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EDD Showcase

2011 witnessed the democratization of e-discovery as new judicial voices emerged across the country.

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It has been five years since the 2006 e-discovery amendments to the Federal Rules of Civil Procedure became law, and in the interim, more than half of the U.S. states have adopted some form of electronic data discovery rulemaking. Case law has rapidly evolved from the humble pronouncements of just a few technology-savvy federal judges. During 2011, we saw more opinions at the state court level and heard recommendations from EDD special masters. But even with the tremendous development of case law, some concerns haven't changed, including worries about the difficulty of effectively managing the ever-increasing volume of data and controlling the escalating costs of preservation.

POST-LITIGATION COST RECOVERY. Last year saw a significant rise in the number of published opinions related to the reimbursement of a prevailing party's EDD costs. *See* Fed. R. Civ. P. 54(d). This increased activity may be attributable to an EDD-friendly 2008 amendment to the federal cost-recovery statute that changed the phrase "fees for exemplifications of copies of papers" to "fees for exemplification and the costs of making copies of any materials." *See* 28 U.S.C. § 1920(4).

As a result, some courts have defined "copying" and "exemplification" to focus on the physical preparation and duplication of data, whether by copying paper or scanning electronic documents. See *Francisco v. Verizon South, Inc.*, 272 F.R.D. 436 (E.D. Va. Mar. 2, 2011), rejecting requests for costs where methods employed in the case went beyond scanning.

Still other courts have defined the terms broadly to include data processing and production. For example, in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2:07-cv-1294 (W.D. Pa. May 6, 2011), Pittsburgh, Pa.-based U.S. District Court Judge Terrence McVerry granted defendant's motion to recover more than $367,000 in EDD processing costs, finding such costs are "the 21st century equivalent of making copies." McVerry noted in his decision that the parties had agreed that responsive documents would be produced electronically.

Philadelphia-based U.S. District Court Judge Legrome Davis went one step further. He expanded recoverable costs to include the creation of litigation databases, storage of data, imaging hard drives, keyword searches, de-duplication, data extraction and processing, running privilege screens (i.e., keywords for privileged documents), data hosting, technical support, project management, data recovery, tape restoration — and the production costs associated with the creation of load files. See *In re Aspartame Antitrust Litigation*, No. 2:06-CV-1732 (E.D. Pa. Oct. 5, 2011).

Yet, if parties stipulate to split otherwise recoverable costs during discovery, the prevailing party could be precluded from recovery if the court finds the agreement to be a "final settlement of cost." See *In re Ricoh Co. Patent Litigation*, 2011-1199 (Fed. Cir. Nov. 23, 2011). Still, the law on the area is far from settled. Race Tires America is seeking review of its case by the U.S. Court of Appeals for the Third Circuit.

PROPORTIONALITY. In 2011, courts continued to encourage cooperation between counsel, including frank discussions about each party's respective electronic data systems — particularly when it was clear from the record that parties had failed to do so prior to filing motions to compel. Moreover, many courts emphasized the need for targeted, proportional discovery, rather than broad demands that a party search its entire data and email system for files, irrespective of cost.

In *Thermal Design, Inc. v. Guardian Building Products, Inc.*, No. 08-C-828 (E.D. Wis. Apr. 20, 2011), Milwaukee-based U.S. District Court Judge Rudolph Randa refused to approve plaintiff's electronic fishing expedition simply because the defendant had the financial resources to pay for the searches. The defendant had already produced 91 gigabytes of data at a total cost of $600,000. Randa noted that the financial resources of the defendant are not tantamount to good cause under FRCP 26(b)(2)(C).

Likewise, Denver-based U.S. Magistrate Judge Kristin Mix rejected a defendant's request for the production of every recorded sales call on plaintiff's database for a two-year period. She noted in her ruling that it would take an estimated four years to listen to the calls to identify potentially responsive information. See *General Steel Domestic Sales, LLC v. Chumley,* No. 10-cv-01398 (D. Colo. Jun. 15, 2011). Mix held that the defendant failed to show good cause for the information.

THE COST OF PRESERVATION. While case law continues to grow, and parties begin to understand the overall cost and burden involved in document production and review, there is still a void in e-discovery law related to the effective management of overly broad preservation demands and the resulting costs.

One of the year's most controversial opinions came from New York City-based U.S.D.C. Magistrate Judge James Cott, who seemed to suggest that the concept of proportionality should not be applied when assessing a party's preservation obligation. See *Pippins v. KPMG LLP*, 11 Civ. 0377 (S.D.N.Y. Oct. 7, 2011). Even more surprising was Cott's broad definition of "key players" for whom electronic information must be retained — sweeping in all potential class members, including thousands of defendants' current and former employees who may never be plaintiffs or witnesses in the case.

