

e-DISCOVERY



ESI Case Law Update 2015

CONTENTS

- 1** Introduction
- 1** Preservation
- 6** Proposed Amendments to Rule 37
- 7** Search Methodology/Technology-Assisted Review
- 9** Proportionality
- 12** Cost-shifting
- 14** Form of Production
- 15** Social Media
- 18** Conclusion
- 19** Offices

AUTHORS

Gregory J. Bautista – New York Metro

Daniel M. Braude – New York Metro

Eric G. Cheng – New York Metro

Sa’adiyah K. Masoud – Boston

Jonathan E. Meer – New York Metro

Carlos Enrique Provencio – D.C. Metro

Christopher J. Seusing – Boston

Jason R. Waters – D.C. Metro

2015 ESI Case Law Update

INTRODUCTION

Preservation, predictive coding, and proportionality continued to dominate key decisions concerning electronically stored information (ESI) in 2014. Preservation cases provided substantial guidance to parties in terms of the steps needed to establish a defensible process and avoid sanctions. Courts increasingly expect parties and their counsel to assume an active supervisory role in implementing and monitoring litigation holds. Litigants are expected to involve their information technology departments as key stakeholders in preservation process. In addition, sanctions on parties and their counsel continue to present a significant risk of failing to comply with the ESI requirements of the Federal Rules of Civil Procedure.

Technology-Assisted Review (TAR) or predictive coding, gained such widespread acceptance since the 2012 decision in *Da Silva Moore v. Publicis Groupe & MSL Grp.* that the author of that opinion, Magistrate Judge Andrew Peck, proclaimed that it is “black letter law” that courts will permit TAR when a party wants to use it. Judge Peck’s observation in *Rio Tinto PLC v. Vale S.A.* confirmed another court’s observation that TAR is no longer untested technology. But Judge Peck also cautioned litigants as to the ongoing questions about the extent of cooperation and transparency required among counsel to implement TAR effectively in litigation.

Proportionality also continues to be a key feature of the 2014 canon of ESI decisions. As the government learned in *United States v. University of Nebraska – Kearney*, a party ignores proportionality principles at its peril. Extremely broad search terms, such as “document* w/25 policy,” and burdensome asymmetrical discovery demands may result in a party losing the discovery it seeks, even on topics about which it is typically entitled to broad disclosure, when Rule 26(b)(2)(C) proportionality considerations favor limiting the

requested disclosure. Moreover, proportionality concerns may even justify significant modifications to the parties’ agreed-upon ESI protocols, allowing them to “switch horses in midstream,” as occurred in *Bridgestone Americas, Inc. v. International Business Machines Corp.*

Courts also continue to grapple with a wide variety of practical considerations in ESI decisions, such as cost-shifting issues, the form of production, and the disclosure of social media content. Cost-shifting considerations align closely with proportionality principles, and a court may use cost-shifting as a means to balance the requesting party’s interest in broad disclosure with the producing party’s concern about the cost-utility analysis of its preservation and production obligations. Several courts issued decisions regarding the application of Rule 34’s instructions on the form of production to the practical realities of modern technology while privacy concerns continue to dominate the disclosure of social media.

PRESERVATION

There are few things more vexing to counsel and litigants than the timing and reach of the duty to preserve ESI. The duty to preserve arises when the likelihood of litigation is known or reasonably foreseeable. For such a seemingly simple standard, state and federal courts continue to issue wide-ranging and varied decisions regarding the scope and timing of preservation. Failing to preserve ESI can lead to crippling sanctions, while over-preservation can substantially escalate litigation costs. The anticipated December 1, 2015, amendments to the Federal Rules of Civil Procedure are expected to bring some uniformity to this area. However, until courts provide guidance on interpreting the new rules, we must rely on recent case law around the country to recognize the effects of failing to preserve ESI.

As always, the deliberate destruction of ESI tends to result in particularly severe sanctions, including a terminating sanction. The respondents in *In re Certain Opaque Polymers*, a matter pending before the U.S. International Trade Commission, “accidentally” lost a laptop, used wiping software, and smashed a key custodian’s hard drive with a hammer. The administrative law judge found that this conduct warranted a default judgment plus payment of nearly \$2 million for the adversary’s legal fees and costs. [*In re Certain Opaque Polymers*](#), No. 337-TA-883, Public Order No. 27, Initial Determination (Oct. 20, 2014). Similarly, the defendant in *The Regulatory Fundamental Group* caused a “loss of all emails and content” by terminating its email hosting account, manually deleting highly relevant emails throughout discovery, and engaging in “additional misconduct in an attempt to cover his tracks.” Judgment was entered against the defendant on the basis that “any sanction short of a terminating sanction would fail to account for the prejudice to the plaintiff or to sufficiently penalize [the defendant] or deter others from engaging in such misconduct.” [*The Regulatory Fundamental Group, LLC v. Governance Risk Management Compliance*](#), 2014 U.S. Dist. LEXIS 107616, 2014 WL 3944796 (S.D.N.Y. Aug. 5, 2014).

These decisions highlight the consistency with which federal and state courts hold parties accountable



for willful spoliation of ESI after the duty to preserve has been triggered. However, at the same time, such obvious situations provide little guidance for litigants who seek to act in good faith by implementing a cost-effective and defensible approach to preservation. In the absence of a uniform preservation standard, we turn to The Sedona Conference® Principle No. 5, which provides a basic framework for parties regarding the duty to preserve:

The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.

While “every conceivable step” may not need to be taken to fulfill a party’s preservation obligation, courts almost always expect parties to do more than simply issue a litigation hold. In many situations, courts have taken to analyzing a litigant’s overall legal hold process, an area traditionally protected by the attorney-client privilege, and levying sanctions for the loss of ESI even when a litigation hold had been issued.

Vicente v. City of Prescott provides an excellent example of the active supervision that counsel must exercise in the preservation context. In response to receiving a preservation demand letter in an employment-related dispute, the City of Prescott notified key personnel to preserve and collect relevant evidence. However, the City failed to alert its IT department of the litigation hold. Consequently, the City’s automatic 30-day email deletion policy remained in place, resulting in the loss of relevant emails. Additionally, certain named defendants self-collected email from their computers without assistance from the IT department. Judge David Campbell found that the defendants’ “document preservation efforts were inadequate... [and] plainly deficient” and resulted in the loss of relevant emails. Explaining that “bad faith is a prerequisite to case-dispositive sanctions such as default judgment,”

the court rejected plaintiff's request for a default judgment but awarded attorneys' fees for having to search for information that "should have been produced by the other side." [Vicente v. City of Prescott](#), 2014 U.S. Dist. LEXIS 109790, 2014 WL 3894131 (D. Ariz., Amended Aug. 13, 2014).

The City of Prescott had company last year in learning that IT personnel should be involved in preservation. In [AJ Holdings Group LLC v. IP Holdings, LLC](#), counsel failed to alert the plaintiff's IT manager of the preservation obligation until the day before his deposition. The plaintiff was sanctioned with adverse inferences at summary judgment and at trial. [AJ Holdings Group LLC v. IP Holdings, LLC](#), No. 600530/2009 (N.Y. Sup. Ct. Sept. 19, 2014).

Similarly, a discovery master's lengthy recommendation to the District of Nevada in [Small v. Univ. Medical Center of Southern Nevada](#), a wage-and-hour putative class action, illustrated the risks involved with failing to conduct appropriate preservation due diligence. Despite being served with a lawsuit and a preservation demand letter in mid-2012, the University Medical Center of Southern Nevada (UMC) failed to make proper preservation efforts for nearly two years. In the absence of a litigation hold policy or set of procedures, UMC and its counsel failed to appropriately alert the IT manager responsible for mobile devices or to even discover the existence of a critical network drive until certain belatedly conducted custodian interviews in 2014.

