



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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In a malpractice suit brought by former client, court holds counsel negligent for failure to institute a legal hold and to monitor discovery compliance

On January 2, 2018, Judge Edgardo Ramos of the Southern District of New York granted and denied in part parties' cross motions for summary judgment. The court sided with the plaintiffs that their former counsel had a duty to advise and explain to their clients their obligations to retain pertinent documents, even though defense counsel was not retained until two years after the duty to preserve arose. The court, however, dismissed the plaintiffs' claims regarding the counsel's conduct at a spoliation hearing, holding that it amounted to second guessing counsel's strategy.

The claim arises from a prior copyright infringement action filed in April 2002, for which the plaintiffs hired their litigation counsel in January 2003, with discovery commencing in April 2003. The plaintiffs had received a cease-and-desist letter regarding the alleged infringement six months prior to the lawsuit's filing.

In the course of responding to the discovery requests in the copyright action, the plaintiffs destroyed relevant documents. In November 2003, a former employee of plaintiffs informed the opposing party (their competitor) that she and her colleagues had removed relevant documents from plaintiffs' files. The competitor then moved for an order to show cause pursuant to Rule 37 to strike the plaintiffs' pleadings because the plaintiffs had intentionally destroyed relevant documents. The court held a spoliation hearing and entered a default judgment on liability against the plaintiffs, who ultimately reached a \$2.5 million settlement on damages.

Following the settlement of the copyright infringement suit, the plaintiffs sued their defense counsel for malpractice, asserting that the defendants negligently failed to render competent legal services by (i) failing to advise them regarding the discovery process and (ii) failing to offer an adequate defense at the subsequent spoliation hearing.

With respect to the first allegation, the plaintiffs argued that the defendants acted negligently by failing to issue a litigation hold, neglecting to inform the plaintiffs that destroying relevant documents was improper, and failing to otherwise monitor compliance with discovery rules.

In response, the defendants advanced two primary arguments. First, they argued that they were not negligent as a matter of law because they had no duty to advise the plaintiffs of their obligation to preserve documents because they were hired almost two years after the plaintiffs had received the

cease and-desist letter, which had already put them on notice of their duty to preserve. Second, the defendants advanced a factual dispute that they had issued an “oral litigation hold” at some point in early 2003 at the parties’ initial meeting and had advised the plaintiffs about responding to the discovery requests.

The court disagreed with the premise that attorneys do not owe their clients a duty to institute a litigation hold or oversee compliance with preservation obligations once a client has been made aware of potential litigation: “the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation.” The court further noted that courts in the Second Circuit have construed counsel’s obligation to include both the “litigation hold as well as overseeing compliance with the litigation hold, and monitoring the client’s efforts to retain and produce relevant documents.” Applying this standard, the court held that the conduct alleged by the plaintiffs would constitute attorney negligence and falls “below the ordinary and reasonable skill possessed by members of the legal bar.” But the court also determined that there was genuine dispute of material fact as to whether the defendants ever issued a litigation hold or properly oversaw the plaintiffs’ compliance with discovery demands.

With respect to the second allegation, the plaintiffs contended that their former counsel negligently rendered legal services at the subsequent spoliation hearing by failing to offer an adequate defense to the claim that plaintiffs intentionally destroyed documents. Specifically, they argued that, among other things, their counsel (i) failed to effectively argue that most documents were destroyed prior to the cease-and-desist letter; (ii) erroneously stipulated to facts without first consulting the client; and (iii) improperly recommended that the client waive attorney-client privilege with respect to advice given in connection with the 2003 document discovery. The court rejected plaintiffs’ arguments as irrelevant, or as merely second guessing counsel’s reasonable trial strategy.

The court denied the plaintiffs’ motion for partial summary judgment, granted in part and denied in part the defendants’ motion for summary judgment, and directed the parties to appear for a status conference on April 18, 2018.

The case is *Industrial Quick Search, Inc. v. Miller, Rosado & Algois, LLP*, No. 13-CV-5589 (ER) (S.D.N.Y. Jan. 2, 2018). A copy of the opinion can be found [here](#).

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Court denies motion to compel the identification of additional custodians and relevant documents in plaintiffs' quest for perfect discovery

On January 3, 2018, Magistrate Judge Erin Wilder-Doomes of the Middle District of Louisiana denied the plaintiffs' renewed motion to compel discovery, which the court determined to be unreasonable and disproportionate.

