

E-Discovery

2018 Year in Review



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E-DISCOVERY: 2018 YEAR IN REVIEW

2018 was an important year for the development of guidance in handling e-discovery issues. Hundreds of courts throughout the United States analyzed and decided issues that will have—and already have had—a large impact on discovery. These cases involve a wide array of topics, from production of social media accounts to the government’s use of cell site location information to the applicability of Rule 26’s proportionality requirements. The Tucker Ellis E-Discovery Group has compiled a list of the most significant e-discovery cases during 2018, grouped by topic, to provide insight and guidance as we study these new developments in e-discovery.

PROPORTIONALITY

Firefighters’ Retirement System v. Citco Group Ltd., 2018 WL 276941 (M.D. La. Jan. 3, 2018): Plaintiffs filed suit against Citco Group alleging multiple breach of contract and tort claims regarding plaintiffs’ \$100 million investment loss. After the parties agreed to certain search terms and custodians, as well as a 30(b) deposition of Citco Group’s corporate counsel, plaintiffs filed a motion to compel “seeking permission from [the] court to email everyone in every Citco entity to ask whether anyone employed by any Citco entity has knowledge relevant to this litigation, and thereafter require the Citco Defendants to conduct additional electronic and hard copy searches for documents.” The court denied plaintiffs’ motion, explaining that such a request is “simply unreasonable, and in essence is a request for the Citco Defendants to ‘go back to square one’ of their document production.” In addition, the court stated that “such a large scale search raises proportionality concerns and, especially in light of the parties’ previous agreements and efforts, would be unduly burdensome.”

Nece v. Quicken Loans, Inc., 2018 WL 1072052 (M.D. Fla. Feb. 27, 2018): Plaintiff filed suit against Quicken Loans for violating the Telephone Consumer Protection Act after Quicken allegedly called a number that plaintiff had placed on the “do-not-call” registry. Despite failing to certify a class within the class certification deadline, plaintiff served class discovery requests upon Quicken and filed a motion to compel production of “[a]ll documents of any type or kind or records of communications received by Defendant or any third party from a proposed class member requesting that Defendant not contact that consumer or customer.” After the magistrate judge granted plaintiff’s motion to compel, Quicken filed objections arguing that compliance with the magistrate’s order “might require 15,000 hours of a Quicken employee’s or of outside counsel’s time.” The judge sustained Quicken’s objections, holding that plaintiff’s “class-discovery requests impose on Quicken a burden disproportional to the needs of this action.” This decision was based largely upon the fact that plaintiff failed to certify a class and that her case alone was worth only \$6,000.

Curtis v. Progressive N. Ins. Co., 2018 WL 2976432 (W.D. Okla. June 13, 2018): Plaintiff filed suit against her insurance company over the valuation of her vehicles. During discovery, plaintiff served non-party Mitchell International, Inc. with a subpoena duces tecum, seeking documents “pertaining to ‘the correspondence, purchase, and analysis of the [computer valuation system]’ Mitchell utilized to create valuations of total loss vehicles” for plaintiff’s insurance company. Mitchell objected to plaintiff’s subpoena, and plaintiff filed a motion to compel. The court granted plaintiff’s motion because “the information requested can be produced electronically,” and the “subpoena at issue does not require the travel or attendance of any witnesses.” In addition, “there is no violation of the 100-mile limitation for electronic documents pertaining to Rule 54.”

***Motorola Solutions, Inc. v. Hytera Communications Corp.*, 314 F.Supp.3d 931 (N.D. Ill. 2018)**: In a case involving an alleged misappropriation of trade secrets, plaintiff filed a motion to compel forensic examination of defendant’s computers in China. Plaintiff alleged that examination of the computers was relevant to a statute of limitations issue. The court denied plaintiff’s motion because “nothing in any of [plaintiff’s] filings shows how the information it hopes to find in the computers in China through forensic examination has anything to do with equitable tolling of the statute of limitations and fraudulent concealment.” In addition, even if examination was relevant to the statute of limitations issue, “discovery of computers in China is not proportional to the importance of discovery in resolving the issues and the burden and expense of the proposed discovery manifestly outweighs its likely benefit to the very limited question of equitable tolling.”

***Winfield v. City of New York*, 2018 WL 840085 (S.D.N.Y. Feb. 12, 2018)**: In a civil rights case regarding affordable housing, plaintiffs served upon the City a 30(b)(6) deposition notice seeking information regarding the City’s housing databases, as well as “information about various policies related to data and data analyses.” The court granted plaintiffs’ motion to compel attendance at the deposition, finding that plaintiffs “demonstrated an adequate factual basis justifying ‘discovery on discovery’” because they “made sufficiently clear at oral argument that they require certain back-end information from the City’s 30(b)(6) witnesses in order to understand the data contained in the ... databases.” The court did, however, grant the City’s motion for a protective order, requiring plaintiffs to “provide the City with more specific topics” so that it could better identify and prepare its 30(b) witnesses.

