



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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## Magistrate Judge Recommends Criminal Contempt for Late Disclosure of 2,500 Emails

On June 14, 2017, Magistrate Judge Gordon P. Gallagher of the District Court of Colorado recommended that the defendant in a Commodity Futures Trading Commission (“CFTC”) enforcement action receive a criminal contempt sanction for discovery violations. The CFTC brought a motion for criminal contempt sanctions and a motion for default judgment. Alternatively, the CFTC sought permission to use approximately 2,500 emails disclosed mere days before the close of discovery for any purpose at trial, and for the defendant to be barred from making any evidentiary objections related to those emails. The defendant claimed the emails had not been produced due to his “disorganization and forgetfulness,” technical difficulties, and a lack of awareness that the emails existed and that he was only able to log on to the particular account “by serendipity.”

Judge Gallagher noted the defendant’s behavior over the course of the action in discovery had been contemptuous and that a substantial financial penalty (defendant had already been penalized for \$22,000 for earlier discovery sanctions) would be most effective in deterring future conduct. He rejected the defendant’s “excuses” for the late production, noting they “defy explanation.” The judge noted that by producing the emails so late, the CFTC was denied an opportunity to authenticate them during discovery.

Judge Gallagher recommended (1) granting the CFTC’s motions for sanctions; (2) allowing the emails to be used at trial without evidentiary objections; (3) imposing a substantial financial penalty upon the defendant, and (4) awarding reasonable costs and attorneys’ fees to the CFTC.

The defendant filed a motion objecting to the Magistrate Judge’s recommendation. On August 28, 2017, District Judge Robert E. Blackburn of the District Court of Colorado overruled the defendant’s objection and ordered that the CFTC may use the disclosed emails for any purpose at trial, and that the defendant may not make any evidentiary objections to their use. Judge Blackburn also ordered that the CFTC be awarded reasonable attorneys’ fees and costs incurred in bringing the discovery motions. Judge Blackburn did not impose a financial penalty upon the defendant as a criminal contempt sanction, because he said it would raise “complex due process issues.”

The case is *U.S. Commodity Futures Trading Commission v. Gramalegui*, No. 15-cv-02313 (D. Colo. June 14, 2017). A copy of the opinion can be found [here](#). The district court’s case is *U.S. Commodity Futures Trading Commission v. Gramalegui*, No. 15-cv-02313 (D. Colo. Aug. 28, 2017). A copy of the opinion can be found [here](#).

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## **Court Orders Production of Irrelevant Documents Under “Attorneys’ Eyes Only” Designation so Opposing Party Can Verify Relevance Determination**

On July 7, 2017, Magistrate Judge C.J. Williams of the Northern District of Iowa granted in part and denied in part a plaintiff’s motion to compel ESI discovery. The defendant had withheld documents that contained the parties’ agreed-upon search terms but had been determined by the defendant to be irrelevant. The judge ordered the defendant to produce those documents so that the plaintiff could verify that the documents were in fact not relevant.

Judge Williams noted that the plaintiff’s belief that at least some of the withheld documents were relevant was “not well supported” because the defendant had been able to demonstrate that all the examples the plaintiff had cited were either irrelevant or duplicates of already-produced documents. However, the court noted that the order was nevertheless warranted because the defendant had a history of failing to meet all discovery obligations.

Two additional factors played a role in the court’s decision: First, the defendant had previously offered to make production of irrelevant documents under the “Attorneys’ Eyes Only” designation for a prior set of documents. Second, the search terms were so narrowly tailored that there was a question as to how the documents could hit on those terms and not be relevant.

The court ordered that the plaintiff bear its own costs in reviewing the withheld documents, but that if it found the defendant had improperly withheld relevant documents, the plaintiff could bring a motion for sanctions to recover attorneys’ fees.

The case is *Nachurs Alpine Solutions, Corp. v. Banks*, No. 15-CV-4015 (N.D. Iowa July 7, 2017). A copy of the opinion can be found [here](#).

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## Court Says ESI Spoliation Without Prejudice is Like Basketball: “No Harm; No Foul”

On July 12, 2017, Magistrate Judge Iain D. Johnston of the Northern District of Illinois noted that “Federal Rule of Civil Procedure 37(e) incorporates the long-standing principle embodied in the phrase used on basketball courts every day across the country: ‘No harm; no foul.’”

In this workplace harassment and retaliation action, the plaintiff sought emails that she had sent to her secondary supervisor, as well as emails her secondary supervisor had sent to Human Resources. Both the plaintiff and the secondary supervisor left the defendant’s employment during this litigation. The plaintiff believed that these emails would likely demonstrate that she had been a satisfactory employee.

However, the defendant company, per its standard policy, had deleted both sets of emails 90 days after each employee had left the company, even though defendant had already received a letter from plaintiff’s counsel regarding preservation of documents. The plaintiff filed a motion for sanctions for the destruction of emails under Rule 37(e).