Potentially relevant text messages, among numerous other types of ESI, were lost during the nearly two years that had passed before UMC began making reasonable efforts to conduct custodian and IT interviews. As the discovery master explained, "these problems were exacerbated by UMC retaining less than effective counsel and electronic discovery consultants who had to be replaced midstream." Ultimately, the discovery master recommended that the court enter a default judgment against UMC as to 613 opt-in plaintiffs and grant automatic class certification as well as rebuttable presumptions on a variety of issues in favor of the

putative class plaintiffs. [Small v. Univ. Medical Center of Southern Nevada](#), Report and Recommendation and Final Findings of Fact and Conclusions of Law of Special Master Daniel B. Garrie, 2:13-cv-00298 (D. Nev., August 18, 2014).

Failure to comply with obligations to preserve ESI can lead to sanctions on parties and counsel alike. The plaintiffs in [Brown v. Tellerate Holdings](#) brought age discrimination claims against a former employer, asserting that termination of the plaintiffs was performance-related. To rebut the defense as pretextual, the plaintiffs requested records related to their performance from the defendant's cloud provider. The defendant resisted production by arguing that it was contractually prohibited from producing ESI from the cloud provider. The defendant then tried to assert that it could not access historical data. Finally, the defendant claimed that the historical data was not preserved. The court found that these representations "turned out simply to be untrue." After a full year of motion practice addressing these issues, the court concluded: "[W]ith the participation of its counsel, [defendant] either intentionally or inadvertently failed to fulfill certain of its discovery obligations, leading to a cascade of unproductive discovery conferences, improperly opposed discovery motions, and significant delay and obstruction of the discovery process." The court sanctioned the defendant by awarding attorneys' fees and costs to the plaintiff, *to be paid jointly by the defendant and its counsel*, and precluded the use of "any evidence which would tend to show that the [plaintiffs] were terminated for performance-related reasons." [Brown v. Tellerate Holdings Ltd.](#), 2014 U.S. Dist. LEXIS 90123, 2014 WL 2987051 (S.D. Ohio July 1, 2014).

The decisions in [City of Prescott](#), [AJ Holdings Group](#), [Small](#), and [Brown](#) reaffirm the proposition that attorneys are obligated to *verify* what clients tell them about ESI. As explained by the court in [Brown](#), defense counsel must "do more than issue a general directive to their client to preserve documents which may be relevant to the case." Counsel should "speak to the key players"

so that counsel and the client together can “identify, preserve, and search the sources of discoverable information.” Without this due diligence, counsel is helpless to understand where ESI is stored, how long it existed, and who has access to it. As a result, counsel may be unable to make the “reasonable inquiry” required by Rule 26(g) without conducting appropriate interviews with document custodians and IT personnel. If counsel in these cases had taken such steps early in the preservation process, they almost certainly would have avoided such severe outcomes.

In slight contrast, courts have issued more varied opinions regarding the scope of a party’s obligation to preserve relevant information and the consequence of any preservation shortcomings. The Texas Supreme Court in *Brookshire Bros. v. Aldridge* addressed a trial court’s decision to provide an adverse inference instruction to the jury as to destruction of surveillance video footage. In the underlying case, the plaintiff sustained injuries from a slip-and-fall incident in a supermarket. After the plaintiff notified the defendant of his injuries, the defendant retained eight minutes of surveillance camera footage approximately spanning from the plaintiff’s entry to the store to shortly after the fall. The remainder of the footage was overwritten pursuant to a standard 30-day continuous loop. The plaintiff argued that the failure to preserve additional footage prior to the incident amounted to spoliation of evidence as to the issue of notice of an alleged dangerous condition.

The trial court granted the plaintiff’s spoliation motion and instructed the jury that if the defendant “knew or reasonably should have known that such portions of [non-preserved video] contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.” The jury returned a verdict in excess of \$1 million and the defendant appealed. On appeal, the Texas Supreme Court overturned the adverse inference sanction. Echoing the proposed amendment to Rule 37(e) of the Federal

Rules of Civil Procedure, as expected to be adopted on December 1, 2015, the court explained that a party’s unsuccessful effort to preserve relevant information does not require a spoliation jury instruction unless the party has “the specific intent to conceal discoverable evidence and no lesser remedy will suffice to overcome the prejudice the spoliation caused,” or, absent intent, an instruction may be warranted when “a nonspoliating party has been irreparably deprived of any meaningful ability to present a claim or defense.” [*Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 \(2014\)](#).

Another situation involving surveillance footage preservation, but with a different outcome, was addressed in *Riley v. Marriott International*. The plaintiff asserted that preservation of only seven minutes of footage of a slip-and-fall incident warranted an adverse inference instruction to the jury. Notably, the footage failed to capture how water came to be present at the incident location or how long it took to remove the water, which could indicate the volume of water present. Citing to *Zubulake*, the court explained that



it must consider “two related inquiries: *when* does the duty to preserve attach, and *what* evidence must be preserved?” There was no dispute that the defendant had a duty to preserve. As to what evidence must be preserved, the court found that plaintiffs were prejudiced by the loss of evidence. Despite the absence of willfulness on the part of the defendant, the court imposed an adverse inference sanction, explaining that the “failure to provide the Court with any sworn facts from persons with knowledge of the destruction of the challenged evidence demonstrates such a lack of diligence that it suggests bad faith destruction.” [*Riley v. Marriott International, Inc.*](#), 2014 U.S. Dist. LEXIS 135728, 2014 WL 4794657 (W.D.N.Y. 2014), citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

In addressing the appropriate scope of preservation, courts may analyze when the duty to preserve has been triggered. *In re Ethicon Inc. Pelvic Repair Systems Product Liability Litigation* involved a question of whether the preservation obligation in an earlier lawsuit could create a duty to preserve for subsequent litigation. The relevant history dates back to March 2003 when defendant Ethicon was served with a lawsuit claiming injuries caused by one of its surgical mesh products. Although this lawsuit was dismissed in early 2004, counsel failed to formally release the legal hold. Beginning in 2006, additional pelvic mesh lawsuits began to “trickle” in, with Ethicon becoming aware of widespread pelvic mesh litigation no later than 2010, the year before consolidation under multidistrict litigation (MDL). Throughout this time period, Ethicon failed to preserve various sources of ESI from both current and former employees, which the court attributed to Ethicon being “disorganized, or distracted, or technically challenged, or overextended.” Nevertheless, the MDL plaintiffs demanded that the court strike Ethicon’s key defenses and order an adverse inference instruction for all MDL cases in addition to entering a default judgment against Ethicon in three bellwether cases. As the primary basis for seeking such severe sanctions, the plaintiffs asserted that the preservation duty as to the MDL

litigation was triggered upon the filing of the initial mesh lawsuit in 2003.

Notably, the plaintiffs pointed to Ethicon’s failure to release the 2003 hold as an indication that Ethicon anticipated future lawsuits. Although the court ordered the payment of plaintiffs’ attorneys’ fees with respect to the filing of its discovery motion, it otherwise rejected the plaintiffs’ demands and refused to issue any further sanctions. As the court explained, two years had passed after dismissal of the 2003 complaint before another lawsuit was filed. Therefore, “an isolated lawsuit, or even two, would not reasonably lead Ethicon to believe that large-scale nationwide products liability litigation was down the road.” [*In re Ethicon Inc. Pelvic Repair Systems Product Liability Litigation*](#), 12-md-2317 (S.D. West Virginia, February 4, 2014).

