

The E-Discovery Digest

A periodic publication on notable decisions relating to key discovery topics

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Attorney-Client Privilege/Work-Product Decisions

Decisions Protecting Against Disclosure

Emails Protected by Privilege Even if Attorney Not the Author or Primary Recipient

Rowan v. Sunflower Elec. Power Corp., No. 15-CV-9227-JWL-TJJ, 2016 WL 3743102 (D. Kan. July 13, 2016)

Magistrate Judge Teresa J. James of the U.S. District Court for the District of Kansas held that defendant Power Constructors, Inc. (PCI) had properly claimed attorney-client privilege with respect to emails for which an attorney was not the author or primary recipient. The plaintiff in the case had challenged emails on PCI's privilege log that were not written or sent by PCI's in-house counsel, including those on which in-house counsel was carbon copied. The court rejected the plaintiff's arguments, finding that privilege can properly attach to documents transmitted between nonattorney employees of the corporation if the communications are confidential and are for the purpose of obtaining legal advice from an attorney. The court also held that the plaintiff waived its argument that PCI's privilege log descriptions were insufficient by failing to raise it in a timely fashion after receiving the log. The court, however, ordered PCI to provide additional information with respect to privilege log entries whose descriptions indicated they were "calendar entr[ies]," as "it is not evident on its face how a calendar entry contains a communication made in confidence for the purpose of giving or obtaining legal advice."

Affidavit of In-House Counsel Sufficient to Establish Documents Privileged

Klaassen v. Atkinson, No. 13-2561-DDC, 2016 WL 3881334 (D. Kan. July 18, 2016)

Magistrate Judge K. Gary Sebelius of the U.S. District Court for the District of Kansas denied a motion to compel the production of documents listed on the defendants' privilege log, finding that the defendants met their burden of establishing that the documents were shielded from discovery by the attorney-client privilege based in large part on the affidavit of the defendants' in-house counsel. The plaintiff filed suit against the University of Kansas Medical Center (KUMC) and various high-ranking KUMC officials in an employment dispute alleging retaliation. The court found that the defendants sufficiently

established the applicability of the attorney-client privilege based on the defendants' briefing, privilege log and the affidavit of a Kansas University in-house attorney. Specifically, the court heavily cited the in-house counsel's affidavit as the basis for its findings that the communications at issue were made in furtherance of seeking legal advice, that the communications were at all times maintained as confidential and that certain communications concerned "an ongoing legal matter" in which the attorney was involved as counsel.

Draft Email to In-House Counsel That Was Never Sent Subject to Attorney-Client Privilege

Idenix Pharm., Inc. v. Gilead Scis., Inc., No. CV 13-1987-LPS, 2016 WL 4060098 (D. Del. July 20, 2016)

U.S. District Judge Leonard P. Stark of the District of Delaware held that a draft email addressed to the defendant's in-house counsel regarding technical issues in a draft patent application was protected under the attorney-client privilege, even though there was no evidence that it was ever sent to the in-house counsel. The email, concerning technical issues in a draft patent application, was drafted by a chemist employed by the defendant and sent between two of his email addresses. The court held that the attorney-client privilege was applicable "[w]here client and counsel share technical information" and indicated that privilege applied even though the email at issue was not sent to in-house counsel because it revealed an intended request for legal advice.

Decisions Ordering Disclosure

Attorney Notations Not Privileged Where No Evidence They Were Communicated to Client

Greyhound Lines Inc. v. Viad Corp., No. CV-15-01820-PHX-DGC, 2016 WL 4703340, at *1 (D. Ariz. Sept. 8, 2016)

U.S. District Judge David G. Campbell of the District of Arizona granted the plaintiff's motion to compel the defendant to produce documents containing annotations that were purportedly made by counsel. The plaintiff did not dispute that the defendant had already produced unannotated versions of the documents but challenged the defendant's assertion of privilege with respect to the annotations themselves. The defendant asserted that the fact that the documents were found in the law department's files was sufficient to establish that an attorney had authored the notations, but the defendant was unable to identify the specific author because the law department employed up to 35 attorneys at one time. The court found that, even if the defendant could show that a lawyer had made the notations, the documents would still be subject to production because the defendant "failed to provide

any evidence that the notations were ever communicated to anyone." The court noted that Arizona's corporate attorney-client privilege protects only "communications."

