



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 declines to sanction overt spoliation when other evidence provides similar information

On April 9, 2018, Chief District Court Judge Clay D. Land of the U.S. District Court for the Middle District of Georgia issued an order rejecting the plaintiff's request for spoliation sanctions. Under Judge Land's ruling, "even if" the defendant "did wrongfully fail to preserve" the evidence, the existence of another type of evidence providing similar information meant there was no "uncurable prejudice" and that "the practical importance of [the destroyed evidence] is low."

The dispute stems from a roadway accident in which a tractor trailer associated with FedEx ran off the road. The plaintiff was parked in an emergency lane helping a disabled driver when the veering truck struck the plaintiff's car and injured the plaintiff. The plaintiff requested data from Omnictracs, a system containing information on the status of FedEx truck drivers such as when they sleep, drive, stay on-duty without driving, or go off-duty. Such data would potentially have assisted with the plaintiff's personal injury claims. In discovery, it became clear that FedEx had failed to preserve the relevant Omnictracs data, allowing the system to automatically erase the data after 180 days. However, another system used by FedEx, Pro Detail, tracks driving time of FedEx drivers using GPS, and FedEx had successfully preserved the relevant Pro Detail data.

The fact of FedEx's failure to preserve relevant data was not in dispute; indeed, the court stated that "FedEx's risk and legal departments did not instruct Omnictracs to preserve" the data. The court considered five factors when determining whether to award sanctions for spoliation: (i) whether the plaintiff was prejudiced; (ii) whether the prejudice is curable; (iii) "the practical importance" of the destroyed data; (iv) the good or bad faith of the relevant actor; and (v) "the potential for abuse if sanctions are not granted."

With the availability of the GPS data for the driver, the court held that the "severe" sanctions requested by the plaintiff (either to strike FedEx's answer or prohibit FedEx from contesting the plaintiff's evidence on liability and punitive damages) were not warranted in this case. In a footnote, the court conceded that the substitute data did not indicate time when the driver was on-duty but not driving. But "[b]ased on the present record, **it would have been rare** for a truck driver like Kelly" to have been on-duty but not driving for long enough to violate the regulation at issue. (Emphasis added.) The court declined to issue sanctions.

The case is *Barrett v. FedEx Custom Critical, Inc.*, No. 3:17-CV-62 (CDL) (M.D. Ga. Apr. 9, 2018). A copy of the opinion can be found [here](#).

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Court refuses to award 20 U.S.C. Section 1920 costs for use of a database because using the database is not “printing”

On May 4, 2018, Magistrate Judge David L. Horan of the U.S. District Court for the Northern District of Texas rejected an attempt by the defendants to claim the costs of creating and maintaining a database of digital documents under 20 U.S.C. Section 1920. Under Judge Horan’s ruling, such activities are not “printing” under the statute and therefore may not be reimbursed.

Under 20 U.S.C. Section 1920(3)-(4), any federal court has the power to tax as costs “fees and disbursements for printing,” and “the costs of making copies of any materials where the copies are necessarily obtained for use in the case.” Regarding the Section 1920(3) argument that such fees amounted to “printing,” Judge Horan held that Congress did not intend for “printing” to cover electronic databases, and similarly refused to reimburse the defendants for the cost they would have incurred had they printed the contents of the database in hard copy. Under the court’s analysis, a 2012 Supreme Court case (*Taniguchi v. Kan Pacific Saipan, Ltd.*) required the court to narrowly interpret Section 1920’s use of the word “printing.” Regarding the Section 1920(4) argument that loading documents to the electronic database amounted to “making copies,” the court held that the defendants failed to show that the copies were “necessarily obtained for use in the case.” In support of his position, Judge Horan quoted the Ninth Circuit:

A lawyer may review electronically stored information for privilege either by viewing the original documents on the client’s computer or, alternatively, by viewing copies uploaded to the lawyer’s computer. Although the latter method of review requires the creation of a copy, **the ability to conduct the review by looking at the original document establishes that the uploaded copy was not necessarily obtained for use in the case.** (Emphasis added.)

