Electronic Discovery Update
Spring 2013

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New York Courts Continue to Explore the Relevance of Social Media

Litigants defending against personal injury and similar claims increasingly are seeking information stored on social media sites ("SMS"), which often memorialize thoughts, feelings and reactions that are relevant to damages claimed by the injured party. Over the past year, New York state courts have handed down no fewer than nine decisions crystalizing the law concerning discoverability of SMS data in the context of motions to compel authorizations or passwords. Although personal injury litigation is the primary driver of the development of SMS discovery in New York, the issue also has made an appearance in a few federal cases dealing with employment discrimination claims. Because decisions compelling the production of SMS data are becoming more frequent and publicized, litigants should expect to make and receive discovery requests for SMS information with increasing regularity. Discovery from SMS sources requires careful planning, due to the balancing act between privacy, undue burden, and the right of discovery.

Concerns Affecting a Court's Determination

As Eastern District of New York Magistrate Judge Marilyn D. Go noted this past December, "although the law regarding the scope of discovery of electronically stored information ("ESI") is still unsettled, there is no dispute that social media information may be a source of relevant information that is discoverable." *Reid v. Ingerman Smith LLP*, 2012 WL 6720752, at *2 (E.D.N.Y. Dec. 27, 2012) ("*Reid*"). One court provided a useful analogy, likening certain SMS data to an "Everything About Me" folder that is voluntarily shared with others. *EEOC v. Original Honeybaked Ham Co. of Ga.*, 2012 WL 5430974, at *1 (D. Colo. Nov. 7, 2012). "The fact that [SMS data] exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation." *Id.*

Many courts currently are grappling with the question of to what extent SMS information, which can function almost like a

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daily diary, is relevant and exactly how to limit production to relevant data only. New York courts typically favor liberal discovery, but when it comes to SMS data, there is a particular concern that litigants not use SMS data requests as a fishing expedition. *See Fawcett v. Altieri*, 960 N.Y.S.2d 592, 597-98 (Sup. Ct. Richmond County 2013) ("*Fawcett*"); *Winchell v. Lopiccolo*, 38 Misc. 3d 458 (Sup. Ct. Orange County 2012) ("*Winchell*"). Accordingly, to successfully compel the production of SMS data, generally one must have a factual predicate for the belief that it will contain relevant data. *See Kregg v. Maldonado*, 98 A.D.3d 1289 (2d Dep't 2012) ("*Kregg*"). Typically, parties can establish such a factual predicate by (i) showing that the opposing party has made the type of information sought public (for example, Facebook profile pictures), (ii) pointing to deposition testimony or other evidence showing that the SMS contains relevant information, or, to a limited extent, (iii) citing a plaintiff's claim for loss of enjoyment of life. *See*, *e.g.*, *Glazer v. Fireman's Fund Ins. Co.*, 2012 WL 1197167 (S.D.N.Y. Apr. 5, 2012) ("*Glazer*"); *Bianco v. North Fork Bancorporation Inc.*, 2012 WL 5199007 (Sup. Ct. N.Y. County Oct. 10, 2012) ("*Bianco*"); *Richards v. Hertz Corp.*, 100 A.D.3d 728 (2d Dep't 2012); *Winchell*; *Heins v. Vanbourgondien*, Slip Op. (Sup. Ct. Suffolk County Sep. 25, 2012) ("*Heins*"); *Abizeid v. Turner Constr. Co.*, No. 23538/10 (Sup. Ct. Nassau County Sep. 5, 2012) ("*Abizeid*"); *Walter v. Walch*, 88 A.D.3d 872 (2d Dep't 2011) ("*Walter*").

Successfully Compelling Discovery

As two of the more colorful cases concerning SMS show, when a party opposing discovery has posted relevant SMS data without privacy restrictions, New York courts may find that such postings constitute enough of a factual predicate to compel discovery. In *Abizeid v. Turner Constr. Co.*, the plaintiff claimed that she sustained permanent injuries and was in constant pain after a slip-and-fall accident in the stairwell of a parking garage. *Abizeid,* at 2. As part of their motion to compel SMS data, the defendants produced pictures located on the public portion of the plaintiff's Facebook page that contradicted her claims of injury, including vacation pictures showing her off-roading with wild animals nearby, serving as a bridesmaid in a wedding, and drinking a large cocktail in a restaurant. Similarly, the plaintiff in *Richards v. Hertz Corp.* claimed an auto accident left her with an impaired ability to play sports and caused pain that was worse in cold weather. 100 A.D.3d 728 (2d Dep't 2012). The defendants showed the court pictures from the public portions of the plaintiff's Facebook page that showed her on skis in the snow after her accident. Despite the public display of seemingly relevant information on the plaintiffs' Facebook pages, neither the court in *Abizeid* nor *Richards* compelled the plaintiffs to provide defendants with authorizations to access their Facebook accounts. Citing the potential for overreaching and privacy concerns, both courts ordered in-camera review of the Facebook pages so that the court could determine what SMS data, if any, was relevant.