Compared with Ethicon in the pelvic mesh MDL, Takeda Pharmaceuticals suffered a much different fate after it failed to release prior legal holds in *In re: Actos (Pioglitazone) Products Liability Litigation*. This multidistrict litigation, which was created in 2011, arose out of claims by plaintiffs that they developed bladder cancer as a result of taking Takeda’s diabetes drug Actos®. The relevant history, however, dates back to 2000, the year after which Takeda brought Actos to the market. In 2000, Takeda received the first of a handful of claims asserting damages for various maladies allegedly caused by Actos, ranging from liver and cardiovascular problems to pancreatic and bladder cancer. These initial claims were resolved quickly prior to litigation.

The first Actos lawsuit filed against Takeda came in 2002 – the plaintiff claimed to have suffered liver damage. Counsel issued a legal hold at this time, which was issued in connection with the liver damage allegations. However, the hold was worded to encompass alleged damages “for personal injury and wrongful death” and directed recipients to “interpret this directive in its broadest sense.” While a conservative approach to preservation is often defensible, Takeda failed to release or narrow the scope of the 2002 hold, and instead chose to merely “refresh” it when the scope of Actos litigation

expanded to include bladder cancer allegations. Takeda's in-house counsel ultimately admitted that the 2002 litigation hold was a general product liability hold and that Takeda had never issued a malady-specific hold with regard to Actos.

Despite the 2002 hold, Takeda destroyed numerous relevant documents across a wide range of custodians before and after creation of the 2011 bladder cancer MDL. The court characterized this spoliation as "a pervasive and widespread failure by Takeda to preserve such large swaths of Actos®-related files and documents generated and held by so many high-ranking key Takeda officials, all of whom were directly involved with the development and marketing of Actos®." Takeda asserted that its duty to preserve documents associated with bladder cancer litigation was not triggered until 2011. Faced with not only the broad language of its 2002 hold but also a perceived lack of candor toward the court, this argument had little chance of success. The court noted that "Takeda failed to admit the very existence of [the 2002] hold and its subsequent 'refreshers,' until the persistent involvement of the magistrate judge forced the issue." Furthermore, the court was persuaded by the plaintiffs' steering committee that Takeda had engaged in "a pattern of conduct carefully constructed, deliberately carried out, reflective of bad faith and a willful abuse of the judicial process" in the course of acting to "eliminate evidence of the potential health risks of Actos®."

As a sanction, the court ordered that it will give a permissive instruction to allow juries to make their own determinations as to the nature of the lost documents and will permit evidence of Takeda's document destruction activities to be presented at trial. In one notable 2014 trial, a jury awarded \$6 billion in punitive damages to a bellwether plaintiff on top of \$1.5 million in compensatory damages. Although the punitive damages award against Takeda was reduced to \$27.7 million, this does not bode well for Takeda in future

Actos trials. [*In re: Actos \(Pioglitazone\) Products Liability Litigation*](#), 11-md-2299 (W.D. Louisiana, January 30, 2014, and June 23, 2014). In stark contrast to the MDL litigation, however, a motion by plaintiffs for spoliation sanctions against Takeda in Actos litigation pending in a Wisconsin state court was denied in early March 2015. The court found that the 2002 hold was limited to liver damage allegations, and therefore the loss of relevant materials prior to 2010 did not constitute spoliation as to bladder cancer litigation. [*Thomas Van Treeck v. Takeda Pharmaceuticals America Inc. et al.*](#), 12-cv-007359, Docket Entry No.16 (Wisc. Circuit Court, Milwaukee County).

PROPOSED AMENDMENTS TO RULE 37

As demonstrated above, preservation issues continue to present significant challenges, even for parties acting in good faith. Amendments to the Federal Rules of Civil Procedure that address sanctions for the failure to preserve ESI are anticipated to go into effect on December 1, 2015. In its Report of September 2014, the Judicial Conference Committee on Rules of Practice and Procedure recognized that:

Preservation of ESI is a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference jury instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith.

See Summary of the Report of the [*Judicial Conference Committee on Rules of Practice and Procedure*](#), September 2014.

The Committee recommended adopting an amendment to Federal Rule 37 to resolve "the circuit split with a more uniform approach to lost ESI, and thereby reduc[e] a primary incentive for over-preservation." *Id.* However, the Committee warned that the revised rule does not "create a duty to preserve" and is not a "detailed rule specifying the trigger, scope, and duration of a preservation obligation," because such a rule is "not feasible" with the wide variety of cases in federal court.

Instead, revised Rule 37 “addresses actions courts may take when ESI that should have been preserved is lost.”

In its current form, Rule 37(e) provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” The proposed revised Rule 37(e) provides:

[I]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation, may:
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

If the amendments now pending before the Supreme Court are adopted and submitted to Congress prior to May 1, 2015, they would become effective on December 1, 2015, so long as legislation is not adopted to reject, modify, or defer them. Should the Rule 37 amendment be implemented, it would still likely bring a degree of uniformity to the imposition of sanctions and hopefully with it a reduction in over-preservation.

SEARCH METHODOLOGY/TECHNOLOGY-ASSISTED REVIEW

In 2014 courts continued to recognize predictive coding or TAR as an acceptable and cost-effective method for identifying responsive documents. The use of TAR was first approved by the judiciary in the 2012 opinion of U.S. Magistrate Judge Andrew J. Peck of the Southern District of New York in *Da Silva Moore v. Publicis Groupe, SA*. Since *Da Silva Moore*, the judiciary has become more knowledgeable about TAR and its benefits, even recommending its use to parties that had not previously considered it, as the court did in [*Aurora Cooperative Elevator Co. v. Aventine Renewable Energy*](#), No. 4:12cv230 (D. Neb. Mar. 10, 2014). In this case, the magistrate judge ordered that the parties “consult with a computer forensic expert to create search protocols, including predictive coding as needed, for a computerized review of the parties’ electronic records.” The court recognized that it was “highly foreseeable that the forensic expert will need to confer with not only the parties’ counsel, but representatives of the parties to develop an accurate and predictable search protocol.”



Although TAR is not without critics, perfection is not required for defensibility, as U.S. District Judge Denise Cote ruled in [*Federal Housing Finance Authority v. HSBC North America Holdings, Inc.*](#), 2014 WL 584300 (S.D.N.Y. Feb. 14, 2014). Additionally, the Tax Court

in [*Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue*](#) disagreed with the IRS's argument that predictive coding was an "unproven technology" despite being a "relatively new technique ... that has yet to be sanctioned (let alone mentioned) by this Court in a published Opinion." 143 T.C. No. 9 (Sept. 17, 2014). The court addressed this in hearing a motion brought by the IRS to have the petitioners produce ESI contained on two backup tapes of its entire email server, or to produce copies of the backup tapes. The petitioners argued that it would take many months and at least \$450,000 to fulfill the request using manual review for responsiveness and privilege and sought approval from the court to use predictive coding. The court granted the request to use predictive coding, rather than the IRS's request to receive all of the ESI subject to a clawback agreement, acknowledging that if the IRS believed "the ultimate discovery response is incomplete and can support that belief, [it] can file another motion to compel at that time."

