

Bingham eDiscovery News

Bingham's eDiscovery Group is pleased to publish our newest 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 cost shifting, predictive coding, mobile devices, social media, discovery sanctions, and other topics of potential interest to our clients.

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COST SHIFTING

Shifting the Costs of Non-Parties Under Federal Rule of Civil Procedure 45(d): *Legal Voice v. Stormans, Inc.*, (9th Cir. Dec. 31, 2013)

Legal Voice involved a challenge to a Washington state rule relating to the requirements on pharmacies to maintain and dispense certain prescription drugs and drugs approved by the Federal Drug Administration. Following a discovery dispute, the Ninth Circuit reversed the district court's denial of discovery costs, which a non-party had requested under Federal Rule of Civil Procedure 45(d). In so doing, the Ninth Circuit potentially opened the door for increased cost-shifting in the context of subpoenas.

Legal Voice, formerly known as Northwest Women's Law Center (the "Law Center"), a non-party to the case, participated in the rule-making process as a member of the task force that developed the draft text of the rules, which the Washington State Board of Pharmacy ultimately approved. These rules were challenged by the plaintiffs (*Stromans, Inc.*, doing business as *Ralph's Thriftway*, *Rhonda Mesler*, and *Margo Thelen*). As part of the suit, the plaintiffs filed a motion to compel the Law Center to produce 14 categories of documents. The district court granted the motion as to six of those categories. The court also stated that each party would "bear its own costs incurred in connection with these motions," and it did not otherwise address the Law Center's request for costs and fees under Rule 45(d) in its initial ruling.

The plaintiffs and the Law Center disputed the scope of the order with respect to those six categories, leading the court to issue a second order clarifying the intended scope of the first order. The Law Center also asked the court to clarify whether it would bear the costs associated with producing the documents.

In its order clarifying the scope of the order granting the motion to compel, the district court directly addressed the issue of shifting costs under Rule 45(d) saying that "[t]he scope of production has been sufficiently limited by the Court such that the cost of producing said documents should not be overly burdensome."

Subsequently, the plaintiffs filed a second motion to compel seeking material similar to that it had unsuccessfully sought in its first motion. When it opposed the second motion to compel, the Law Center reiterated its request for costs and fees. It submitted a declaration from its

executive director stating that it had incurred approximately \$20,000 in expenses in complying with the subpoena. The district court denied the second motion to compel and denied the Law Center's request for costs and fees without explanation.

The Law Center did not appeal the rulings immediately. Instead, after final judgment was entered in the case, it appealed the district court's denial of its request for costs and sanctions under Rule 45(d).

The Ninth Circuit reversed the district court's denial of costs under Rule 45(d)(2)(B)(ii). In interpreting the language of the rule to require mandatory cost shifting, the Court of Appeals pointed to the *D.C. Circuit's Linder v. Calero-Portocarrero*, 251 F.3d 178 (2001), opinion, which held that only two considerations were relevant under the rule: (1) whether the subpoena imposes expenses on a non-party, and (2) whether those expenses are "significant." If so, the rule requires the party seeking discovery to bear at least enough of the expense to render the remainder "non-significant."

The Ninth Circuit held that the district court erred by framing the issue in terms of "undue burden." The district court should have only considered whether the cost of compliance was significant. The Court of Appeals then noted that the *Linder* court had thought \$9,000 would be sufficiently "significant" to justify cost-shifting, so the court had no issue with concluding that the \$20,000 at issue here was "significant."

PREDICTIVE CODING

Parties cannot unilaterally decide to use predictive coding after agreeing to use search terms and manual review: *Progressive Casualty Insurance Company v. Delaney*, 2014 WL 2112927 (D. Nev. May 20, 2014), superseded by 2014 WL 3563467 (July 18, 2014)

This case concerned a dispute over the coverage of an insurance policy, namely whether one of the policies offered by Progressive covered lawsuits instituted by the FDIC after it had taken over a failed bank, Sun West Bank, as receiver.

The parties initially agreed to an ESI protocol under which the parties agreed to a set of search terms that would determine potentially relevant documents. Progressive then could either produce all non-privileged documents captured by the agreed-upon search terms or produce those same documents subject to proper objections. If Progressive determined that documents hit upon by the search terms were not relevant, the parties had to meet and confer.