Privacy settings and concerns generally are not a bar to discovery, but rather have been deemed to inform whether a request is burdensome or oppressive. *See Reid*, at *4; *Fawcett*, at **8-9; *Abizeid*, at 4-5. With privacy concerns becoming more acute for the average SMS user, however, it might soon be the case that a party seeking discovery does not have access to relevant and publically available data in order to make a case for further discovery. In such instances, and in general, some New York courts have required parties seeking discovery of SMS data to predicate a request on deposition testimony or other evidence. *See*, *e.g.*, *Cuomo v. 53rd & 2nd Assocs., LLC*, No. 111329/10 (Sup. Ct. N.Y. County Aug. 27, 2012) ("*Cuomo*") (ordering discovery of SMS data because plaintiff "made reference to his face book account" during his deposition). In fact, some courts have dismissed a request without prejudice pending forthcoming deposition testimony. *See*, *e.g.*, *Fawcett*, at *13; *Heins*, at 2.

> New York courts typically favor liberal discovery, but when it comes to SMS data, there is a particular concern that litigants not use SMS data requests as a fishing expedition.

Apart from deposition testimony, other evidence, such as e-mails, may provide the factual predicate for compelling

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SMS data. In *Glazer,* the plaintiff alleged that she had been retaliated against because she complained about discrimination against non-African-Americans and terminated because of her religion. *Glazer*, at *1. The defendants sought to compel LivePerson, a web-based consulting site, to produce transcripts of the plaintiff's chats with psychics. The defendants were able to produce emails (which the plaintiff had sent to herself) containing excerpts of certain chats concerning the plaintiff's work performance, relationships with co-workers, treatment by the defendants, and personal beliefs about African-Americans. Although the court did not compel LivePerson to produce the transcripts, it did order the plaintiff to open a new LivePerson account so that she could access her old chats and produce all LivePerson chats to the defendants. *Id.* at **1, 12-13.

Parties seeking SMS data without an outside source on which to base an SMS request may be supported in their argument if the opposing party seeks to recover for loss of enjoyment of life. In *Walter*, for example, the defendants based their request on the plaintiff's contention that she was in constant pain and that her overall quality of life and sense of well-being had been severely impacted as a result of a motor vehicle accident. *Walter*, at *4. The court compelled the plaintiff to provide authorizations so that the defendants could access her account. *Id.* at *3. Although courts are worried about "fishing expeditions," a few have granted full access when there is a loss of enjoyment of life claim. *Id. See also Cuomo*, at 3 (ordering plaintiff, who claimed that he was unable to play sports, dance or do other activities after knee surgery, to provide defendants with an authorization for access to his Facebook account). Still, this seems to be an anomaly, with most courts favoring in-camera review or requiring a narrowly tailored request rather than unfettered access to a SMS account. *See*, *e.g.*, *Bianco*, at *1; *Reid*, at *2; *Winchell*, at 421-25; *Kregg*, at 1290; *Loporcaro v. City of New York*, 2012 WL 1231021, at *8 (Sup. Ct. Richmond County Apr. 9, 2012). *See also AllianceBernstein L.P. v. Atha*, 100 A.D.3d 499, 500 (1st Dep't 2012) (in-camera review of iPhone).

Conclusion

It is no longer a secret that SMS data has the potential to be a rich source of probative information. Facebook and other SMS sources have become an increasingly integrated part of everyday life – memorializing daily activities, mental processes, and emotional states. At the outset of a case, litigants would be well-served to think strategically about whether and how to best use such sources of data. Parties seeking discovery of SMS data need to actively steer the discovery process, specifically requesting SMS data that is narrowly tailored to the dispute. Finally, attorneys might consider the use of questions concerning the use of SMS at party depositions in order to create and preserve a factual predicate for a motion to compel SMS data should a discovery dispute arise. ■

Fourth Circuit Addresses Admissibility of Emails Between Spouses Accessed on Workplace Devices

In a recent decision that upheld the bribery and extortion convictions of a former member of the Virginia House of Delegates, the Fourth Circuit addressed the issue of whether an employee has a reasonable expectation of privacy in his use of workplace electronic mail for personal communications to a spouse, holding that emails sent to a spouse on a work computer were not covered by the marital communication privilege. *United States v. Hamilton*, 701 F.3d 404 (4th Cir. 2012) ("*Hamilton II*").

The issue first arose in connection with a motion before the Eastern District of Virginia trial court by the government to admit into evidence emails exchanged between the defendant, Phillip Hamilton, and his spouse, through the email system of Hamilton's employer, the Newport News public school system. *United States v. Hamilton*, 778 F. Supp. 2d 651 (E.D. Va. 2011) ("*Hamilton I*"). In the emails at issue, the couple discussed their financial troubles, and Hamilton told his wife he would "shoot for" a salary of

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$6,000 a month from Old Dominion University in return for securing state funding for the University's proposed educational center. *Hamilton II*, 701 F.3d at 406.

