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.

IN THIS ISSUE:

Court issues order compelling targeted production of legacy platform ESI

On December 6, 2018, Justice Joan Madden of the Supreme Court of the State of New York denied a defendant's motion for a protective order and granted the plaintiff's cross-motion to compel the production of targeted metadata in his medical records.

From May 8, 2014 to July 29, 2014, the plaintiff stayed at the defendant's facility for rehabilitation, and allegedly developed serious physical ailments as a result of a lack of proper treatment. Before litigation, the plaintiff received a version of his electronically-stored medical records from the defendant indicating that on the date of his check-in, under the heading "Physician Progress Note" the item "Pressure Ulcer" had been checked "No." During discovery, the plaintiff received subsequent conflicting versions of his electronically-stored medical records, including one version where that item had been checked both "No" and "Yes," and another version where that item had not been checked at all.

The plaintiff moved to compel production of the audit trail and metadata of his medical records, spanning the period from the 2014 check-in to mid-2018. The defendant's records vendor submitted an affidavit stating that (1) it had already produced a complete audit trail, and (2) the defendant uses an off-site legacy storage system that has "long been discontinued" and that it would cost approximately $250,000 to produce the requested metadata.

A systems administrator employed by the plaintiff's law firm disputed that the defendant's produced audit report was complete, pointing out that the "record was accessed to print this law firm a copy of the medical record pre-suit and there is no such log of that accession." The systems administrator also stated that with respect to the $250,000 estimate, limiting the metadata search and production to just the content in the "Physicians Progress Notes" field would be "acceptable and satisfactory to identify the origin of the changes to [the plaintiff]'s medical records."

The court found that the plaintiff made a sufficient showing for the production of metadata, and that the defendant had not yet provided a credible explanation for the different and conflicting versions. Indeed, the defendant's counsel at oral argument had "improbably suggested" that the check had "migrated" from the "No" box to the "Yes" box.

The court ordered that the metadata be limited to the "Physician Progress Notes" heading during the three-month period of plaintiff's stay. The court also ordered that if the defendant failed to comply with that order, then the medical records at trial would be limited to the version produced pre-suit.

The case is *Miller v. Sauberman,* 2018 N.Y. Slip Op. 33142(U) (N.Y. Dec. 6, 2018). A copy of the opinion can be found here.

Top of Page

Jimi Hendrix can set his guitar on fire, but court says his trademark infringers cannot spoliate

On November 28, 2018, District Judge Paul A. Engelmayer of the Southern District of New York granted plaintiffs' motion for an adverse inference instruction.

The plaintiffs are the successors-in-interest to the estate of legendary rock guitarist Jimi Hendrix. They sued the defendants for trademark infringement, alleging the defendants had unlawfully used Mr. Hendrix's likeness to sell various products and services.

In issuing its opinion, the court observed that it already "had been called on repeatedly" to issue orders designed to ensure the defendants' ongoing compliance with "elementary discovery obligations." The defendants had:

- Failed to identify non-produced devices, such as tablets and cell phones, that contained relevant ESI;
- Failed to produce forensic images as ordered by the court;
- Used anti-forensic software to delete relevant ESI;
- Failed to preserve ESI on a specific computer; and
- Intentionally deleted relevant text messages.

The court found that spoliation had occurred, and that the spoliation had been intentional. The court then considered issuing sanctions under Federal Rule of Civil Procedure 37. In its "firm conclusion," the court reasoned that "no lesser sanction" than both the adverse inference instruction and an order awarding plaintiffs the costs for bringing the spoliation motions "would adequately remedy plaintiffs' injury."

The court also considered the plaintiffs' motions for terminating sanctions (i.e., default judgment or dismissal on one or more issues or the entire case) and a preliminary injunction, but declined to grant those motions. It reasoned that this was not the "rare case" deserving of terminating sanctions—yet—and that it was not yet in a position to adequately assess plaintiffs' trademark infringement claims in order to issue any injunction.

The case is *Experience Hendrix, L.L.C. et al. v. Pitsicalis et al.*, 17 Civ. 1927 (S.D.N.Y. Nov. 28, 2018). A copy of the opinion can be found here.

Top of Page

Court orders defendants to review random sample of search term hits

On October 11, 2018, Magistrate Judge Laurel Beeler of the Northern District of California ordered defendants to review a random sample of documents containing a disputed search term to determine if the remaining documents containing the term should similarly be reviewed for responsiveness.

