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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State Bar of California Discusses Electronic Discovery in Context of Ethical Duty of Competence

In a (non-binding, advisory) Formal Opinion issued June 30, 2015, the California state bar opined that part of an attorney's ethical duty of competence included "at a minimum, a basic understanding of" issues relating to e-discovery; however, in certain cases with a large number of e-discovery issues, an attorney may require a higher level of technical knowledge and ability. The state bar further determined that if an attorney does not meet the required competence level for a given case, he or she has three options: (1) acquire the skills necessary before performance is required; (2) bring in technical consultants or competent counsel to assist; or (3) decline representation of that client.

The Opinion set forth the following list of capabilities that, according to the state bar, all attorneys handling e-discovery should have, if necessary with assistance from competent counsel or expert consultants:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.

The Opinion addressed a hypothetical situation in which an attorney was not well-versed in his client's electronically-stored information, incorrectly assumed that a clawback agreement covered non-privileged, non-responsive documents, and failed to consult at all with his client's IT department. These failures resulted in the deletion of responsive documents as part of the client's routine deletion policies, and the production of highly confidential and proprietary (but non-responsive) information to a competitor. The state bar stated that "at the least, Attorney risked breaching his duty of competence when he failed at the outset of the case to perform a timely e-discovery evaluation," and that if he had, he would have been able to bring in an expert to assist if he was unable to understand the underlying issues. The state bar further noted that

the attorney in this hypothetical may have violated his duty of confidentiality by not taking sufficient steps to protect the production of privileged or confidential documents, and that the clawback agreement may not apply because the production of electronic documents wholesale (per search terms) was not “inadvertent.”

The Formal Opinion is Number 2015-193, and can be found here.

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Court Orders Sanctions for Extensive Discovery Negligence

In an opinion addressing the third motion for sanctions filed by the plaintiff in a breach of contract case, the Northern District of Texas agreed with the plaintiff that the defendants had engaged in egregious misconduct related to their discovery obligations, and issued strong sanctions against the defendants.

The court determined that the defendants had committed the following discovery violations:

- Failing to produce documents specifically ordered by the court to be produced to plaintiff (defendants had claimed this failure was a "mistake" and documents "fell through the cracks";
- Relied on the individual defendant to collect documents himself without the assistance of attorneys or any of his employees and did not use a system to keep track of what had been produced (the court described the process as "haphazard and unconventional" and the defendant's attitude "cavalier");
- Failing to reveal the existence of relevant entities that have interests in and did business with defendants until very recently (2014), despite those entities being formed in 2012, during the discovery period; and
- Defendants demonstrated "persistent negligence" with regard to their discovery obligations, including an email instructing a subordinate to "just remember to delete messages . . . lol" and a "careless" disposal of the president's laptop.

Although the Court did not order the far-reaching sanctions requested by plaintiffs, it did order defendants to pay to plaintiffs the reasonable expenses and attorneys' fees incurred by the plaintiff from February 19, 2014 through November 3, 2014, including fees incurred in filing the motion for sanctions at issue.

The case is *Thermotek, Inc. v. Orthoflex, Inc.*, No. 3:11-cv-870-D (N.D. Tex. July 7, 2015). A copy of the decision can be found here.

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Court Determines "Marginal Relevance" Insufficient for Continued Discovery

On June 3, 2015, the District Court for the District of Arizona held that the burden of collecting and producing three years' worth of financial spreadsheets and certain medical examination reports outweighed the potential benefit of continued discovery of such materials in a worker's compensation case. The court determined that, under Federal Rule of Civil Procedure 26(b)(1), producing the financial spreadsheet was too burdensome to the defendant given that the relevance to the plaintiffs' claims was marginal.

The case is *Miller v. York Risk Servs. Group*, No. 2:13-CV-1419 (D. Ariz. June 3, 2015). A copy of the decision is available here.

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Court Orders Cost Sharing for Conversion of ESI

On March 27, 2015 the Western District of Virginia granted, in part, defendant's motion seeking payment of costs by plaintiff to convert its ESI into a readable format at plaintiff's request. Although plaintiff alleged that the costs were related to the defendant's failure to comply with Rule 72(b)(2), the court held that the plaintiff had acknowledged that it had software to convert the documents in question into a readable format, but had "taken no steps to convert defendant's documents despite the relatively modest quoted cost…" The defendant had been required to pay the reasonable costs to convert the production into a readily usable format, and the plaintiff attempted to pass along its conversion costs under the guise of "processing." The court ordered cost sharing for the court-ordered conversion services under U.S.C. § 1920, but not for attendant processing fees by the plaintiff-selected vendor.

The case is *Hanwha Azdel, Inc. v. C&D Zodiac, Inc.*, No. 6:12-CV-00023 (W.D. Va. Mar. 27, 2015). A copy of the decision is available here.

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Federal Trade Commission Updates Best Practices Guide for Merger Investigations

On August 4, 2015, the Federal Trade Commission ("FTC") updated its guide to best practices for merger investigations, its first update since 2006. The guide update stresses the importance of an early understanding of a client's data storage and relevant systems, stressing that this understanding could lead to more efficient and timely resolution of investigations.

In the context of a Second Request to a Hart-Scott-Rodino filing (in which the FTC tries to scrutinize the deal in determining whether the merged entities would assume an anticompetitive position in the market), the FTC indicated it might require the parties to submit in their application a "data map," which "can be helpful in identifying the types of data your client creates and stores and the relationship between the client's different data sets."

The guide also provides:

"The merging parties can contribute to these negotiations best by explaining the organizational and decision-making structure of the parties' businesses as well as where, how, and by whom relevant information is kept. Employees or counsel familiar with company's operations, data, storage, and document retention policies should participate in the meetings … in the most successful meetings, [parties convey] to the staff the structure and content of central files, corporate files and databases. … Our review of previous investigations suggests that an early, substantive discussion on issues, custodians, data, and documents leads to less costly, more focused Second Requests, which in turn leads to faster compliance and review."

Finally, the guide addresses the use of search terms to comply with Second Requests. The FTC states that their staff may comment on proposed search terms in advance of a document production process, which would greatly increase the likelihood of the production being sufficiently comprehensive in the FTC's eyes. However, the FTC stressed that its staff will not agree that any list of search terms is sufficient, and it is always the company's responsibility to produce the necessary documents in response to a Second Request.

The updated guide can be found here.

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Annual Litigation Trends Survey Highlights eDiscovery Issues

The Annual Norton Rose Fulbright Litigation Trends Survey covered numerous issues relating to eDiscovery. Of note, a full 47% of the respondents (comprised of more than 800 corporate counsel in 26 countries) reported that they had not been required to preserve or collect data from a mobile device in the past year. Further, 29% of respondents stated that in all of their cases, they primarily relied on self-preservation for ESI, and only 26% of respondents said that they relied on self-preservation in none of their cases. The survey also showed that 57% of respondents have used some form of technology-assisted review (such as predictive coding).

The full report can be found here.

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