The government sought to admit the emails under F.R.E. 401, contending that they showed the defendant's state of mind, intent and motive. Neither side contested the relevance of the emails to the prosecution, but Hamilton opposed their admissibility on the grounds that the use of the emails sent to his wife violated the spousal privilege. District Judge Henry Hudson admitted the emails, noting that Hamilton was aware that his employer "had access to the contents of his computer and took no steps to safeguard the electronic messages between him and his wife." *Hamilton I*, 778 F. Supp. 2d at 655. Hamilton appealed.

The Fourth Circuit's analysis turned on the issue of whether Hamilton had a reasonable expectation of privacy in his use of a work-provided email system on a workplace computer when communicating with his spouse. In an opinion authored by Circuit Judge Diana Motz issued on December 13, 2012, the court drew an analogy to the Supreme Court's holding in *Wolfle v. United States*, 291 U.S. 7 (1934), that a defendant's communication with his spouse did not fall within the privilege as a result of his voluntary disclosure to a third-party, a stenographer. Making an analogy linking old and new writing technologies, the Fourth Circuit reasoned that "email has become the modern stenographer." *Hamilton II*, 701 F.3d at 408.

This stenographer/email analogy guided the court's analysis on two levels. First, just as *Wolfle* noted that in the 1930s a party's communications with a stenographer were presumed to be confidential, modern computer users believe that communications by email are confidential, and therefore have a reasonable expectation of privacy in using email. This tipped in favor of maintaining the privilege. The *Hamilton II* court drew an important distinction, however, noting that just as spouses in the pre-electronic communication era could "conveniently communicate" without the use of a stenographer, spouses today can "conveniently communicate" without using a workplace email account on a work computer. *Id.* In other words, the court reasoned that the fact that one generally has a privilege in communicating with one's spouse, and one generally has a reasonable expectation of privacy in using email, does not mean that one has a reasonable expectation of privacy in emailing one's spouse on a work email account from a workplace computer.

The court then focused on whether Hamilton's employer put him on notice that his computer use was being monitored through a workplace computer usage policy. Both sides conceded that when Hamilton sent the emails in 2006 his employer did not have a computer usage policy that addressed employee privacy rights. The University added a policy in 2008, however, stating that all users should have "no expectation of privacy in their use of the Computer System," and that "[a]ll information created, sent[,] received, accessed, or *stored* in the . . . Computer System is subject to inspection and monitoring at any time." *Id.* (quotation marks omitted). The Fourth Circuit emphasized the inclusion of storage in the school's usage policy to highlight the fact that the emails Hamilton sent in 2006 were still being stored by the school's computer system when the government opened its investigation in 2009 and when the charges were filed in 2011. The court also took note of the fact that Hamilton had to affirmatively acknowledge this usage policy every time he logged onto his work computer.

Hamilton challenged this aspect of the court's reasoning, maintaining that he never waived the privilege because he was not on notice at the time that he sent the emails and could not waive the spousal communication privilege retroactively. The Electronic Privacy Information Center ("EPIC") joined him in this argument, stating in an amicus brief cited by the court that it seemed "extreme" to "require an employee to scan all archived e-mails and remove any that are personal and confidential every time the workplace use policy changes[.]" *Id.* (citing EPIC Br. at 18) (quotation marks omitted).

Judge Motz acknowledged the difficulty of this issue, stating "[i]n an era in which email plays a ubiquitous role in daily communications, these arguments caution against lightly finding waiver of marital privilege by email usage." *Hamilton II*, 701 F.3d at 408. However, the court ultimately rejected the privilege argument, because Hamilton did not take any steps to protect the emails even after he was put on notice that his employer's computer usage policy permitted the inspection of stored emails. *Id.* The court drew a parallel with courts that have held that

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defendants do not have an "objectively reasonable" belief in the privacy of files on their office computers when put on notice by their employer that their use of electronic media would be monitored. *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (employer's policy put employee "on notice" that "it would be overseeing his Internet use"); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (listing employer's maintenance of relevant usage policy, monitoring of employee email, third-party right of access to email, and employee's awareness of the policy as key factors suggesting no expectation of privacy).