Fed. Trade Comm'n v. AbbVie Inc., No. CV 14-5151, 2016 WL 4478803, at *2 (E.D. Pa. Aug. 25, 2016)

U.S. District Judge Harvey Bartle III of the District of Eastern Pennsylvania held that defendant AbbVie Inc. did not meet its burden of proving that handwritten notes were protected by the attorney-client privilege. According to AbbVie's privilege log, the documents at issue were handwritten notes reflecting legal advice from outside patent counsel regarding a patent application and were therefore subject to privilege protection. AbbVie did not assert a claim of protection pursuant to the work-product doctrine. The declaration submitted by AbbVie in support of its privilege claims stated that the handwritten notes were not shared with the client. The court held that AbbVie did not meet its burden to prove that the notes were protected by the attorney-client privilege because the attorney's notes were not "communications" and were "prepared by counsel for his own use in prosecuting his client's case." The court explained that "[n]otes are not privileged simply because some unidentified portions might contain client information."

Internal Accident Report Not Protected by Attorney-Client Privilege or Work-Product Doctrine

Vessalico v. Costco Wholesale Warehouse, No. 15CV1292(LDW) (SIL), 2016 WL 3892403, at *2 (E.D.N.Y. July 14, 2016)

Magistrate Judge Steven I. Locke of the U.S. District Court for the Eastern District of New York granted a motion to compel defendant Costco Wholesale Warehouse (Costco) to produce an accident report prepared following an accident at a Costco store. Costco opposed production of the report, arguing that it was "clearly immune from disclosure" under the attorney-client privilege and work-product doctrine because Costco's assistant general manager testified that the "report is prepared solely for Costco's legal department." However, the court found that "an investigative report does not become privileged merely because it was sent to an attorney." Because the accident report was essentially a factual account of the plaintiff's accident and was not primarily or predominantly of a legal character, the court found that it was not protected from disclosure pursuant to the attorney-client privilege. Similarly, the court held that the defendant failed to establish that the accident report was work product "prepared exclusively and in specific response to imminent litigation," because it was a standard form that was completed in the ordinary course of business whenever an accident occurred on Costco's property. The court found that the fact that the accident

report form contained an instruction stating “This report is to be prepared for the company’s legal counsel” was not sufficient to establish that work-product protection applied.

Spoilation Decisions

Decisions Imposing Sanctions

Plaintiffs’ Unilateral Destruction of Allegedly Defective Products at Issue Justifies Adverse-Inference Instruction

Starline Windows Inc. v. Quanex Bldg. Prods. Corp.,
No. 15-CV-1282-L (WVG), 2016 WL 4485568
(S.D. Cal. Aug. 19, 2016)

Magistrate Judge William V. Gallo of the U.S. District Court for the Southern District of California recommended granting the defendant component manufacturer’s motion for spoliation sanctions in a case arising from the sale of allegedly defective window components. The plaintiffs, who sold the products at issue to property owners, were separately being sued by those property owners in a state court case. The plaintiff-sellers, in turn, sued the defendant component manufacturer in federal court. The defendant moved for spoliation sanctions against the plaintiffs, alleging that the plaintiffs had, over the course of 2 1/2 years, destroyed thousands of the allegedly defective windows at issue (after replacing them pursuant to the terms of the sellers’ warranty to the property owners) without giving the defendant’s experts the chance to inspect the windows. The defendant argued that the plaintiffs were fully aware of the possibility of litigation against the component manufacturer at the time they began destroying the windows and continued the practice after litigation began. The court found that the plaintiffs should have reasonably known the windows would be relevant to the litigation but nonetheless destroyed 6,000 of the products “during a time when they had a clear and unmistakable duty to preserve this relevant evidence.” The court also held that the plaintiffs’ destruction of the products without advance notice to the defendant was not justifiable, especially in light of the reasonable alternative solutions of saving the products or providing the component manufacturer with notice that they were to be destroyed. In addition, the court noted that the defendant had suffered prejudice because the other available evidence (photographs, owner complaints and warranty claim forms) did not tell the complete story as to the cause of the alleged defect in each product. Based on these conclusions, the magistrate judge held that sanctions were warranted but declined to prohibit the plaintiffs from presenting any evidence regarding the condition of the windows. Instead, the magistrate judge recommended that the district court give an adverse inference instruction at trial to let the know jury to presume that the evidence destroyed was unfavorable to the plaintiffs.

