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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Federal Agency's Review of Cell Phone Data Obtained from Local Police But Not Responsive to the Original Warrant Was an Illegal Search Under the Fourth Amendment

A federal court last month granted a defendant's motion to suppress cell phone evidence, finding it had been properly obtained with a search warrant by a local police department, but that the subsequent review by a federal law enforcement agency amounted to a warrantless search.

The saga began when the local police department obtained a warrant to search the defendant's phone for evidence in an investigation into potential forgery, counterfeiting, and identity theft. The police extracted data from the cell phone, segregated the portion of the data that was relevant to the case, and saved that portion separately. In a separate and unrelated matter concerning firearm offenses, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") was building a case against the same defendant and heard about the police department's investigation. Upon learning about the police department's copy of the defendant's phone data, the ATF requested a copy of the data from the police. The ATF reviewed a complete copy of the data, not just the segregated portion, without obtaining its own warrant. The key issue before the court was whether the ATF's subsequent review of a copy of data that was collected under the original warrant *but was unresponsive to that warrant* constituted a search.

While a box of paper documents can be shared among law enforcement agencies, the court stated that "cell phone data is not the same as physical evidence" and feared that allowing law enforcement agencies to "permanently save all unresponsive data collected from a cell phone after a search for future prosecutions on unrelated charges" would permit "mass retention of unresponsive cell phone data… inconsistent with the protections of the Fourth Amendment." After determining that neither the "plain view" exception nor the exclusionary rule applied to the phone data, the court held that the ATF's review of the complete cell phone data without a warrant violated the defendant's Fourth Amendment rights, and excluded the unsegregated (unresponsive to the original warrant) data from the federal case. The court noted, however, that the excluded data may be used for impeachment purposes if the defendant testifies at trial, since illegally seized evidence is still permitted for impeachment under 8th Circuit case law.

The case is *U.S. v. Hulscher*, No. 4:16-CR-40070-01 (D.S.D. Feb. 17, 2017). A copy of the opinion can be found here.

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Pro Se Civil Plaintiff Denied Court-Appointed Expert Help with eDiscovery and Complicated Software Claims at the Core of His Case

In February 2017, a Magistrate Judge for the Southern District of Ohio rejected a *pro se* civil plaintiff's motion under Rule 706 of the Federal Rules of Evidence to appoint an expert to help the plaintiff navigate eDiscovery and the technical aspects of his claims. The case centers on claims that software employed by the jealous husband of a female friend of the plaintiff illegally intercepted digital communications between the plaintiff and his friend. Despite the plaintiff's arguments that the "nature of eDiscovery and the complicated software and algorithms central to this case demand appointment of experts in this field," and that such assistance would otherwise be prohibitively expensive, the court refused the request and stated that "if this Court desires an expert to aid the Court at trial, it can and will appoint one" but "it cannot and will not appoint an expert to assist Plaintiff in discovery or to prove his claims at trial." The court further noted that even if it were to appoint such an expert under Rule 706, section (c) of the Rule dictates that costs for such an expert would be apportioned amongst the parties, not funded by the court.

The case is *Luis v. Zang*, Case No. 1:12-cv-629 (S.D. Ohio Feb. 1, 2017). A copy of the opinion can be found here.

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SDNY Judge Rules Against Firm Claiming $362.50 Blended Rate for Temporary Associates Conducting Document Review

Presented with Plaintiffs' counsel's request for $51.7 million in attorneys' fees as part of settlement approval proceedings, Judge William H. Pauley III held that the blended rate requested for a group of temporary attorneys was "unreasonable" and instead awarded $41.4 million in fees. Judge Pauley chastised the firm Barrack, Rodos & Bacine for using "temporary associates for the bulk of document discovery at standard associate hourly rates" and claiming a blended rate of $362.50 per hour for "first-cut document review," which the Court felt was "typically the domain of contract attorneys or paralegals." Although the sixteen temporary attorneys at issue were considered full-time associates with full benefits during the case, all had since left the firm. Citing the Court's duty to avoid a "windfall" to the Plaintiffs' firm, Judge Pauley reduced the requested lodestar multiplier from 1.5 to 1.2, thus reducing attorneys' fees by $10 million.

