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E-DISCOVERY UPDATE

E-discovery Update, produced by FORTÉ, Buckley's e-discovery and information governance solution, is a quarterly publication that highlights key cases and other developments in the world of electronic discovery. FORTÉ offers a smarter combination of people, processes, and technology to provide the best possible e-discovery outcomes. If you would like to learn more about FORTÉ's capabilities, don't hesitate to contact us.

IN THIS ISSUE:

Court denies sanctions request because defendant did not show the requested ESI was lost

On March 20, 2019, Judge Helen Gillmor of the District of Hawaii denied the defendant's motion for spoliation sanctions in this contract dispute between a local automobile dealership and a national distributor of automobiles.

The defendant claimed that the plaintiff and its sole owner and manager (collectively, "the counter-defendants") failed to preserve certain electronically stored information (e-mail accounts maintained by a third party and electronic dealer management system records) in violation of Federal Rule of Civil Procedure 37(e). The counter-defendants claimed no spoliation had occurred because any relevant records were available from third-parties and sanctions were not appropriate.

The judge noted that under Federal Rule of Civil Procedure 37(e), a party is subject to spoliation sanctions when it fails to take reasonable steps to preserve evidence that "cannot be restored or replaced through additional discovery" such as from other custodians.

Here, the judge found, the defendant seeking the documents had not demonstrated that the information maintained by the counter-defendants' third-party vendors was unavailable. The judge stated that the defendant "admits that it has not sought any of the discovery" from either of their vendors, and that instead the defendant "is focused on" the counter-defendants' failure to preserve the information.

Noting that the defendant could issue subpoenas within three weeks to obtain records from the third-party vendors, the judge denied the defendant's motion for spoliation sanctions.

The case is *Envy Hawaii LLC v. Volvo Car USA LLC*, Civ No. 17-00040 HG-RT (D. Hawaii Mar. 20, 2019). A copy of the opinion can be found here.

Top of Page

Court sanctions Prince bootleggers for intentionally deleting text messages

On March 5, 2019, Magistrate Judge Tony Leung of the District Court of Minnesota granted in part and denied in part the plaintiff's motion for sanctions due to spoliation of evidence and denied as moot the plaintiff's motion to compel discovery in this trademark infringement case.

The plaintiff, a representative of the estate of the musician Prince, alleged that the defendants had released tracks featuring Prince without the estate's permission. During discovery, the plaintiffs received a third-party production of text messages from a defendant to the third party. The plaintiffs then filed a motion to compel production of relevant text messages from the defendant, which the court granted on July 19, 2018. At the next meet-and-confer conference, the defendants indicated that they could not produce responsive text messages because they had not disengaged the auto-delete function on their phones and the text messages had been automatically deleted.

The court first found that the defendants had a duty to preserve the text messages, and then considered whether the defendants had an affirmative defense. The defendants maintained that their decision not to preserve the texts was reasonable, but the court stated that it was "baffled" by their arguments. In one argument, the defendants stated that they "could not possibly be expected to know" that they should preserve text messages, and that their previous lawyers had never told them to do so. The court observed that "parties are responsible for the conduct of their attorneys" and that "in the contemporary world of communications" all text messages, emails, and social media are not immune from discovery.

The court then found that in this case, the lost ESI could not be restored or replaced from any other source. It also found that the defendants acted with the intent to deprive the plaintiffs of relevant information. Thus, monetary sanctions were appropriate under Federal Rule of Civil Procedure 37(b) and (e).

The court ordered the defendants to pay the reasonable expenses, including attorneys' fees and costs, that the plaintiffs incurred as a result of their misconduct. In addition, the court ordered the defendants to pay a $10,000 fine to the court.

The court also denied without prejudice plaintiff's motion for a presumption that the evidence destroyed was unfavorable to the defendant or, alternatively, an adverse inference instruction. It chose to defer consideration of those sanctions to a later date closer to trial, given that discovery was still on-going.

The case is *Paisley Park Enterprises, Inc. v. Boxhill*, No. 17-cv-1212 (WMW/TNL) (D. Minn. Mar. 5, 2019). A copy of the opinion can be found here.

Top of Page

Defendant attempts to voluntarily dismiss counterclaim to avoid “ESI maelstrom”

On February 12, 2019, Magistrate Judge Iain D. Johnston of the District Court for the Northern District of Illinois denied the defendants’ motion for leave to remove their counterclaim for defamation *per se*, reasoning that the defendants were dropping the claim solely to avoid discovery disputes over the preservation of ESI related to that claim, and therefore could not demonstrate that good cause existed to amend the pleading.

The case arose in September 2012, when DR Distributors, LLC (“the plaintiff”) filed an action alleging trademark violations against 21 Century Smoking, Inc. and Brent Duke (“the defendants”). In October 2013, the defendants filed an answer and counterclaim alleging a variety of causes of action. In November 2014, the defendants filed a second amended counterclaim, which included a “defamation *per se*” claim (defamation *per se* refers to false statements that are considered so harmful to one’s reputation, the claimant does not have to prove damages—they are presumed). No party sought to further amend a pleading between December 2014 and February 2015.

As discovery continued, the plaintiff discovered that the defendants had lost emails and internal instant messages related to their defamation counterclaim, resulting in what Judge Johnston described as “an ESI food fight of Hollywood proportions.” Then, on October 15, 2018—nearly four years after the expiration of the amended pleading deadline—the defendants moved for leave to amend their counterclaim under Federal Rule of Civil Procedure 15 to remove their defamation *per se* claim. The plaintiff was then in the unusual position of opposing the defendants’ motion to remove the counterclaim against the plaintiff. Specifically, the plaintiff informed the court of its intention to file a brief addressing the defendants’ spoliation of relevant ESI—a brief which the court described as “longer than a CVS receipt,” which would “raise nearly every conceivable basis for sanctions.”