Judge Horan wrote further, “Defendants’ choosing to proactively gather any and all relevant and discoverable materials and copy them onto an electronic database for potential production in discovery—**although perhaps efficient, convenient, and cost-conscious**—does not automatically render the copying of such materials taxable under Section 1920(4) without further explanation.” (Emphasis added.)

The case is *Gonzales v. Pan Am. Labs., LLC*, No. 3:14-cv-2787-L (N.D. Tex. May 4, 2018), *report and recommendation adopted*, No. 3:14-cv-2787-L (N.D. Tex. May 22, 2018). A copy of the opinion can be found [here](#).

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Court disagrees with “quick peek” caselaw, orders special master to review privilege designations

On May 10, 2018, Magistrate Judge Katharine H. Parker of the Southern District Court of New York denied the plaintiffs’ motion for a compelled “quick peek” at approximately 3,300 documents on the defendant’s privilege log. In doing so, the magistrate judge declined to follow *Fairholme Funds, Inc. v. United States*, No. 13-465 (Ct. Fed. Cl. Oct. 4, 2017) (summarized in the [January 2018 edition](#) of the Buckley Sandler eDiscovery Newsletter).

Under Federal Rule of Evidence 502(d), a “quick peek” allows the parties to produce documents without engaging in a privilege review, but without waiver of privilege or work product protection, as a way to avoid the excessive costs of full privilege review and disclosure when large numbers of documents are involved.

The plaintiffs had raised concerns about the defendant’s deliberative process privilege designations, and the court had directed the plaintiffs to identify a subset of 80 documents out of the roughly 3,300 documents listed on that log that had been withheld on the basis of deliberative process privilege. The court also had ruled that the defendant would have an opportunity to re-review the 80 document subset.

The defendant re-reviewed the subset and subsequently produced 51 of those 80 documents, leading the court to order the defendant to turn over all 80 documents for *in camera* review. That review led to a decision ordering the defendant to produce certain documents from the sample set, and the court directed the defendant to re-review all of its privilege designations, after which the defendant de-designated even more documents as privileged and produced them.

At a subsequent case management conference, the plaintiffs raised a concern that the defendant still was designating as privileged a large number of documents. Two weeks later, the plaintiffs proposed that the Court allow them a “quick peek” of 3,300 documents that had been withheld on the basis of privilege, citing *Fairholm Funds*.

Judge Parker respectfully disagreed with the court in *Fairholm Funds* for “a number of reasons.” She noted that FRE 502(d) “authorizes a court to issue an order *protecting* privilege—it does not create an exception to the law of privilege or authorize a court to compel disclosure of privileged information.” (Judge’s italics). Also, Judge Parker found the Rules Enabling Act (28 U.S.C. § 2072) explicitly prohibits the U.S. Supreme Court from prescribing rules of evidence that abridge, enlarge, or modify any substantive right, including any privilege.

Judge Parker further found that FRE 502(d) solely addresses attorney-client and work product privileges; it does not address the deliberative process privilege. Finally, to the extent the court in *Fairholme Funds* justified its order on the ground that it did not have the time or resources to conduct an *in camera* review, Judge Parker opined that “it did so in complete disregard of Federal Rule of Civil Procedure 33.” That rule allows for the appointment of a special master, and the Advisory Committee Notes to that rule explicitly contemplate “reviewing discovery documents for privilege.”

The court denied the plaintiffs’ motion and proposed the appointment of a recently-retired magistrate judge to conduct an *in camera* review of the 3,300 documents, pending any conflict-of-interest issues or other suggested candidates by the parties. A special master has been appointed, but the review has been suspended pending a motion for an extension of time.

The case is *Winfield v. City of New York*, No. 15-CV-05236 (S.D.N.Y. May 10, 2018). A copy of the opinion can be found [here](#).