The search terms narrowed the number of documents from approximately 1.8 million to approximately 565,000. After Progressive concluded that it would not be able to review the 565,000 documents responsive to the search terms agreed on, the parties engaged in substantial discussions. Ultimately, the parties were unable to agree on a revised ESI protocol after weeks of discussions, and the defendants sought judicial intervention.

The court refused to allow Progressive to implement a predictive coding methodology that it had developed unilaterally without seeking input from the opposing party's counsel. According to the court, several authorities had also noted that applying predictive coding after applying search terms could be ineffective. Moreover, the court noted that the predictive coding protocol proposed by Progressive would give its counsel exclusive responsibility for training the predictive coding software, rather than the cooperative process normally used.

The court noted in denying Progressive’s request that “[h]ad the parties worked with their e-discovery consultants and agreed at the onset of this case to a predictive coding-based ESI protocol, the court would not hesitate to approve a transparent, mutually agreed upon ESI protocol.”

***Federal Housing Finance Agency v. HSBC North America Holdings, Inc., et al.*, 2014 WL 584300, at *3 (S.D.N.Y. Feb. 14, 2014)**

The court noted that it had previously approved the use of predictive coding over the objections of the plaintiffs at a hearing very early in the case. The plaintiffs had objected to predictive coding on several grounds, which were resolved through discussion at the hearing and the continued involvement of the plaintiffs in the coding process. Plaintiffs’ original objections included the defendant’s plan to limit the set of documents by using keyword searches first and then applying predictive coding to only those documents within the keyword searches.

***FDIC v. Bowden*, No. CV413-245, 2014 WL 2548137, at *13 (S.D. Ga. June 6, 2014)**

In this case, the FDIC was acting in its role as a receiver for a bank it had taken over. The parties had initially proposed competing protocols involving search terms and manual document review. After a lengthy analysis of the two parties’ proposed ESI protocols, the court suggested that the parties use predictive coding, which reflects the growing momentum in favor of predictive coding among the members of the bench.

MOBILE DEVICES

The Supreme Court’s recent decision in *Riley v. California*, which requires that police obtain a search warrant before accessing a cell phone, may have implications beyond the criminal context. *Bakht v. Safety Marking, Inc.*, Civ. No. 3:31CV1049 (JCH) (June 26, 2014)

The plaintiffs in this case alleged race discrimination and hostile work environment on the basis of race. The plaintiffs sought to obtain “any and all texts, emails, or other electronically stored information that are stored or were deleted from the cell phone or web sites accessed that are derogatory, disparaging, manifest a bias, or a discriminatory (sic) on the basis of race, ethnicity, color, or national origin.” Plaintiffs stated that the information “would also include information concerning the source of each item, the date(s) the item was created or accessed, and the destination of each text or email (“metadata”).”

The individual defendants objected to inspection of the cell phones, but agreed to authorize retrieval of phone and text records from their cellular service providers.

The court noted that the right to information under Rule 34(a) was “counterbalanced by a responding party’s confidentiality or privacy interests. A party is therefore not entitled to a routine right of direct access to a party’s electronic information system, although such access may be justified in some circumstances.”

The first ground the court used to support its ruling was the plaintiffs’ failure to show that they were unable to obtain similar information through other discovery methods. The second ground was the implication of privacy concerns in the context of the modern cell phone.

The court’s reticence about ordering broad collections of data led it to instead deny the plaintiffs’ motion and urge the plaintiffs to use other discovery devices to narrow the scope of

the search in terms of the temporal and substantive scope, as well as the number of individuals' phones to be searched.

Courts continue to address the duty to preserve ESI on mobile phones.

