

Bingham eDiscovery News

Bingham's eDiscovery Group is pleased to publish our latest issue of *Bingham eDiscovery News* — a newsletter covering recent legal developments on electronically stored information ("ESI") and other emerging eDiscovery topics.

2013 was an interesting year for eDiscovery and we expect more important developments in 2014. Here are some predictions on what may lie ahead in the coming year:

- **Heightened focus on collaboration, transparency and disclosure**

National, state and local eDiscovery rules will continue to mandate increased cooperation on eDiscovery, particularly as judges grapple with advances in technology and data complexity.

- **Greater emphasis on proportionality**

Courts will look to proportionality to determine whether a requesting party is entitled to the information and, if so, who should pay for the cost of producing it.

- **Need to embrace and master eDiscovery tools**

When it comes to eDiscovery technologies, the future is now. Judges, in particular magistrate judges, will expect counsel to understand the technology being used to filter and produce data. The most effective advocates will be those that can select the right technology for the particular matter, cooperate sufficiently with opposing counsel on the use of that technology, and explain it clearly to the court.

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PREDICTIVE CODING

Cambridge Place Investment Management, Inc. v. Morgan Stanley & Co., Inc., et al., a case pending in the Business Litigation Session of the Massachusetts Superior Court, is one of the many cases filed nationwide arising out of the sale of residential mortgage backed securities. In *Cambridge Place*, Bingham represented J.P. Morgan Securities LLC in motion practice concerning the use of predictive coding for document review and production. The motion resulted in the first known decision by a Massachusetts state court judge approving the use of predictive coding in document production. Following is an interview with Andrew Gallo, a partner in Bingham's FIRE Lit. practice group, and a member of the Bingham team that handled this matter.

Q: First of all, can you briefly explain what predictive coding is?

A: To put it simply, predictive coding is a method of technology assisted review that involves using a computer to rank or prioritize electronic documents based upon their likelihood of being responsive to a particular set of document requests. The technology is similar to that used by popular websites, like Amazon, that can offer you selections based upon what you've searched for or purchased in the past.

Q: How does it work?

A: The process works by doing a manual review for responsiveness of a small set (often called a "seed set") of randomly selected documents or other electronically stored information from the documents or information to be reviewed. The documents manually marked responsive and non-responsive in the seed set are then analyzed by a computer program that can identify the unique characteristics of the documents marked as responsive (including frequency and placement of words and phrases). Once adequately trained, the computer can use information gleaned from the seed set to rank a much larger set of documents based upon likelihood of responsiveness. From there, the producing party can determine what to do with the ESI based upon the rankings. One may want to automatically produce those documents that the computer has ranked as most likely to be responsive, to manually review for production those documents in the middle range, and to discard, without further review, those documents the computer has deemed least likely to be responsive. The idea is to minimize the number of documents that require human review.

Q: Why did you decide to use predictive coding in this matter?

A: We had identified dozens of custodians with millions of emails that would be within the review set given the scope of plaintiff's document requests and the relevant time for the review. We were also under a tight deadline of just under 6 months to get the review completed. We believed that predictive coding would be useful not only to make the review process faster and more efficient but also to prioritize the most relevant documents for review and production early in the process.

Q: What lessons did you take away from this experience?

A: First and foremost, it is important to be reasonably transparent with opposing counsel and the court if you intend to use predictive coding. Given that the technology will be new to many litigants and judges, you do not want to take anyone by surprise after the fact of having used it. Many courts have already accepted the technology, and the weight of the scholarly commentary is that the technology is more efficient and can be more accurate than a linear, manual review.

Accordingly, litigants should be able to make a good case for the use of predictive coding, particularly where large amounts of ESI are involved.

Second, in negotiating any protocol, you should know going in what issues are important to your client and where you have room to give. Have an idea of where you would like to end up in the negotiation and a plan about how to get there. During the negotiation do not get caught up on issues that are immaterial to the process or statistically insignificant.

Finally, have a good vendor that can provide you with expert advice both on how the technology works and on statistical issues that may arise with respect to how the technology is implemented. Bingham's internal eDiscovery and Practice Technology group has experience with multiple vendors and can act as an invaluable resource in this regard. Experts, including a statistician, will be critical in helping you negotiate the protocol and, as was true in our case, you may need testimony from the expert during any motion practice.

The complete interview with Andrew Gallo regarding his experience negotiating a predictive coding protocol in this matter can be found [here](#).