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Court orders parties to meet and confer again, and to file a joint letter with result

On May 17, 2018, United States District Judge Edward M. Chen of the Northern District of California ordered parties to meet and confer a second time on the basis that the parties had not adequately met and conferred the first time in an effort to resolve their discovery dispute.

The court observed that the plaintiffs had a duty to preserve information on electronic devices once they each reasonably anticipated the litigation, but such data on the electronic devices was continuously overwritten by routine use. The plaintiffs indicated that they did not want to disrupt their businesses by not using those electronic devices. In an effort to accommodate the plaintiffs' concern, the defendants had moved to image the plaintiffs' devices. The court had granted the defendants' motion in part, allowing forensic imaging of a sampling of those devices "at no monetary cost to [p]laintiffs." Further, the court had ordered the parties to meet and confer regarding preservation of data on some of the plaintiff's electronic devices by imaging, and to report back on the results of that conference by May 15, 2018.

A day before that deadline, the plaintiffs filed a letter objecting to the proposed imaging, arguing among other things that they would be deprived of the ability to use their devices while they were being imaged. A day after the court's May 15 deadline, the defendants filed a letter asking for more time to respond to the plaintiffs' letter, stating that a "full and complete" meet and confer had not taken place.

The court found that the ordered meet and confer had not adequately taken place, and ordered the parties to further meet and confer before filing a joint letter reporting back on the result. The court suggested that the plaintiffs' expert do the imaging, as long as that expert's fee was reasonable.

The court ordered that the parties file the joint letter by May 24, 2018. If there were any remaining discovery disputes at that time, then the parties were to state in the joint letter "what each dispute is, the last offer of compromise made by each party regarding that dispute, and what each party's position is on the dispute." The court indicated that any party taking an "unreasonable or unwarranted" position would risk sanction.

On May 24, 2018, the parties filed the joint letter outlining their agreement to forensically mirror up to seven of the plaintiffs' devices by the plaintiffs' expert. No disputes were indicated.

The case is *John Finkelstein, et al. v. San Mateo County District Attorney's Office, et al.*, Case No. 18-cv-00009-EMC (N.D. Cali. May 17, 2018). A copy of the opinion can be found [here](#).

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Court rejects both parties' search terms as over-inclusive and not proportional

On June 4, 2018, Magistrate Judge Elizabeth A. Preston Deavers of the U.S. District Court for the Southern District of Ohio, when addressing each party's proposed search terms, rejected both lists, citing burden and proportionality concerns.

The court held that the defendant's terms were unworkably broad and comprised of merely the names of the four projects at issue in the dispute. The proposed search terms would "significantly increase" the cost of discovery for the plaintiff, including a privilege review that alone was estimated to cost \$100,000 to \$125,000. It further held that the plaintiff's search terms were overly complicated, relying on employee names and common construction and mechanical terms combined with Boolean connectors to attempt to screen out irrelevant projects. In the court's view, both proposals were overly inclusive and lacked proportionality to the needs of the case.

The court's order was a flat rejection of both approaches. Neither the parties nor the court suggested alternatives, such as any other form of technology-assisted review. The court scheduled a July 31, 2018 status conference at which time the parties could propose new discovery plans.

The case is *Am. Mun. Power, Inc. v. Voith Hydro, Inc.*, No. 2:17-CV-708 (S.D. Ohio June 4, 2018). A copy of the opinion can be found [here](#).

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Court grants motion for protective order from overly broad search terms request

On June 29, 2018, Magistrate Judge R. Steven Whalen of the Southern Division of the Eastern District Court of Michigan issued a protective order in a patent case, where the plaintiffs had requested relief from “unduly burdensome email discovery.”

The parties, all of whom manufacture both automobile roofs and roof-opening mechanisms for convertibles, had entered into a stipulated order governing the production of electronically stored information (“the ESI Order”). Under the ESI Order, each requesting party had to limit its email production requests to eight custodians as well as a total of ten search terms per custodian. Furthermore, the ESI Order provided that the search terms had to be “narrowly tailored to particular issues” and could not include company names or product names.

