The Buckley Sandler *eDiscovery Update* is a quarterly publication that highlights key cases and other developments bearing on electronic discovery issues. Buckley Sandler's eDiscovery group has extensive knowledge and experience in electronic discovery in compliance, enforcement, and complex litigation matters. If you would like to discuss any electronic discovery matters with our team, do not hesitate to contact us.

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Court Imposes Sanctions for Falsifying Evidence Under the Revised Rule 37(e) but Declines to Grant Dismissal or an Adverse Inference

In February 2017, Judge Andrew Peck issued a discovery order noting that "[i]t is time, once again, to issue a discovery wake-up call to the Bar in this District" regarding how to properly respond to discovery requests. In *Fischer v. Forrest*, 2017 U.S. Dist. LEXIS 28102 (S.D.N.Y. Feb. 28, 2017), the defendant served responses to document requests that, among other things, included general objections that were incorporated by reference in the responses. Judge Peck reviewed the responses and found them to be deficient in at least four ways:

- First, Judge Peck ruled that "incorporating all of the General Objections into each response violates Rule 34(b)(2)(B)'s specificity requirement as well as Rule 34(b)(2)(C)'s requirement to indicate whether any responsive materials are withheld on the basis of an objection." Judge Peck also noted that general objections "should rarely be used" now that the Federal Rules have been amended unless each such general objection applies to every single document request.
- Second, Judge Peck ruled that the general objection to relevance was improper because it used the relevance standard eliminated by the December 2015 revisions to the Federal Rules.
- Third, Judge Peck noted that objecting to requests on the grounds that they are overly broad or unduly burdensome "is meaningless boilerplate" because the objections did not explain why the requests were too burdensome or overly broad.
- Fourth, Judge Peck noted that the responses improperly failed to "indicate when documents and ESI that defendants are producing will be produced."

Id. at *2-3. Based on these findings, Judge Peck required the Defendants to revise their responses to comply with the Federal Rules. He also warned that "[f]rom now on in cases before this Court, any discovery response that does not comply with Rule 34's requirement to state objections with specificity (and to clearly indicate whether responsive material is being withheld on the basis of objection) will be deemed a waiver of all objections (except as to privilege)." *Id.* at *3.

The case is *Fischer v. Forrest*, No. 14-CIV-1304 (S.D.N.Y. Feb. 28, 2017). A copy of the opinion can be found here.

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Court Orders Statistical Sampling in Lieu of a Burdensome Production

On January 1, 2017, Magistrate Judge R. Steven Whalen of the Eastern District of Michigan, citing the proportionality provision of the Federal Rules of Civil Procedure, granted in part and denied in part plaintiffs' motion to compel in a putative consumer class action case against UPS. Plaintiffs claimed that UPS had breached its contract by overcharging for certain shipments valued over $300.

Plaintiffs requested that UPS provide, in response to an interrogatory, package-specific information broken down by various categories, from 2008 through 2013. UPS responded that it would be excessively burdensome to answer the interrogatory. Specifically, UPS estimated that it would take six months to restore its archives, and additional time to intensively review each individual contract at issue. UPS also argued that its arbitration clauses and its standard 180-day window for filing billing complaints should reduce the relevant date range to a six-month span in 2013. In response to the interrogatory, UPS did provide an estimate of the number of packages valued over $300 that were shipped from June 30, 2013 to December 29, 2013.

Judge Whalen found that the relevance of plaintiffs' requested information was "not proportional to the needs of the case at this time" and cited the 2015 amendments to the Federal Rules of Civil Procedure. Moreover, the judge stated that even if UPS constrained its research to the six months in 2013, its burden would still be "not insubstantial." Instead, the court found that the "appropriate balance" could be struck through statistical sampling. .

Judge Whalen granted plaintiffs' motion in part, and ordered that the parties meet and confer to devise "a mutually agreeable methodology" for obtaining a sampling of the requested data for the six months in 2013. If the parties could reach an agreement, UPS would provide the data and shoulder the cost of production. If the parties could not reach an agreement, then the plaintiffs would have the option of requesting that UPS produce package-specific data for the six month period, for which the plaintiffs would bear the cost of production.

The case is *Solo v. United Parcel Service Co.*, No. 14-12719 (E.D. Mich. Jan. 10, 2017). A copy of the opinion can be found here.