PROPORTIONALITY

Citing Proportionality Concerns, Court Concludes it Would be Senseless to Require Plaintiff to go to Great Lengths to Produce Non-Crucial Evidence

***Apple Inc. v. Samsung Elecs. Co. Ltd.*, No. 12-CV-0630-LHK (PSG), 2013 WL 4426512 (N.D. Cal. Aug. 14, 2013)**

In this patent infringement case, Samsung sought the production of several categories of financial information from Apple. While Apple maintained financial databases and did not deny that the requested information was relevant, it claimed that it did not have reports of the nature Samsung requested and that only a "herculean effort" could produce "even a subset" of the reports demanded. Regardless, the court determined that compelling production would not violate established discovery principles, reasoning that creating completely new documents is not the same as requiring a party to query an existing dynamic database for relevant information.

However, the court determined that because the parties had already submitted their expert damages reports, the financial documents would be of limited value to Samsung. The court reasoned that although counsel was not able to shed light on exactly what was done, Samsung's experts were clearly able to apportion the worldwide, product line data to estimate product-specific damages in the United States. As such, the court stated that "[i]t seems, well, senseless to require Apple to go to great lengths to produce data that Samsung is able to do without. This the court will not do."

Recognizing, however, that "Samsung's damages experts [were] still open to an attack by Apple for their failure to use more granular financial data," the court, precluded Apple from challenging Samsung's damages experts "for failing to allocate geographically or by product model in any way that could have been supported by the reports disputed here that were requested but not produced." This order should remind parties to consider the full range of remedies available in discovery disputes. Although the court did not require production of the data, it issued an order foreclosing any criticism of the requesting parties' experts related to the non-produced data.

Court Declines to Compel Response to “Ultra-Broad” Request for Passwords and User Names or Allow “Exhaustive Forensic Examination” of Computers

***NOLA Spice Designs, LLC v. Haydel Enters., Inc.*, No. 12-2515, 2013 WL 3974535 (E.D. La. Aug. 2, 2013)**

In this trademark infringement case, the defendant sought to compel the plaintiff and its principal (a third-party defendant) to produce “passwords and user names to all online web sites related to the issues in this litigation” and to compel the plaintiff and its principal to “submit their computers to an exhaustive forensic examination.” Both of the defendant’s requests were denied.

The court acknowledged that “there is no protectable privacy or confidentiality interest in material posted or published on social media,” but noted that the defendant’s arguments to that end “miss[ed] the point.” Instead, the court focused on the “ultra-broad” nature of the request that “would permit [the defendant] to roam freely through all manner of personal and financial data in cyberspace pertaining to [the plaintiff and the third-party defendant].” Reasoning that neither the defendant’s promises to “limit itself” to information “related to the issues in this litigation,” nor the protective order already in place “would be effective in controlling the potential for mischief,” and also noting the lack of legal authority presented to support “such broad-ranging and logistically uncontrollable discovery of ESI,” the court declined to compel the production of the requested information.

The court conceded that the defendant’s request for “exhaustive forensic examination” of the plaintiff’s and its principal’s computers was “within the scope of ESI discovery contemplated by [the FRCP],” but noted that “such requests are also subject to the proportionality limitations applicable to all discovery.” The court explained that while forensic examinations were not uncommon, “[c]ourts have been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature.”

SANCTIONS

Judge Declines to Presume Prejudice in Document Deletion, Recommends Denial of Motion for Sanctions

***Herrmann v. Rain Link, Inc.*, No. 11-1123-RDR, 2013 WL 4028759 (D. Kan. Aug. 7, 2013)**

In this ADA discrimination case, the plaintiff sought sanctions for the defendants’ allegedly intentional spoliation of evidence and argued that prejudice could be presumed. The magistrate judge declined to do so, finding that defendants’ spoliation was merely negligent.

The document destruction resulted from defendants’ failure to suspend their routine practices, which, although negligent, did not relieve the plaintiff of its obligation to make a showing of actual — rather than theoretical — prejudice. Ultimately, the magistrate judge found that while some documents and ESI were destroyed, the plaintiff had not shown it was prejudiced by the destruction of documents.

Recognizing that the question of prejudice in at least one instance was a “close call” and that “issues concerning the admission and exclusion of evidence” were “best left” to the trial judge, the magistrate judge recommended that the plaintiff’s request for evidentiary sanctions be denied without prejudice.