In the litigation, the plaintiff alleged that the defendants stole its cell-phone app's platform and released a copycat app. During the course of discovery, the plaintiff contended that it recently learned that the defendants utilized the term "Ajax" to refer to the plaintiff's company and demanded that the defendants run searches for the term in its document collection and produce any resulting responsive documents. The defendants represented that the term referred to the threatened litigation rather than the plaintiff. The defendants also represented that there were approximately 5,100 unique documents containing the term and that reviewing all of them would be unduly burdensome.

Rather than order a full review of the search term hits, Judge Beeler ordered the defendants to review 10% of the previously unreviewed search term hits within a week to determine the responsiveness rate within the sample, and thus the effectiveness of the search term in identifying responsive documents. The defendants were also required to produce any responsive documents in the sample, produce a privilege log for any withheld documents, and disclose the responsiveness rate in the sample. Following the process, the parties were required to meet and confer on any remaining dispute concerning the documents at issue. Ultimately, subsequent meet and confers were not necessary, as the case was dismissed on November 16, 2018.

The case is *Updateme Inc. v. Axel Springer SE*, No. 17-cv-05054-SI (LB) (N.D. Cal. Oct. 11, 2018). A copy of the opinion can be found here.

Top of Page

Magistrate judge recommends sanctions for failure to institute effective document preservation hold

On October 4, 2018, Magistrate Judge Jeffrey Cole of the Northern District of Illinois issued a report and recommendation to sanction a defendant for failure to institute an effective ESI preservation hold, and recommended that the plaintiff in the case be permitted to present evidence to the jury about the defendant's failure to preserve evidence.

The discovery dispute arose out of the plaintiff's request for all email and text messages exchanged between certain individuals that mention or concern the plaintiff. In particular, the plaintiff was seeking instant messages that were allegedly used to harass the plaintiff. While the defendant initiated a preservation hold after the plaintiff threatened litigation, no in-house or outside attorney oversaw the preservation efforts. Instead, the hold consisted mostly of vague instructions to employees to preserve documents and ESI concerning the plaintiff. Moreover, no efforts were made to specifically preserve instant messages.

The judge found that the defendant's failure to preserve evidence at least demonstrated "gross negligence" and that sanctions were warranted. However, the judge declined to grant a sanction that would have barred defendant from contesting the plaintiff's contention that the instant messages were harassing and discriminatory. Instead, the magistrate judge recommended a "missing evidence instruction" to be fashioned by the district court judge at trial.

On November 7, 2018, District Judge Marvin E. Aspen adopted the magistrate judge's report and recommendation. Specifically, the district judge ordered that the parties would be allowed to present evidence and argument to the jury regarding defendant's obstruction or failure to preserve electronic evidence. The judge also indicated that he would consider "appropriate jury instructions regarding this evidence at trial."

The case is *Franklin v. Howard Brown Health Ctr.*, No. 17 C 8376 (N.D. Ill. Oct. 4, 2018). A copy of the opinion can be found here.

Top of Page

Court finds that failure to preserve surveillance video does not merit sanctions

On September 27, 2018, District Court Judge Dabney L. Friedrich of the District Court for the District of Columbia denied a motion for sanctions against George Washington University ("GW") for allegedly destroying two surveillance videos in a wrongful termination case.

GW argued that the surveillance videos were destroyed in the normal course of business before the duty to preserve arose and explained that its video recorders automatically delete old footage as the recorders become full, typically between 14 and 30 days after the footage is recorded. The plaintiff claimed that GW must have downloaded the footage at issue during the Human Resources investigation that led to his firing and that therefore GW should be sanctioned for failing to preserve the videos.

The court considered the motion for sanctions in the context of Federal Rule of Civil Procedure Rule 37(e), which places the burden on the party alleging spoliation and requires the court to consider whether (1) the ESI "should have been preserved in the anticipation or conduct of litigation"; (2) the ESI "is lost because a party failed to take reasonable steps to preserve it"; and (3) the ESI "cannot be restored or replaced through additional discovery." The court concluded that because the evidence of spoliation was unclear, the plaintiff had failed to carry his burden of establishing sanctions were warranted.

The case is *Ball v. George Washington Univ.*, No. 17-cv-0507 (DLF) (D.D.C. Sept. 27, 2018). A copy of the opinion can be found here.

Top of Page

Court orders party to execute releases for documents held by non-parties

On September 17, 2018, Magistrate Judge Charles S. Miller, Jr. of the District of North Dakota issued an order granting in part and denying in part defendants' motion to compel discovery, including ordering plaintiff to execute releases for records held by non-parties.