The case is *Pa. Public School Employees Retirement Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19 (S.D.N.Y. Dec. 27, 2016). A copy of the opinion is available here.

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Litigant Sanctioned by Court for "Selective Preservation"

During a lengthy litigation matter between two home security companies regarding customer poaching, defamation, and interference with contractual relationships, the defendant alleged that the plaintiff selectively preserved fewer than 150 customer phone calls that were generally favorable to the plaintiff and allowed all other customer phone calls to be overwritten (and thus effectively destroyed) as part of its standard retention procedures. When presented with a spoliation motion by the defendant, the Northern District of California concluded that there was a clear duty to preserve the call recordings at the time that they had been overwritten, because litigation was ongoing at the time and the company knew the calls were relevant to the case. The court further reasoned that as the plaintiff's litigation hold was insufficient to preserve information the plaintiff knew or should have known was relevant, the plaintiff had failed to take reasonable steps to preserve the calls. Neither party suggested that the calls were not lost and irreplaceable.

Since there was a duty to preserve, the loss of data resulted from a failure to take reasonable steps to preserve it, and the calls were irreplaceable, the court held that spoliation had occurred. However, in determining what sanctions to impose, the court observed that the record was "relatively murky," and that it could not definitively determine that the plaintiff acted with intent to deprive the defendant of the call recordings. Thus, the court could not impose severe sanctions under FRCP 37(e)(2), and instead ordered attorneys' fees associated with the motion and precluded the plaintiff from introducing at trial any of the call recordings that it did preserve. Additionally, the Court held that both parties could address spoliation at trial and stated that it would instruct the jury that the plaintiff had failed to preserve evidence despite a duty to do so.

The case is *Sec. Alarm Fin. Enters., L.P. v. Alarm Protection Tech.*, No. 3:13-cv-00102 (D. Alaska, Dec. 6, 2016). A copy of the opinion is available here.

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When Litigation is Reasonably Anticipated, Preserve Relevant Text Messages Quickly and Effectively

A September 2016 opinion from the Western District of North Carolina reminds litigators of the importance of adequately preserving text messages and other electronically-stored information ("ESI") once litigation is reasonably anticipated. In *Schaffer v. Gaither*, Plaintiff's counsel knew that Plaintiff had text messages on her phone that could be central to her EEOC and judicial proceedings concerning alleged sexual harassment by her former employer. Unfortunately, her counsel neglected to adequately preserve the texts (e.g., by "printing out the texts, making an electronic copy of such texts, cloning the phone, or even taking possession of the phone and instructing the client to simply get another one"). After dropping her phone in the bathroom, Plaintiff turned in the broken phone, and with it the key electronic records, as she was required to do in order to make an insurance claim. Later efforts to locate the data revealed that the texts were likely lost forever.

The defendant argued that the Court ought to dismiss Plaintiff's case entirely as a sanction under FRCP Rule 37 for spoliation of evidence. The Court agreed that "plaintiff and her counsel failed to take reasonable steps to preserve those texts as they apparently resided only on plaintiff's phone." In other words, it was not enough for Plaintiff to simply leave the old messages in her inbox; additional preservation was required under the Rule. However, the Court reasoned, under the newest iteration of Rule 37(e), while Plaintiff's failure to take "reasonable steps to preserve" ESI when "such information cannot be restored or replaced through additional discovery," is sanctionable, the loss may only be treated as spoliation if Plaintiff acted "with the intent to deprive." The Court could not, at that time, determine that Plaintiff acted with such intent.