Adverse Inference Warranted Where Timing of Document Deletion Was ‘Highly Suspect’

Lexpath Techs. Holdings, Inc. v. Welch, No. 13-CV-5379-PGS-LHG,
2016 WL 4544344 (D.N.J. Aug. 30, 2016)

Judge Peter G. Sheridan of the U.S. District Court for the District of New Jersey granted the plaintiff’s motion for spoliation sanctions in a breach-of-contract and tortious-interference action based on allegations that the defendant (a former employee of the corporate plaintiff) improperly competed with and interfered with the plaintiff’s business after he left the company. The plaintiff alleged that the defendant improperly deleted files from his work-issued laptop that were relevant to the litigation between the parties. In support of its spoliation claims, the plaintiff presented evidence from a forensic expert that electronic files on the laptop had been deleted and renamed with a cleaning software and that three thumb drives had recently been attached to the laptop. The court held that spoliation had occurred because the defendant had a duty to preserve materials but failed to do so. In so holding, the court rejected the defendant’s arguments that: (1) only junk files were deleted and there was no duty to preserve such materials, and (2) no duty to preserve existed because the plaintiff had not yet requested to inspect the laptop at the time the files were deleted. In addition, the court held that the temporal connection between the defendant’s termination of employment and his deletion of the files was “highly suspect” and therefore sufficient evidence of bad faith. Accordingly, the court found that an adverse inference instruction was warranted.

Destruction of Relevant Evidence by Nonparty Employees Can Give Rise to Sanctions Against Corporate Party

GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS,
2016 WL 3792833 (D. Del. July 12, 2016)

District Judge Leonard P. Stark of the District of Delaware imposed spoliation sanctions against the defendant in an anti-trust action where a senior-level employee of the defendant intentionally destroyed evidence related to the suit, despite the fact that a litigation hold was in place. The employee at issue not only deleted roughly 40 percent of his emails over a four-month period in violation of the litigation hold but also instructed other employees to delete their own emails. The defendant argued sanctions were not warranted because its employee’s actions were not sanctioned by the company, the company took reasonable steps to preserve electronically stored information, the company did not act in bad faith and the plaintiff had not shown any prejudice resulting from the loss of the emails at issue. After noting that the recent amendments to Federal Rule of Procedure 37 did not change the 3rd Circuit’s standard for imposing spoliation sanctions, the court held that sanctions were appropriate. According

to the court, upon learning of the employee's misconduct, the defendant did not take sufficient steps to attempt to recover the deleted emails. In addition, even though the nonparty employee acted unilaterally in destroying the evidence, his bad faith could be attributed to the defendant. The court issued compensatory and punitive monetary sanctions, an adverse inference instruction and noted the possibility of evidentiary sanctions if later requested.

Decisions Declining to Impose Sanctions

Refusal to Issue Spoliation Instruction Affirmed Where Party Seeking Sanction Failed to Request Judicial Finding That Elements of Spoliation Met

Lincoln Composites, Inc. v. Firetrace USA, LLC,
825 F.3d 453 (8th Cir. 2016)

A panel of the U.S. Court of Appeals for the 8th Circuit refused to reverse a jury verdict in favor of the plaintiff in an action arising from a contract dispute involving the sale of an allegedly defective product. The defendant argued, *inter alia*, that the district court had erred in refusing to provide an adverse inference instruction based on alleged spoliation committed by the plaintiff. The defendant had moved pretrial for spoliation sanctions based on the plaintiff's failure to preserve the allegedly defective product at issue, and the motion was denied by the magistrate judge. Following trial, the plaintiff included an adverse inference instruction in its proposed jury instructions, which was not included in the instructions issued by the court. On appeal, the appellant argued that the district court erred in failing to provide an adverse inference instruction because the spoliation question was one for the jury. The panel disagreed, holding that the defendant did not expressly request that the district court make the findings required to impose an adverse inference instruction under federal law — *i.e.*, that evidence was intentionally destroyed and resulted in prejudice to the moving party — following the presentation of its evidence at trial. Further, the defendant did not object to the pretrial denial of its motion for sanctions by the magistrate judge or ask that the district court review the magistrate judge's findings. Accordingly, the district court did not err in failing to issue an adverse inference instruction to the jury.