The court recounted the diverging views on the question of whether a court has authority to compel a party to sign releases necessary for release of records held by non-parties. Some courts have found no such authority due to the lack of express authorization in Federal Rule of Civil Procedure 34. On the other hand, other courts have found that Rule 34 may be read expansively to permit such authority because it provides for the inspection of documents under another party's control even if those documents are not necessarily in its possession. Meanwhile, there is a lack of Circuit Court precedent directly on point and a difference of opinions exists even within the same district court. In describing the opposing view on the "possession, custody, or control" issue, the judge noted that it may be time to revisit the drafting of Rule 34 to specifically resolve this issue.

Ultimately, the judge concluded that the court held such authority and ordered the plaintiff to sign releases for marital counseling, Social Security disability benefits, disability insurance, and mental health records. As an alternative, the court held that the plaintiff may herself obtain these records and produce the responsive documents.

The case is *Scott v. City of Bismark.*, No. 1:17-cv-059, -- F.R.D. -- (D.N.D. Sept. 17, 2018). A copy of the opinion can be found here.

Top of Page

Court sanctions law firms for discovery gamesmanship

On September 7, 2018, District Court Judge Thomas S. Zilly of the Western District of Washington sanctioned two law firms for attempting to take advantage of improper service of discovery responses by the adverse party.

The law firms had filed a motion for partial summary judgment on behalf of their client, the plaintiff, claiming that the defendant had missed a discovery deadline by virtue of failing to serve its responses to requests for admission by acceptable means when it served its responses via email, because the parties had not formally agreed to service via email under Federal Rule 5(b)(2)(E). The law firms argued that the requests for admission were therefore deemed admitted, including some on the ultimate questions at issue in the litigation.

The court rejected the law firms' arguments as frivolous, noting that the defendant timely served its responses even if the manner of service was improper. Further, the court observed that even if the plaintiff had not consented to email delivery, the plaintiff had not been prejudiced. The court ruled that the defendant would be given the opportunity to cure service, obtain an extension to the deadline, or withdraw any admissions pursuant to Federal Rule of Civil Procedure 36(a)(3) & 36(b). The court found that plaintiff's counsel had tried to use a "misunderstanding" as to how the discovery requests and responses would be exchanged as a weapon in litigation "contrary to the letter and spirit of the Federal Rules of Civil Procedure and the local rules and the practices of this district." The court reminded the parties and counsel that it "expects them to act reasonably and cooperatively in the discovery process and to comport themselves in a professional and courteous manner."

The case is *Nirp Pasadena, PLLC and NIRP Sugar Land, PLLC v. Medstreaming, LLC*, No. 2:17-cv-01607 (W.D. Wa. Sept. 7, 2018). A copy of the opinion can be found here.

Top of Page

Court grants adverse inference from defendant's failure to preserve evidence

On August 9, 2018, Magistrate Judge Peggy A. Leen of the District of Nevada issued a lengthy ruling granting an adverse inference instruction as a sanction against the defendant for failure to preserve evidence.

The case arose in 2012 as a class action of employees of University Medical Center ("UMC") over unpaid wages and overtime compensation and followed a two-year Department of Labor investigation over the same issues. The court appointed a special master after the defendant repeatedly failed to produce ESI responsive to the plaintiffs' discovery requests.

After it conducted a de novo review of the special master report, the court agreed that the defendant had committed multiple discovery violations through failing to preserve evidence. The court was "astonished" by UMC's objection that it did not know what to preserve. Citing the Advisory Committee notes to the 2015 amendment of Federal Rule of Civil Procedure 37(e), the court reminded UMC and its counsel that they "had a legal duty to figure this out." The court continued:

"It is simply not an option to fail to learn how to address the technical issues related to preservation, collection, and production of ESI. Even the old dogs of the federal judiciary must learn new tricks. We no longer communicate with quill pens and paper. We no longer store most information on paper. We file lawsuits electronically. We do research electronically. We keep track of what is going on in the world electronically."

The court found that "UMC and its counsel failed to conduct an adequate investigation to determine which employees were likely to have discoverable information, and where that information was stored." It also found that the defendant and its counsel failed to implement a document preservation policy despite pending litigation. It concluded that the defendant consequently modified, lost, or deleted numerous ESI responsive to the plaintiffs' discovery requests, including from mobile devices.

In addition to the adverse inference instruction, Magistrate Judge Leen also granted monetary sanctions in the form of reasonable costs and attorneys' fees unnecessarily incurred by the plaintiffs as a result of the discovery violations. She rejected the more drastic sanction of default judgment recommended by the special master who investigated the discovery violations.

The case is *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL (D. Nev. Aug. 9, 2018). A copy of the opinion can be found here.

Top of Page

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