TAR has also gained traction as a tool that can be used in combination with search terms. In [*Bridgestone Americas, Inc. v. International Business Machines Corp.*](#), 2014 U.S. Dist. LEXIS 142525 (M.D. Tenn. July 22, 2014), as discussed below with regard to proportionality, the magistrate judge addressed Bridgestone's request to use TAR to review more than two million documents for responsiveness, which was opposed by IBM as the parties had previously agreed upon search

terms to identify potentially responsive documents. Acknowledging that Rule 26 states that discovery will be tailored by the court to be as efficient and cost-effective as possible, and that the potential cost of review for millions of documents would likely cost millions, the magistrate judge allowed the use of predictive coding using search terms provided by the defendant. He noted that "[t]here is no single, simple, correct solution possible under these circumstances," and that he was "allowing Plaintiff to switch horses in midstream." Thus, he warned plaintiff that "openness and transparency in what [it] is doing will be of critical importance." This includes providing defendants with the seed set of documents used to set up predictive coding.

Transparency concerns also led Magistrate Judge Peck to issue an important memorandum decision in [*Rio Tinto PLC v. Vale S.A.*](#), 114cv3042 (S.D.N.Y. March 2, 2015). There, the court confronted a stipulated protocol for TAR, but elected to issue an opinion on the importance of transparency and cooperation when using this technology. Interestingly, he stated, "it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it." He continued, "it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review." Although Judge Peck agreed to the parties' proposed stipulated protocol in *Rio Tinto*, he cautioned that his order should not be viewed as sanctioning this particular protocol insofar as it related to the level of transparency and cooperation required among parties engaged in TAR.

When the parties fail to cooperate, however, the use of TAR has been denied. In [*Progressive Casualty Insurance v. Delaney*](#), the court admonished Progressive for failing "to engage in the type of cooperation and transparency that its own e-discovery consultant has so comprehensibly and persuasively explained is needed." 2014 WL 2112927 (D. Nev. May 20, 2014). Progressive did not seek the court's approval or the defendant's consent to use predictive coding, excluded



the defendants from decisions regarding the predictive coding methodology, and deviated from the best practices recommended by their vendor. The parties had previously stipulated to an ESI protocol in which Progressive was to apply the search terms to email and general documents, review the documents retrieved, and produce them to the defendants. Although the magistrate judge recognized that TAR is a “far more accurate means of producing responsive ESI in discovery ... than human review or keyword searches,” she refused to let Progressive use TAR because a protocol had already been established and Progressive failed to cooperate when it determined that the time and expense of linear review was unwieldy.

There is also authority emerging outside of TAR on parties’ search methodologies. The plaintiffs in [*Freedman v. Weatherford Int’l.*](#), 2914 WL 4547039 (S.D.N.Y. Sept. 12, 2014) sought to compel the production of certain documents that they identified through documents produced by a third party that were not part of the defendants’ production. The court recognized, in “certain circumstances where a party makes some showing that a producing party’s production has been incomplete, a court may order discovery designed to test the sufficiency of that party’s discovery efforts in order to capture additional relevant material.” The plaintiffs in *Freedman*, contending that the defendant Weatherford’s production was faulty, sought a report of the documents “hit” by search terms used to identify additional potentially relevant documents that had not been produced. Recognizing that “plaintiffs do not seek to probe the specifics of Weatherford’s discovery efforts, but rather to identify the documents missing from [Weatherford’s] production,” the court denied plaintiffs’ request for the search report because only three previously unproduced emails would have been identified using the search terms.

In a pair of opinions from Magistrate Judge Jonathan Goodman from the Southern District of Florida, the court reinforced the obligations of clients and counsel with regard to the collection and preservation of ESI, confirming the “basic rule” that outside counsel “must

carefully craft the appropriate keywords, with input from the ESI’s custodians as to the words and abbreviations they use.” [*Procaps S.A. v. Patheon, Inc.*](#), 2014 WL 1047748 (S.D. Fla. Mar. 18, 2014).

In the first opinion, the defendant sought to compel forensic examination of plaintiff’s (Procaps’s) electronic media based on plaintiffs’ failure to travel to Colombia where its company was based to meet with their IT team to discuss how relevant or responsive ESI would be identified. Plaintiff also failed to obtain an ESI consultant to assist with the implementation of a litigation hold or search for documents. *Procaps S.A. v. Patheon, Inc.*, 2014 WL 800468 (S.D. Fla. Feb. 28, 2014).

Several critical custodians conducted their own searches for ESI and documents without seeing document requests or receiving search terms from its counsel. The court ordered that a third-party forensic examiner should be engaged to conduct the forensic analysis and awarded sanctions against plaintiffs’ counsel. In the second opinion, the defendant sought to compel the plaintiff to propose adequate search terms in furtherance of the forensic analysis. The defendant became concerned because Procaps’s counsel proposed eight search terms, all in English, despite the location of Procaps’s headquarters in Colombia with Spanish-speaking employees. Plaintiffs’ counsel agreed that “the law requires him and his law firm to receive input from his client’s ESI custodians in order to determine appropriate search words.” However, it was discovered that this only took place after the motion to compel was filed. Sanctions were awarded to the defendants against the lawyer and his firm.

PROPORTIONALITY

Courts are increasingly recognizing and considering proportionality objections to impose meaningful limitations on the cost and duration of discovery. The decisions in 2014 teach that litigants’ discovery efforts should be reasonable and proportional to what is at stake in litigation and that courts will turn to Rule 26(b)(2)(C) to scrutinize ESI discovery requests. The balancing

test set forth in Rule 26(b)(2)(C) is an important standard because it instructs courts to limit the frequency or extent of discovery otherwise allowed by the federal rules if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

For example, these considerations guided two courts in determining whether to allow counsel to modify their ESI search methodologies after an initial exchange of discovery. In [McNabb v. City of Overland Park](#), No. 12-cv-2331, 2014 WL 1493124 (D. Kan. April 16, 2014), Magistrate Judge Teresa James declined to permit a party to modify its search methodology. In that case, a police officer employed by the City of Overland Park filed suit alleging sexual discrimination, harassment, hostile work environment, and retaliation arising from the misconduct of a fellow officer. The City produced five categories of documents totaling more than 36,000 individual documents. The production included emails sent or received by the plaintiff, emails sent or received by the fellow officer, emails mentioning the plaintiff or the fellow officer, and emails containing either of their last names.

Plaintiff then sought to search the electronic files of 14 custodians for 35 specific keywords. This would have resulted in an additional 10,189 emails to be reviewed in response to the plaintiff's requests. Plaintiff claimed that the proposed search terms would

lead to discoverable information related to sexual harassment and inappropriate workplace behavior. But Judge James noted that a significant number of the proposed search terms were not sexually charged and that they were duplicative.

The magistrate judge stated that the plaintiff must present something more than "mere speculation" that the additional searches would likely reveal additional responsive emails for the court to compel the searches and productions requested, and found the proposed list overly broad. Quoting *Cotton v. Costco Wholesale Corp.*, 2013 WL 3819974, at 1–2 (D. Kan. July 24, 2013), Judge James noted that the proposed list "could conceivably encompass some information that may arguably be relevant to this litigation but would also likely encompass much information having nothing to do with the issues in this case." The judge found that the plaintiff had not met her burden in showing that the search terms were proper and denied the plaintiff's motion to compel.

In contrast, as explained above, the court in *Bridgestone Americas, Inc. v. International Business Machines Corp.*, allowed a litigant to "switch horses in midstream." The court reasoned that Rule 26's proportionality standard warranted a change in the existing protocol. The *Bridgestone* case concerned a \$600 million suit over alleged defects in a sales and distribution program that IBM was hired to build.

