaged in a collaborative effort to solve the problem.” The court then ordered defendants to respond to plaintiffs’ interrogatories because plaintiffs’ concerns seemed “reasonably grounded” and “defendants were less than forthcoming with information.” However, the court acknowledged “discovery about discovery” was not warranted in every case.

## DISCOVERY RULES

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### **How Key Proposed Amendments to the Federal Rules of Civil Procedure Could Affect Day-to-Day eDiscovery Practice**

The Judicial Conference Committee on Rules of Practice and Procedure is considering amendments to ten Federal Rules of Civil Procedure: 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. Public comment on the proposed amendments recently closed on Feb. 18, 2014. The amendments are geared towards making eDiscovery more manageable, in light of the numerous challenges presented by ESI: high volumes of stored information, the costs and time involved in reviewing stored information for litigation purposes, and the tactic of pushing adversaries into settlements by driving up litigation with high volumes of ESI. Thus, key amendments focus on cooperation, proportionality and managing costs. The earliest the amendments may become effective is Dec. 1, 2015. A list of the proposed changes with Committee Notes is available [here](#).

#### **Cooperation**

Rule 1 governs the scope and purpose of the Federal Rules. The proposed amendment to Rule 1 introduces a duty of cooperation between adversarial parties into the Federal Rules by adding in a reference to “the parties,” meaning courts are no longer solely responsible for achieving the “just, speedy, and inexpensive determination” of legal actions. The Committee Note clarifies the purpose of this amendment as being responsive to “pleas to discourage overuse, misuse, and abuse of procedural tools that increase cost and result in delay.” Neither Rule 1 nor the Committee Note defines cooperation, which means additional interpretation will be required by courts if it is adopted.

Practical takeaways:

- Cooperation may no longer be optional
- Communicate with your opponent throughout litigation
- Agree to realistic deadlines and commit discovery plans in writing

### Proportionality

Rule 26(b)(1) governs the scope of discoverable information. Currently, the scope of discovery is limited by privilege and relevancy concerns. However, in practical terms, this standard is broad since large amounts of information may be considered relevant. To narrow the scope of discoverable information, the proposed amendment to Rule 26(b)(1) would force parties to consider: 1) the needs of the case, 2) the amount in controversy, 3) the importance of the case issues, 4) the parties' resources, 5) the importance of the discovery, and 6) whether the burden and expense of discovery exceeds its projected benefit. Proportional discovery requirements could significantly lower both the costs and time involved in reviewing volumes of ESI for litigation, making the process more efficient.

Practical takeaway:

- When responding to discovery, conduct a cost/benefit evaluation and, in appropriate circumstances, use the new Rule 26(b)(1) to seek court relief if the opposing party is unwilling to narrow the scope.

### Managing Costs

Rule 26(c)(1)(B) deals with protective orders. The proposed amendment to Rule 26(c)(1)(B) is underlined in the following passage: “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: specifying terms, including time and place or the allocation of expenses, for the disclosure of discovery.” The amendment to Rule 26(c)(1)(B) makes the court's authority to shift the costs of discovery between parties explicit by adding in language about allocation of expenses. However, the Committee Note makes clear that although this authority already exists under the current rule, “explicit recognition will forestall the temptation some parties may feel to contest this authority.” The Committee Note does not expand further on the purpose of this amendment, but it appears to address both cooperation and scope of discovery concerns. First, parties and counsel may be discouraged from attempting to drive up the costs of litigation since they will run the risk of having courts exercise the explicit authority to shift costs. Second, in discouraging parties and counsel attorneys from using such tactics, this amendment may foster increased cooperation.

Practical takeaway:

- Don't serve unreasonable and overbroad discovery requests in an attempt to drive up your opponent's litigation costs, as these costs may ultimately become your costs.

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This issue of *Bingham eDiscovery News* was written by [Liên Payne](#).

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