KPMG filed a formal objection to the court's order and several third parties, including the Chamber of Commerce of the United States, have filed "friend of the court" briefs asking the district court to set aside Cott's decision. The potential for misapplication of the *Pippins* case underscores the need for uniformity among courts when dealing with disproportionate preservation demands.

In September 2011, the Discovery Subcommittee of the Judicial Conference of the U.S. Standing Committee on Rules of Practice and Procedure held a "mini-conference" to discuss amendments to the Federal Rules of Civil Procedure, including several related to EDD preservation. The subcommittee's initial draft includes specific language that would apply the concept of proportionality to preservation and as an additional factor to be considered when assessing a party's culpability for spoliation sanctions.

The resulting amendments, to the extent approved, would add much-needed balance between a party's preservation and production obligations and further the overall goal of FRCP 1, "to secure the just, speedy, and inexpensive determination of every action and proceeding."

SPOLIATION AND DISCOVERY MISCONDUCT. In 2010, the e-discovery community marveled at Baltimore-based District of Maryland Chief Magistrate Judge Paul Grimm's issuance of a civil contempt order that defendant Mark Pappas be jailed for up to two years unless and until he paid the opposing side's attorneys' fees and costs that Grimm awarded as a sanction for egregious spoliation and discovery misconduct. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Civil No. MJG-06-2662 (D. Md. Sept. 9, 2010)(affirmed by the U.S. District Court with an order for Mr. Pappas to pay the remaining $571,440 balance of the $1 million sanctions award).

In 2011, Salt Lake City-based U.S. Magistrate Judge Samuel Alba also raised the specter of prison time in addition to sanctions when he referred a civil case to criminal prosecution for defendant's egregious misconduct, including the rampant deletion of electronic information and subsequent cover-up. See *Philips Electronics North America Corp. v. BC Technical*, 2:08-CV-639-CW-SA (D. Utah Feb. 11, 2011).

Similarly, Brooklyn-based U.S. Magistrate Judge Cheryl Pollak was not amused when defendants failed to produce accurate electronic payroll records relevant to plaintiffs' Fair Labor Standards Act claims. *Yu Chen v. LW Restaurant, Inc.*, No. 10-CV-200 (E.D.N.Y. Aug. 3, 2011).

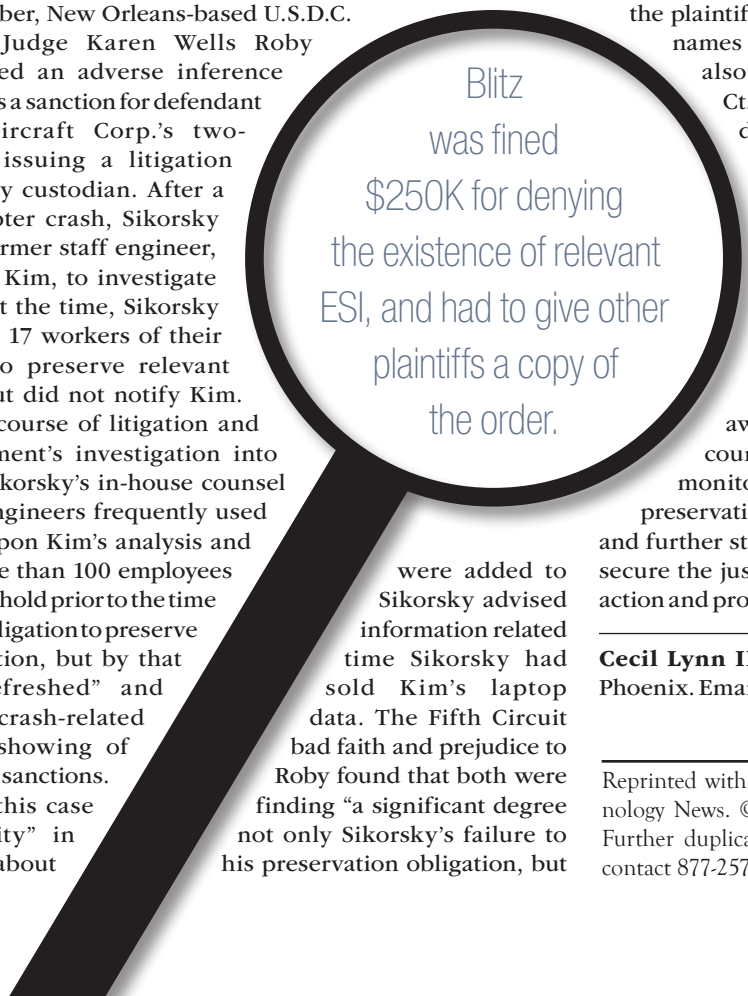
In rejecting defendants' "dog-ate-my-homework" excuse, Pollak opined that the loss of the hard disk containing the records was deliberate and consistent with defendants' history of discovery misconduct.