The parties agreed that certain search methodologies, including manual review by attorneys, would be used during discovery, and this agreement was set forth in a case management order. After using keyword searches and de-duplication technology, Bridgestone culled 16.6 million responsive documents down to 2.3 million. Bridgestone then calculated the costs of manual attorney review and predicted that it would take 50 attorneys more than three months to review the documents and that TAR of the documents would offer faster, cheaper, and more accurate results. IBM would not agree to this approach, and motion practice ensued. Judge Joe B. Brown agreed with Bridgestone

in determining that Rule 26 required a more reasonable result and that TAR was appropriate. At the same time, Judge Brown emphasized that the parties would need to demonstrate “full openness in this matter” in using TAR, while indicating approval with Bridgestone’s agreement to provide IBM the seed documents initially used to “train” its predictive coding software.

Another significant proportionality decision in 2014 rejected the use of expansive search terms when other discovery tools at the disposal of the parties could accomplish discovery with lesser cost and delay. In [*United States v. University of Nebraska at Kearney*](#), No. 4:11-cv-3209, 2014 WL 4215381 (D. Neb. Aug. 25, 2014), the government claimed that the university wrongfully denied student requests for accommodations under the Fair Housing Act. Specifically, the students sought permission to bring emotional assistance animals into university housing for anxiety and depression.

At the outset of the litigation, the parties filed a stipulation and order setting forth the parameters for the exchange of ESI. The government sent a list of proposed search terms, electronic databases, and custodians it requested to be searched. One of the government’s proposed search terms sought “document* w/25 policy.” Despite the breadth of the government’s requests, the university produced hard-copy documents that it represented were “all documents related to requests for reasonable accommodation in University housing.” Otherwise, the University of Nebraska – Kearney (UNK) determined that it did not intend to proceed with discovery as to ESI due to the cost of retrieval, review, and production.

The government defended the breadth of its requests by arguing that “courts have consistently held that a plaintiff is entitled to discovery of all evidence of comparators and background evidence that would tend to show discriminatory conduct or disparate treatment ...” Otherwise, the government did not attempt to justify its demands on proportionality in terms of the cost-benefit considerations involved in the dispute. The parties remained unable to reach agreement, and the

government moved to compel production from UNK.

Judge Cheryl Zwart invoked proportionality principles set forth in Rule 26(b)(2)(C) to resolve the dispute in UNK’s favor. She emphasized that the government’s complaint alleged housing discrimination and that the government’s proposed search terms went well beyond the allegations at issue in the case. Judge Zwart wrote: “The court finds the government’s proposed ESI is, on its face, overly broad, not ‘reasonably calculated to lead to the discovery of admissible evidence,’ (Fed.R.Civ.P. 26(a)(1) (emphasis added)), and inconsistent with the goal of securing ‘the just, speedy, and inexpensive determination’ of this case as required under Rule 1 of the Federal Rules of Civil Procedure. Fed.R.Civ.P.1”. She also noted that the government’s requests were additional discovery requests, accepting UNK’s position that it had already provided responsive information on student requests for reasonable accommodation in university housing.

While the judge understood that the government was looking for evidence “to shore up a claim of discriminatory intent” and its pursuit of civil penalties against UNK, the government had not made any showing through deposition testimony or written discovery responses that such evidence existed. Therefore, she found no reason to suspect wide-scale discriminatory intent or practices by UNK to justify the breadth of the proposed discovery. She also noted that (1) ESI was not the only, best, or most economical method for obtaining this information and (2) depositions should suffice with far less cost and delay. Finally, Judge Zwart noted that there was no evidence that UNK had hidden or destroyed documents or that it could not be trusted to comply with written discovery requests.

Poignantly, Judge Zwart highlighted the potential impact that the government’s discovery requests could have on the willingness of UNK students and the general public to request accommodations or voice concerns about discriminatory treatment, when the result could be the federal government scouring their information in

unrelated cases. The court indicated that a mechanism greater than a civil discovery clawback order was needed to allow unwitting students to consent to or object to the disclosure of information from their files in suits to which they are not parties. The court believed that some of the information being sought could be obtained through less-expensive methods such as depositions. In short, the burden on innocent third parties of UNK disclosing personal file information outweighed the benefit of the requested discovery, especially in light of less intrusive alternatives.

COST-SHIFTING

Recent cost-shifting cases have invoked proportionality principles in determining whether a requesting party must pay for the discovery it needs. Courts have focused on a cost-benefit analysis in reaching their decisions. Accordingly, to the extent that the value of the case is very small, a producing party has limited means, or a non-party has no discernible interest in the litigation, courts have limited the scope or burden of producing data and have considered shifting the cost of requests to protect the producing party from undue burden or expense. Cooperation also is a key element.

In [*Saliga v. Chemtura Corporation*](#), 3:12-cv-00832-RNC, 2013 U.S. Dist. LEXIS 167019, 3-7 (D. Conn. Nov. 25, 2013), for example, the U.S. District Court for the District of Connecticut highlighted the importance of cooperation. The court stated, "Of, course, the best solution in the entire area of electronic discovery is cooperation among counsel." Nevertheless, in this employment dispute, the parties reached an impasse regarding the production format for emails, search terms, and discovery on the defendant's data collection. Both parties sought fees and costs. The court granted in part and denied in part the plaintiff's discovery motions, and then turned to the competing fee-shifting requests. Relying on multiple opinions from federal courts in New York, the Connecticut court refused to shift costs to either party because of its substantive ruling leading to the "mixed result" of granting in part and denying in part the motion. In this case, neither party could be seen

to be the obstructor of discovery and both parties had commensurate interest in the litigation.

In [*Black & Veatch v. Aspen Insurance \(UK\) Ltd.*](#), No. 12-2350-SAC (USDC D. Kan. Feb. 28, 2014), the U.S. District Court for the District of Kansas reiterated the general rule regarding the bearing of costs and expenses in e-discovery: "the general rule is that a party should bear the costs of producing discovery." The court also implored cooperation among the parties with regard to ESI, noting that they "are in the best position to balance its relevancy and burden of production." This matter revolved around an insurance coverage dispute that resulted in a business tort case with extensive discovery. The discovery dispute in *Black & Veatch* related to requests to search a "central filing" repository of documents that had previously been searched in related litigation purportedly at great cost to Black & Veatch (B&V).

In considering the fee-shifting request, the court considered numerous "cost-benefit" factors to determine whether to shift the cost to the requesting party. These factors included whether the information was stored in an accessible or inaccessible format; the quantity of information available from other and more easily accessed sources; the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; predictions as to the importance and usefulness of the further information; and the parties' resources. B&V did not



make a detailed showing but instead based its fee request on the assertion that it had spent \$600,000 on e-discovery costs in the prior litigation and to do so again was unduly burdensome. Without an affidavit of more precise cost estimates to respond to the discovery requests, the court found that B&V failed to demonstrate the data was inaccessible due to cost. Rather, the information was clearly relevant to issues in the case, and B&V had the resources to bear the costs.

The general rule regarding each party bearing its own discovery costs does not necessarily apply to non-party discovery arising from Rule 45 subpoenas *duces tecum*. Instead, courts more vigilantly protect non-parties subject to subpoenas from undue burden and costs. This rule was recently explained in [*Western Convenience Stores, Inc. v. Suncor Energy \(U.S.A.\) Inc.*](#), 2014 WL 1257762 (D. Col. Mar. 27, 2014). In *Western Convenience*, the plaintiff brought a price discrimination antitrust suit against a fuel supplier. To prove the discriminatory pricing, plaintiff needed evidence of sales to other buyers at different prices. The plaintiff subpoenaed its competitor Dillon Companies (Dillon) seeking information on fuel deliveries, prices, discounts, and rebates from contracts between the defendant Suncor Energy, Inc. (Suncor) and the non-party, Dillon. Dillon refused to provide any of the information sought in the subpoena and filed a motion to quash or modify the subpoena.