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Department of Justice Issues Guidance Prohibiting Human Quality Control Review of Technology Assisted Review Results for Responsiveness

The Department of Justice Antitrust Division ("the Antitrust Division") recently announced that it will not permit human quality control of a production subsequent to employing technology-assisted review to determine responsiveness. Although this announcement pertains strictly to documents produced in response to Second Requests, this change in approach to eDiscovery will likely be monitored closely given the way in which federal regulators share approaches with their counterparts at other agencies.

At a March 2017 American Bar Association meeting, Senior Counsel Tracy Greer of the Antitrust Division presented and discussed a white paper she had authored. Greer shared that since 2014, the Antitrust Division has encouraged producing parties to use Technology Assisted Review ("TAR"), and that this initiative was "working effectively" for both sides in most investigations.

However, Greer cited two concerns surrounding the use of TAR. The first concern was transparency. She noted that under the Antitrust Division's Model Second Request Instructions, producing parties must identify and discuss the use of TAR to the Division before using it. This discussion between the parties engaging in the TAR process will allow the Antitrust Division to better "ensure that it is obtaining the documents and information needed for the investigation."

Greer's second concern was attorneys overruling TAR's responsiveness call upon performing a subsequent privilege review. The effect of the Antitrust Division's new approach is to prohibit further quality control by attorneys who would otherwise not produce (or list it on a privilege log) a document that was coded responsive by the TAR algorithm. As Greer said:

"One of the main attractions to the Division of producing parties using TAR is that more knowledgeable reviewers are making the judgment about responsiveness to the Second Request. Antitrust investigations, for the most part, do not involve a straightforward legal analysis of an event or disagreement. Therefore, the responsiveness of a category of information may be subtle and not obvious to someone who is not well-versed in the transaction at hand. Moreover, TAR is used because the results of the process are better and more consistent than a manual review. As a result, the Division will not agree to a party conducting essentially a second responsiveness review of the production during the privilege review process."

This is a controversial stance amongst certain attorneys in private practice because, among those who believe TAR generates "better and more consistent" results than human review, there is a common understanding that the TAR process is not perfect. Post-TAR quality control

allows for discovery of “miscoded” documents. The Antitrust Division’s new rule does not allow for such corrections.

The white paper “Avoiding E-Discovery Accidents & Responding to Inevitable Emergencies: A Perspective from the Antitrust Division” is available here.

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"Improper Boilerplate Objection With No Specifics" Results in Privilege Waiver

On March 6, 2017, Magistrate Judge William Matthewman of the Southern District of Florida granted the defendant's motion to compel documents pertaining to the terms upon which the plaintiff retained certain investigators. The plaintiff had objected to the production of these documents on the basis of "Work Product Doctrine and Attorney Client Privilege."

In granting the motion, Judge Matthewman found that the plaintiff had failed to complete a privilege log as required by Local Rule. Second, Judge Matthewman found that the plaintiff's objection to the defendant's document request improperly failed to include "the detailed information" supporting its work product and privilege objections as required by Local Rule. Judge Matthewman also noted that under Federal Rule of Civil Procedure 34(b)(2)(B), the plaintiff was required to "state with specificity the grounds for objecting to the request, including the reasons" and found the plaintiff had done neither. In sum, Judge Matthewman observed that the plaintiff had made an "improper boilerplate objection with no specifics."

The court held that as a result of the foregoing, plaintiff had waived any such asserted privilege, and ordered plaintiff to produce the requested documents within ten days.

The case is *Sream, Inc. v. Hassan Hakim & Sarwar, Inc.*, No. 16-CV-81600 (S.D. Fla. March 6, 2017). A copy of the opinion can be found here.

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Court Imposes Adverse Inference for Destruction of Audio Recordings

In *Hsueh v. N.Y. State Dep't of Fin. Servs et al.*, No. 15 Civ. 3401 (PAC), 2017 WL 1194706 (S.D.N.Y. Mar. 31, 2017), the plaintiff sued her employer and former manager for sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and the New York City Human Rights Law. Among other things, the plaintiff alleged that (i) her supervisor sexually harassed her; and (ii) her employer's human resources department did not take her complaint seriously and excluded her from the investigation. At her deposition, the plaintiff admitted that she had recorded one or more conversations with the human resources employee who allegedly disregarded her complaints, but had since deleted them. Based on that admission, the defendant-employer filed a motion for spoliation sanctions requesting dismissal of the claim in its entirety or an adverse inference.

Subsequent to the filing of the spoliation motion, the plaintiff claimed to have located the recording by working with her husband to restore it using back-up hard drives. The depositions likewise revealed that the original recording device had since been donated, meaning that the only version available was the version that was restored and produced. After re-deposing the plaintiff and her husband, the defendant-employer renewed its motion for spoliation sanctions and also sought the recovery of fees and costs incurred as a result of the spoliation, arguing that spoliation still occurred because the restoration was potentially incomplete, so data had still been lost. *Id*. at *5.

