



## E-DISCOVERY UPDATE

### E-Discovery Task Force Update

The legal framework in litigation for addressing the explosion in electronic communications has been in flux for a number of years. Sidley Austin LLP has established an "E-Discovery Task Force" to stay abreast of and advise clients on this shifting legal landscape. An inter-disciplinary group of more than 25 lawyers across all our domestic offices, the Task Force monitors and examines issues and developments in the law regarding electronic discovery. The Task Force works seamlessly with our firm's Litigators who regularly defend and prosecute all types of litigation matters in trial and appellate courts, federal and state agencies, arbitrations, and mediations throughout the country. The co-chairs of the E-Discovery Task Force are:

Alan C. Geolot  
+1 202.736.8250  
ageolot@sidley.com

Colleen M. Kenney  
+1 312.853.4166  
ckenney@sidley.com

Joel M. Mitnick  
+1 212.839.5871  
jmitnick@sidley.com

To receive future copies of this and  
other Sidley Updates via email,  
please sign up at  
[www.sidley.com/subscribe](http://www.sidley.com/subscribe)

Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000. Prior results do not guarantee a similar outcome.

### Notable E-Discovery Cases and Events

This update addresses the following recent events and court decisions involving e-discovery issues:

1. The U.S. Supreme Court decision in *City of Ontario v. Quon* upholding the right of an employer to access, search and review employee messages on employer-provided equipment when such a search is legitimate and reasonable;
2. An Illinois federal district court decision imposing sanctions for a party's reckless failure to preserve relevant materials but refusing to order an adverse inference because the plaintiff failed to demonstrate that the defendant acted willfully or in bad faith;
3. A New Jersey district court opinion 1) finding there was no bright line rule preventing a defendant from claiming that ESI was not reasonably accessible under Rule 26(b)(2)(B) even when the defendant had made the ESI inaccessible by not issuing a timely litigation hold; and 2) upholding a Magistrate Judge's ruling that plaintiff had failed to demonstrate good cause to require production of such inaccessible ESI under Rule 26(b)(2)(B); and
4. An Arkansas federal court decision granting plaintiffs' request for a renewed keyword search with additional search terms and additional custodians but finding that defendant's backup tapes were reasonably inaccessible and that plaintiffs had not made a showing of good cause to justify the restoration and production of ESI on such backup tapes.

This **Sidley Update** has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

**1. In *City of Ontario v. Quon*, 130 S.Ct. 2619 (U.S. June 17, 2010), the U.S. Supreme Court upheld a government employer’s right to access and review text messages sent and received on employer-provided equipment when such a search was legitimate and reasonable under the employer’s privacy policy.**

The principal issue in this case was whether a government employee had a reasonable expectation of privacy in text messages sent through government-issued communications equipment despite a written policy that such messages were subject to monitoring without notice. In October 2001, Quon, a member of the Ontario Police Department, was issued a pager capable of sending and receiving text messages. *Id.* at 2625. The City, including the Ontario Police Department, operated under a Computer Policy stating it had “the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.” *Id.* A year and a half prior to being issued the pager, Quon signed a statement acknowledging he had read and understood the Computer Policy. *Id.*

While the Computer Policy did not specifically address text messaging or pagers, the City made clear that text messages sent via the pagers would be treated the same as e-mails, stating at a staff meeting, and later in writing, that “[text] messages would fall under the City’s policy as public information and [would be] eligible for auditing.” *Id.* In the first few billing cycles Quon exceeded his monthly usage of text messages, and reimbursed the City for the additional charges. At that time Quon was reminded by his supervisor that the text messages could be audited but that he had no plans to do so. *Id.* Nevertheless, after several months of overage fees, the Department decided to conduct a limited review of the messages to determine whether the text allowance under the plans was adequate to cover business use. *Id.* at 2626. During the review, Quon’s supervisor discovered that Quon had sent a disproportionately large amount of personal and even sexually explicit texts during his shifts, and referred the matter to

internal affairs to determine if Quon was violating Ontario Police Department rules. *Id.* Ultimately, Quon was disciplined for his texting habits. *Id.*

The District Court ruled in favor of the City of Ontario, but the Ninth Circuit reversed in relevant part, holding that even though the search was conducted for “a legitimate work-related rationale” it was “not reasonable in scope” and thus was a violation of Quon’s Fourth Amendment rights. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 908 (2008). The Ninth Circuit identified a host of additional methods the department could have used to conduct the review of text messaging usage that would have provided more protection for Quon’s privacy rights. *Id.* at 909. The City of Ontario appealed.