At the time of printing, Southern District of New York District Judge Paul A. Engelmayer issued an opinion in *Medcalf v. Walsh*, 2013 WL 1431603 (S.D.N.Y. Apr. 9, 2013), which briefly addressed the spousal privilege as applied to email in the context of a defamation litigation. The plaintiff's claim was based in part on the contents of the defendant spouses' email communications, which the plaintiff had accessed and discovered in her capacity as assistant to one of the defendants. In dismissing the complaint, Judge Engelmayer held that under New York defamation law, "all communications between [spouses], on any subject, [a]re absolutely privileged based on [the spouses'] status as a married couple" and therefore could not satisfy the publication element of the claim. *Id.* at *4 (internal quotation marks and citations omitted). The Court rejected the plaintiff's argument that there was no reasonable expectation of privacy in emails sent "using a law firm's email network" and without an "in confidence" designation. *Id.* at *5. Judge Englemayer explained: "[T]he [New York defamation] case law does not reflect an exception for spousal communications made via media which third parties may be capable of accessing." *Id.*

Conclusion

Hamilton I and II serve as a reminder that in this modern discovery age, where ESI review and production is fast becoming the norm, employees whose employers have put them on notice of the lack of privacy in their workplace computer devices and systems (and perhaps even those who have not been so clearly advised) might be best protected by leaving personal spousal communications for a different medium. ■

Service Via Facebook?

The next time you log in to your Facebook account, the little red message icon could mean that you are heading to court. In the case of *FTC v. PCCARE247 Inc., et al.*, 2013 U.S. Dist. LEXIS 31969 (S.D.N.Y. Mar. 7, 2013), the India-based defendants are alleged to be operating a scheme that tricks American consumers into paying to fix problems with their computers that do not exist. The Federal Trade Commission served its Summons and Complaint by sending it to the defendant via Indian Central Authority (pursuant to international law), email, Federal Express, and personal service. *Id.* at *4. Although service by email, Federal Express, and personal service had been somewhat successful, service via the Indian Central Authority (which had stopped communicating with the FTC) had been completely unsuccessful with all defendants. *Id.* Accordingly, on March 13, Judge Paul A. Engelmayer of the Southern District of New York granted the FTC's motion to serve the defendants via email and Facebook. *Id.* at *19. As Judge Engelmayer noted, "[p]articularly where defendants have 'zealously embraced' a comparatively new means of communication, it comports with due process to serve them by those means." *Id.* at *17 (citation omitted).

Because a Facebook profile can be created using real, fake, or incomplete information, the Court cautioned that serving a defendant via Facebook might raise due process concerns if there were no independent facts to confirm ownership of the account (for example, the email address associated with the account is known to belong to the defendant). *Id.* at *15. Considering Facebook's meteoric insertion into daily life, it is conceivable that for difficult-to-reach defendants, such form of service may cease to be "a relatively novel concept" and become part of a litigant's toolbox. *Id.* at *16. Other social media sites could soon be accepted as proper channels for service as well. For example, service via a verified Twitter account might be less objectionable than service via Facebook since Twitter undertakes steps to independently confirm ownership. As Judge Englemayer observed, "history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel." *Id.* at *16-17. ■

E-Discovery Working Group of the New York State Unified Court System Proposes Amendments to the Uniform Rules

The New York State court system has proposed amending court rules to require lawyers in civil cases to confer about electronic discovery prior to the preliminary conference in every case reasonably likely to involve the discovery of electronically stored information ("ESI"). Until now, only parties with cases in the state's Commercial Division have been under such an obligation so early in the case. The proposed new rule, and two other proposed revisions, all announced on January 7, 2013, are part of the court system's ongoing effort to improve the management of electronic discovery issues. This is the first revision proposed since the First Department of the New York Supreme Court Appellate Division issued its game-changing decision one year ago in *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (lst Dep't 2012) ("*VOOM HD*"), and is one more indication that the court system recognizes how costly delay can be in the age of ESI. *VOOM HD*, recapped below, addressed standards for the preservation of electronically stored information. The proposed new rules, formulated by the E-Discovery Working Group of the New York State Unified Court System (the "E-Discovery Working Group"), address the excessive litigation costs that can result when parties take an adversarial approach to electronic discovery.

VOOM HD Holdings LLC

One year ago, the New York State Appellate Division, First Department, issued a unanimous decision adopting e-discovery preservation rules in *VOOM HD*. Specifically invoking standards that had been established by Southern District of New York Judge Shira A. Scheindlin in two landmark cases, *Zubulake v. USB Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003), and *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Amer. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), the First Department now requires parties to take reasonable steps to preserve relevant documents once they reasonably anticipate litigation. This means putting a "litigation hold" in place and suspending routine document retention and destruction practices. *VOOM HD*, 93 A.D. at 36. A party failing to institute a preservation plan as soon as litigation is reasonably anticipated faces the possibility of sanctions, including an adverse inference charge permitting the fact finder to draw an inference against the party, if relevant evidence is lost as a result.

The Proposed Changes to the New York Uniform Rules of the Trial Courts

On the heels of *VOOM HD*, the E-Discovery Working Group proposed amendments to 22 NYCRR § 202.12(b) of the Uniform Rules of the Trial Courts. Section 202.12 establishes the procedures to be followed by New York State Supreme and County Courts at preliminary conferences. Until now, subsection (b) has required only that, where a case is reasonably likely to include electronic discovery, counsel for all parties come to the preliminary conference with enough information about their clients' technological systems to be able to engage competently with the court in discussions of electronic discovery. The proposed revision adds two provisions: (i) a requirement that counsel in such cases confer about electronic discovery before the preliminary conference, and (ii) a list of questions to help the court, and, presumably counsel, decide whether a case is "reasonably likely to include electronic discovery."