Spoliation Sanctions Denied Where Moving Party Failed to Present Sufficient Evidence That the Materials Could Not Be Recovered or Were Destroyed Intentionally

Konica Minolta Bus. Sols., U.S.A. Inc. v. Lowery Corp.,
No. 15-CV-11254, 2016 WL 4537847 (E.D. Mich. Aug. 31, 2016)

Judge Victoria A. Roberts of the Eastern District of Michigan denied a motion for spoliation sanctions based on the loss of

electronically stored information (ESI) relevant to the trade secret and contract issues before the court. During a contentious discovery period that included numerous objections to production, the defendant failed to produce certain electronic devices containing potentially relevant ESI. In the early stages of discovery, the plaintiff moved for sanctions based on the loss of this material. That motion was filed before the recent amendments to Rule 37, which adopted a new standard for spoliation sanctions based on the loss of ESI, were enacted. The plaintiff later filed an amended motion for sanctions after the Rule 37 amendments took effect. In ruling on the plaintiff's spoliation allegations, the court held that the amended version of Rule 37 governed. Applying the rule, the court found that while there was "strong evidence" that ESI was lost after a duty to preserve arose, sanctions are "not automatic" any time materials are destroyed. Instead, to apply sanctions, the court needed to assess whether reasonable steps were taken to preserve the materials that were lost, whether the materials could be recovered and whether the loss of materials was motivated by an intent to deprive a party of evidence. Because the court did not have sufficient evidence upon which to base such determinations, it denied the motion for sanctions without prejudice.

Verbal Litigation Holds Are Not *Per Se* Inadequate

First Am. Title Ins. Co. v. Nw. Title Ins. Agency, LLC,
No. 2:15-CV-00229, 2016 WL 4548398, at *1 (D. Utah Aug. 31, 2016)

Magistrate Judge Paul M. Warner of the U.S. District Court for the District of Utah granted in part and denied in part a motion for spoliation sanctions in a competing venture action where the defendant and certain nonparties allegedly deleted files potentially relevant to the suit. The plaintiff brought a motion for spoliation sanctions against the defendant, an entity comprised of former employees of the plaintiff, arguing that the defendant's litigation hold was inadequate because it was oral, not written, and that the defendant (and certain nonparty employees of the defendant) destroyed materials relevant to the litigation. The court rejected the proposition that a verbal litigation hold is *per se* inadequate. The court then considered the plaintiff's allegations that a variety of materials, including emails from shared personal accounts, documents from a company-issued computer and iPad, emails sent from a new company account, and documents in the possession of nonparty employees, were lost. The court denied the motion with respect to the majority of the materials, finding either that no duty to preserve existed at the time they were destroyed or that no prejudice resulted from their loss. The one exception applied to files deleted by a nonparty employee shortly after she left the plaintiff's company to join the defendant. The court found that this information was not recoverable, likely relevant and likely destroyed in bad faith.

Form/Format of Discovery Responses

Discovery Responses Do Not Need to Be Perfect, and Responses Based on Predictive Coding Are Appropriate

Dynamo Holdings Ltd. P’ship v. Comm’r of Internal Revenue, No. 2685-11, 8393-12, 2016 WL 4204067 (T.C. July 13, 2016)

Ronald L. Buch of the U.S. Tax Court denied a motion by the commissioner of the Internal Revenue Service to compel more complete discovery responses in connection with a proceeding relating to the tax treatment of transfers from one entity to another. The court had previously granted a motion to compel discovery by the commissioner but had allowed the petitioners to respond using predictive coding in order to identify responsive documents. The commissioner argued that this predictive coding method for identifying documents was inadequate, as evidenced by the fact that it resulted in the recall of only a small number of documents. The court disagreed, finding that even if it were to “assume” that the predictive coding used was flawed in some way, it was still adequate. According to the court, the commissioner’s motion was predicated on the “myth” that a perfect discovery response is possible. The court rejected this notion, finding that the Tax Court Rules and the Federal Rules of Civil Procedure do not require a perfect response to discovery requests and instead only require the responding party to make a “reasonable inquiry” in an attempt to identify the requested materials. Further, the court noted that “[t]he fact that a responding party uses predictive coding to respond to a request for production does not change the standard for measuring the completeness of the response.” Accordingly, the commissioner’s motion to compel more complete responses to discovery was denied.

Party Is Not Required to Use Predictive Coding Even Though It Is Cheaper, More Efficient and Superior to Keyword Searching

Hyles v. New York City, No. 10 Civ. 3119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016)

In this employment discrimination and hostile work environment action against the City of New York, Magistrate Judge Andrew J. Peck of the U.S. District Court for the Southern District of New York held that the city was not required to use predictive coding, also known as technology-assisted review or TAR, at the plaintiff’s request when it preferred to use keyword searching. The court acknowledged that predictive coding “is cheaper, more efficient and superior to keyword searching.” Thus, even though the court “would have liked the City to use TAR in this case,” it “cannot, and will not, force the City to do so.” The court noted

that “[t]here may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. [But w]e are not there yet.”