Writing for eight members of the Court, Justice Kennedy declined to embrace a broad view of the issue presented or to attempt to announce new rules for emerging technologies, stating, “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear,” and “[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.” *City of Ontario*, 130 S.Ct. at 2629.

Accordingly, the Court did not resolve the parties’ dispute over whether Quon had an expectation of privacy in his text messages sent on the pager provided by the City. The Court stated, “[a] broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds.” *Id.* at 2630. The Court assumed, *arguendo*, that Quon had an expectation of privacy in his text messages, that the City’s review of the text messages constituted a search under the Fourth Amendment, and that the review of text messages was akin to the search of an employee’s physical office such that the same principles apply. *Id.* It found, however, that even

under these assumptions, the City's search was reasonable under the Fourth Amendment.

The Court first concluded that the search was justified by a legitimate business purpose (ensuring employees were not forced to cover costs for employment-related text messaging if their city's subscription plan was too low). *Id.* at 2631. It also found the scope of the search was reasonable, noting that the review of messages was for a limited period only (two months) and that the City redacted all text messages sent or received when the officers were off duty. *Id.* Finally, the Court noted that it would not have been reasonable for Quon to assume that his text messages were private when he was specifically informed that they could be audited. *Id.* As to the Ninth Circuit's conclusion that there were less intrusive ways in which the City could have conducted the review, the Supreme Court noted that it has "repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment." *Id.* at 2632 (citation omitted).

Of note, while this case involved government employers, the Court concluded that a similar search would be "regarded as reasonable and normal in the private-employer context." *Id.* at 2633 (citation omitted).

**2. In *Jones v. Bremen High School District 228*, 2010 WL 2106640 (N.D. Ill. May 25, 2010), Magistrate Judge Susan Cox found that defendant was reckless and grossly negligent in not preserving relevant email and granted in part plaintiff's motion for sanctions. Specifically, the Magistrate Judge ordered that (1) the jury be instructed of defendant's duty to preserve email and its failures to do so, and thus preclude defendant from arguing that an absence of discriminatory statements during the "non-preservation" period was evidence that no such statements were made; (2) defendant pay costs and fees associated with plaintiff's motion for sanctions; and (3) plaintiff could depose witnesses and defendant must bear the cost of those depositions.**

On October 5, 2007, the plaintiff, an African American woman and secretary in the Bremen High School District ("defendant"), filed a suit with the EEOC alleging that

defendant had discriminated against her on the basis of her race and disabilities. The plaintiff received her right to sue letter on April 13, 2008 and filed her complaint with the court on June 20, 2008.

The defendant did not place a litigation hold on ESI in 2007 when it first learned that plaintiff had filed an EEOC complaint. Instead, only three individuals were asked to self-collect relevant emails and were not guided by counsel in determining what may be relevant. Any emails "double-deleted" (*i.e.*, deleted from the trash bin) during this time period were erased from the backup system after thirty days. Then, in October 2008, the defendant implemented an auto archiving system, which automatically saved all employee email. It was not until the spring of 2009 that the defendant issued a formal litigation hold.