The proposed changes also would amend subsection (c) of § 202.12, the subsection that mandates what is to be considered at the preliminary conference. Already, subsection (c)(3) directs the court, where appropriate,

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to establish a case plan for electronic discovery, and recommends elements the court should consider including in a plan. The proposed revision modifies each of the

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Welcome Guidance From the Delaware Chancery Court

Just over two years ago, the Delaware Chancery Court issued its first set of guidelines for practitioners for the preservation of electronically stored information ("ESI"). One year ago, the Court published non-binding Guidelines for Practitioners ("Guidelines") to help lawyers and their clients handle procedural issues that arise when litigating before it. This year, the Court of Chancery has announced rule changes and new discovery guidelines intended to bring the Court's Rules and Guidelines in line with current practice. The most recent changes, amending Rules 26, 30, 34 and 45 in order to account for modern discovery demands, took effect on January 1, 2013. These changes are consistent with similar changes to the Federal Rules of Civil Procedure. As amended, the Rules now account for the discovery of ESI. While the Delaware Court of Chancery's Guidelines are most helpful for practitioners before the Delaware courts, the Guidelines also provide useful practice points for litigation counsel generally.

Guidelines for Practitioners . . .

According to a press release issued by the Court, the newly expanded Guidelines (*available* at http://courts.delaware.gov/Chancery/guidelines.stm) "explain the Court's expectations regarding parties' responsibility to confer early and often regarding discovery" and "are intended to assist the Bar in developing reliable and transparent procedures for electronic discovery." Dec. 4, 2012 Press Release: Court of Chancery Announces Rule Changes and New Discovery Guidelines, *available* at http://courts.state.de.us/chancery/rulechanges.stm. In an effort to achieve these goals, the Guidelines address various aspects of the discovery process while simultaneously emphasizing the Court's reluctance to adopt a "one-size-fits-all" approach.

The new and improved Guidelines contain an entire section dedicated to discovery, broken down into three components: (1) the preservation of ESI; (2) the collection and review of documents in discovery; and (3) expedited discovery in advance of a preliminary injunction hearing.

. . . for the Preservation of Electronically Stored Information

The first section of the Guidelines reiterates the best practices articulated by the Court in its stand-alone issuance two years ago. Court of Chancery Guidelines for Preservation of Electronically Stored Information, *available* at http://courts.delaware.gov/forms/download.aspx?id=50988. With respect to preserving ESI, the Court reminds all counsel of their duty to take reasonable steps to preserve information that potentially is relevant to the litigation and that is within the party's possession, custody, or control. The Court encourages a party and its counsel — both in-house and outside — to take a collaborative approach to the identification, location, and preservation of potentially relevant ESI, to develop written instructions to disseminate in the form of a litigation hold notice to the custodians of potentially relevant ESI, and to document the steps taken to prevent the destruction of potentially relevant ESI. The Court urges parties and their counsel to confer regarding the preservation of ESI early in the litigation process, and encourages opposing parties to confer about the scope and timing of discovery of ESI.

The Guidelines address various aspects of the discovery process while simultaneously emphasizing the Court's reluctance to adopt a "one-size-fits-all" approach.

. . . for the Collection and Review of Documents in Discovery

In the second section of the discovery related portion of the Guidelines, the Court addresses the collection and review of documents in discovery, with a special focus on identifying privileged documents and properly preparing privilege logs – what the Court deems "[o]ne of the most difficult parts of the discovery process." Guidelines, II.7.b. Again, the Court encourages counsel to meet and confer promptly after the start of discovery to develop and implement a discovery plan that accounts for ESI. The Court notes the importance of transparency in this process, indicating that open communication concerning search terms, cutoff dates, etc., can help parties identify potential areas of disagreement sooner rather than later, as well as provide parties with some

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protection if problems arise further along in the process. The Guidelines emphasize the importance of retaining experienced outside counsel to be actively involved in establishing and monitoring the procedures used to ensure that documents are properly and timely collected, reviewed and produced. In the same vein, the Court reminds counsel of the importance of interviewing custodians who may be in possession of responsive documents to identify how and where the custodians maintain their records.

Apropos of the vulnerability of ESI to deletion or modification, counsel are warned to exercise care in developing the necessary procedures to preserve and collect ESI. Guidelines, II.7.b.v. On the other hand, the Court notes that counsel also should consider issues of burden and expense to ensure that the costs of litigation are proportionate to what is at stake. The Guidelines specifically note the necessity for parties to discuss the appropriate extent of electronic discovery and "try to reach a case-specific accord based on a candid appraisal of the information base each side has, the costs of employing various electronic discovery techniques, and the stakes at issue in the case." *Id.* The Court also emphasizes its expectation that Delaware counsel play an active role in the discovery process, at a minimum discussing with co-counsel the Court's expectations. Guidelines, II.7.b.vi.

