

Bingham E-Discovery News

Bingham's E-Discovery Group is pleased to publish our next issue of *Bingham E-Discovery News*, a newsletter covering recent legal developments on electronically stored information (ESI) and other hot e-discovery topics. In this issue, we discuss a recent spoliation order, new e-discovery rules and guidelines, and recent developments related to predictive coding, Rule 502(d) orders and social media.

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DRASTIC BUT JUSTIFIED PENALTY IN SPOLIATION CASE

U.S. District Judge Sue L. Robinson started the New Year off with a bang by ordering — for the second time, on remand after an appeal — a powerful spoliation sanction against Rambus in *Micron v. Rambus*, Case No. 1:00-cv-00792-SLR (D. Del. 2013) (Docket No. 1151). After concluding that Rambus had improperly and in bad faith destroyed relevant documents, the court banned Rambus from enforcing 12 of the semiconductor patents-in-suit against Micron.

This ruling followed the same court's January 2009 finding that Rambus had unlawfully spoliated discoverable documents. After Rambus appealed, the Federal Circuit remanded the case in part with instructions to the district court to reconsider its bad faith and prejudice determinations. In reviewing its determinations and concluding that the "only" appropriate sanction was to hold the patents-in-suit unenforceable against Micron, the court listed several reasons why Rambus' document destruction was done in bad faith, including the fact that Rambus had implemented its document retention policy with the specific purpose to disadvantage Micron or other potential defendants. Rambus intended its document retention policy, which was part of a "firm litigation plan" and included "shred days," to confer a litigation advantage and executed it selectively. Because "Rambus' destruction of evidence was of the worst type: intentional, widespread, advantage-seeking and concealed," the court concluded that unenforceability was the only sanction that would *not* "reward Rambus for the gamble it took by spoliating and tempt[ing] others to do the same."

NEW E-DISCOVERY RULES AND GUIDELINES

Federal courts and agencies across the country continue to implement new rules, guidelines and model orders regarding the proper role and scope of e-discovery.

Northern District of California Issues New E-Discovery Guidelines

On Nov. 27, 2012, the Northern District of California announced new guidelines for the discovery of ESI, which took effect immediately. The court's uniform standing order now requires that joint case management statements include a certification that the parties have reviewed the guidelines and have met and conferred pursuant to Federal Rule of Civil Procedure 26(f) "regarding reasonable and proportionate steps taken to preserve evidence relevant to the issues reasonably evident in this action." In addition, under the new guidelines, each party should designate an e-discovery liaison to

facilitate the meet-and-confer process and to help resolve any disputes regarding “the technical aspects of e-discovery.”

The court released three [documents](#): (1) guidelines for the discovery of ESI, (2) an ESI checklist for use during the Rule 26(f) meet and confer process, and (3) a model stipulated order about ESI discovery. The new guidelines could have considerable implications for litigants and their counsel in the Northern District of California. For more information, see Bingham’s Nov. 29, 2012, [Legal Alert](#).

FTC Revises Rules of Practice to Account for ESI Issues

On Sept. 20, 2012, the Federal Trade Commission issued final revisions to the Rules of Practice that govern its investigatory actions. The revisions took effect on Nov. 9, 2012, and include several references to ESI and e-discovery issues:

- § 2.7(a)(1) defines ESI;
- § 2.7(a)(2) includes ESI in the definition of “documentary material;”
- § 2.7(j) sets guidelines for the manner and form of producing ESI;
- § 2.7(k) requires parties in most circumstances to meet and confer with the FTC within 14 days to discuss, among other topics, e-discovery issues related to subpoenas and civil investigative demands; and
- § 2.14(c) relieves parties of their obligations to preserve documents related to an FTC investigation after a year passes with no written communication from FTC staff.

A WATERSHED YEAR FOR PREDICTIVE CODING?

2012 was a big year for predictive coding (also referred to as technology-assisted review), an emerging e-discovery issue on which courts have yet to reach consensus.