The discovery dispute in this \$100 million pension investment loss case stems from the plaintiffs' objection to the custodians that the parties had previously agreed to. Although the plaintiffs did not assert that any specific custodian should be added to the agreed-upon list, they argued that the defendants should (i) email a questionnaire to every employee of every defendant entity to determine who has "personal knowledge of the issues in this lawsuit"; (ii) "respond completely and accurately to [a set of interrogatories] to determine whether the custodian list on which the electronic searches were based were in fact complete, comprehensive, and accurate"; and (iii) search (a) "the individual business and personal computers of persons having personal knowledge," (b) the networks and hard copy documents of the defendant and its subsidiaries "in which a positive response is received from their employee in response to the proposed email questionnaire," and (c) "all company networks of companies which employ attorneys listed on the [defendants'] privilege log."

Denying the motion to compel, the court held that the plaintiffs' request was unreasonable and amounted to putting the defendants back to "square one" in their discovery responses. The court reasoned that plaintiffs did not meet their burden to show that the identified custodians were unreasonable, nor did they identify additional proposed custodians after the defendants expressed willingness to discuss the issue.

Finally, the court noted that such an undertaking by itself would be unduly burdensome and raised proportionality concerns – the defendant would have to search the files of 235 affiliates and subsidiaries, amounting to 170 terabytes of emails. The court reasoned that the defendants had no duty to "ensure that every single potentially responsive document ... should be produced." The court cited to other decisions holding that "there is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files, and in an era where vast amounts of electronic information is available for review, courts cannot and do not expect that any party can meet a standard of perfection" and found that the defendants made reasonable efforts to identify appropriate custodians and responsive documents.

The court denied the motion to compel.

The case is *Firefighters' Retirement System v. Citco Group Ltd.*, No. 13-CV-373 (SDD/EWD) (M.D. La. Jan. 3, 2018). A copy of the opinion can be found [here](#).

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Court warns it may issue monetary sanctions if responding party continues to include boilerplate discovery objections

On January 18, 2018, Magistrate Judge Kaden S. Crawford of the Southern District of California ordered a responding party to amend and supplement its responses to discovery requests and overruled its existing discovery objections, criticizing the use of “boilerplate” objections.

The court first noted that the responding party’s responses to the discovery requests were made subject to an introductory section entitled “General Objections.” The court overruled these objections, finding them to be “boilerplate, non-specific, and unsupported.” The court also noted that the objections to requests for admission were also improper, whereby the responding party “raised a number of boilerplate objections to a request and then *admitted* the request ‘subject to and without waiving the foregoing objections.’” The court found these objections “confusing and misleading,” which left the requesting party “guessing and wondering as to whether the responding party actually provided a complete and accurate response.”

Finally, the court warned that if the responding party “***continues to include general, boilerplate, unsupported, and/or non-specific objections in its supplemental responses, the Court will overrule the objections and consider imposing monetary sanctions.***” (Bold and italics used by the court).

The case is *Springer v. General Atomics Aeronautical Systems Inc.*, No. 16-CV-2331 (BTM/KSC) (S.D. Cal. Jan. 18, 2018). A copy of the opinion can be found [here](#).

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Judges' survey explores key areas of improving e-discovery activities

On February 9, 2018, EDRM at Duke Law School, Exterro Inc., and BDO USA, LLP published a joint report summarizing the results of their 2018 Judges' Survey. The report, titled "Good Faith and Honest Cooperation: Judicial Perspectives on Improving E-Discovery Activities," summarized the views of thirty responding judges on ways to "improve e-discovery to better reach a 'just, speedy, and inexpensive determination of every action.'" The report was based on empirical tally of the responding judges' answers along with analyses of the results by six federal judges.

According to the survey, the top three means for improving e-discovery outcomes are (i) increased cooperation among attorneys (44%); (ii) active participation at Rule 26(f) conferences (33%); and (iii) effective application of proportionality (15%). The report also discussed the reasonableness of document preservation, attorneys' preparation, and use of technology.

Cooperation:

The need for greater cooperation among lawyers took the top spot in judges' responses. Retired U.S. Magistrate Judge David Waxse of the District of Kansas wrote of a particularly effective tool he and another judge have used successfully to ensure cooperation among lawyers: when unable to come to an agreement, lawyers must meet again in person with the requirement that they "video tape the efforts to reach a cooperative solution to the problem and either advise me of the resolution they have reached or send me a copy of the video." As a result, he has never received a video recording, and the attorneys work out their differences.

Meet-and-Confer Conferences:

The judges surveyed indicated that a specific way to improve the outcome of meet-and-confer conferences is to incorporate technology personnel in the discussion, hold additional in-person conferences to resolve issues, and utilize phased or tiered approaches to document collection.

Judge Xavier Rodriguez of the Western District of Texas noted that litigants may be well served by having informal discussions with opposing counsel as early as possible regarding what information should be requested and why it is relevant. Doing so would assist the parties in determining what information should be preserved so that the reasonableness of one's preservation efforts does not become "an exercise evaluated in hindsight."