The court noted that “Rule 45(d) ... contemplates three scenarios in which costs may be shifted from the non-party to the requesting party.” First, Rule 45(d)(1) requires the court to impose “appropriate sanctions” if the requesting party or attorney fails to “take reasonable steps to avoid imposing undue burden or expense” on the non-party recipient. Second, when the equities require that the requesting party bear some or all of the cost of production, the court can shift the costs under Rule 45(d)(2)(B). Third, under Rule 45(d)(3)(C), when a motion to quash or modify is filed to protect the disclosure of trade secrets but the requesting party shows a substantial need for the material that cannot be met without undue hardship, the court must ensure

the subpoenaed person is reasonably compensated for that burden.

While the court in *Western Convenience* noted that, when dealing with non-party subpoenas, there is divergence from the general rule that producing parties pay their own costs, the court applied the familiar cost-benefit analysis and rewarded the cooperation of the party issuing the subpoena. The court admonished the parties to “stop thinking as adversaries and start helping [the court] to figure out a way [to] move this case forward.” The court noted that it had mediated the discovery process through a series of five discovery hearings, eleven status reports, and a number of rulings on discovery parameters. The court found that Dillon failed to confer with *Western Convenience* as was required, never sought an improved protective order, failed to quantify any cost or burden in responding to the subpoena, and missed numerous court-ordered deadlines. In turn, the court noted that *Western Convenience* had modified its subpoena to fit the facts of the case, as it had required. The court positively recognized *Western Convenience*’s efforts to meet and confer and to negotiate a new protective order palatable to all parties.

Ultimately, the court balanced the equities of the discovery dispute, applying the standards for cooperative discovery from Rule 26(g)(1)(B). The court found *Western Convenience* had made efforts to streamline discovery and reduce the overall burden, while Dillon was evasive and obstructive. The court held that Rule 45 cannot impose an obligation of reasonableness on the issuing party and “then turn a blind eye to a non-party’s unreasonable behavior in determining whether sanctions are appropriate.” Therefore, the court refused to award Dillon the \$122,202.50 in attorney’s fees and \$26,547.32 in costs. Nevertheless, the court awarded \$19,515 in fees under Rule 45(d)(3)’s language requiring compensation for the production of trade secrets. The court also criticized Dillon’s documentation of its costs and legal fees and refused to reimburse Dillon for motion practice caused by Dillon’s own “foot-dragging.”

FORM OF PRODUCTION

We see the courts continue to refine their approach to e-discovery, including addressing the form of production of discovery materials. While the general rule of production of materials “as they are kept in the usual course of business” under Rule 34 remains the proper starting point, courts have conducted more thoughtful and in-depth analysis based on the nature of the materials in dispute. In the matter of [Melian Labs, Inc. v. Trilogy LLC](#), No. 13-cv-04791-SBA, 2014 U.S. Dist. LEXIS 124343 (N.D. Cal. Sept. 4, 2014), a trademark dispute matter, the plaintiff allegedly failed to comply with the agreed-upon protocol for producing emails and Microsoft Excel spreadsheets in native format. Instead, plaintiff produced the documents in PDFs stripped of all metadata. Initially, since there existed a prior stipulation, the court held that the normal rule of “as they are kept in the usual course of business” under Rule 34 was not applicable and the terms of the stipulation were controlling under Rule 26. The court then reminded the parties that a responding party may generally produce documents in the format of their choice. Interestingly, the court observed that in the context of emails, it is the demanding party’s burden to articulate in a motion to compel why metadata is important when every email should contain the information sought on the face of the document (date sent, time sent, date received, time received, to, from, cc, bcc, and subject). Accordingly, the court will not compel the production of metadata absent a demonstration by the demanding party that the information is relevant and unavailable in the produced format.

For example, in [Pero v. Norfolk S. Ry., Co.](#), No. 3:14-CV-16-PLR-CCS, 2014 U.S. Dist. LEXIS 166121 (E.D. Tenn. Dec. 1, 2014), a personal injury matter, at issue was a digital video recording that shows plaintiff at the time of the injury and a copy of the audio reflecting plaintiff’s radio communication at the time. The defendant refused to produce the video/audio, claiming licensure issues and offered to show the video only at its attorney’s office. The court declined to require the plaintiff to view the at-issue video at the

defendant’s counsel’s office or to obtain a license for the proprietary software. The court ordered the defendant to either “provide the Plaintiff with a laptop computer loaded with the video recording and the software for viewing the recording, which would be used only for that litigation and returned after the litigation” or “request that the Plaintiff procure a software license and...then reimburse Plaintiff for the costs of that license...”

Similarly, in [Swoope v. CSX Transportation, Inc.](#), 4:13-CV-307-HLM, Doc. 54, 2014 U.S. Dist. LEXIS 167628 (N.D. Ga. Aug. 13, 2014), the court held that the defendant “cannot use its choice to enter into a software agreement as a shield against producing a relevant piece of discovery, nor can it use the agreement as a basis for attaching burdensome conditions to the production of the recording.” The Swoope court instructed the defendant to produce a copy of the video in a “reasonably viewable form, such as .avi” or provide the plaintiff with the software necessary to view the recording. This recent trend is important to note for practitioners because the cost for software licenses may have a significant impact on the cost of discovery.

It is also good to remember that while the parties can demand the production of materials in any format, the responding parties do not have to acquiesce if undue hardship can be demonstrated. In [Peterson v. Matlock](#), 2014 WL 5475236 (D. N.J. Oct. 29, 2014), a personal injury case concerning an inmate who was allegedly beaten by correctional officers, the plaintiff moved to compel seeking production of his medical records either in their native format with the required software reader or broken into searchable headings. Citing Rule 34, the court held that the defendant has satisfied the burden of showing undue hardship or expense in the production of metadata or ESI. Specifically, in denying plaintiff’s motion to compel, the court noted that even though “the PDF record provided may be less convenient for Plaintiff, requiring staff from the [defendant] to sort and identify each page of every inmate medical record would create a substantial hardship and/or expense, which outweighs Plaintiff’s interests in receiving the records in their native format.”

Similarly, in *Anderson Living Trust v. WPX Energy Prod.*, LLC, 298 F.R.D. 514, 2014 U.S. Dist. LEXIS 31025 (D.N.M. Mar. 6, 2014), the court analyzed the question of whether “a party must, under Rule 34(b)(2)(E)(i) ..., arrange and label electronically stored information to correspond to the categories in the request, or whether compliance with rule 34(b)(2)(E)(ii) – production of ESI in the form that the requesting party requests or in another reasonably usable form – is sufficient.” The court concluded that “the Rule 34(b)(2)(E)(i) requirement that documents be produced either in the usual course of business or labeled to correspond to categories in the request does not apply to ESI.” Thus, the court



declined to order defendants to arrange and label their production, including approximately 20,000 pages of hard copy documents that had already been scanned and produced in PDF format at plaintiff's request.

SOCIAL MEDIA

Social media continues to embed itself in the fabric of our day-to-day lives as more and more people make use of it in a wide variety of ways. Consequently, it can also serve as a rich source of discovery in a variety of legal matters. While social media continues to become more prevalent, courts across the country continue to struggle to find the balance between privacy and the competing demands of full and fair discovery.