Accordingly, Pollak recommended an adverse inference instruction that the defendants willfully fabricated documents and a complete bar on defendants' ability to present evidence at trial related to defendants' payroll or employment records, including witness testimony. Given the severity of sanctions, it is somewhat surprising that Pollak denied plaintiffs' request for a default judgment.

Yet the year's most eye-opening misconduct sanction may well go to Blitz, USA, which was ordered to pay $250,000 in civil contempt sanctions for denying the existence of relevant electronically stored information and subsequently producing the same information in later litigation. *Green v. Blitz, USA, Inc.*, No. 2:07-cv-00372-TJW (E.D. Tex. Mar. 1, 2011).

U.S.D.C. Judge T. John Ward (who retired in September 2011) further ordered Blitz to furnish a copy of the related court opinion and order to every plaintiff in every lawsuit pending against it, or where Blitz had previously been a defendant in the past two years. Ward tacked on an additional $500,000 in civil contempt sanctions to be waived pending Blitz's certification of compliance with the court order.

In December, New Orleans-based U.S.D.C. Magistrate Judge Karen Wells Roby recommended an adverse inference instruction as a sanction for defendant Sikorsky Aircraft Corp.'s two-year delay issuing a litigation hold to a key custodian. After a fatal helicopter crash, Sikorsky re-hired a former staff engineer, Dr. Wonsub Kim, to investigate the cause. At the time, Sikorsky had notified 17 workers of their obligation to preserve relevant evidence, but did not notify Kim. During the course of litigation and the government's investigation into the crash, Sikorsky's in-house counsel and other engineers frequently used and relied upon Kim's analysis and reports. More than 100 employees the litigation hold prior to the time Kim of his obligation to preserve to the litigation, but by that already "refreshed" and containing crash-related requires a showing of justify severe sanctions. satisfied in this case of culpability" in notify Kim about were added to Sikorsky advised information related time Sikorsky had sold Kim's laptop data. The Fifth Circuit bad faith and prejudice to Roby found that both were finding "a significant degree not only Sikorsky's failure to his preservation obligation, but also related to the destruction of the data that formed the basis of Kim's crash analysis.



FORM OF PRODUCTION. In February 2011, Manhattan-based U.S. District Court Judge Shira Scheindlin issued an opinion in *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency,* 10 Civ. 3488 (S.D.N.Y. Feb. 7, 2011), pronouncing that metadata must be produced by government officials in response to a Freedom of Information Act request. The opinion included an appendix of metadata fields Scheindlin deemed necessary for preservation and production.

The opinion was heavily criticized for the burden it would place on government agencies to preserve and produce metadata for every FOIA request regardless of need or merit. The government appealed the ruling. Scheindlin ultimately withdrew the opinion.

SOCIAL MEDIA DISCOVERY. Social media continues to play an important role in electronic discovery with a number of courts focusing on a party's need to preserve and produce relevant content from his or her Facebook, MySpace, and other internet web pages. See *Zimmerman v. Weis Markets, Inc.*, No. CV-09-1535 (Pa. Commw. Ct. May 19, 2011).

In 2011, courts put personal injury and employment litigation plaintiffs on notice that relevant chat conversations, photographs, and wall posts are potentially relevant and subject to production irrespective of whether the material is maintained publicly or privately.

Yet, courts are still grappling with how best to produce social media information. In *Weis Markets*, Judge Charles Saylor, a judge on the Northumberland County Court of Common Pleas, ordered the plaintiff to turn over all passwords, user names, and log-in names related to his MySpace and Facebook accounts. See also *Gallion v. Gallion*, FA114116955S (Conn. Super. Ct. Sept. 30, 2011), where the court ordered opposing divorce lawyers to exchange their client's respective Facebook and dating website passwords.

By the end of 2011, more than 30 states had some form of e-discovery rulemaking. In addition, several federal and state courts have adopted local rules and protocols. Even local bar associations, such as the New York State Bar Association, continue to publish best practices and recommendations related to EDD.

Hopefully, these rules and resources will increase awareness and cooperation among parties and their counsel. The e-discovery community will continue to monitor the discovery subcommittee's efforts to craft a preservation rule that underscores the need for proportionality and further strives to achieve the mandate set forth in Rule 1, "to secure the just, speedy, and inexpensive determination of every action and proceeding."

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