As discussed in our [inaugural issue](#) of *Bingham E-Discovery News*, the first major decision on this subject was Magistrate Judge Peck’s closely scrutinized opinion authorizing the use of predictive coding for e-discovery in *Monique Da Silva Moore, et al., v. Publicis Groupe & MSL Group*, Civ. No. 11-1279(ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012). District Court Judge Andrew L. Carter then adopted Magistrate Judge Peck’s order in a short opinion on April 26, 2012. 2012 WL 1446534.

Following on the heels of *Da Silva Moore*, the plaintiffs in *Kleen Products LLC, et al. v. Packaging Corporation of America et al.*, No. 1:10-cv-05711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012), moved for an order requiring the defendants to redo their previous document productions (and all future productions) using “Content Based Advanced Analytics,” a predictive coding method. The plaintiffs criticized the defendants’ use of Boolean keyword searches to identify responsive documents as subject to “inadequacies and flaws.” In response, the defendants defended their use of keyword searches and further argued they should not be compelled to use a technology that was not in place when they had begun their review in December 2011. To the dismay of those hoping for another federal order addressing the merits of predictive coding, the court ultimately did not rule on the issue. Instead, in August 2012, after months of meeting and conferring at the court’s urging, the parties entered a stipulation under which the plaintiffs withdrew their demand. Even in the absence of a formal ruling on the issue, *Kleen* reveals that some parties already have begun pushing federal courts to embrace predictive coding as the new standard.

In *EORHB, Inc. et al. v. HOA Holdings, Inc., et al.*, No. 7409-VCL (Del. Ch. Ct.), during an Oct. 15, 2012, hearing on a motion for partial summary judgment, Vice Chancellor J. Travis Laster of the Delaware Chancery Court took the unprecedented step of issuing a *sua sponte* order requiring the parties to utilize predictive coding for discovery. Vice Chancellor Laster described the case as “an ideal non-expedited case in which the parties would benefit from using predictive coding.” He therefore ordered both parties to “show cause why this is not a case where predictive coding is the way to go,” as it “seem[ed] to [him that] this is the type of non-expedited case where we could all benefit from some new technology use.” The Vice Chancellor’s casual references to predictive coding and its presumed benefits highlight the importance of ensuring that parties and judges alike have a common understanding about the definition of predictive coding, its potential benefits and its limitations.

As we look ahead to 2013, parties should pay close attention to the evolving role of technology-assisted review in electronic discovery. To the extent future rulings in any jurisdiction suggest further acceptance or rejection of this new approach to e-discovery, we will revisit the issue in upcoming editions of *Bingham E-Discovery News*.

FRE 502(D): THE ROAD TO FASTER AND CHEAPER E-DISCOVERY WITHOUT THE FEAR OF WAIVING PRIVILEGE

In many ways, e-discovery has made access to, and review of, documents for production easier. On the other hand, e-discovery has vastly increased the quantity of documents for review and, consequently, the time and resources needed to parse through those documents in preparation for production. Magistrate Judge John Facciola, a leading jurist in the field of e-discovery, highlighted an existing solution that may help litigants save a lot of time and effort throughout the discovery process in his recent ruling in *Chevron v. Weinberg Group*, Misc., Action No. 11-409 (D.D.C. 2012) (Docket No. 62).

In the Oct. 26, 2012, ruling, Magistrate Facciola entered a Rule 502(d) order that allowed the defendant, Weinberg Group, to knowingly produce allegedly privileged materials without waiving any related privileges. Federal Rule of Evidence 502(d) specifically provides that “a federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.” A Rule 502(d) order, then, can permit a litigant to produce many more documents than it would otherwise, without the worry of waiving privilege. The order “relieves the [defendant] of its responsibility to go through each document in earnest and make a sound determination regarding any material that is privileged.” This allows for faster document production and less time and resources spent on privilege logs. Further, as Magistrate Facciola put it, “a 502(d) order can alleviate much of the meaningless back and forth” in which parties often engage.

However, as the decision notes, with the benefits of a 502(d) order come areas of caution. First, Magistrate Facciola made clear the producing party continues to bear the burden to defend any asserted privilege should the receiving party attempt to use a produced document at trial. Magistrate Facciola explicitly rejected that the receiving party would have to “prove that [a] document is not privileged” before using it.