PRACTICE TIPS

- It is often best to enter into e-discovery agreements at the outset of discovery. Courts will look to these agreements when handling disputes, so make sure the agreement is detailed and unambiguous.
- If a dispute regarding proportionality arises, do your best to quantify the time and expense it would take to comply with a discovery request. Quantification is important regardless of whether you are the one seeking to compel the discovery or the one arguing that additional discovery is overly burdensome.

SOCIAL MEDIA

***Shenwick v. Twitter, Inc.*, 2018 WL 833085 (N.D. Ca. Feb. 7, 2018)**: In a securities class action against Twitter, plaintiffs requested that Twitter search the private direct messages of each of its custodians. Twitter agreed to produce the messages from the named individual defendants in the case, but argued that the Stored Communications Act prevented disclosure of “direct messages from anyone other than a named defendant.” The court agreed with Twitter’s argument, reasoning that the Stored Communications Act does, in fact, prevent courts from enforcing subpoenas issued to an electronic communication services provider. The court explained that, “[i]f Plaintiffs issued a third party subpoena to a company – not Twitter – for direct messages that the individual custodians sent and received, there is no question that the Court could not enforce such a subpoena. Under the same reasoning, the Court cannot compel Twitter, a party in this litigation, to produce protected direct messages of individual custodians who are not parties simply because Twitter is also the provider of the direct messaging service.”

Forman v. Henkin, 2018 WL 828101 (N.Y. Feb. 13, 2018): Plaintiff filed a personal injury lawsuit against a horse owner, alleging that she suffered spinal and traumatic brain injuries as a result of falling from the horse. Plaintiff specifically alleged that “she had become reclusive as a result of her injuries and also had difficulty using a computer and composing coherent messages.” Defendant sought “unlimited authorization to obtain plaintiff’s entire ‘private’ Facebook account, contending the photographs and written postings would be material and necessary to his defense of the action.” The Court of Appeals of New York affirmed the granting of defendant’s motion to compel, finding that the Supreme Court Appellate Division erred in applying a heightened threshold to production of the Facebook account and reasoning that “even private materials may be subject to discovery if they are relevant.” The court explained that “it was reasonably likely that the data revealing the timing and number of characters in posted messages would be 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.”

PRACTICE TIP

- Advise clients that social media accounts, even those containing private information, may be discoverable. This is particularly important for plaintiffs in personal injury actions.

CELL PHONES

Carpenter v. United States, 138 S. Ct. 2206 (June 22, 2018): The Supreme Court held that a warrant is required to access cell site location information (CSLI) from a cell phone company. In the opinion, Chief Justice Roberts noted that technology has required courts to find ways to preserve privacy from the government, even when tools have enhanced the government’s ability to surveil. He found that individuals have a reasonable expectation of privacy in CSLI and that a warrant is required; however, the decision was noted as being “a narrow one.”

Lazoja v. Nielsen, No. 2:18-cv-13113 (N.J.D.C. Oct. 2018): A Muslim woman had her iPhone seized when she arrived at Newark International Airport. Customs and border agents requested that she unlock her phone, but she refused, in part because it contained privileged legal communications. The agents retained custody of the phone. Federal authorities cracked the phone and imaged it. The women then filed a civil suit and a motion to return property, seeking the return of her data and the expungement of any copies made. The government agreed to delete the seized data.

Ortiz v. Amazon.com LLC, 2018 WL 2383210 (N.D. Cal. May 25, 2018): Plaintiff alleged that defendant failed to pay him for all the hours he worked. Plaintiff was ordered to produce his cell phone records, as they were relevant to determine whether he made or received work-related phone calls or text messages. Plaintiff failed to produce such records, claiming that they were not in his possession or control since he was not the account holder. The court ordered plaintiff to provide defendant with his cell phone account holder’s name and address so that defendant could subpoena the cell phone records directly from her.

United States v. Kolsuz, 890 F.3d 133 (4th Cir. 2018): This case involved the search of an iPhone seized when an individual was about to board an international flight. The phone was subjected to a forensic analysis. Information from that report was used to indict and convict the individual. The government argued that although the search was warrantless, it fell within the border search exception to the warrant requirement. The Fourth Circuit found that warrantless forensic searches of electronic devices seized at the border must be justified by individualized suspicion. Since the frequency of this type of search at the border has increased, the Supreme Court eventually will need to resolve whether such searches require suspicion or actual judicial process.