The court questioned the defendant’s counsel and discovered that emails existed between the plaintiff’s secondary supervisor and her primary supervisor. After reviewing *in camera* these responsive documents that had not been previously produced, the court found that those new emails tended to be harmful to the plaintiff’s case because they showed she was transferred for performance issues and not because she had complained of sexual harassment. Finally, the court noted that the plaintiff had not presented any evidence that the defendant acted with the intent to deprive; instead, the court observed that the defendant had acted “with a pure heart but empty head.”

Based on these findings, the court found that Rule 37(e) did not allow for sanctions because the plaintiff could not be prejudiced by the loss of information that was available from another source and the disputed information was in fact harmful to her case.

The case is *Snider v. Danfoss*, No. 15-CV-4748 (N.D. Ill. July 12, 2017). A copy of the opinion can be found [here](#).

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## **Taylor Swift Motion for Adverse Inference Denied Because Plaintiff Claimed His Spilt Coffee Caused the Loss of Data**

On July 19, 2017, Judge William J. Martinez granted in part a defendant's motion for sanctions for the plaintiff's spoliation of evidence, allowing the defendant to cross-examine the plaintiff about his data destruction in front of a jury. In this litigation, the plaintiff, a male radio host, claimed he was fired after Taylor Swift, the defendant, reported to his employer that he had inappropriately touched her during a staged photo opportunity before one of her concerts. The plaintiff had recordings of conversations with his employer around the time of his termination and the defendant sought those recordings in discovery. The plaintiff produced edited versions of the recordings. He claimed he had edited out irrelevant material and the unedited versions were lost when he spilled coffee on his computer.

Judge Martinez denied the defendant's request for an adverse inference sanction. He noted that an adverse inference requires a finding that a party intentionally acted to destroy evidence, and in this case he could not enter sanctions due solely to spilled coffee. Judge Martinez noted that the critical issue in this case was the irreconcilable differences between the plaintiff's and the defendant's version of events on the day in question and that the case would be decided by the jury based on who they found credible. Thus, it would be inappropriate for him to order an adverse inference, which would be tantamount to concluding the plaintiff was not credible. However, he did allow the plaintiff to be cross-examined in front of the jury on the loss of the data. Ultimately the jury believed Ms. Swift.

The case is *Mueller v. Swift*, No. 15-cv-1974 (D. Colo. July 19, 2017). A copy of the opinion can be found [here](#).

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## **“Completely Reckless” Production Constituted Waiver of Privilege Under Deficient Clawback Agreement**

On August 2, 2017, Magistrate Judge Kimberly A. Jolson of the Southern District of Ohio denied a defendant’s motion for sanctions and its motion to compel the return of forty-three privileged documents that the defendant, through its counsel, had produced twice.

The parties had entered into a clawback agreement, which provided that a) if a producing party discovered it had inadvertently produced a document that is privileged, that party would promptly notify the opposing party, b) the receiving party would promptly destroy or return all copies of the inadvertently-produced document, and c) inadvertent production of privileged documents would not constitute a waiver of that privilege. The parties also agreed that based on the small scale of the case, a clawback order from the court under Federal Rule of Evidence 502(d) was not necessary.

For its first submission of documents, the defendant turned over a partial production twenty-seven days past the production due date, and that production set contained forty-three privileged documents. The defendant identified the disclosure of privileged documents twelve days later as it was preparing a privilege log and immediately attempted to claw them back. The plaintiff refused, citing several reasons why it thought the disclosure was not inadvertent, including that it was “unbelievable” that a law firm of defense counsel’s size would make such a mistake. Nevertheless, the plaintiff sequestered the documents in dispute while the court reviewed them *in camera*.

Six weeks later, as the dispute over the waiver issue continued, the defendant made another partial production that included the same forty-three privileged documents to the plaintiff.

In analyzing the issue, the court noted that mistakes happen in discovery, and that “privileged documents will inevitably fall through the cracks and be produced inadvertently.” However, the court found that this situation was not the result of a technical error or a third-party vendor mistake, but rather that it was unlikely “any meaningful review of the documents occurred.” The court stated that it “recognizes an attorney’s responsibility to guard [the attorney-client] privilege, and holds an attorney accountable when normal cracks become chasms—as was the case here.”

The court determined that the clawback agreement was ambiguous and deficient and that the defendant did not take reasonable steps to prevent disclosure due to its “reckless” review. Finding that the defendant waived its privilege, the court denied the defendant’s request for sanctions against the plaintiff and did not order the plaintiff to return the forty-three privileged documents at issue.

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The case is *Irth Sols. v. Windstream Commc'ns*, No. 2:16-CV-219 (S.D. Ohio Aug. 2, 2017). A copy of the opinion can be found [here](#).

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## **Court Imposes Adverse Inference for Failure to Preserve Text Messages on a Non-Party's Phone**

On August 23, 2017, District Judge Robert W. Sweet of the Southern District of New York granted the plaintiffs' motion for an adverse inference sanction and denied the defendants' motion for summary judgment.

The plaintiffs are all but one of the surviving members of the band Lynyrd Skynyrd, as well as representatives of the deceased members who were killed in a 1977 plane crash. After the crash, certain surviving members and relatives entered into a "blood oath" to not perform under the Lynyrd Skynyrd name again. Through a series of events, that agreement was formalized into a 1988 consent order that governed the use of the name, images, and history of Lynyrd Skynyrd.

