# Bingham E-Discovery News

Bingham's E-Discovery Group is pleased to launch the inaugural issue of *Bingham E-Discovery News*, a newsletter covering recent legal developments on electronically stored information (ESI) and other "hot" e-discovery topics, such as social media, cloud computing and data security. *Bingham E-Discovery News* will be published several times throughout the year to keep our clients apprised of the latest developments in this constantly evolving field. We hope you find it to be a useful tool for your work in this area.

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## GREEN LIGHT FOR COURT-SANCTIONED PREDICTIVE CODING

The Southern District of New York recently took what could be a precedent-setting step regarding predictive coding (also referred to as technology-assisted review). On Feb. 24, 2012, Magistrate Judge Andrew Peck penned a closely scrutinized opinion authorizing the use of predictive coding for e-discovery. *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). Plaintiffs filed an objection to Magistrate Judge Peck's order in the district court based on his alleged pre-existing favoritism for predictive coding, which allegedly resulted in a failure to examine the reliability of predictive coding as applied in the case. On April 26, 2012, District Court Judge Andrew L. Carter overruled plaintiffs' objections and adopted Magistrate Judge Peck's order in a short opinion. 2012 WL 1446534.

Because "no review tool guarantees perfection," the court held that Judge Peck's conclusion that predictive coding would be more appropriate than keyword searching in this case was not clearly erroneous or contrary to law. 2012 WL 1446534, at *3. According to the court, plaintiffs' challenges to the reliability of predictive coding are speculative and premature because there is no evidence the software "will deny plaintiffs access to liberal discovery." *Id*. at *2. Although Judge Peck did not hold a "formal evidentiary hearing" about the reliability of predictive coding, this was a "minor issue" because Judge Peck's order and protocol for electronically stored information contains standards for measuring the reliability of the process. *Id*. Recognizing the deference due to Magistrate Judges in ruling on non-dispositive motions, the court determined that Judge Peck was in the best position to determine if and when a full evidentiary hearing would be required to determine the reliability of the predictive coding. *Id*.

Plaintiffs have also filed a motion to recuse Magistrate Judge Peck because of his prior advocacy for predictive coding, but the district court has yet to rule on that motion as of the date of this issue of *Bingham E-Discovery News*. Given the district court's adoption of Judge Peck's "well-reasoned" opinion that considers "the potential advantages and pitfalls of the predictive coding software," such a recusal seems unlikely. *See Id*. The stage is now set for predictive coding – and other means of technology-assisted review – to gain momentum as a court-sanctioned discovery tool, a welcome development for parties attempting to rein in discovery costs. *See e.g., Global Aerospace, Inc. v. Landow Aviation, L.P.*, Case No. CL 61040 (Va. Cir. Ct. Apr. 23, 2012) (approving use of computer-assisted review over plaintiffs' objection).

## IF THE COST OF A COPY DOESN'T APPEAR ON AN INVOICE, IS IT STILL A COPY?

Recently, in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 11-2316, 2012 WL 887593 (3d Cir. Mar. 16, 2012), the Third Circuit analyzed the e-discovery costs that may be recovered by a prevailing party under 28 U.S.C. § 1920(4), which allows recovery of "fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." The court held that, based on the evidence before it, "only scanning and file format conversion can be considered to be 'making copies.'" Specifically, the court awarded the prevailing parties the costs for the "conversion of native files to TIFF," the "scanning of documents to create digital duplicates," and "converting VHS recordings to DVD format." The court excluded from the definition of taxable costs keyword searching and other "indispensable" activities such as gathering, preserving, processing, searching, culling and extracting ESI. The court also held that none of the e-discovery work in the case produced "illustrative evidence or the authentication of public records" and therefore did not qualify as fees for "exemplification."

The invoices attached to the prevailing party's Bill of Costs did not clearly explain the charges at issue, the rationale for the activities, nor the results of the actual production. Because the court could not determine exactly what services the e-discovery vendors performed, the court declined to order their recovery as costs. Litigants, particularly in the Third Circuit, should consider requiring detailed invoices from their e-discovery vendors to help recover appropriate costs down the road.