> The Court notes the importance of transparency in this process, indicating that open communication concerning search terms, cutoff dates, etc., can help parties identify potential areas of disagreement sooner rather than later, as well as provide parties with some protection if problems arise further along in the process.

Notably, the Court devotes over three pages of this section of the Guidelines to advising practitioners on best practices for reviewing documents for privilege and preparing privilege logs. Emphasizing the systemic over-designation of documents as privileged, the Court urges senior lawyers to provide clear guidance to junior attorneys about "how the privilege assertion process should unfold." Guidelines, II.7.b.vii.(a). The Court provides specific instructions concerning how documents on a privilege log should be described, and warning that it is inconsistent with the spirit of these guidelines "for parties who receive a proper privilege log to use it as the basis for a claim that the generation of the privilege log waived privilege in any way." Guidelines, II.7.b.vii.(c). As the Court advises, "[r]ote repetition of 'Communication for the purpose of providing legal advice'" is not an adequate explanation of the basis for the assertion of attorney-client privilege. *Id.*

The Court concludes this portion of the Guidelines by emphasizing how befitting the "goose and gander" rule may be to parties seeking constructive discovery solutions. As the Court counsels, what is good for one party is generally good for the other. Where parties communicate in good faith, each will better understand the basis for the other's production of privileged documents, thereby reducing the incidence of discovery disputes concerning the assertion of privilege. Guidelines, II.7.b.viii.

. . . for Expedited Discovery in Advance of a Preliminary Injunction Hearing

Lastly, the Court issued a new component of the Guidelines to set forth typical practice as to the conduct of expedited discovery in advance of a preliminary injunction hearing in high stakes commercial and corporate litigation. Guidelines, II.7.c.i. Although this component of the Guidelines is not limited in scope to e-discovery, the Court's recommendations necessarily encompass aspects of e-discovery by addressing document collection, review, and production, generally. With respect to document collection, the Court encourages parties to collect and produce the "core documents" associated with the application for preliminary injunction as promptly as possible and then make good-faith and reasonable efforts to agree on and limit the number of custodians from which each party collects. Even in expedited discovery, the Court urges counsel to interview the custodians from whom they have collected documents to better ascertain any potential

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sources of relevant documents. As noted throughout the Guidelines, the Court expects Delaware counsel to play an active role in this process, noting that its "expectations are not lessened in expedited litigation, and, if anything become more important because of the absence of any room in the schedule to redress discovery shortcomings." Guidelines, II.7.b.iii.

With respect to document review and production, the Court encourages parties to produce significant documents as soon as possible and all other documents on a rolling basis, with outside litigation counsel actively overseeing the document collection, review and production. More noteworthy, however, is the Court's encouragement "that parties make agreements that reduce the time, expense and burden associated with conducting a document-by-document privilege review and preparing privilege and redaction logs so that the merits of the application may be developed in the limited time available and fairly presented to the Court." Guidelines, II.7.b.v. The Court also encourages parties to agree to forego redaction logs where the information in such a log would be redundant of information already available on the face of the redacted document. Lastly, the Court notes that parties sometimes agree to forego a document-by-document privilege review altogether in favor of a "quick peek" agreement through which the party seeking discovery is permitted to review responsive documents without the producing party waiving privilege as to qualifying documents.

Conclusion

The Guidelines may be an early precursor for the emergence of similar rules and expectations in courts throughout the country. In light of how rapidly e-discovery law is expanding, this extensive guidance from the Delaware courts on how best to handle the challenges of electronic discovery is both useful and welcomed. ■

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listed elements, making them more detailed and specific, and adds a recommendation that the plan include a claw-back provision for inadvertently produced privileged information.

Finally, the proposed changes would amend 22 NYCRR § 202.70, the section that sets forth the procedure for preliminary conferences in the Commercial Division. The proposed revision to § 202.70 conforms the elements to be considered to be consistent with those contained in § 202.12(c) and § 202.70. There was no need to add a requirement that counsel confer about electronic discovery before the preliminary conference because that has been mandated in all cases in the Commercial Division since 2006. And, as already formulated, § 202.70 requires the parties to consider the elements of an electronic discovery plan before the preliminary conference. A feature distinguishing the rules for the regular civil courts and the rules for the Commercial Division is not disturbed by the proposed amendments – in the regular civil courts, judges may establish an electronic discovery plan but they are not required to; in the Commercial Division, the parties must consider the elements of a plan during their pre-preliminary conference discussion of electronic discovery.