In 2016, the defendant film company decided to produce a film based on the 1977 plane crash, and hired a filmmaker for the project as an independent contractor. The film company also contacted the former drummer of the band who had survived the crash ("the co-defendant"), and entered into an agreement for his involvement as the main character of the film. The co-defendant and the filmmaker regularly texted each other over the course of a year to relay historical information about the crash.

The plaintiffs filed a complaint alleging a violation of the consent order that the co-defendant had signed, and sought a permanent injunction to defendants' film. Several days after the complaint was filed, the non-party filmmaker switched cell phone providers and acquired a new phone without saving the old text messages. The plaintiffs moved for an adverse inference sanction for spoliation. The defendants argued that they could not be sanctioned for the actions of an independent contractor who is a non-party to the proceedings, and that his phone was not within their control.

Judge Sweet found that the text messages were under the defendants' control because the non-party filmmaker had "worked closely" with the defendants, had been deposed by the plaintiffs for this matter, and had a financial interest in the outcome of the litigation since he was entitled to a percentage of the film's net receipts. The judge announced that "common sense" indicated that the filmmaker's texts were within the defendants' control and should have been preserved once litigation was anticipated. The judge also noted that the plaintiffs had tried to obtain the text messages from the co-defendant, to no avail. Judge Sweet granted the motion for an adverse inference and ultimately entered judgment in favor of the plaintiffs.

The case is *Ronnie Van Zant, Inc. v. Pyle*, No. 17 Civ. 3360 (S.D.N.Y. Aug. 28, 2017). A copy of the opinion can be found [here](#).

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## **Court Does Not Sanction Plaintiff Who Skipped “Pointless” Meet-And-Confer Because Defendant Did Not State with Particularity the Grounds for Seeking the Order to Compel**

On August 29, 2017, Magistrate Judge David L. Horan of the Northern District of Texas denied the defendants’ motion for sanctions for the plaintiff’s refusal to meet and confer.

The defendants had served document requests to the plaintiff, who responded with voluminous productions and untimely written discovery responses. After a scheduled meet and confer date, the defendants filed a motion to compel, alleging that the plaintiff had refused to attend. The court ordered the parties to meet and confer and to file a joint status report afterwards. The plaintiff filed a response to the order, disputing that she had refused to meet and confer. She also contended that she stood by her responses to the document requests and that a meet and confer would be “pointless as a result.” The defendants then moved for sanctions because the plaintiff had “failed to respond” to the court’s order to attend, and had failed to make herself available for the meet and confer.

Finding that the defendants had failed “to even minimally support” with particularity under FRCP 7(b)(1)(B) the motion to compel, Judge Horan observed that the defendants had failed to explain why plaintiff’s objections to their requests were insufficient. The plaintiff had argued, for example, that her social security number was clearly irrelevant to the subject matter, and had objected to the defendants’ request for it, which the court found to be a valid objection. Judge Horan also found that the defendants had not specified which Rule 34 requests were at issue and why.

Stating that a status conference would have been “a waste of time” because the plaintiff had repeatedly insisted that she would not change her discovery responses and the defendants had not indicated which specific document requests had an insufficient response, the court denied the defendants’ motion to compel. However, the court declined to award the plaintiff any expenses incurred in responding to the defendants’ motion, because the plaintiff’s refusal to make herself available for a meet-and-confer would make such an award unjust.

The case is *Carter v. H2R Restaurant Holdings, LLC, et al.*, No. 3:16-cv-1554 (N.D. Texas Aug. 29, 2017). A copy of the opinion can be found [here](#).

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## **Sedona Conference Releases Third Edition of *The Sedona Principles***

On October 1, 2017, The Sedona Conference released the final version of the third edition of *The Sedona Principles*.

The Third Edition reflects changes to 14 principles that deal with, among other topics, proportionality and preservation obligations. Those principles are Principle 2 and Principle 8.

Principle 2 was simplified to emphasize the fundamental purpose and import of proportionality. The authors note the 2015 amendment to Federal Rule 26(b), and observes that “[by] moving proportionality into the definition of the scope of discovery, [it] reinforces that proportionality is on a par with relevance” in all stages of discovery.

Principle 8 was updated substantially to reflect the changes in how ESI is maintained, including the advent of cloud computing. It establishes a new process for addressing the preservation and production of unique, relevant ESI. Before, the standard was whether the ESI was “reasonably accessible.” Under the updated Principle 8, litigants must identify the “primary and most readily available” sources of the ESI. If those sources are not feasible, then the litigant moves down the continuum to secondary and less readily available sources, as necessary to obtain the ESI, until it is no longer reasonable or proportionate to the needs of the case.

In addition to its fourteen principles, the publication also provides commentary to each principle that often urges further amendment to the Federal Rules of Civil Procedure in order to reflect the consensus positions established in this document.

The publication is *The Sedona Principles, Third Edition*, 19 SEDONA CONF. J. 1 (forthcoming 2018) and may be accessed [here](#).

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