***Hosch v. BAE Systems Information Solutions, Inc.*, No. 1:13-cv-00825 (AJT/TCP), 2014 WL 1681694, at *2 (E.D. Va. Apr. 24, 2014)**

The plaintiff in this case claimed to have been harassed and fired in retaliation for disclosing information about the defendant's allegedly fraudulent billing practices in violation of the False Claims Act. The plaintiff deleted all of his text messages and voicemails by wiping his iPhone just two days before turning it over to his counsel. He had similarly wiped the information from his BlackBerry before he produced it. The court, after finding that this was part of a consistent pattern of conduct by the plaintiff, dismissed the case with prejudice and awarded attorney's fees and costs for the motions for sanctions and to compel.

***In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, MDL No. 22385, 2013 WL 6486921, at *16-18 (S.D. Ill. Dec. 9, 2013)**

In this product liability multi-district litigation, the defendant was faced with several discovery issues. The defendant had not specifically listed text messages as one of the forms of data subject to the litigation hold until more than a year and a half after the court determined the duty to preserve had arisen, and more than a year and a half after the defendant's duty to preserve had arisen. The defendant also failed to stop the automated deletion of employee text messages, which the defendant had programmed into the company-issued phones.

The court held that the "safe-harbor" under Federal Rule of Civil Procedure 37(e) was not available because of this failure to intercede. The court noted that the defendant should have argued the request for text messages was too burdensome by objecting to the requests, not by allowing the information to be deleted and raise the argument in response to the motion for sanctions. The court also held that it did not matter if text messages were a less prominent form of communication; the defendant still had a duty to produce them.

AUTHENTICATION OF SOCIAL MEDIA EVIDENCE

***United States v. Hassan*, 742 F.3d 104, 132-34 (4th Cir. 2014) and *Randazza v. Cox*, Case No. 2:12-cv-2040-JAD-PAL**

Courts have addressed the proper procedures for authenticating social media in two recent cases. In both, the courts noted the possibility that the documents were self-authenticating as certified domestic business records.

The two district courts also noted that to authenticate the evidence in this manner, the party offering the evidence needed an affidavit showing the records fulfilled the three requirements of Rule 803(6):

- the records were "made at or near the time by — or from information transmitted by — someone with knowledge;"
- that they were "kept in the course of a regularly conducted activity of a business;" and
- that "making the record was a regular practice of that activity."

In *United States v. Hassan*, 742 F.3d 104, 132-34 (4th Cir. 2014), the prosecution sought to authenticate Facebook pages and YouTube videos embedded in those pages. To do so, the prosecution obtained the certification from records custodians at Facebook and Google that met the above three requirements. The court found that YouTube videos and Facebook pages were self-authenticating as certified domestic business records. The court held that the three requirements of Rule 803(6) were satisfied since (A) the records were “made at or near the time by — or from information transmitted by — someone with knowledge”; (B) they were “kept in the course of a regularly conducted activity of a business”; and (C) “making the record was a regular practice of that activity.” The Facebook pages and accounts were tracked to the defendants’ mailing and email addresses via internet protocol addresses. *Id.* at 133.

In *Randazza v. Cox*, however, the plaintiffs provided the affidavit of one of the plaintiffs for some of the websites that was sufficient to authenticate the sites. The plaintiffs failed to provide the certificate of YouTube’s custodian or another qualified person verifying the page had been maintained as a business record in the course of regularly conducted business activities. The court held that the plaintiffs had failed to authenticate a YouTube video when they failed to proffer the certificate of YouTube’s custodian or other qualified person verifying that the page had been maintained as a business record in the course of regularly conducted business activities.

UPDATE ON THE PROPOSED AMENDMENTS TO FRCP

The Committee on Rules of Practice and Procedure approved proposed amendments to the Federal Rules of Civil Procedure. This includes amendments of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37(e), and 55. The text of the rules as adopted by the Committee on Rules of Practice and Procedure was published in the committee’s meeting agenda book, available [here](#). A redline of the proposed amendments against the current text is available [here](#). Next the proposed amendments will go to the Judicial Conference, which will consider them at its meeting this month.

DISCOVERY ABOUT DISCOVERY

Discovery about discovery is generally not allowed, although it may be permitted under certain limited circumstances.