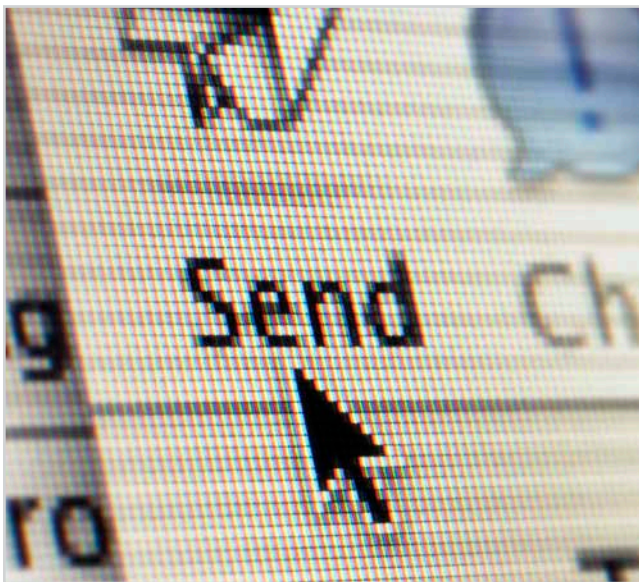
A frequent threshold issue that courts encounter regarding social media discovery concerns the privacy implications of the actual discovery requests. Using “reasonableness” as the guiding principle, courts continue to focus discovery demands by balancing material and necessary requests against privacy concerns. A recent New York case involving social networking postings illustrated a characteristic balancing effort. In *Del Gallo v. City of New York*, 43 Misc. 3d, 1235A (N.Y. Sup. Ct. 2014), the court noted that discovery of social networking postings requires the “application of basic discovery principles in a novel context.”

Del Gallo involved, in part, the production of material on social media site LinkedIn in connection with a personal injury and wrongful death claim. The court applied “a two-prong analysis for determining whether social media accounts are discoverable. First, the court determines whether the content in the accounts is material and necessary, and then it balances whether the production of this content would result in a violation of the account holder's privacy rights.” To demonstrate materiality, the party seeking the information “must establish a factual predicate for their request by identifying relevant information in plaintiff's [social media] account.” The court in *Del Gallo* allowed information pertaining to plaintiff's communications with recruiters and others related to job offers and inquiries, but denied discovery requests concerning communications with former colleagues inquiring about her condition. The court also denied a party's request for access to “all social media sites,” finding such a request “an improper fishing expedition.”

Courts have not given discovery on social networking sites any sort of special protection, but have required that a discovery request seeking such material satisfy Rule 26's requirement that it be reasonably calculated to lead to the discovery of admissible evidence. In *Smith v. Hillshire Brands*, 2014 U.S. Dist. LEXIS 83953, 12-13 (D. Kan. June 20, 2014), the defendant argued that social media sites provided a contemporary diary of the plaintiff's mental state and thus were relevant to

e-DISCOVERY

emotional distress claims. Magistrate Judge O'Hara found requests for all-inclusive access to all social media sites not to be reasonably calculated to lead to admissible evidence and not tailored to posts or information related to the plaintiff's emotional state. The court found that such a broad foray into every thought plaintiff reduced to writing on the Internet since January 1, 2013, was nothing more than the proverbial "fishing expedition" that courts scrupulously try to avoid.



Similarly, in *Ogden v. All-State Career Sch.*, 299 F.R.D. 446, 450 (W.D. Pa. 2014), the defendant in an employment matter sought complete access to the plaintiff's Facebook, Twitter and MySpace accounts for (1) evidence proving that the plaintiff willingly engaged through his social media accounts in the complained-of sexual harassment at work or (2) evidence that he was not offended by such conduct. The court stated, "it is the nature of the claims and defenses and not merely the form of medium that define the bounds of relevancy and courts have declined to permit far-roving discovery into social media accounts where the inquest does not meet the basic tenants of Rule 26...Defendant is no more entitled to such unfettered access to plaintiff's

personal email and social networking communications than it is to rummage through the desk drawers and closets in plaintiff's home." Instead of granting full access, the plaintiff was ordered to review his social media sites, identify any status updates, messages sent and received, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments and applications related to the underlying workplace conduct or his emotional state during the relevant period, and produce to defendant a copy of all electronic communications belonging or attributable to him as a result of his affirmative actions.

Courts in other jurisdictions also have limited the scope of production for everything on social media sites to just what is at issue in the litigation. *See, e.g., D.O.H. v. Lake Cent. Sch. Corp.*, 2014 U.S. Dist. LEXIS 5585, 7-8 (N.D. Ind. Jan. 15, 2014) (limiting the scope of social media disclosure, as well as ordering the party "to provide a privilege log for any records not produced"); *Stonebarger v. Union Pac. Corp.*, 2014 U.S. Dist. LEXIS 90071, 14 (D. Kan. July 2, 2014) (ruling that the party need only produce information from a social media site that relates to claims of damages in the litigation).

Preservation is another area in which courts continue to apply basic discovery principles in the social media context. The duty to preserve social media information once a party is on notice of litigation or a potential for litigation is the same as the parties' obligation as to other electronic documents. In *Painter v. Atwood*, 2014 U.S. Dist. LEXIS 35060, 18 (D. Nev. Mar. 18, 2014), one issue before the court involved information removed from a social media site. Magistrate Judge Koppe went to great lengths to parse whether the party or potential witness who deleted the information was on notice of the duty preserve and the degree of culpability of the perpetrator for each respective claim of spoliation. For all but one claim of spoliation, Judge Koppe found that there was not sufficient notice to preserve, that the data was preserved in another format, or that the defendants failed to meet their burden of showing actual spoliation. The court noted that that even if a party removes certain information from a social media site, the fact that the

party maintained that same information in another form was sufficient to satisfy preservation requirements.

With respect to posts or messages removed from Facebook and destroyed, however, both the party and its counsel were responsible for that destruction. The court noted that “it is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments. Once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation.” See also *Keller v. Keller*, 2014 Conn. Super. LEXIS 1675, 30 (Conn. Super. Ct. July 9, 2014) (finding a party willfully in contempt of an order when it made changes to a social media account after the court’s order to preserve was entered and specifically extended to cover social media sites).

Judge Koppe finally turned to the appropriate remedy for the intentional spoliation of the Facebook posts. The court noted that its broad discretion in remedying spoliation includes the power to dismiss the action and the power to instruct the jury that it can infer the missing evidence was unfavorable to the plaintiff. Judge Koppe noted that dismissal is a “harsh sanction” reserved for instances where a party willfully deceived the court and interfered with the orderly administration of justice. Moreover, if less drastic sanctions are available to remedy the spoliation, outright dismissal is not appropriate. Focusing only on the deleted Facebook posts, the court found dismissal of the action too severe a sanction when an adverse inference was available and sufficient to remedy any prejudice to the defendants.

These cases demonstrate that long-existing discovery principles applied to new technological contexts govern the scope of discovery requests concerning social media. One area in which technology may be troublesome, however, concerns the production of social media materials. As a starting point, the form in which a party produces information from social media sites should be in compliance with Rule 34(b)(1)(C). This rule makes it clear that a requesting party “may

specify the form or forms in which electronically stored information is to be produced.” But compliance with this rule may run counter to traditional notions of privacy if a requesting party overreaches in the eyes of the court.

In *Chapman v. Hiland Operating, LLC*, 2014 U.S. Dist. LEXIS 74248, 6 (D.N.D. May 29, 2014), where the parties were seeking information from an inactive account on a social media site, the court found that the responding party did not have to provide its adversary with the account login and password or full access to the account, but only produce information “in the form of a screen shot [or] other similar format all information from the account” in connection with the dispute. Some courts have gone so far as to require responding parties to present the information to the court in camera, so the court can provide direction as to how the information is produced. See *Stallings v. City of Johnston City*, 2014 U.S. Dist. LEXIS 68566, 9 (S.D. Ill. May 19, 2014) (addressing a dispute as to whether redacted or un-redacted social media data should be produced to the other party).