Conclusion

The rule changes proposed by the E-Discovery Working Group reflect an evolving process of integrating electronic discovery doctrines into state court practice. Rapidly developing case law and emerging technologies make ESI preservation and production standards sometimes appear to be moving targets. With these proposals, the New York state courts will take a further step towards providing guidance and assisting litigants as they anticipate and manage the costs of electronic discovery. ■

Southern District Magistrate Judge Francis Makes a Further Contribution to E-Discovery Jurisprudence

In a recent Southern District of New York insurance policy case, *Fleisher v. Phoenix Life Ins. Co.*, 2012 WL 6732905 (S.D.N.Y. Dec. 27, 2012), the parties engaged in a lengthy dispute over e-discovery obligations and compliance. Magistrate Judge James C. Francis IV's opinion reflects important e-discovery considerations for civil litigants, particularly for those involved in class action litigation, and adds to the e-discovery lexicon on issues around search terms, e-discovery delays and compliance, and cost shifting, among others.

Background

Judge Francis has made a significant impact in the field of e-discovery law, issuing numerous influential opinions on the subject, including a precedential opinion in the case of *Orbit One Communications, Inc. v. Numerex Corp.*, 271 F.R.D. 429 (S.D.N.Y. 2010). Kramer Levin previously profiled Judge Francis in a "Spotlight on the Judiciary" article in the firm's January 2010 *Electronic Discovery Update newsletter, available at* http://www.kramerlevin.com/Electronic-Discovery-Newsletter-January-2010-01-04-2010/. The *Fleisher* opinion represents another contribution by Judge Francis to the ever-evolving and influential body of electronic discovery law.

The litigation at issue in Judge Francis's most recent e-discovery decision concerned a contract dispute over rate increases on premium-adjustable, universal life insurance policies that the defendant provided to policyholders, the putative class action plaintiffs. 2012 WL 6732905, at *1. In their putative class action, the plaintiffs alleged that the defendant increased the cost-of-insurance ("COI") rates, notwithstanding the general increase in life expectancy, to generate additional fees as well as policyholder lapses. *Id.*

Discovery Process Leading Up to the Present Motion

In *Fleisher*, the plaintiffs served their first set of document requests on the defendant on December 21, 2011, seeking information on the COI increases among other things. 2012 WL 6732905, at *1. Four months later, in April 2012, the defendant proposed search terms for collecting electronically stored information ("ESI"). *Id.* The parties then exchanged additional proposed search terms and, on May 2, the defendant agreed to run a list of search terms across its ESI. *Id.* At the end of July 2012, the defendant advised that the agreed-to search terms had returned too many documents and it would need several more months to complete document production, this time based on a reduced list of search terms. *Id.* Through this back-and-forth process, problems with the defendant's search capabilities became apparent. *Id.* For example, use of "Project X" as its code name for the COI increase proved problematic because the search software dropped single characters such as "X" and searching for "Project X" would have resulted in a search returning every document containing the word "project" alone. *Id.* After approximately eight months, little movement in the discovery process had resulted. *Id.*

In November 2012, the plaintiffs filed a motion pursuant to F.R.C.P. 37, seeking to compel the defendant to complete production of responsive documents within two weeks. *Id.* The defendant opposed the motion, arguing that the delay in production had resulted from the sheer volume of information requested and that any harm to the plaintiffs could be ameliorated by prioritizing the production. *Id.* at *2. The defendant further maintained that it was awaiting completion of an ongoing production in a separate litigation, the production in which was responsive to one category of documents the plaintiffs sought. *Id.* In addition, the defendant requested time to complete the production beyond the two weeks sought by the plaintiff.

Meet-and-Confer Requirements: Good Faith Is Required on a Motion to Compel

As a prerequisite, a motion to compel discovery under F.R.C.P. 37 requires a certification that the movant has in good faith conferred or attempted to confer with the party failing to produce the discovery in an effort to obtain the information or materials without court action. *Id.* , at *2. The defendant argued that the plaintiffs' motion to compel discovery should be denied because they had failed to comply with the requirement to meet and confer in good faith. *Id.* at *2. Judge Francis rejected this argument, holding that the plaintiffs had satisfied the requirement by communicating with the defendant on numerous occasions throughout the delay period, attempting to work through the various discovery issues. *Id.* Judge Francis held that during that same period the defendant had been non-responsive and failed to make a single proposal to address the plaintiffs' concerns. *Id.* Judge Francis noted that under

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certain circumstances, the Rule 37 meet-and-confer requirement may be excused, for example, when it would be futile to do so. *Id.* (citing *Gibbons v. Smith*, No. 01-Civ.-1224, 2010 WL 582354, at *2) (S.D.N.Y. Feb. 11, 2010)) (other citations omitted). However, Judge Francis also noted "futility should not be lightly presumed." *Fleisher*, 2012 WL 6732905, at *2. Judge Francis found that because the plaintiffs had made numerous unsuccessful attempts to obtain the defendant's compliance with its discovery demands over an extended period of many months, the plaintiffs' meet-and-confer obligations were satisfied. *Id.*