Proportionality:

In the judges' view, the concept of proportionality under the 2015 amendments to the Federal Rules of Civil Procedure has received heightened attention, with more parties making proportionality claims on a frequent basis. Nevertheless, the responding judges thought that attorneys were not providing the courts with sufficient tools to resolve any proportionality claims, such as:

- Presentation of alternative remedies to the court, such as sampling techniques and use of assisted review tools;
- Metrics in support of attorneys' proportionality arguments;
- Additional work with opposing counsel before raising it with the court; and
- Avoidance of sole reliance on costs when raising a proportionality argument

Preservation and New Technologies:

Judges were split on whether the duty to preserve applies evenly across all data sources, such as social media, Internet of Things ("IoT") data, and wearables, with only 18% responding that the duty applies evenly.

Yet retired Chief Magistrate Judge Frank Maas of the Southern District of New York wrote in the report that "many lawyers still have their heads in the sand with regard to emerging technologies," despite the passage of nearly twenty years since the days when lawyers were arguing that email should not be preserved and produced.

Judge Maas then noted that it is not uncommon today for parties and their counsel to take the steps necessary to preserve email, yet "ignore the need to do so with respect to new sources of information such as social media, mobile, and IoT data." He concluded that "the more cutting edge the source, the less likely it is that it will be adequately addressed by counsel or the court at the preservation stage. It is therefore critical that counsel and the courts address these new means of communication at an early stage, even if the ultimate conclusion is that the marginal utility of information from a particular source does not justify the cost of its preservation and production."

Attorneys' Preparation

A plurality of responding judges—37%—recommended that outside counsel improve their understanding of their clients' IT systems and ESI structures and policies. Judge Michelle Childs of

the District of South Carolina wrote in the report that judges expect outside counsel “to be very well conversant in e-discovery vernacular,” understand their clients’ unique data management systems, and provide appropriate guidance to the court on available options for resolution of e-discovery disputes (including metrics on cost and the relevance of the information sought to guide proportionality analyses).

Use of Technology

A plurality of responding judges—46%—did not express an opinion on what type of technology they would consider most helpful in creating defensible, streamlined e-discovery practices. Of the ones that expressed an opinion, 43% pointed to the increased use of document review technology, followed by legal project management software. As one unnamed responding judge noted, “we still have big sales job to do with the Bar regarding not putting eyes on every document.”

A copy of the report can be found [here](#).

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New York Court of Appeals reverses Appellate Division's heightened standard for production of non-public social media postings

On February 13, 2018, the New York Court of Appeals unanimously reversed a decision of the Appellate Division and reinstated the trial court's original discovery order compelling plaintiff's production of certain private social media records.

The discovery dispute stems from an alleged traumatic brain injury after the plaintiff fell off the defendant's horse. The plaintiff alleged, among other things, that she could no longer engage in a variety of activities after the accident, which made it difficult for her to read, write, and use a computer.

The defendant moved to compel the production of the plaintiff's private photographs and postings on her Facebook account, which were not visible to the general public or to the defendant, arguing that the photographs documenting the plaintiff's activities before and after the accident, in addition to the timestamps showing how long it took plaintiff to write a post, would be relevant to her claims.

The trial court granted the defendant's motion to compel in part, ordering the plaintiff to produce (i) all privately posted photos prior to the accident that she intended to introduce at trial; (ii) all privately posted photos after the accident that did not depict nudity or romantic encounters; and (iii) an authorization for Facebook records showing each time the plaintiff posted a private message after the accident and the number of characters or words in the messages.

The plaintiff appealed, and the Appellate Division limited the trial court's order to only photos that the plaintiff intended to use at trial. The Appellate Division appeared to adopt a heightened standard for production of private social media posts, taking a similar approach to other New York state courts who allowed discovery of *private* Facebook records only if the party seeking disclosure had demonstrated that there was material in the same user's *public* posts that tended to contradict the injured party's allegations in some respect.

Writing for a unanimous court, Chief Judge Janet DiFiore wrote that the Appellate Division erred in adopting such a standard because conditioning the discovery of private social media records would allow a party to "unilaterally obstruct" disclosure of materials by manipulating the privacy settings on one's social media account to turn a public posting into a private one.

Instead, the court noted that the discovery of social media records should be analyzed using the “well-established rules” of discovery. First, courts should “consider the nature of the event giving rise to the litigation and the injuries claimed, as well as any other information specific to the case, to assess whether relevant material is likely to be found on the Facebook account.” Second, courts should “balanc[e] the potential utility of the information sought against any specific ‘privacy’ or other concerns” and “issue an order tailored to the particular controversy that identifies the types of materials that must be disclosed while avoiding disclosure of nonrelevant materials.” Such tailoring might include limitations on the timeframe of the requested information and exempting from disclosure any “sensitive or embarrassing materials of marginal relevance.”