Several recent court decisions have addressed requests by parties to delve into the actions of an opposing party in responding to various discovery requests. In a dispute over works compensation claims, *Miller v. York Risk Servs. Grp.*, 2014 WL 1456349 (D. Ariz. Apr. 15, 2014), the plaintiffs moved to compel the defendant to participate in a Rule 30(b)(6) deposition regarding the “manner and method” the defendant used to store and maintain ESI. In denying the plaintiffs’ motion, the court stated that it did not think starting with such discovery was helpful or appropriate. The court also stated that starting discovery in such a manner “puts the cart before the horse and likely will increase, rather than decrease, discovery disputes.” The court highlighted that rather than turning to the court system, the first step should have been for the parties’ counsels to engage in a collaborative effort to solve any issues that arose.

In *Ruiz-Bueno v. Scott*, No. 2:12-CV-0809, 2013 WL 6055402 (S.D. Ohio Nov. 15, 2013), a wrongful death case, the defendants, a sheriff’s office, was reluctant to share information about how they had searched for ESI. They had failed to provide any information about how they went

about searching for responsive communications besides saying that each defendant was asked twice to produce his or her relevant email.

The court required the defendants to answer interrogatories about the actions they took in responding to the plaintiffs' discovery requests. The court went on to state that the problems that had arisen could have been addressed as part of the Rule 26(f) planning process.

After ordering forensic examination by an independent third party for inadequate preservation and collection, the court stated the “basic rule” that custodians must be consulted for input on search terms: *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 WL 800468 (S.D. Fla. Feb. 28, 2014); No. 12-24356-CIV, 2014 WL 1047748 (S.D. Fla. Mar. 18, 2014)

In this antitrust case, the plaintiff failed to institute a formal litigation hold until ordered to by the court. The court also ordered that the plaintiff hire a third-party vendor to collect and search its ESI. As part of this, the court ordered the plaintiff to develop search terms to be used. Several issues were noted in the court's opinion, including that counsel never traveled to meet with the plaintiff's IT team to discuss how ESI would be collected and how the plaintiff stored its data. Moreover, the court found that some executives had performed their own searches for ESI without seeing the defendant's document requests or a list of search terms from the plaintiff's counsel.

In the second order, the court was faced with the plaintiff's refusal to say whether it had or would consult with custodians on what search terms should be used as directed by the court in its order. Although the plaintiff's counsel filed an affidavit stating that counsel had consulted with the custodians, the court noted that this conflicted with later affidavits putting the date on which counsel consulted with the custodians as after the date specified in the affidavit. Thus, the court ordered the plaintiff's counsel to consult with custodians to develop relevant search terms.

PRESERVATION, SPOILIATION, & SANCTIONS

***In re Actos (Pioglitazone) Products Liability Litigation*, MDL No. 11-2299 (Jan. 30, 2014)**

In this products liability multi-district litigation, the court sanctioned the defendant for failing to enforce its own litigation hold and failing to follow its document retention procedures. The defendant, a drug manufacturer, had issued a litigation hold in 2002, and the hold had been refreshed several times between 2002 and 2012. The court allowed the plaintiffs to present evidence showing Takeda's conduct in destroying relevant evidence, namely the records from 46 employees. The court also instructed the jury to take evidence of the defendant's spoliation into account. The federal jury awarded \$9 billion in punitive damages, of which Takeda is responsible for \$6 billion and Eli Lilly \$3 billion. The jury found that the plaintiffs were entitled to \$1.5 million in actual damages.

***T&E Investment Group, LLC v. Faulkner*, Nos. 11-CV-0724-P, 3:11-CV-1558-P, 2014 WL 550596 (N.D. Tex. Feb. 12, 2014)**

In this trademark and libel case, the defendants were ordered to provide access to all of the computers used by the defendants during 2011. An expert who examined the computers reported that the data on one of the computers had been manipulated. A defendant, Christopher Faulkner, had used a bulk file changer to copy the data from a computer he used in his home, which was not produced, to another computer that was produced and examined. The

magistrate judge concluded that this was an attempt to make it appear that the computer he copied the data to was the computer he had used for a number of years. The court adopted the magistrate's recommendations and ordered an adverse inference instruction be given and monetary sanctions be levied against the defendant for manipulating metadata using a bulk file changer in an attempt to hide a computer used by a defendant in his home.

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