The defendant’s proposed search terms included the product names of plaintiff Webasto, which the court found to facially violate the ESI Order. Moreover, the defendant proposed search terms such as “Sale” (including as part of the word Sales), “Top,” “Fabric,” “Fold,” and “Drawing” (or dwg in the alternative).

Webasto attached to its motion the declaration of its attorney stating that it attempted in good faith to perform the defendant’s searches, and the volume of ESI returned for three of its custodians was 30 gigabytes, 13 gigabytes, and 10 gigabytes.

Webasto later attached to its reply brief the declaration of its attorney stating the number of individual records returned under the defendant’s proposed terms for five of its custodians: 118,336 documents, 44,373 documents, 44,460 documents, 245,109 documents, and 162,067 documents. Webasto’s attorney also stated that he reviewed the first 100 records in Webasto’s pre-production database and found that none of them were responsive or relevant to the case. He further stated that he had reviewed several emails involving persons with the word “Sales” in the job title of their email signature.

The district court noted that “individual records may contain multiple pages each” and cited Webasto’s declaration that the search terms had returned more than 614,000 documents “comprising potentially millions of individual pages for production.” The court found that many of the search terms were overbroad, and noted that “[u]sing ‘dwg’ as an alternative designation for ‘drawing’ (which is itself a rather broad term) would call into play files with common file extension .dwg.”

The court granted the plaintiffs' motion for a protective order, ordering the parties to meet and confer in a good-faith effort to reasonably limit ESI production and to submit an amended discovery request. The court denied the plaintiffs' motion for cost-shifting because of the opportunity the defendant had to reformulate its discovery request, but indicated it would reconsider the issue if the defendant did not reasonably narrow its requests.

The case is *Webasto Thermo & Comfort North America, Inc. v. BesTop, Inc.*, No. 16-13456 (E.D. Mich. June 29, 2018). A copy of the opinion can be found [here](#).

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Sedona Conference publishes July 2018 public comment version of *Primer on Social Media, Second Edition*

The [Sedona Conference](#), a nonprofit “dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights,” has recently released an updated, July 2018 public comment version of its 2012 *Primer on Social Media*.

The original *Primer on Social Media* provided guidance on handling social media in the context of corporate governance and litigation. Dramatic changes in social media platforms and technology, as well as the related rules and laws governing their use, spurred Working Group 1 on Electronic Document Retention & Production of the Sedona Conference to update the publication.

The public comment version provides guidance for addressing the most common discovery challenges associated with social media. It provides an overview of the emerging technologies for social media, and the legal considerations in various contexts and stages of the discovery process.

Although social media is a dynamic field with ever-shifting technological considerations, the guidance focuses on two familiar concepts in approaching eDiscovery challenges: cooperation and competency.

First, the Working Group urges parties to cooperate early and often when confronted with novel social media issues “to develop reasonable steps for identifying and handling difficult social media preservation and collection issues.” Even if discussions between counsel are ultimately unsuccessful at a Rule 26(f) discovery conference, the parties will have at least “framed the issues for further consideration and possible resolution by the court at the FRCP 16 scheduling conference.”

Second, the Working Group reminds lawyers of their ethical duty of competence, which includes keeping current with “the benefits and risks associated with relevant technology.” Lawyers are therefore advised to either outsource the technological expertise, or to “stay abreast of ongoing technological and legal developments to ensure continued understanding of the issues surrounding discovery of social media.”

Both versions of the document are available for download free of charge [here](#).

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iPhone USB Restricted Mode poses new challenge for forensic tools and electronic collection

On July 9, 2018, Apple released an iPhone update pushing out a new feature: USB Restricted Mode. The update, labeled iOS 11.4.1, ostensibly helps users prevent law enforcement from using tools like Cellebrite and [GrayKey](#) to unlock a confiscated iPhone.