Plaintiff Prisoner Entitled to ESI on Individual Defendants’ Personal Computers in Civil Rights Action

Sunderland v. Suffolk Cty., No. CV 13-4838(JFB)(AKT), 2016 WL 3264169 (E.D.N.Y. June 14, 2016)

Magistrate Judge Kathleen Tomlinson for the U.S. District Court for the Eastern District of New York held that the plaintiff in a civil rights action brought by a prisoner was entitled to search electronically stored information (ESI) on individual defendants’ personal computers and personal email accounts to identify any evidence of motivation or bias. The plaintiff, a transgender prisoner who had been diagnosed with gender dysphoria, brought a civil rights action against New York’s Suffolk County and individual defendants for failing to provide medical treatment. The plaintiff sought ESI regarding the plaintiff, discussing gender identity or sexual preference issues and other specified terms. The court concluded that the requested information fell within the broad scope of relevant discovery under Rule 26(b) of the Federal Rules of Civil Procedure. According to the court, the personal email accounts and computers may contain information on bias or motivation against the plaintiff and was not unduly intrusive or burdensome because it was limited to a five-year time frame.

Defendant Required to Produce Documents in Native Format in the Absence of Evidence That It Would Be More Expensive Than PDFs

Mitchell v. Reliable Sec., LLC, No. 1:15-cv-03814-AJB, 2016 WL 3093040 (N.D. Ga. May 23, 2016)

In this workplace and pregnancy discrimination action, Magistrate Judge Alan J. Baverman of the U.S. District Court for the Northern District of Georgia rejected the defendant’s argument that the costs to produce certain discovery in native format with metadata were unreasonable. The defendant argued that the costs of producing electronically stored information in native format were disproportionate because the plaintiff’s damages were likely to be less than \$10,000, and the proposed production would cost approximately \$3,000. The plaintiff maintained that producing the discovery in native format with metadata was necessary because the materials at issue — emails and spreadsheets — were susceptible to *post hoc* manipulation. The court agreed with the plaintiff and found that the defendant failed to explain why producing these materials in native format would cost more than producing PDF files. Additionally, the court noted that even if the defendant had demonstrated why

the native production was more expensive, the plaintiff had shown “good cause” to seek the production in native format. According to the court, it would not be “unreasonable” for the plaintiff to “verify” that the documents had not been manipulated.

Other Discovery Decisions

Warrant Provisions of the Stored Communications Act Only Apply Within the Territorial Jurisdiction of the United States

In re a Warrant to Search a Certain E-mail Account Controlled & Maintained by Microsoft Corp., No. 14-2985, 829 F.3d 197 (2d Cir. July 14, 2016)

Judge Susan L. Carney of the U.S. Court of Appeals for the 2nd Circuit held that a warrant issued under the Stored Communications Act (SCA) that sought information associated with an email account stored on servers located overseas was not enforceable. The lower court had issued the warrant to Microsoft, having found probable cause that the account was being used in furtherance of narcotics trafficking. Microsoft had produced customer data stored in the United States but declined to access the data stored and maintained in Ireland. The 2nd Circuit found that “Microsoft [had] the better of the argument” because the SCA “[n]either explicitly nor implicitly ... envision[s] the application of its warrant provisions overseas.” According to the court, the presumption is that the laws of the U.S. only apply within the territorial jurisdiction of the United States.

Preservation Order Not Required Where No Evidence Party Had or Would Destroy Evidence

Artec Group, Inc. v. Klimov, No. 15-cv-03449-RMW, 2016 WL 4474614, at *1 (N.D. Cal. Aug. 25, 2016)

District Judge Ronald M. Whyte of the Northern District of California denied in part the plaintiff’s motion for a preservation order in a trade secret and misappropriation action. The plaintiff sought a protective order to protect against the loss of evidence that may result from the defendants’ handling of a 3-D scanner that allegedly incorporated the misappropriated trade secrets. The scanner had previously been confiscated by a German court and was in the possession of a court-appointed expert. The plaintiff argued that, upon the release of the scanner by the German court, the defendants should be prohibited from touching it and instead be required to deliver the scanner to a neutral third party for preservation. The defendants opposed the motion, stating that their attorneys would take and maintain custody and control of the scanner in compliance with the defendants’ duty to preserve. The court sided with the defendants, finding that there was no evidence the defendants had not complied with their preservation obligations in the past or would not comply with those obligations going forward. The court noted that it was “not convinced that the possibility that defendants might benefit from spoliating evidence justifies a preservation order.” Accordingly, the court ordered the defendants’ attorneys to take possession of the scanner and not modify or release it to any third parties without written agreement between the parties or an order of the court.

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