

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 address self-collection by custodians, waiver of privilege through inadvertent production, evidence obtained from social media sites and test cases in the Seventh Circuit's E-Discovery Pilot Program. *Bingham E-Discovery News* is published several times throughout the year to keep our clients apprised of the latest developments in this constantly evolving field.

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NEW YORK DISTRICT COURT SAYS DOCUMENT CUSTODIANS "CANNOT BE TRUSTED"

On July 13, 2012, Judge Scheindlin of the Southern District of New York, a respected authority on e-discovery, issued a decision on the use of search terms and self-collection by custodians that is certain to be closely scrutinized by e-discovery practitioners and their clients. *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, No. 10-Civ-3488 (SAS), 2012 WL 2878130 (S.D.N.Y. 2012). The plaintiffs sought documents pursuant to the Freedom of Information Act ("FOIA"). The government's efforts in response involved hundreds of employees from at least five federal agencies/offices and thousands of hours of work, resulting in tens of thousands of documents being produced. Nevertheless, the court found many of the government's searches to be inadequate on the parties' cross-motions for summary judgment.

With respect to the information a court requires to determine reasonableness, Judge Scheindlin said, "It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used." She added, "It is not enough to know the search terms. The method in which they are combined and deployed is central to the inquiry. The precise instructions that custodians give their computers are crucial."

Regarding self-collection, the court stated, "Most custodians cannot be trusted to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for *an* answer on Google (or Westlaw or Lexis) is very different from searching for *all* responsive documents in the FOIA or e-discovery context." The court further stated, "Simple keyword searching is often not enough. . . . There is increasingly strong evidence that keyword searching is not nearly as effective at identifying relevant information as many lawyers would like to believe."

Though the holding is limited to the FOIA context, the court's analysis and its likely impact is broader. In addition to regularly discussing e-discovery under the Federal Rules of Civil Procedure interchangeably with FOIA requests, Judge Scheindlin also stated, "Much of the logic behind the increasingly well-developed caselaw on e-discovery searches is instructive in the FOIA search context because it educates litigants and courts about the types of searches that are or are not likely to uncover all responsive documents."

Litigants in all contexts should therefore keep in mind and consider avoiding practices the court found troubling, which include:

- Failing to provide the court any documented instructions or guidance given to custodians about how searches should be conducted;
- Failing to instruct custodians to search archived records;
- Instructing custodians to use specific search terms, but failing to address “the issue of combining any of the search terms or using any connectives;” and
- Providing custodians with “recommended” search terms, but failing to monitor use of the search terms and instead relying on custodians to conduct appropriate searches.

Litigants should also be aware of the court’s emphasis on the need for “careful thought, quality control, testing, and cooperation with opposing counsel” in designing search terms and protocols. Finally, it is worth noting the court’s discussion of available predictive coding methods such as latent semantic indexing, statistical probability models and machine learning tools on which “parties can (and frequently should) rely.”

INADVERTENT PRODUCTION AND WAIVER: TWO CAUTIONARY TALES

Experts Need Supervision, Too

The Western District of New York recently underscored the importance of overseeing work done by experts to prevent production of privileged documents. *Ceglia v. Zuckerberg*, No. 10-CV-00569A(F), 2012 WL 1392965 (W.D.N.Y. Apr. 19, 2012). The plaintiff hired an information technology expert to recover a document from his lawyer’s computer while the lawyer was out of town. The document was attached to a privileged email. Despite the lawyer’s instructions to the contrary, the expert copied the email along with the attachment. The expert then produced both documents to the defendants without any review by the lawyer. The court found waiver in part because the plaintiff did not meet its burden under Federal Rule of Evidence 502(b)(2) to demonstrate that it “took reasonable steps to prevent disclosure.” The court explained that if the lawyer could not have been present physically to oversee retrieval of his own files, then he should have had the expert forward the planned production to him so that he “could have reviewed the documents to ensure there [were] no extraneous, privileged materials attached.”

Note: The court also independently found waiver under Rule 502(b)(3) because the plaintiff did not request return of the privileged email for more than two months after notice of the production, which did not qualify as “reasonable steps to rectify the error.”

Reasonable Review and Production Procedures are Only Half the Battle

In another case, the District of New Jersey held that the producing parties waived privilege — despite clearly reasonable *initial* efforts to withhold privileged documents — when subsequent problems should have put them on notice that “something had gone profoundly awry with their document production and privilege review.” *D’Onofrio v. Borough of Seaside Park*, No. 09-6220 (AET), 2012 WL 1949854 (D.N.J. May 30, 2012).

The defendants first produced the privileged documents on a disc that included material collected from multiple custodians, including six boxes of documents from lawyers. A law firm partner personally reviewed and made privilege determinations for every document in the six lawyer boxes, but then a clerical employee unintentionally included in the production to the plaintiff all of the

identified privileged information from four of the six boxes. The court agreed that these efforts were reasonable.

Soon after, a new secretary realized that certain of counsel's privileged electronic comments inadvertently had been included in the production. The defendants recalled the disc and produced a replacement without conducting any additional re-review. Later, the plaintiff alerted the defendants to an issue with the organization of the documents on the disc. In reorganizing the documents, the defendants found certain privileged documents on the disc inadvertently produced from the files of the non-lawyer custodians. The defendants withheld these documents from their next replacement production, again without conducting any additional re-review. Additionally, in preparing and serving their privilege log for the production, the defendants apparently failed to recognize that far fewer entries appeared on the log than reference to the partner's initial review should have indicated. The defendants did not realize they had produced approximately 1,000 pages of privileged material from the four boxes at issue until the plaintiff attached several of the documents to a reply brief almost a year and a half after the initial production.