In the end, while the Court declined to dismiss Plaintiff's case for the missing texts, it noted that Defendant would be able to examine witnesses with knowledge of the texts before the jury, and could explore the destruction of the texts at trial. The Court reserved the right to revisit sanctions if evidence came to light in trial suggesting the destruction of the ESI was intentional.

The case is *Shaffer v. Gaither*, No. 5:14-cv-00106 (W.D.N.C. Sept. 1, 2016). A copy of the opinion is available here.

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Defense Attorney Sanctioned for Citing Caselaw that Analyzed Superseded Version of FRCP 26(a)(1)

During a February roundtable discussion at the LegalTech 2017 conference, several federal judges repeatedly cited *Fulton v. Livingston Financial LLC* as an example of how many trial attorneys do not yet appreciate the ramifications of the amended Federal Rules of Civil Procedure.

In this Western District of Washington case, Judge Robart considered imposing sanctions against the Illinois-barred defense attorney who had briefed a motion to compel. The judge first found that the brief misrepresented the plaintiff's position factually. Moreover, the attorney had cited caselaw that established that under Federal Rule of Civil Procedure 26(a)(1), documents are discoverable if they are "relevant and non-privileged." Judge James Robart noted that the "highly publicized" amendments of the Federal Rules of Civil Procedure that took effect on December 1, 2015 had "dramatically changed" what information was discoverable, and observed that the new standard was one of proportionality. The court found that these citations to outdated caselaw amounted to a reckless misrepresentation of the law.

Invoking the court's inherent authority to sanction bad faith conduct, the judge ordered the attorney to provide a copy of his brief to his managing partners at the Hinshaw & Culbertson office in Chicago. The attorney was also required to explain to his employers "that the court is entering sanctions against a Hinshaw lawyer for quoting provisions of the civil rules that are badly out of date, and also making direct misrepresentations to the court." The court also imposed a conditional sanction that if any federal court threatens or imposes sanctions on him in the next five years, that the attorney must provide "a copy of this order and the offending briefing" to that court.

The case is *Fulton v. Livingston Financial LLC,* No. C15-0574 (W.D. Wash. July 25, 2016). A copy of the opinion can be found here.

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Watch for Emojis in Your Data Set

As the use of emojis in digital communications becomes commonplace among all consumers of social media, so must the legal community consider how to approach the digital representations in eDiscovery. An article in Today's General Counsel by Joe Sremack, director of Berkeley Research Group and CEO of Boxer Analytics, raises interesting questions about emojis and eDiscovery that are worth discussing with your litigation team in any matter involving a document set that may contain emojis. In a collection and review process relying on keywords, how will emojis, which do not respond to such searches, be accurately identified? Interpretation is similarly rife with difficulty; the graphics can mean different things in different contexts or geographical settings, and emojis can even display as different visual representations depending on the device (e.g., emojis can look different on an Apple device versus an Android device). Data processing and storage can also present issues if the emoji data is not properly handled. While relevant software does exist, including Sremack's own product, UniSearch Pro, the article notes the availability of ad hoc processes to address these issues and suggests that better software solutions will hit the market once "courts and e-discovery professionals begin to regularly encounter emoji data and understand its value."

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Survey of Federal Judges on eDiscovery Practices and Trends

For the third year in a row, Exterro, an eDiscovery vendor, surveyed 22 federal district and magistrate judges regarding electronic discovery issues. As in previous years, the two biggest eDiscovery problems identified by the judges are “No or poor cooperation between parties” and “Parties are not educated on e-discovery issues.” Also, 77% of judges surveyed agreed that the area with “the greatest potential for improvement among counsel” is “[a]pplying the principles of cooperation and proportionality.” Finally, regarding the 2015 amendments to the Federal Rules of Civil Procedure, 82% of judges surveyed agreed that the amendments “have helped solve many problems that currently occur in e-discovery today,” and 59% of respondents identified the amendments to Rule 26(b)(1) (relating to proportionality) as the amendments which “had the biggest effect on e-discovery practices.”

Exterro’s white paper on this year’s survey is available here.

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