After the plaintiff filed a motion for sanctions, the defendant in fact produced a significant set of email created "before October 2008, the time period during which email would not have been automatically saved if deleted by recipient/sender." *Id.* at \*5. As a result, the Magistrate Judge found that "it appear[ed] . . . that most (if not all) of the gaps in defendant's production have been filled." *Id.* Nevertheless, the Magistrate Judge concluded: "[B]ecause there was no hold put in place on electronic documents and because emails could be manually and permanently deleted if an employee chose to do this, we cannot determine with certainty that all email relevant to plaintiff's claims were preserved." *Id.* Relying upon "the distinct possibility that emails relevant to the plaintiff's case were destroyed" because of defendant's failure to preserve, *id.* at \*8, the Magistrate Judge determined that the above-listed sanctions were warranted. The Magistrate Judge, however, declined to order an adverse inference instruction stating that emails not preserved contained discriminatory statements because there had been no showing that the defendant acted willfully or in bad faith.

**3. In *Major Tours, Inc. v. Colorel*, 2010 WL 2557250 (D.N.J. June 22, 2010), U.S. District Court Judge Jerome Simandle held that there was no bright line rule preventing a party from claiming that ESI was not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B) even when that party had made the ESI inaccessible by not issuing a timely litigation hold. Judge Simandle also found that the Magistrate Judge did not abuse his discretion in ruling that good cause had not been established to require the production of the inaccessible ESI under Rule 26(b)(2)(B)'s seven factor test.**

In this Section 1983 action, plaintiffs appealed a Magistrate Judge's order concluding that certain backup tapes were not reasonably accessible under Rule 26(b)(2)(B) and that the plaintiffs had not shown good cause to require their production under the seven factor test set forth in the Advisory Committee Notes to Rule 26(b)(2)(B). The Magistrate Judge made this determination despite finding that defendants had not instituted adequate litigation hold notices until several years after the duty to preserve had attached. On appeal to Judge Simandle, plaintiffs claimed that the Magistrate Judge had not given "appropriate weight to the defendants' culpability for the emails being inaccessible, given that the reason for the increased cost of recovery was the defendants' failure to institute a timely and effective litigation hold." *Id.* at \*27. Plaintiffs also argued that a party cannot rely on Rule 26(b)(2)(B) if that party's negligence in fact caused the inaccessibility of the requested data.

Affirming the Magistrate Judge's decision, Judge Simandle concluded that there was no bright line rule in Rule 26(b)(2)(B) that precluded a party from relying on the provision notwithstanding that party's responsibility for the inaccessibility of the ESI. In this case, even though the duty to preserve attached in 2003 and the defendants did not issue a formal preservation notice until 2007, that fact did not override application of the multi-factor good cause test under Rule 26(b)(2)(B). Judge Simandle cited the decision in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit*, 242 F.R.D. 139 (D.D.C. 2007), in which Magistrate

Judge Facciola considered the same issue and "concluded that the proper approach was to balance the defendants' culpability as one factor in the seven factor analysis." *Major Tours* at \*28. Judge Simandle stated:

"The Rules compel exactly this discretionary balancing of costs and benefits of discovery, not a bright line requirement of production, no matter how burdensome, how likely to succeed, or how necessary to the litigation, if a party fails to adequately preserve every byte of previously accessible data." *Id.*

Judge Simandle also found that the Magistrate Judge had not abused his discretion in balancing the good cause factors. "While the undersigned might have weighed the evidence of negligent spoliation more heavily in deciding whether to order discovery of the pre-2007 backup tapes, it is not clear this re-weighing would result in a different outcome." *Id.* at \*29. The Magistrate Judge "found that the amount of evidence produced . . . meant that the backup tapes were likely to produce evidence of only marginal, cumulative benefit, and at great expense." *Id.* Accordingly, the District Judge held that the Magistrate Judge "considered the appropriate factors, weighed them in a reasonable and comprehensive manner, and did not abuse his discretion in doing so." *Id.*

**4. In *Helmert v. Butterball, LLC*, 2010 WL 2179180 (E.D. Ark. May 27, 2010), the plaintiffs brought a motion to compel a search of certain custodians and ESI after failing to reach an agreement with the defendants over the scope of discovery. U.S. District Court Judge Leon Holmes weighed the likelihood that broadening the scope of discovery would lead to new discovery with the costs of that discovery in granting plaintiff's motion in part. The Court rejected the plaintiffs' request to order defendant to restore and search its backup tapes, finding that such ESI was not reasonably accessible and that defendants had not shown good cause to require such production.**

In this Fair Labor Standards Act case, this dispute arose after defendants made an initial production of 890 documents, 90 of which came from a key word search of 22 relevant custodians.