Court Allows Presumption of Prejudice for Intentional Deletion of Emails and Failure to Establish Timely Litigation Hold

***Sekisui Am. Corp. v. Hart*, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013)**

In this breach of contract case, the judge reversed an earlier order that denied spoliation sanctions for the plaintiffs' deletion of ESI. The alleged spoliation occurred between the date plaintiff put defendants on notice of a potential claim, and their actual filing of the complaint seven months later. Over that period, the plaintiffs ordered their IT vendor to delete the emails of one of the defendants and another former employee. Further, the plaintiffs failed to establish a litigation hold until approximately fifteen months after sending the original notice—nor they did notify the IT vendor managing the plaintiffs' ESI of the duty to preserve until three months after the claim was actually filed.

In a June 2013 opinion, a magistrate judge denied the defendants' motion for sanctions because the defendants did not show they had been prejudiced by the negligent destruction of the emails.

The court rejected the plaintiffs' argument that they deleted emails in good faith merely to save server space. The court was concerned that the plaintiffs' employees directly requested the deletion of the ESI in question, and that the company was negligent in implementing a litigation hold. The court also concluded the emails were presumptively relevant, finding that the willful destruction of potentially relevant information was enough to presume prejudice to the moving party and ordering a finding of adverse inference and monetary sanctions against the plaintiffs.

Court Orders Sanctions, Threatens Order to Retain an E-Discovery Vendor for Late and Inadequate Production

***Logtale Ltd. v. IKOR, Inc.*, 2013 WL 3967750 (N.D. Cal. July 31, 2013)**

In this misrepresentation case, the plaintiffs sought to compel the defendants to comply with a prior court order and compel production from a defendant who objected to the plaintiffs' requests. Acknowledging that it shared the plaintiff's concerns "about the inadequacy of Defendants' search for responsive documents," the court granted the plaintiff's motion to compel and also granted the request for attorneys' fees. The court declined to order the retention of an e-discovery vendor "at this time," but warned that such an order would be entered if problems with the defendants' document production continued.

Conceding that their productions had not been timely — and having previously admitted that prior productions were incomplete — the defendants asserted they were "adequately" searching for electronic documents. Specifically, defense counsel explained that he had instructed his client's principals, accountant, and corporate attorney to search their computers and produce all responsive emails and that he had requested that the principals conduct a second search upon discovering "a few gaps in the production" during his review.

Citing the "paucity" of documents produced and defense counsel's admission that productions had been incomplete, the court concluded that "Defense counsel has not been sufficiently proactive in ensuring that his clients are conducting thorough and appropriate document searches, especially in light of obvious gaps and underproduction. Under such circumstances, it is not enough for counsel to simply give instructions to his clients and count on them to fulfill their discovery obligations."

Ultimately, the court ordered the defendants to produce all remaining responsive documents and to supplement their responses to interrogatories. Although the court declined to order the defendants to retain the services of an eDiscovery vendor, the court indicated that “Defendants [were] on notice that if there [were] continuing problems with their document productions,” they would be ordered to retain an eDiscovery vendor and to submit “sworn, detailed declarations regarding their document preservation and collection efforts.”

Discovery Snafu in Apple-Samsung Litigation Highlights Inherent Challenges of Discovery in a Digital World

***Apple Inc. v. Samsung Elecs. Co. Ltd.*, No. 12-CV-0630-LHK (PSG), 2013 WL 4426512 (N.D. Cal. Aug. 14, 2013)**

In this patent dispute, Apple is seeking sanctions against Samsung’s lawyers at Quinn Emanuel for their alleged mishandling of confidential documents. The terms of a 2011 licensing agreement between Apple and Nokia — buried within an expert report — were left unredacted and made available to a Samsung employee in violation of a protective order.

Apple claims that the protected license information had been leaked to at least 220 people, either via email or through an FTP site where the report was stored. While the extent of the damage caused by the disclosure is unknown, Apple claims that Samsung will be able to wield the erroneously disclosed information to gain an unfair advantage, and that the information has already been utilized by Samsung in the company’s ongoing negotiations with Nokia.

In its defense, Quinn Emanuel has claimed that the attorney who emailed the unredacted report to a Samsung executive ordered the recipient to delete it as soon as the mistake was discovered. The lawyer did not realize, however, that the report was also available on an FTP site.