In denying the defendants’ motion, the court held that Rule 16—not Rule 15—applied to the motion, as the motion came after the case management order was entered. Under Rule 16, a party attempting to amend a pleading must demonstrate that good cause justifies extending the amended pleading deadline. In finding that no good cause existed in this instance, the court noted that the defendants’ defamation counterclaim was nothing more than an attempt to “avoid the ESI maelstrom on the horizon.”

The case is *DR Distributors, LLC v. 21 Century Smoking, Inc*., No. 12 CV 50324 (N.D. Ill. Feb. 12, 2019). A copy of the opinion can be found here.

Top of Page

The Sedona Conference publishes primer on social media

In February 2019, the Sedona Conference issued its second *Primer on Social Media*, which was last updated in December 2012. In this edition, the Sedona Conference described the substantial changes in social media technology and its usage since 2012, noting that the number of social media users is now in the billions, with individuals, businesses, and governments all using social media as a means to communicate with their respective audiences. Accordingly, social media has become an increasingly common subject of discovery, requiring lawyers to understand the nuances between different types of social media and the discovery issues they present.

The *Primer* begins by listing examples of platform-based social media, such as Facebook, Twitter, Instagram, and YouTube, as well as different types of messaging applications, such as over-the-top messaging (iMessages), anonymous messaging (Blind), ephemeral messaging (Snapchat), and cloud-based messaging (Slack). The *Primer* also lists less common social media, such as live-streaming video and location-based social intelligence platforms.

The *Primer* goes on to discuss the unique discovery issues posed by these emerging technologies, most common of which are relevance and proportionality concerns. For example, the *Primer* notes that courts generally reject efforts to obtain entire account data associated with an individual's social media account, reasoning that a user's *entire* account history is unlikely to contain a significant amount of relevant information. Rather, courts will often require parties seeking social media data to provide temporal and subject matter limitations, just as with other types of discovery. Other social media discovery issues covered by the *Primer* are issues related to (i) possession, custody, and control of social media accounts by different types of parties; (ii) the preservation, collection, and search obligations for social media accounts; (iii) the Stored Communications Act (which limits what companies may turn over in response to subpoenas); and (iv) reviewing and producing social media data. The *Primer* also discusses the issues posed for parties seeking social media information located in a foreign country, outlining the barriers presented by EU privacy and data protection laws and the APEC Privacy Framework and Cross-Border Transfer Guidelines.

The *Primer* concludes by describing methods for authenticating evidence gathered from social media accounts, as well as ethical considerations for attorneys seeking to use information gathered from social media as potential evidence in litigation.

The *Primer* can be located here.

Top of Page

Court orders discovery of “tagged” photos not posted directly by plaintiff

On January 24, 2019, the New York Supreme Court Appellate Division First Department unanimously reversed an order that had denied the defendant’s motion to compel access by a third party data mining company to the plaintiff’s devices, email accounts and social media accounts in order to obtain photographs and other evidence of the plaintiff engaging in physical activities.

The plaintiff was a semi-professional basketball player who claimed to have become disabled as a result of an automobile accident and had sued both the owner and the driver of the other vehicle involved in the accident. The defendant moved to compel photos posted on Facebook by users other than the plaintiff that tagged the plaintiff and depicted the plaintiff playing basketball.

In writing the opinion, Judge Adam Silvera observed, “[that the] plaintiff did not take the pictures himself is of no import. He was ‘tagged,’ thus allowing him access to them, and others were sent to his phone.” The court found that the plaintiff had not complied with his discovery obligations, and that the access sought to his devices and accounts was appropriately limited in time and in subject matter.

The case is *Vasquez-Santos v. Mathew*, 168 A.D.3d 587 (N.Y. App. Div. 2019). A copy of the opinion can be found here.

Top of Page

TAR Guidelines published by EDRM

In January 2019, EDRM published *Technology Assisted Review (TAR) Guidelines* in recognition of the growing role of artificial intelligence ("AI") in the legal profession.

The EDRM drafting team was comprised of over 50 legal practitioners, including judges, in-house counsel, outside counsel, and litigation support vendors. The guidelines, in their words, are designed to "not only demonstrate the validity and reliability of TAR but [also to] demystify the process." In the preface of the guidelines, the drafting team observes that "[t]he potential for significant savings in time and cost, without sacrificing quality, is what makes TAR most useful."

The drafting team also observes the widespread judicial acceptance of TAR as a reasonable method of review. It emphasizes that "no reported court decision has found the use of TAR invalid." Further, TAR is used by "the most prominent law firms in the world" and the DOJ, SEC, and IRS have "recognized the utility and value of TAR."

The guidelines consist of four chapters. The first seeks to define Technology Assisted Review and compare it to manual human review. The second describes the typical TAR workflow. The third suggests alternative tasks (besides responding to discovery requests) where applying TAR may be useful. Finally, the fourth lists factors to consider when deciding to employ TAR.

The drafting team states that it wrote the guidelines with the intent that "as technology continues to change, the general principles underlying the guidelines will also apply to future iterations of AI beyond the TAR process."

A separate drafting team of 15 federal judges and 75-100 practitioners and experts seek to deliver a separate "best practices" to accompany the guidelines. The "best practices" are intended to provide a protocol on whether and under what conditions TAR should be used. The first draft of the "best practices" is expected in the summer 2019.

The publication is *Technology Assisted Review (TAR) Guidelines* (January 2019) and may be accessed here.

Top of Page

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