*Id.* at \*1. Plaintiffs, concerned that the search conducted by the defendant had been too narrow, requested another search from an expanded list of custodians and additional search terms. *Id.* at \*2. After extended discussions between the parties on the scope of a renewed search were unsuccessful, the plaintiffs sought assistance from the Court, asking that it compel the defendant to search all possible sources of ESI for 43 custodians using 70 specified search terms. *Id.* at \*2-3. The defendant agreed to search all but 10 of the 43 custodians, using 12 proposed search terms, but argued anything beyond that would be duplicative of what had already been produced and would impose significant burden and expense. *Id.* at \*3. Further, the defendant argued that some of the ESI the plaintiffs asked to be searched, including backup tapes, was inaccessible. *Id.*

Addressing the proposed search term list first, the Court noted that under the liberal discovery of the federal rules “a request for discovery should be allowed ‘unless it is clear that the information sought can have no possible bearing’ on the claim or defense of a party.” *Id.* (citation omitted). The Court acknowledged that ESI can, at times, be denied if “it is unreasonably cumulative or duplicative or [ ] the burden or expense [ ] outweighs its likely benefit.” *Id.* The Court then examined four categories of search terms and, in all but one instance, concluded the terms were narrowly tailored to lead to relevant evidence. Accordingly, it granted the plaintiffs’ request that these terms be included in the new search. It dismissed the defendant’s objection over the additional cost it would incur to review such data for relevancy and privilege, stating, “In any discovery request, relevant documents must be combed for privilege, and the defendant offers no evidence as to why this request should be any different.” *Id.* at \*4. The Court rejected one category of proposed search terms because the plaintiffs failed to adequately explain why the terms were likely to lead to new, relevant evidence. *Id.*

The Court also granted the plaintiffs’ request to expand the number of custodians to be searched, agreeing with the plaintiffs that some, but not all, of the identified executives, employees and former employees were likely to be in possession of relevant evidence. *Id.* at \*7. The Court further granted the plaintiffs’ request that the search not be limited to active and archived emails, but that work laptops, hard drives and, in some instances, personal email accounts should be searched as well. *Id.* at \*7. The plaintiffs specifically requested that the personal email accounts of three senior managers be searched, arguing that the managers had been involved in several decisions relevant to the litigation prior to being issued work accounts by the defendant. *Id.* at \*9. The Court granted the request as to two of the managers, rejecting the defendant’s claims that it did not have control over, or access to, the managers’ personal email accounts. *Id.* at \*9.

The Court agreed, however, that the defendant’s backup tapes were not reasonably accessible, finding that the data would have to be completely restored at significant cost prior to the defendant being able to search the data. *Id.* at \*8. While discovery of inaccessible data may be compelled on a showing of good cause, the Court concluded that the plaintiffs had not met their burden. *Id.* at \*8-9. Most notably, the plaintiffs failed to specify what new information they expected to discover from the backup tapes. The Court held that the “slim likelihood that new and relevant information may be discovered does not outweigh the substantial burden and expense required to retrieve the information from the backup tapes.” *Id.* at \*9 (citing *Major Tours, Inc. v. Colorel*, 2009 WL 3446761, at \*4). Finally, the Court declined the defendant’s request to shift part of the costs of discovery to the plaintiffs, holding that such shifting is appropriate only when ESI is relatively inaccessible (e.g. backup tapes). *Id.* at \*10.

**If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.**

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.

**www.sidley.com**

*Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm’s offices other than Chicago, London, Hong Kong, Singapore and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin LLP, a separate Delaware limited liability partnership (Singapore); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.*

SIDLEY AUSTIN LLP  
**SIDLEY**