As a threshold matter, the Court first found that Rule 37(e) of the Federal Rules of Civil Procedure did not apply to the spoliation at issue because Rule 37(e) applies only to situations where a party fails to take reasonable steps to preserve ESI, and not to situations where a party intentionally destroys ESI. *Id*. at *4. Having concluded that Rule 37(e) did not apply, the Court determined that it "may rely on its inherent power to control litigation in imposing spoliation sanctions." *Id.*

Relying upon that authority, the Court analyzed whether an adverse inference was appropriate. *Id.*at *4-5. First, the Court found that there was good reason to believe the recording was incomplete, and there was no way to restore the full conversation. Second, because the recording did not support the plaintiff's version of events, the Court concluded that the plaintiff destroyed it to prevent her employer from using it in the litigation. Based on these findings, the Court found that an adverse inference was the appropriate remedy for the plaintiff's deletion of the recording. *Id.* at *6. The Court also granted the motion for attorney's fees and costs (pending defendants' submission of detailed invoices), finding that the plaintiff's bad faith caused discovery to be re-opened. *Id.*

The case is *Hsueh v. N.Y. State Dep't of Fin. Servs. et al.*, No. 15-CIV-3401 (S.D.N.Y. Mar. 31, 2017). A copy of the opinion can be found here.

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Supreme Court Issues Guidance on a Federal Court's Authority to Sanction Bad-Faith Litigation Conduct by Ordering the Payment of Opponent's Legal Fees

On April 18, 2017, the United States Supreme Court unanimously reversed a Ninth Circuit Court of Appeals decision, which upheld an award of sanctions for bad faith litigation conduct. In the underlying action, the plaintiffs sued Goodyear Tire & Rubber Company ("Goodyear"), alleging that the failure of a specific Goodyear tire caused the plaintiffs' motor vehicle to swerve off the road and flip over. *Goodyear Tire & Rubber Co. v. Haeger et al.*, 137 S. Ct. 1178, 1181 (April 18, 2017). During the litigation, the plaintiffs "repeatedly asked Goodyear to turn over test results" for the tire in question, but Goodyear apparently did not produce the sought-after test results. The case settled before trial. *Id.* at 1181.

Months later, the plaintiffs' counsel learned that Goodyear had produced test results on the relevant tire in a different case, and that the test results supported the plaintiffs' claims that had since been settled. The plaintiffs then went back to the District Court to seek discovery sanctions in the form of attorneys' fees and costs expended in the litigation. *Id.* at 1181-82.

The District Court granted the relief sought, relying on its inherent power to sanction litigation misconduct. The District Court found that Goodyear had engaged in a "years-long course" of bad-faith behavior, and that Goodyear had made "repeated and deliberate attempts to frustrate the resolution of [the] case on the merits." *Id.* at 1184. The District Court calculated that the plaintiffs had spent $2.7 million in legal fees and costs since Goodyear made its first improper discovery response, and awarded the plaintiffs that entire amount. *Id.* at 1185. A divided Ninth Circuit panel affirmed the decision.

The Supreme Court reversed the decision, finding that the award of $2.7 million went beyond the District Court's inherent power to sanction litigation misconduct. Specifically, the Supreme Court explained that a fee award granted due to litigation misconduct "may go no further than to redress the wronged party for losses sustained; it may not impose an additional amount as punishment for the sanctioned party's behavior." *Id.* at 1186. Thus, a federal court may "shift only those attorney's fees incurred because of the misconduct at issue." The Court explained that such a causal connection "is appropriately framed as a but-for test: The complaining party…may recover "only the portion of his fees that he would not have paid for but for" the misconduct. *Id.* at 1187.

Applying the foregoing principles, the Supreme Court found that the sanctions award was invalid because the District Court did not show that the full amount awarded was incurred *because of* the litigation misconduct. *Id.* at 1188-90. In doing so, the Court rejected the argument that the case would have settled much earlier, noting that Goodyear elected to go to trial in another case where the same test results were produced. Accordingly, the Supreme

Court reversed the decision and remanded the case to the District Court for determination of the proper sanctions amount.

The case is *Goodyear Tire & Rubber Co. v. Haeger et al.,* 137 S. Ct. 1178 (April 18, 2017). A copy of the opinion can be found here.

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