Second, the opinion acknowledged the risk of 502(d) orders shifting the discovery dispute into the future and creating an element of uncertainty for the receiving party about if, and to what extent, a document can be used at trial. However, resting on his own experience, Magistrate Facciola stated, “[t]hat limited risk is easily overwhelmed by the benefit of [the receiving party] getting the

documents for which it has been waiting for two years, and of saving everyone the time and effort that it will take to litigate privilege claims as to documents that will never again see the light of day.”

The decision also reflects frustration that after two years of litigation, the producing party had “just now discovered Rule 502(d), the use of which may have prevented the protracted litigation and discovery battles that have plagued this case for the past two years.” Magistrate Facciola’s sentiment may well refer to many cases where 502(d) orders are not requested or even considered. His ruling is a reminder to litigants that there are ways to ease the burdens of discovery. Should judges continue to be willing to enter 502(d) orders, parties should consider this possibility early in the litigation process when formulating a discovery plan.

E-DISCOVERY AND SOCIAL MEDIA: WHAT ARE THE LIMITS?

As everyone knows, Rule 26(b)(1) permits a party to obtain discovery regarding matters relevant to any party’s claim or defense. As broad as this definition is, it is not unlimited; for example, Rule 34(b)(1)(A) requires the requesting party to describe the items to be produced with “reasonable particularity.”

In September, the Central District of California considered the limits of “reasonable particularity” in the context of discovery into social media content. In *Mailholt v. Home Depot U.S.A., Inc.*, 2012 WL 3939063 (C.D. Cal. Sept. 7, 2012), an employment discrimination case in which the plaintiff employee claimed mental and emotional distress caused by the defendant employer’s wrongdoing, the employer sought broad discovery of the employee’s social media content as relevant to the employee’s emotional and mental state. The employer claimed that it should have access to that content, including employee’s Facebook and LinkedIn profiles, because those communications were particularly likely to be relevant: “in this day and age, many communications between friends and/or about an individual’s emotional state are communicated via social media.”

The *Mailholt* opinion noted that several courts have found that although certain social media is available for public view, some are not, and “the Federal Rules do not grant a requesting party ‘a generalized right to rummage at will through information that [the responding party] has limited from public view.’”

In coming to its decision, the *Mailholt* court acknowledged the employee’s use of social media was not itself necessarily probative of the mental and emotional issues in the case. Thus, the court narrowly granted the employer’s request by limiting the scope to social media communications between the employee and the current or former defendant employees and/or social media communications that referred to her employment or the lawsuit. But see *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D.Ind.2010) (granting broad discovery of social media content per requests that resembled the requests at issue in *Mailholt*). The court considered and rejected the following requests as overbroad and missing the “threshold showing” of being reasonably calculated to lead to the discovery of admissible evidence:

- “Profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries)” from any social networking site from October 2005 through the present “that reveal, refer, or relate to any emotion, feeling, or mental state of Plaintiff, as well as communications by or from Plaintiff that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.”
- “Third-party communications to Plaintiff that place her own communications in context,”

- “Any pictures of Plaintiff taken during the relevant time period and posted on Plaintiff’s profile or tagged or otherwise linked to her profile.”

The message of *Mailhoit* is that while social media may seem to be everywhere, discovery into it is not a free-for-all. Counsel should draft discovery requests carefully, narrowly tailor them to the specific issues of the case, and always remember that “[a] court can limit discovery if it determines, among other things, that the discovery is: (1) unreasonably cumulative or duplicative; (2) obtainable from another source that is more convenient, less burdensome or less expensive; or (3) the burden or expense of the proposed discovery outweighs its likely benefit.” *Mailhoit, Inc.*, 2012 WL 3939063 at *571 (quoting *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 558 (D.Conn.2006)).

This issue of *Bingham E-Discovery News* was written by [Bree Hann](#), [Nargues Motamed](#) and [Kevin Papay](#).

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