The court concluded that the defendant’s request for photographs was “likely to yield relevant evidence” because it was “reasonably calculated to yield evidence relevant to plaintiff’s assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive.” In addition, the request for data about social media postings was “relevant to plaintiff’s claim that she suffered cognitive injuries that caused her to have difficulty writing and using the computer, particularly her claim that she is painstakingly slow in crafting messages.”

Accordingly, the Court of Appeals reinstated the trial’s court discovery order.

The case is *Forman v. Henkin*, 30 N.Y.3d 656 (Feb. 13, 2018). A copy of the opinion can be found [here](#).

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Applying proportionality principle, court grants motion to compel production of information stored on backup tapes

On February 27, 2018, Magistrate Judge Richard Bourgeois of the Middle District of Louisiana granted the plaintiff's motion to compel production of the defendant's backup tapes containing former employees' data, finding that the benefit of discovery outweighed the cost of production.

The dispute arose in a breach of contract case with an amount in controversy exceeding \$20 million. Over the course of multiple meet-and-confer conferences, the defendant made multiple representations regarding the state of the backup tapes that it later admitted were inaccurate, including that (i) certain backup tapes covering a two year time period suffered a recent hardware failure rendering them unavailable, which the defendant subsequently corrected because the tapes have "always" been unavailable due to corruption of the data; (ii) the estimated cost to restore the tapes that were not corrupt ranged from \$332,400 to \$584,300, but the defendant later submitted a corrected estimate of \$12,968; and (iii) the defendant had restored and produced all information for a specific time frame, when in fact that was not the case.

The plaintiff filed a motion to compel production for the available tapes and to examine the corrupt tapes. The defendant opposed the motion, arguing primarily that (i) the final estimated cost of production (\$12,968) was unduly burdensome, and (ii) the plaintiff's request to have its own expert conduct an examination of the corrupt tapes posed a "significant security risk."

Siding with the plaintiff, the court reasoned that the defendant never disputed the relevance of the information on the backup tapes, with 29% of their data being distinct from what was previously produced. With the final estimated cost of recovery totaling only \$12,968, the court held that the plaintiff's request for production was not unduly burdensome in light of the \$20 million amount in controversy.

The court admonished the defendant that "based on the now revealed fact that certain backup tapes have always been unavailable, months of the [c]ourt's time and efforts have been wasted and reasonable diligence should have revealed that any 'estimates' were not based on any specific analysis or inquiry." The court found that the defendant provided "no satisfactory explanation ... as to how multiple representations were made to the [c]ourt regarding the completed production of certain years of data, only to now be told that not only is that inaccurate, but that for certain years this data never existed."

The court granted the plaintiff's motion to compel production of the recoverable backup tapes, but it postponed ruling on the plaintiff's request to inspect the corrupt tapes until the defendant has conducted additional investigation regarding the feasibility to restore those tapes.

The case is *The Physicians Alliance Corp. v. Wellcare Health Insurance of Arizona*, No. 16-CV-203 (SDD-RLB) (M.D. La. Feb. 27, 2018). A copy of the opinion can be found [here](#).

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Court compels party to review its documents for responsiveness before production; allows use of technology-assisted review

On March 8, 2018, Magistrate Judge Tom Schanzle-Haskins of the Central District of Illinois granted in part a relator's motion to compel a defendant to review its own documents for responsiveness before producing them.

The defendant had produced 575,000 native files after running search terms, but without reviewing them further for responsiveness. The relator complained that the defendant's production contained irrelevant documents, some of which contained "incomprehensible special characters and other symbols." The relator moved to compel the defendant to review its documents for responsiveness and to re-produce only the responsive documents in Bates-stamped image (TIFF) format.

The court granted the motion in part, reasoning that under Fed. R. Civ. P. 26(g)(1), parties must make reasonable inquiry and certify that discovery is complete and responsive. The court held that running key word searches alone before production to the opposing party did not constitute a reasonable inquiry under the Rules. The court did, however, allow the defendant to review its documents using Technology Assisted Review ("TAR"), as opposed to a manual linear review, and re-produce the relevant documents identified by the TAR system.

The court, however, denied the relator's request to receive the production in image format because the relator's document request instructions specifically allowed for native format production, and the defendant was not required to produce documents in more than one format under Fed. R. Civ. P. 34(b)(2)(E).

The case is *U.S. ex rel. Proctor v. Safeway, Inc.*, No. 11-CV-3406 (C.D. Ill. Mar. 8, 2018). A copy of the opinion can be found [here](#).

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