CONCLUSION

Magistrate Judge Andrew Peck's pronouncement that TAR is now "black letter law" confirms that predictive coding is no longer untested, unreliable, or novel technology. In three short years following *Da Silva Moore*, TAR has changed the ESI landscape. As Magistrate Judge Peck observed, parties will continue to struggle with the need for cooperation and transparency in the process of using TAR. But use of this technology is expected to expand in a wide variety of civil litigation as it becomes more efficient, cost-effective, and accepted among litigators. Although it may not yet be justified in every case, parties should consider this technology and consult with their counsel about the risks and benefits of using this tool in significant litigation.

Proposed amendments to Rule 37(e) promise to provide a measure of comfort for producing parties in terms of the ever-present threat of sanctions. Pending adoption of the proposed amendments, the risk of significant sanctions arising from preservation shortcomings persists in ESI cases. As advised in 2014's key decisions on this topic, parties and their counsel should take measures to actively supervise the implementation and monitoring of litigation holds, and they should be certain to involve a party's information technology department as a key stakeholder in the preservation process.

Beyond preservation, the proportionality rule provides an important resource for the producing parties, particularly in litigation involving asymmetrical discovery. Of course, parties should invoke proportionality issues upon receiving potentially onerous discovery demands with limited relevance or evidentiary value. But the decisions from 2014 demonstrate that proportionality considerations remain important during the discovery process. In fact, they may even justify amending the agreed-to protocol when the parties learn that the cost of conducting discovery in a certain manner substantially outweighs the benefit of the information sought.

Over the next year, we expect courts to continue to embrace TAR and proportionality as reasonable approaches to managing ESI, particularly in cases involving substantial potential expense to the parties. However, we also anticipate that failures of the parties to actively implement, monitor, and supervise their preservation efforts will continue to produce sanctions in the form of adverse inferences and monetary awards. Courts will also continue to struggle with a myriad of practical issues involving the cost and form of production. In addition, they will demand meaningful cooperation from the parties to facilitate the Rules' objective of securing a "just, speedy, and inexpensive determination of every action and proceeding."

OFFICES



ALBANY

677 Broadway
Albany, NY 12207
518.449.8893

BALTIMORE

500 East Pratt Street
Baltimore, MD 21202
410.539.1800

BOSTON

260 Franklin Street
Boston, MA 02110
617.422.5300

CHICAGO

55 West Monroe Street
Chicago, IL 60603
312.704.0550

DALLAS

Bank of America Plaza
901 Main Street,
Dallas, TX 75202
214.698.8000

DENVER

1225 17th Street
Denver, CO 80202
303.572.5300

EDWARDSVILLE

101 West Vandalia Street
Edwardsville, IL 62025
618.307.0200

GARDEN CITY

666 Old Country Road
Garden City, NY 11530
516.228.8900

HARTFORD

100 Pearl Street
Hartford, CT 06103
860.249.7129

HOUSTON

909 Fannin Street
Houston, TX 77010
713.353.2000

KENTUCKY

100 Mallard Creek Road
Louisville, KY 40207
502.238.8500

LAS VEGAS

300 South 4th Street,
Las Vegas, NV 89101
702.727.1400

LONDON

65 Fenchurch Street
London, EC3M 4BE
United Kingdom
+44.20.7553.8383

LOS ANGELES

555 South Flower Street
Los Angeles, CA 90071
213.443.5100

MIAMI

100 Southeast Second Street
Miami, FL 33131
305.374.4400

MICHIGAN

39555 Orchard Hill Place
Novi, MI 48375
313.327.3100

MILWAUKEE

740 North Plankinton Avenue
Milwaukee, WI 53203
414.276.8816

NEW JERSEY

200 Campus Drive
Florham Park, NJ 07932
973.624.0800

NEW YORK

150 East 42nd Street
New York, NY 10017
212.490.3000

ORLANDO

111 North Orange Avenue
Orlando, FL 32801
407.203.7599

PHILADELPHIA

Independence Square West
The Curtis Center
Philadelphia, PA 19106
215.627.6900

SAN DIEGO

655 West Broadway
San Diego, CA 92101
619.321.6200

SAN FRANCISCO

525 Market Street
San Francisco, CA 94105
415.433.0990

STAMFORD

1010 Washington Boulevard
Stamford, CT 06901
203.388.9100

VIRGINIA

8444 Westpark Drive
McLean, VA 22102
703.245.9300

WASHINGTON, DC

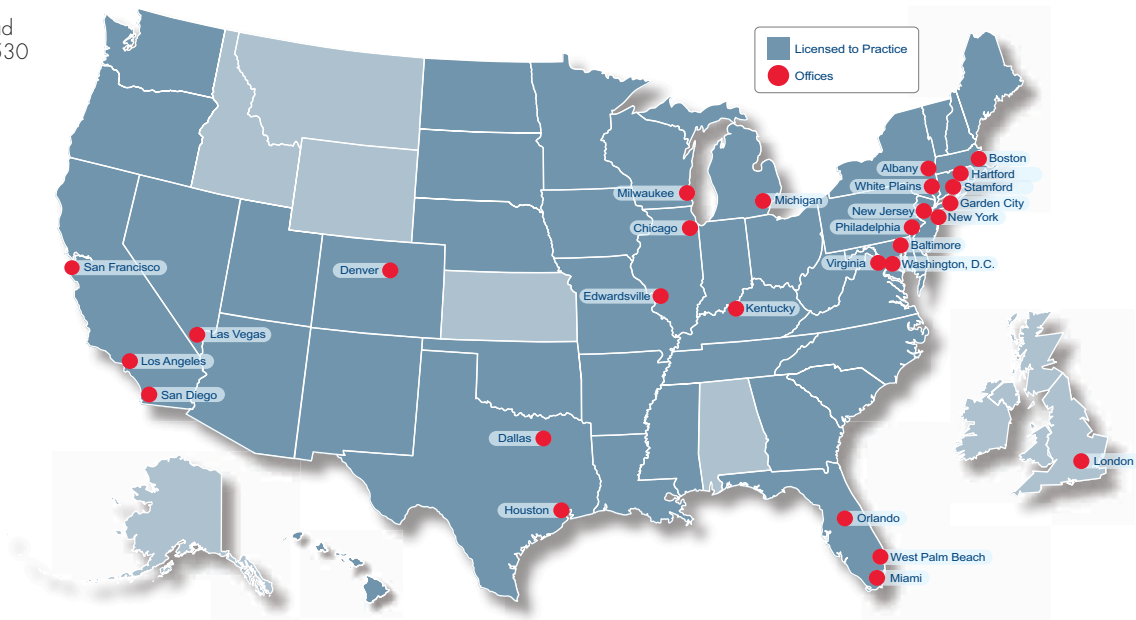
700 11th Street, NW
Washington, DC 20001
202.626.7660

WEST PALM BEACH

222 Lakeview Avenue
West Palm Beach, FL 33401
561.515.4000

WHITE PLAINS

1133 Westchester Avenue
White Plains, NY 10604
914.323.7000



OFFICES

Albany
Baltimore
Boston
Chicago
Dallas
Denver
Edwardsville
Garden City
Hartford
Houston
Kentucky
Las Vegas
London
Los Angeles
Miami
Michigan
Milwaukee
New Jersey
New York
Orlando
Philadelphia
San Diego
San Francisco
Stamford
Virginia
Washington, DC
West Palm Beach
White Plains