According to articles on [The Verge](#) and [Motherboard](#), law enforcement has the ability to bypass the iPhone's limitations on the number of incorrect passwords allowed before the phone completely locks down (or erases itself) using specialized software via USB connection. Law enforcement attach an external device through the locked iPhone's lightning port, use the software to make an unlimited number of failed attempts to guess the phone's password, and eventually gain access to its data. This new USB Restricted Mode puts a clock on that process; after the iPhone is locked for one hour, USB Restricted Mode activates and prevents the phone from connecting to USB accessories. Law enforcement is therefore left with only sixty minutes in which to transport a confiscated phone to a location with the equipment necessary to crack the iPhone's password.

However, the internet is already churning out workarounds. In a [post](#) to ElcomSoft blog, Oleg Afonin describes how to disable the countdown and avoid the activation of USB Restricted Mode long enough to get the iPhone back to a lab for processing and data extraction.

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Second Circuit finds that attorney-client privilege and confidentiality order outweighs proportionality concerns in reversing order to subpoena documents for foreign proceeding

On July 10, 2018, the United States Court of Appeals, Second Circuit reversed the order of the United States District Court for the Southern District of New York, where the district court had granted appellee's petition to subpoena documents from the appellant law firm.

The law firm represented a Netherlands-based client whom the appellee had sued in prior litigation. In the course of that matter, the U.S. law firm had come into possession of certain client documents that had been sent to the United States solely for the purpose of the American litigation under a stipulated confidentiality order. Eventually, the suit was dismissed because it was found that United States courts lacked jurisdiction.

The appellee subsequently brought another action against the law firm's client, this time in the Netherlands. The appellee also petitioned the district court to subpoena the documents held by the law firm under 28 U.S.C. § 1782 to aid in her litigation in the Netherlands.

Section 1782 provides federal-court assistance in gathering evidence for use in foreign tribunals and allows a district court the discretion to order a person (including a law firm) to give testimony or provide documents. However, that person may not be compelled to take such action "in violation of any legally applicable privilege." Moreover, the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) has discussed four non-exclusive factors to be considered in granting a petition under § 1782 ("the Intel factors").

The four Intel factors are:

1. whether the person from whom discovery is sought is a participant in the foreign proceeding (if not, that weighs in favor of granting the § 1782 petition);
2. the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance;
3. whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and
4. whether the request is unduly intrusive or burdensome.

The district court had granted the motion to compel by applying the Intel factors. It had found that (1) the law firm was not a party in the Dutch litigation, (2) there was no evidence that the Netherlands courts would be unreceptive to U.S. discovery, (3) the requested documents were likely to be discoverable under Dutch law, and (4) the production would be minimally burdensome for the law firm. In addition to the Intel factors, the district court also determined that not all of the requested documents were likely to be in the Dutch client's possession more than a decade after the litigation had begun in the United States.

The law firm argued that the district court lacked jurisdiction to grant the petition, and that in any event it was an abuse of discretion to do so. The Second Circuit held that the district court had correctly determined that it possessed jurisdiction over the appellee's petition, because the elements for personal jurisdiction were satisfied. However, the Second Circuit also held that the district court had abused its discretion under § 1782. It stated that under existing precedent, when the "real party from whom documents are sought" (here, the Dutch client) is involved in foreign proceedings, the first Intel factor counsels against granting a § 1782 petition seeking documents from U.S. counsel for the foreign company.

Noting that the Intel factors were non-exclusive, the Second Circuit found that the district court did not give the confidentiality order proper weight, and had not taken into account attorney-client privilege concerns. Citing a case it had decided in 1997, the Second Circuit ruled in favor of the law firm because granting the motion to compel would jeopardize "the policy of promoting open communications between lawyers and their clients."

The Second Circuit reversed the order of the district court and remanded for the district court to revise its order.

The case is *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, No. 17-424-CV (2nd Cir. 2018). A copy of the opinion can be found [here](#).

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