eDiscovery UPDATE

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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Supreme Court Approves Proposed Amendments to Rules 26 and 37

On April 29, 2015, the Supreme Court adopted proposed amendments to the Federal Rules of Civil Procedure. The proposals have been transmitted to Congress and, absent legislation to reject or modify them, will become effective on December 1, 2015. The key changes for discovery purposes are to Rules 26 and 37 and are summarized below:

- Rule 26(b)(1), which defines the scope of discovery, will now specifically incorporate a proportionality standard. It also contains a modified list of factors that courts are to consider when deciding whether particular discovery requests should be allowed. The new standard will be as follows: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."
- Rule 26(f)(3), which sets forth the contents of discovery plans, will now require the parties to address preservation of ESI, in addition to its production.
- Rule 37(e) has been substantially revised. The current version provides that a party may not be sanctioned for losing ESI "as a result of the routine, good-faith operation of an electronic information system." The new Rule 37(e) dispenses with that safe harbor, inserting in its place provisions authorizing courts, upon a finding that a party failed to take reasonable steps to preserve ESI that "should have been preserved" and that another party was prejudiced by its loss, to impose "measures no greater than necessary to cure the prejudice." If, however, the court finds that a party "acted with the intent to deprive another party of the information's use in the litigation," then it may presume that the information was unfavorable, instruct the jury that it "may or must" make such a presumption, or dismiss the claims or enter a default judgment.

A copy of the amendments is available here.

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Judge Peck Revisits Technology Assisted Review

On March 2, 2015 Magistrate Judge Andrew Peck of the United States District Court for the Southern District of New York issued an opinion following up on his seminal 2012 opinion regarding technology assisted review (TAR) in the *Da Silva Moore*case. Although Judge Peck was merely approving an agreed TAR protocol, he took the opportunity to comment on developments in the law regarding TAR. His observations include the following:

- "[I]t is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it." However, courts have thus far been unwilling to impose TAR on unwilling parties.
- Whether or not parties must disclose the documents in their seed sets remains an open question, with courts ruling both ways. However, "while I generally believe in cooperation, requesting parties can insure that training and review was done appropriately by other means, such as statistical estimation of recall at the conclusion of the review as well as by whether there are gaps in the production, and quality control review of samples from the documents categorized as non-responsive."
- "It is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review."

The case is *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. Mar. 2, 2015). A copy of the opinion is available here.

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Court Holds Inadvertent Disclosure Not a Waiver Because of Reasonable Production Process

On April 14, 2015, the United States District Court for the Southern District of West Virginia denied plaintiff's motion to compel production of an inadvertently produced privileged document. The document had been tagged as privileged during defendant Ford's document review process, but was produced due to a mistake by Ford's document production vendor. As soon as Ford discovered the error, it immediately sought to claw back the document. The plaintiffs opposed that effort, contending that Ford's review procedures were inadequate and that they had come to rely on the document in developing their litigation strategy. The court held that Ford had taken "reasonable precautions" to prevent disclosure of privileged documents. Specifically, after attorneys had reviewed documents for relevance and privilege, the vendor was supposed to remove documents tagged as privileged from the production. The key question was "the reasonableness of the review procedure, not the precision of post-review processing." Ford's methods were reasonable because they were customary in the legal profession at the time and, as noted in the notes to Rule 502, the producing party is not required to "engage in a post-production review to determine whether any protected communication or information has been produced by mistake." In sum, "reasonable precautions are not necessarily foolproof."

The court also rejected the plaintiffs' reliance arguments, noting that Ford had acted immediately to retrieve the document after discovering the error. It also rejected plaintiffs' claims that Ford should have discovered the error sooner because the plaintiffs had requested depositions of certain people involved with the document, finding that "not realistic given the demands and time constraints of large-scale litigation." Finally, the court disregarded the plaintiffs' claims that they could not "duplicate through other evidence" the factual information in the document, holding that the issue is only "whether the act of restoring immunity to an inadvertently produced document would be unfair, not whether the privilege itself deprives parties of pertinent information."

The case is *Johnson v. Ford Motor Co.*, No. 3:13-CV-06529 (S.D. W. Va. Apr. 14, 2015). A copy of the opinion is available here.

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Court Orders Deposition of Court-Appointed Forensic Expert

On April 24, 2015, the United States District Court for the Southern District of Florida granted a motion to take the deposition of a court-appointed forensic expert. The expert was appointed when the plaintiff in an antitrust suit disclosed various inadequacies in its document preservation and collection procedures, including a failure to implement a timely litigation hold. The court appointed both a special master and a forensic expert to assist in attempting to recover lost documents. After the expert firm issued a lengthy report on its efforts, the defendant sought leave to conduct a deposition. The court recognized that the deposition was an effort to develop a spoliation motion, but ordered the deposition to proceed because it would assist the court in understanding the complex ESI issues at issue. The court also noted that a deposition could yield information favorable to the plaintiff and thereby preclude the spoliation motion.

The case is *Procaps S.A. v. Patheon, Inc.*, No. 12-24356-CIV (S.D. Fla. April 24, 2015). A copy of the opinion is available here.

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Court Denies Motion to Compel Production of Plaintiff's Flash Drive Containing Unauthorized Copies of Employer's Personnel Records

On June 18, 2015, the United States District Court for the Middle District of Tennessee denied a motion to compel production of a flash drive that the plaintiff, a former employee of the defendant, had used to make unauthorized copies of payroll records for use in her employment discrimination suit. The plaintiff had produced paper copies of the documents on the flash drive, but the defendant contended that the production was likely incomplete. The defendant also argued that it needed to determine when the documents were obtained and whether they had been transmitted to third parties. The court, however, determined that there was no basis to believe that plaintiff's production was incomplete, that her testimony about when she obtained the documents was false or that she had transmitted the documents to any undisclosed parties.

The court cited the Advisory Committee notes to the 2006 amendments to Rule 34, which state that there should be no "routine right of direct access to a party's electronic information system" and that courts should guard against "undue intrusiveness resulting from inspecting or testing such systems." It also noted that the defendant had waited to bring its motion until shortly before trial. Accordingly, it denied the motion.

The case is *Hawkins v. Center for Spinal Surgery*, No. 3:12-1125 (M.D. Tenn. June 18, 2015). A copy of the opinion is available here.

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Survey of Federal Judges on eDiscovery Practices and Trends

Recently, 22 federal district and magistrate judges responded to a survey regarding electronic discovery issues sponsored by Exterro, an eDiscovery vendor. The responses indicated that the two main problems perceived by the judges are "a lack of knowledge about clients' e-discovery environment and a lack of cooperation between opposing parties and attorneys." Also, the "primary area where counsel needs improvement" is preservation, with an attendant need to better understand the client's data systems. Finally, half of the judges indicated that Rule 502(d), which allows a court to order that a given production will not create a waiver for purpose of any litigation, is the "most underutilized" federal tool available to litigants.

Exterro's report on the survey is available here.

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