## YET ANOTHER COURT ADOPTS "MODEL" OR "DEFAULT" LIMITS ON THE SCOPE OF E-DISCOVERY

In the fall of 2011, Chief Judge Rader of the Federal Circuit unveiled the new Federal Circuit Model Order Regarding E-Discovery in Patent Cases during a speech to the Eastern District of Texas Judicial Conference. The Federal Circuit Model Order (Order) was intended as "a helpful starting point for district courts to use in requiring the responsible, targeted use of e-discovery in patent cases." The Order includes presumptive limits on custodians and search terms for email production requests, as well as cost-shifting provisions to deter electronic fishing expeditions. Other courts have followed suit, or at least are actively evaluating their own default standards.

For example, on Dec. 8, 2011, the District of Delaware revised its "Default Standard for Discovery Including Discovery of Electronically Stored Information (ESI)." The revised default standard is designed to encourage early identification of relevant information and limit the ability of parties to fish around for data. Within 30 days of a Rule 16 scheduling conference, the parties are required to identify the 10 custodians most likely to have discoverable information, as well as sources of non-custodial data. Once that group is established, only 10 search terms can be used to find ESI, absent good cause. The District of Delaware also protects parties from having to preserve and produce more complex ESI, such as data on mobile phones or temporary files.

The Eastern District of Texas became the most recent court to embrace a modified version of the Federal Circuit's model order when Chief District Judge Leonard Davis published its own modified Model Order on Feb. 27, 2012. Although somewhat more lenient than the Federal Circuit model (*e.g.* eight email custodians instead of five, and 10 search terms per custodian instead of five), the Model Order in the Eastern District of Texas includes more detailed parameters about ESI production that could apply to non-patent cases. Specifically, in the absence of a showing of good cause, parties are not required to restore backup data or preserve and collect voicemails, PDAs or mobile phones.

The trend is clear: courts are increasingly willing to adopt default standards to rein in the mounting burden of ESI. Although a one-size-fits-all standard may present challenges in certain matters, proactive steps by the judiciary to educate members of the bench and bar, and to impose reasonable e-discovery standards, should be a welcomed development for most litigants.

## THE CASE FOR REAL REFORM: THE LAWYERS FOR CIVIL JUSTICE COMMENT TO THE CIVIL RULES ADVISORY COMMITTEE

On March 15, 2012, the Lawyers for Civil Justice (LCJ), an organization of corporate counsel and defense lawyers supporting civil justice reform, submitted comments to the Civil Rules Advisory Committee to stop tinkering with the existing Federal Rules of Civil Procedure relating to civil discovery standards, and instead provide substantial reform to lower litigation costs.[1] Specifically, the LCJ calls for amendments that (1) limit the current scope of discovery; (2) trigger the duty to preserve evidence at the "commencement of litigation" rather than upon "reasonable anticipation of litigation" while limiting the availability for sanctions for spoliation issues; and (3) put the responsibility of discovery costs on the requesting party. After describing these and other proposals, the LCJ concludes as follows:

> For almost 20 years, the Rules Committee has recognized the danger the information explosion poses to our civil justice system. In that time, the problems of discovery have worsened dramatically, and, left unchecked, they will only continue to grow. Our system is crying out for national, policy-based solutions designed to provide uniform real world relief for real world problems. With this in mind, the Committee should give intense consideration to developing a package of interrelated rule amendments governing discovery, preservation and cost allocation such as those proposed in this comment.

Comment at 24.

These cost-control recommendations go far beyond the model standards imposed by local courts (discussed above) and therefore will likely prompt a spirited debate among policymakers, thought leaders and practitioners. Stay tuned.

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**This issue of *Bingham E-Discovery News* was prepared by Erika Gasaway and Patrick A. Harvey.**

[1] The full comment, entitled "NOW IS THE TIME FOR MEANINGFUL NEW STANDARDS GOVERNING DISCOVERY, PRESERVATION, AND COST ALLOCATION," is available at http://lfcj.digidoq.com/BLAP/Federal%20Rules%20of%20Civil%20Procedure%5COfficialComments/FRCP%20-%20Joint%20LCJ%20DRI%20FDCC%20IADC%20Comment%20-%20New%20Standards%20031512.pdf

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