PRACTICE TIPS

- In criminal matters where a phone has been seized without a warrant, consider whether a motion to suppress or a motion for return of property is appropriate.
- When clients or attorneys are travelling out of the country, have a plan of action if border agents request the unlocking of a phone. The plan should address the grounds, if any, on which to refuse the request, and a contingency plan if the phone is seized.
- When responding to discovery requests concerning cell phone records, begin by determining what information should be provided and who possesses that information.

SEARCH TERMS AND TECHNOLOGY-ASSISTED REVIEW (TAR)

***Webasto Thermo & Comfort North America Inc. v. BesTop, Inc.*, 2018 WL 3198544 (E.D. Mich. June 29, 2018)**: In this patent infringement case, the parties entered into a stipulated order governing the production of ESI. The patent owner moved to stay discovery and for a protective order, claiming the competitor violated the stipulated order by propounding overly broad search terms. In addition to finding the search terms overly broad on their face, the overbreadth was established by the return of multiple gigabytes of ESI, potentially comprising tens of millions of pages based upon only a partial production of the proposed search terms. Furthermore, the search of the first 100 records produced using the search terms revealed no documents related to the issues of the lawsuit. Accordingly, a protective order was issued.

***City of Rockford v. Mallinckrodt ARD INC.*, 2018 WL 3766673 (N.D. Ill. Aug. 7, 2018)**: The parties agreed to certain aspects of discovery, including using keyword searching and a protocol for agreeing on search terms, date restrictions, and custodians. There was also a protocol for disputes over specific search terms, but the parties could not agree what to do after production to verify the accuracy of production. The court ruled that sampling the null set was reasonable and proportionate under Rule 26, after mentioning that random sampling of the null set is part of TAR. “Indeed, sampling the null set when using key word searching provides for validation to defend the search and production process, and [sic] was commonly used before the movement towards TAR.” The court also found that plaintiffs’ proposed 95% confidence level with a plus or minus two percent margin was acceptable.

***Cen Com, Inc. v. Numerex Corp.*, 2018 WL 1737943 (W.D. Wash. Apr. 11, 2018)**: Defendant moved to compel plaintiff to run specific search terms relating to a 2012 consent decree into which plaintiff had entered with the attorney general of the state of Washington. Plaintiff refused, arguing that the terms were irrelevant; however, plaintiff relied on the old Rule 26 standard to argue that “these terms are not reasonably calculated to lead to the discovery of admissible evidence.” When applying the current standard, the court found the terms to be relevant, and found that plaintiff had failed to assert that: (1) the search terms are privileged or burdensome; or (2) the discovery is not proportional to the needs of the case as the current Rule 26 requires. Plaintiff was compelled to run the search terms – “attorney w/2 general” and “consent w/2 decree.” Defendant was also awarded attorney’s fees related to the motion to compel.

***In re Broiler Chicken Antitrust Litigation*, 2018 WL 1146371 (N.D. Ill. Jan. 3, 2018)**: This case was a class action involving three putative plaintiff classes and nearly 30 defendants. After plaintiffs filed their first set of requests for production, the district judge appointed a special master to address the discovery disputes arising from such a large amount of e-discovery. The special master ultimately entered an order regarding search methodology of electronically stored information. The order included a detailed procedure on how TAR could be used. Specifically, the order went through each step of the process: (1) pre-search deduplication and culling of collected data; (2) search methods; and (3) validation protocol. However, it should be noted that while TAR was an accepted search method, an alternative protocol for keyword searches was also included.

***In Re Domestic Airline Travel Antitrust Litigation*, 2018 WL 4441507 (D.D.C. Sept. 13, 2018)**: In a large multidistrict class action, defendant’s use of TAR led to a voluminous – six-million-document – production of predominantly non-responsive documents. The core production of 3.5 million documents contained only 600,000 responsive documents. Despite the fact that dozens of attorneys reviewed the produced documents, plaintiffs requested an extension to the fact discovery deadline so that they could better review all of the documents. The court granted an extension of fact discovery deadlines because “Plaintiffs have demonstrated good cause to warrant an extension of deadlines in this case based upon Plaintiff’s demonstration of diligence and a showing of nominal prejudice to the Defendants.”

PRACTICE TIPS

- Avoid lengthy discovery disputes from the start by taking care to draft narrow terms and engage in meaningful negotiations with opposing counsel to tie the terms to specific case issues.
- Consider if any verification, including random sampling of the null set, is necessary even in cases concerning key word searching. In the protocol, specify whether verification is desired and, if so, at what confidence level.