Coordination of Discovery: Disclose What You Must, When You Can

One of the asserted bases on which the defendant opposed the plaintiffs' motion to compel was that it could not comply with the plaintiffs' discovery requests until it completed production in another case, because one of the categories of documents sought by the plaintiffs included all of the documents produced in that action. *Id.* at *2. Judge Francis found this argument "perplexing" and unpersuasive. *Id.* at *3. He held that the defendant could produce immediately what it had already produced in the other action, and supplement its document production as additional documents were disclosed in the other case and that F.R.C.P. 26(e)(1)(A) required as much. *Id.*

Deadlines and Cost Shifting: E-Discovery in the Class Action Context

Raising an issue of apparent first impression in New York courts, perhaps the most noteworthy and precedential aspect of Judge Francis's opinion is the cost-shifting analysis. Approximately one year had passed between the time that the plaintiffs served their initial discovery requests on the defendant and the time that the plaintiffs filed their motion to compel discovery. *Id.* at *3. The parties asserted divergent proposals as to the timing of a future production — the plaintiffs sought to compel discovery within two weeks of the date they filed their motion to compel, and the defendant suggested a deadline approximately five months after the filing. *Id.* The Court found both parties' proposals "unreasonable" and selected a mid-point deadline of approximately two months later, to allow for follow-up discovery after expert reports were due. *Id.*

In connection with this issue, the defendant argued that the cost of completing the document production within any deadline other than the more extensive one it had suggested should be shifted to the plaintiffs. *Id.* The defendant relied primarily on a decision issued by the District Court for the Eastern District of Pennsylvania, in which the court had held that – because class certification was pending and the plaintiffs requested extensive discovery, compliance with which would be very expensive – if the plaintiffs were confident the court would certify their class, they "should have no objection to making an investment" in the case. *Id.* (citing *Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 341 (E.D. Pa. 2012)). Judge Francis noted that this

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cost-shifting approach to putative class action cases had never been adopted by any court within the Second Circuit, and that such a presumption ran counter to important precedent from the United States Supreme Court. *Id.* at *4 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) ("Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests.")). However, Judge Francis noted the presumption set forth in *Oppenheimer* could be rebutted under certain circumstances and looked to the range of factors set forth in the influential *Zubulake v. UBS Warburg, LLC* line of cases. *Id.* (citing *Zubulake*, 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003)). Those factors include:

> (1) the degree to which the request for information is designed to discover germane information, (2) the availability of the same information from different sources, (3) the cost of production as compared to the amount in controversy, (4) the cost of production as compared to the resources of each party, (5) the parties' relative abilities to

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> control discovery costs and their incentives to control costs, (6) the degree of importance of the issues being decided in the litigation, and (7) the relative benefits to each of the parties in obtaining the information at issue.

Id. (citing *Zubulake*, 217 F.R.D. at 322). Judge Francis noted that, in the first instance, the defendant had addressed only two of the *Zubulake* factors and even that analysis was incomplete. *Id.* The defendant primarily had argued that the costs of compliance with the plaintiffs' e-discovery requests, as compared to the relative resources of *plaintiffs' counsel*, mandated the shifting of cost to plaintiffs. *Id.* Judge Francis rejected this rationale, writing "it is far from clear why the resources of counsel should be taken into consideration. . . . [I]f the assets of counsel were to be taken into consideration, the ability of clients to engage an attorney of their choice would likely be hampered." The court declined to consider the relative resources of counsel or to shift the costs. *Id.*

An additional argument advanced by the defendant in favor of cost-shifting was the cost to review the production for privileged and confidential information and communications. Judge Francis stated that, generally, it is not appropriate to shift the costs of e-discovery onto the requesting party on that basis, because "the producing party has the exclusive ability to control the cost of reviewing the documents." *Id.* (quoting *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)). Even so, Judge Francis entered an order pursuant to Federal Rule of Evidence 502(d) to address the defendant's concern, which precluded the production of privileged documents from constituting a waiver of privilege or work product protection in that case or any other. *Id.* This afforded the defendant the choice between an "exacting" and expensive review, or a more "economical" one. *Id.* Additionally, Judge Francis stated that he would "entertain a protective order" to further protect commercially sensitive and confidential information which would allow the defendant to expedite its document review and production. *Id.*

For these and other aforementioned reasons, Judge Francis granted the plaintiffs' motion to compel discovery from the defendant, and denied defendant's application to shift document production costs to the plaintiffs.

Conclusion

Judge Francis's opinion addresses a range of increasingly standard e-discovery issues, including search terms, production timing, cost-shifting, and the inadvertent production of privileged and/or confidential documents. Moreover, the decision affirms the consistent expectation in the New York federal courts that counsel and parties be knowledgeable, timely, and cooperative in handling their e-discovery compliance obligations. ■

For their contributions to this issue of the *Electronic Discovery Update*, we recognize and thank Kramer Levin associates **Peggy J. Farber, Anastasia N. Kaup, Edward M. Lintz, Matthew B. Moses, Lisa C. Neunder,** and **Lynda M. Tricarico**.