Stressing that the disclosure was inadvertent, Quinn Emanuel has changed its policy on performing redactions in response to Apple’s allegations, now requiring two sets of eyes to review a redacted document prior to production. The magistrate judge in charge of the inquiry has demanded and will review more than 2,000 documents from Quinn Emanuel to determine whether sanctions are warranted.

ESI VENDORS

A “Cautionary Tale” for Anyone who Uses a Discovery Vendor — Judge Orders ESI Vendor to Produce Data to Owner or Face Sanctions

***GlaxoSmithKline LLC v. Discovery Works Legal Inc., et al.*, Case No. 650210/2013**

In 2004, GlaxoSmithKline (GSK) hired a vendor, Discovery Works Legal Inc., to perform document and hard drive scanning and processing services related to GSK litigation, but the arrangement ran into difficulties in 2011 when — after GSK allegedly found out the vendor was in financial trouble — GSK asked for its data to be cataloged and returned. GSK sued Discovery Works in January, accusing the vendor of threatening to destroy billions of GSK’s most sensitive and confidential documents unless it paid more than \$80,000 in fees/costs.

A judge ordered Discovery Works to provide an index of all GSK client data it has in its possession. The court also ordered the vendor’s information technology staff to meet with the

pharmaceutical company's IT professionals to find the data, which GSK has been unable to obtain despite months of efforts.

The judge advised law firms and companies with similar discovery outsourcing arrangements that they need to give themselves more protections in their contracts with discovery vendors by requiring them to keep an index of all the data and documents the vendors are managing for them. The case is a reminder that the clients should carefully review its agreements with vendors so the rules about the return of data (cost, timing, procedures) are clear and reasonable.

AMENDMENTS

The Judicial Conference Committee on Rules of Practice and Procedure is considering amendments to the Federal Rules of Civil Procedure. The proposed amendments to FRCP 1, 4, 16, 26, 30, 31, 33, 34, 36 and 37 are known as the "Duke Rules Package," which comes out of the May 2010 Duke University FRCP conference. The proposed amendments can be broadly grouped into three categories:

- Amendments to improve early and effective judicial case management;
- Amendments to enhance the means of keeping discovery proportional to the action; and
- Amendments to advance cooperation.

The proposed change to Rule 26 would limit discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . ." and eliminates the "subject matter involved in the action" from the scope of discovery. This would effectively reduce the volume of information subject to discovery — a growing concern in light of the expanding amount of data created in the age of modern technology — and better ensure proportionality.

The proposed amendment to Rule 34 explicitly reflects the common practice of producing copies of documents or ESI rather than simply permitting their inspection.

The proposed amendment to Rule 37 pertains to parties' duty to preserve ESI, focusing on sanctions rather than attempting directly to regulate the details of preservation. It provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions. The amendment also provides a uniform standard for culpability findings that support the imposition of sanctions, typically requiring a finding that the party acted willfully or in bad faith.

Public comments on these proposed Amendments are due by February 15, 2014 and can be submitted [here](#).

PRIVACY/DATA SECURITY

EU Lawmakers Back Hefty Fines for Data Privacy Regulation Violations

The European Parliament's Committee on Civil Liberties, Justice and Home Affairs has approved a draft version of the data protection regulation it is planning to use in negotiations with national governments in the European Council. The measure is intended to unify and tighten the European Union's current data protection regime. The revisions would subject companies to fines of up to €100 million (\$136.7 million) or 5 percent of their annual revenue for violations —

whichever is greater. The previous cap on fines was the greater of 2 percent of the violator's annual revenue or €100 million.

The draft amendments would also prevent multinational companies from giving European users' personal data to authorities based outside the EU unless they receive permission from local data protection authorities or can show that the transfer is in compliance with an existing data-sharing regime between the requesting country and the EU or member state.

Companies that hold the European users' data must also provide notice to the subject(s) of the request, including the existence of any authorization for the request issued by the supervisory authority; and whether personal data was provided to public authorities during the last consecutive 12-month period

The committee's draft version of the regulation would also strengthen the "right to be forgotten" proposed by the commission, by replacing it with a "right to erasure" that would require data controllers to not only delete users' data at their request but also forward the request to others where the data has been replicated.

This issue of *Bingham eDiscovery News* was written by [Reed Lyon](#), a litigation associate in Bingham McCutchen's San Francisco office.

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