FRAUD/SPOLIATION/SANCTIONS

***King v. Fleming*, 2018 WL 3863326 (10th Cir. Aug. 15, 2018)**: Facing the trial court’s probable dismissal of their action, plaintiffs filed an amended complaint attaching a smoking gun email. While plaintiffs described the attachment as an “unofficial version” of the email, it soon became clear that the email’s incriminating text had been superimposed after delivery. Rather than accepting defendants’ offer to withdraw the fraudulent pleading to avoid sanctions, plaintiffs stood by the email’s propriety by asserting in a series of affidavits that the doctored email was a reconstruction intended to “demonstrat[e] ... the truth.” The trial court ordered the requested sanctions – dismissal with prejudice and attorneys’ fees – and the appellate court affirmed.

***ComLab, Corp. v. Kal Tire*, 2018 WL 4333987 (S.D.N.Y. Sept. 11, 2018)**: This litigation concerned whether plaintiff had emailed 13 invoices to defendant during the course of their business relationship. Plaintiff claimed that it had, producing hard copy versions of those alleged emails and asserting that the native versions had been lost to a computer virus. Defendant pointed out that despite enabling the “Litigation Hold” – which “preserves every email that is sent to or from those accounts” – feature on the email accounts of the individuals who allegedly received the emails, no record of the individuals receiving the alleged emails was discovered. Additionally, defendant relied on expert testimony to establish that the invoices’ metadata had been manipulated. Finding that plaintiff had fabricated the email invoices, the court dismissed the case with prejudice.

***Lawrence v. City of New York*, 2018 WL 3611963 (S.D.N.Y. July 27, 2018)**: In a case that “showcases the importance of verifying a client’s representations” and dangers of “unfamiliar[ity] with electronic metadata,” the Southern District of New York demonstrated its power to “fashion an appropriate sanction.” Relying on his client’s statements, plaintiff’s counsel produced pictures that counsel asserted had been taken contemporaneously with a September 2014 attack. When the photographs’ metadata revealed that they had been staged and not taken until two years after the alleged attack, plaintiff’s counsel withdrew, and plaintiff attributed her misrepresentation to her mental illness. Because plaintiff’s counsel had performed a reasonable inquiry, the court denied defendants’ motion for sanctions against him; however, the court granted defendants’ request to dismiss plaintiff’s case with prejudice as a sanction because her “conduct require[d] that the policy favoring adjudication on the merits yield to the need to preserve the integrity of the courts.”

Hernandez v. City of Houston, 2018 WL 4140684 (S.D. Tex. Aug. 30, 2018): The trouble began in this case when defendant failed to preserve, and then intentionally destroyed, the hard drives of six document custodians. Matters only worsened when defendant represented that the destroyed drives did not have responsive information (which was untrue), claimed that the parties’ agreed-upon search terms were too broad because they collected 2.6 million documents (when they only collected 78,702), and then unilaterally applied its own search terms to unreasonably limit its production (despite the ESI protocol’s contrary instruction). The court found that defendant’s many misrepresentations justified entering an order establishing contested adverse facts as true because the sanction would “cure[] the violation without inflicting additional costs on the parties.”

Franklin v. Howard Brown Health Center, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018): This discovery dispute arose from plaintiff’s request for production of particular emails, text messages, and instant messages. In a course of events the magistrate judge described as “bollix[ing] ... to a staggering degree and at every turn,” defendant “allowed employees to decide on their own what was relevant and what wasn’t” and stored responsive instant messages in a folder that automatically deleted its contents after two years, which no one discovered until three years later. Finding that “there can be little question that sanctions are warranted,” the magistrate judge recommended that plaintiff’s motion for discovery sanctions be granted.

PRACTICE TIPS

- If you doubt the authenticity of an email or electronic document produced by opposing counsel, it may be beneficial to hire an expert to dispute authenticity and establish manipulation.
- Review the metadata of electronic documents closely. This is important not only for the attorney who seeks to challenge a document’s authenticity, but also for the attorney producing the ESI.

FORM OF COLLECTION/PRODUCTION

Small v. University Medical Center, 2018 WL 3795238 (D. Nev. Aug. 9, 2018): Defendant’s missteps form the foundation for a 100+-page decision detailing how *not* to conduct a document collection. The highlights include: failing to have a policy for issuing litigation holds; waiting eight months to enter a litigation hold; allowing executives to remain unaware of, or ignore, their preservation duties; not preserving ESI until 18 months from the inception of the relevant litigation; and relying on ESI vendors without ensuring that they were following best practices.