Despite the defendants' reasonable initial procedures, the court found waiver pursuant to Federal Rule of Evidence 502(b). The court relied on the Explanatory Notes to the Rule, which caution that even though a party is not required "to engage in a post-production review" to search for mistakes, a party must "follow up on any obvious indications that a protected communication or information has been produced inadvertently." The court reasoned that the "seemingly unending problems" the defendants encountered with the single production at issue "would have spurred a reasonable person to recheck the entire contents" of the disc. Because the defendants failed to do so, the plaintiff was free to rely on and use the privileged documents.

AUTHENTICATING SOCIAL MEDIA EVIDENCE: IS THE JURY IN FOR A REAL TWEET?

As social media such as Facebook, Twitter and MySpace continue to increase in prevalence, a growing number of parties and courts are grappling with how to authenticate social media evidence at trial. On the one hand, social media by its nature encourages users to provide individualized details, photographs, and background and lifestyle descriptions, all of which ordinarily would be significant for authentication purposes. However, courts have hesitated to rely solely on the internal content of a social media account, because of concerns such as an account's susceptibility to hackers, the ability of anyone to create a fictitious account in another's name, and the frequency with which computers and cell phones may be left unattended while logged into an account.

The Court of Criminal Appeals of Texas (the highest criminal court in the state) recently examined these and other related issues in a thorough opinion cataloguing dozens of relevant cases. *Tienda v. State*, 358 S.W. 3d 633 (Tex. Crim. App. 2012). At trial, the district court admitted into evidence information the prosecution printed from three MySpace accounts associated with the defendant. To authenticate the documents, the prosecution offered account metadata such as the username (based on the defendant's nickname), the location (same as the defendant's) and the defendant's email addresses associated with the account. It also offered content from the account, including multiple photographs of the defendant, and references in instant messages and comments to the defendant's gang and specific details about the crime at issue. The appellate court affirmed, holding that the prosecution had offered "evidence sufficient to support a finding that the matter in question is what its proponent claims," pursuant to Texas Rule of Evidence 901(a). *Cf.* Fed. R. Evid. 901(a) (similarly requiring "evidence sufficient to support a finding that the item is what the proponent claims it is").

The defendant argued unsuccessfully that MySpace accounts can easily be created or accessed without someone’s approval and that the prosecution failed to offer any technological or expert proof of authenticity, such as by tracing the IP address associated with the account to the defendant’s personal computer. The court acknowledged that purported self-identification, without more, typically has been regarded as insufficient to support a finding of authenticity. However, in contrast to those cases, here there was “ample circumstantial evidence — taken as a whole with all of the individual, particular details considered in combination — to support a finding that the MySpace pages belonged to the appellant and that he created and maintained them.”

The highly-detailed, 18-page opinion may be a helpful resource for any lawyer dealing with social media evidence at trial. Litigants should consider carefully the nature of any social media evidence they seek to admit. If available identifying information is not highly “individualized” with ample “particular details,” evidence and testimony from additional percipient and/or expert witnesses may be required.

E-DISCOVERY PILOT PROGRAM IN SEVENTH CIRCUIT CONTINUES SHOWING PROMISE

The Seventh Circuit recently published its Final Report regarding Phase Two of its innovative E-Discovery Pilot Program. The program, launched in May 2009, aims to curb electronic discovery costs and improve the fairness of the litigation process. The program is the only one of its kind in the federal court system, and its goals parallel those of the Sedona Conference Cooperation Proclamation.

The program’s committee — composed of experts from multiple sectors of the Seventh Circuit bar, as well as technology experts — planned three phases for the program. During Phase One, the committee drafted “Principles Relating to the Discovery of Electronically Stored Information” (“Principles”) to guide the program’s test cases. These Principles emphasize the need for cooperation between parties during the discovery process. To promote such cooperation, the Principles require parties to meet early to discuss how electronically stored information (“ESI”) will be discovered, preserved and produced. Additionally, the Principles require parties to appoint “E-Discovery Liaisons” to assist in resolving discovery disputes; these liaisons must be knowledgeable about their party’s electronic systems and e-discovery efforts.

During Phase Two, 40 judges implemented the Principles in nearly 300 federal civil cases. The results were generally positive. As detailed in the nearly 1,000-page Final Report, approximately 75 percent of responding judges reported that the program enhanced fairness in the discovery process. Additionally, responding lawyers stated that the program increased cooperation in 36 percent of cases. Per the report’s Executive Summary, “[b]oth the Phase One and Phase Two surveys’ results show that in those cases in which the Principles had a perceived effect, those effects were overwhelmingly positive with respect to assisting lawyers’ cooperation and enhancing their ability to resolve disputes amicably, their ability to obtain relevant documents, and their ability to zealously represent their clients, as well as providing fairness to the process.” The committee noted that implementing some of its requirements may have caused increased costs and delays. The committee intends to analyze whether the benefits outweigh these potential additional costs and also predicts that these costs could decrease as litigators become more familiar with the program and its Principles.

The committee also envisioned the program as an e-discovery educational tool for judges, lawyers and parties. Accordingly, the committee created new subcommittees during Phase Two, including

the Technology Subcommittee and the Website Subcommittee. The Technology Subcommittee is charged with staying current on evolving technology and its application to e-discovery, and the Website Subcommittee launched the program's website, <http://www.discoverypilot.com>, in May 2011. The website includes e-discovery resources, such as technical information about ESI, and current case law on e-discovery in the Seventh Circuit. (The Phase Two Final Report is also available on the site.)

The committee has now begun Phase Three, in which it will continue to expand its outreach efforts and enhance the educational resources available on its website. The new E-Mediation Subcommittee is also working toward creating a program that will provide free mediation for e-discovery disputes.

This issue of *Bingham E-Discovery News* was written by [Chad Russell](#) and summer associate [Melissa Hughes](#).

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