Baker v. Santa Clara Univ., 2018 WL 3629838 (N.D. Cal. July 31, 2018): After defendant failed to comply with plaintiff’s request to “produce all documents in native form,” plaintiff sought an order requiring defendant to re-produce all 2,500 pages of PDFs as natives. In support of her request, she contended that she needed the natives to “identify[] missing parent emails[,] child emails[,] hidden attachments[,] altered electronic records[,] and other electronic activity.” Although the court did not disagree with her assertion, it found her desired relief unwarranted “[a]bsent a specific, articulable basis for believing [the defendant] ha[d] not complied with its discovery obligations,” especially in light of the fact that she waited until the eve of the discovery cutoff to raise the issue. Consequently, it denied her motion without prejudice.

In re Syngenta AG MIR 162 Corn Litigation, 2018 WL 4609112 (D. Kan. Sept. 25, 2018): This decision outlined the advantages of producing documents as TIFFs. Citing to the Sedona Conference, the court reasoned that TIFFs “allow a party to refer to particular portions of a document – perhaps in designating confidentiality or directing a witness to particular language – by page number.” Consequently, it found that “documents in TIFF format are easier to work with and enable depositions and court proceedings to run more smoothly.” While parties are free to develop ESI protocols that fit their formatting preferences, this decision sheds some light on how courts prefer to receive produced documents introduced as motion, hearing, or trial exhibits.

Metlife Inv'rs. USA Ins. Co. v. Lindsey, 2018 WL 5292222 (N.D. Ind. Oct. 25, 2018): The court granted a motion seeking to have plaintiff reproduce PDFs as natives *and* awarded the attorneys' fees and costs associated with the motion. The consequential circumstances appeared to be that: (i) the parties' agreed-upon ESI protocol dictated that documents were to be produced as natives; and (ii) the defendant had consistently raised and maintained its objection at each phase of plaintiff's rolling productions.

PRACTICE TIPS

- Counsel should work with a client's IT personnel to determine what automated hold processes can be put in place. That discussion should also address whether it is possible and worthwhile to mirror images of computers and/or portions of servers to ensure that documents are not intentionally or accidentally deleted.
- Communicate with opposing counsel to agree on a mutually-acceptable form of production *prior* to producing any documents. Although at least one court preferred that documents be produced in TIFF format, generally, courts will not interfere with parties' agreements regarding the form of production.

PRIVILEGE

In re Abilify (Aripiprazole) Prods. Liab. Litig., 2018 WL 4440707 (N.D. Fla. Oct. 5, 2018): In a products liability case, a pharmaceutical company discovered that it had inadvertently produced a privileged PowerPoint presentation after plaintiffs used the PowerPoint during a deposition. The company objected to the PowerPoint at the deposition and notified plaintiffs that it intended to exercise its clawback rights as to the privileged material. Immediately after the deposition, the company sent an email confirming its intent to claw back the privileged material, but did not send plaintiffs an official notice or privilege log until five days later. Plaintiffs argued that the company waived privilege because it did not provide the full written notice and privilege log within two business days of the deposition. The court rejected plaintiffs' argument because the company immediately notified plaintiffs of its intent to claw back the material at the deposition. In addition, "in the Court's view the one-day delay in sending the privilege log can charitably be described as a situation where the expression 'no harm, no foul' applies."

Winfield v. City of New York, 2018 WL 2148435 (S.D.N.Y. May 10, 2018): After inadvertently producing a privileged document to plaintiffs, the City moved for return of the document under the procedures of the parties' clawback agreement. This led to an argument by plaintiffs that the City over-designated its documents as privileged. At a case management conference, plaintiffs "requested that the Court order Defendant to allow them a "quick peek" at all of the approximately 3,300 documents listed on Defendant's privilege log for purposes of allowing them to determine whether they would challenge the privilege designations." The court denied plaintiffs' request for a "quick peek," reasoning that the court would not "roughshod over a party's assertion of privileges merely to expedite discovery or relieve itself from determining a party's substantive or common law rights." Instead, the court appointed a special master to conduct the privilege review pursuant to Rule 53.

PRACTICE TIP

- Create a specific clawback agreement to provide guidance in the event that there is an inadvertent disclosure.

It is plainly apparent that both litigators and courts are interested in e-discovery capabilities. As technology continues to develop, more and more e-discovery issues will arise and result in an increasing amount of case law and guidance from courts.

The **Tucker Ellis E-Discovery Group** can assist in addressing any questions you may have regarding the cases or issues discussed in this year-in-review report. We have partnered with a national vendor and successfully navigated the e-discovery process in matters of every size – from small cases for privately held businesses to significant, complex class action lawsuits involving Fortune 500 companies.

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