



E-DISCOVERY UPDATE

December Edition of Notable Cases and Events in E-Discovery

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

1. A Ninth Circuit decision ruling that the provisions of the Electronic Communications Privacy Act extend to foreign citizens and prohibit disclosure of their emails to third parties in response to a civil subpoena.
2. A Northern District of California ruling ordering an adverse inference as a sanction for defendants' spoliation of evidence and rejecting the defendants' reliance on the U.K. Data Protection Act, which defendants had claimed required the deletion of emails.
3. A Nevada ruling that a former employee had waived privilege regarding various emails and documents left on his work computer when he was terminated, finding that the employee had failed to take reasonable steps to protect the confidentiality of the materials in question.
4. A Pennsylvania federal court ruling providing guidance on the e-discovery costs recoverable by a prevailing party under the federal rules.

1. In *Suzlon Energy Ltd. v. Microsoft Corp.*, 2011 WL 4537843 (9th Cir. Aug. 3, 2011), the Ninth Circuit held that the protections afforded under the Electronic Communications Privacy Act (ECPA) extend to foreign citizens.

Suzlon Energy Ltd. (Suzlon) sought from Microsoft Corporation (Microsoft) emails of Rajagopalan Sridhar under 28 U.S.C. § 1782 to use in an Australian civil fraud proceeding. *Id.* at *1. Sridhar, an Indian citizen, had an email account with Microsoft through its Hotmail service. *Id.* Microsoft and Sridhar objected to the production of documents arguing, *inter alia*, that production would violate the ECPA. *Id.*

The ECPA prohibits providers of public email account services, such as Microsoft's Hotmail, from disclosing the contents of email communications while in their possession. The ECPA specifically states, "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1). An "electronic communication service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). The ECPA defines a "user" of an electronic communication service as "*any person or entity who—(A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use.*" 18 U.S.C. § 2510 (13) (emphasis added). The District Court granted Microsoft's

motion to quash the request for Sridhar's emails, holding that under the plain text of the statute, defining a "user" as "any person," the ECPA's protections extend to foreign citizens. Suzlon appealed.

The Ninth Circuit affirmed the lower court ruling. The Court found nothing in the text of the statute or the legislative history to indicate that Congress intended the statute to apply only to U.S. citizens. The Court concluded "[a]ny person means any person, including foreign citizens." *Id.* at *2. The Court rejected Suzlon's argument that the ECPA was drafted against the backdrop of the Fourth Amendment and that Congress therefore intended to protect American privacy interests, not the interests of foreign citizens. *Id.* at *3-4. The Court disagreed with Suzlon, stating "nothing in the legislative history clearly refutes the plain language of the text." *Id.* at *4. The Court further observed that applying the protections of the ECPA only to U.S. citizens, as Suzlon suggested, would put email providers in an "untenable" position. On this point, the Court elaborated:

"By limiting the ECPA only to those people entitled to Fourth Amendment protection . . . an email service provider would need to assess whether a particular account holder was at all times a U.S. citizen, or later became a citizen, or was a resident alien with some Fourth Amendment protection, or if there were other reasons to provide Fourth Amendment rights. This would be a costly, fact-intensive, and difficult determination." *Id.* at *4.

Finding that the ECPA "unambiguously applies to foreign citizens," *id.*, and that Sridhar did not give his implied consent for the emails to be produced, the Ninth Circuit upheld the District Court's order to quash the production of documents. *Id.* at *5.

2. In *IO Group Inc. v. GLBT Ltd.*, 2011 WL 4974337 (N.D. Cal. Oct. 19, 2011), Magistrate Judge Donna Ryu ordered an adverse inference as a sanction for defendants' spoliation of evidence in failing to preserve evidence relevant to the underlying lawsuit and continuing automatic deletion of emails for up to a year after the suit was brought. In so ruling, Magistrate Judge Ryu rejected the defendants' reliance on the UK Data Protection Act (DPA), which defendants had claimed required them to delete emails.

In this copyright and trademark infringement case, the plaintiffs alleged that the defendants operated websites that allowed members to upload and download videos in violation of copyright and trademark laws. *Id.* During discovery, defendants claimed they did not have any responsive documents and made "troubling representations" regarding their practice of disposing of certain documents. *Id.* at *2. As a result, the Magistrate Judge ordered each defendant to submit a sworn, "detailed declaration" describing their preservation efforts. *Id.* After the declarations had been submitted, plaintiffs argued that the defendants' declarations "fail[ed] to comply with the order to respond to each area of injury, and that Defendants provided disjointed, unclear and evasive information." *Id.* at *4. The Magistrate Judge ordered further submissions on preservation issues, but defendants did not comply. *Id.* Based on the insufficiency of the defendants' declaration and evidence of what appeared to be spoliation of documents, the plaintiffs filed a motion for terminating sanctions plus attorneys' fees and costs.

Magistrate Judge Ryu agreed with the plaintiffs that the defendants' declarations were "evasive and unforthcoming" and failed to provide the information requested. *Id.* at *4. Defendants did not adequately describe the steps taken to preserve documents, did not disclose whose files had been searched for responsive documents, and did not set forth the number or size of the records that had been searched. *Id.* Additionally, the declarations contained contradictory statements on whether documents had been destroyed. *Id.* Magistrate Judge Ryu found that failure to provide a "detailed" explanation of their preservation efforts, as she had ordered, was sanctionable, and ordered the defendants to pay plaintiffs' attorneys' fees. *Id.* at *5.

Magistrate Judge Ryu also found that the defendants violated their duty to preserve documents. Defendants were notified in writing three times by the plaintiffs about defendants' obligation to preserve evidence—twice before plaintiffs filed suit, and once after the suit was filed. *Id.* at *7. The defendants did not, however, suspend automatic

deletion of their email accounts until nearly a year after the suit had been filed. *Id.* Magistrate Judge Ryu concluded that spoliation occurred as to three categories of evidence: “takedown notices” (notices sent to the defendants requesting that they remove material from their websites that was allegedly protected by copyright and trademark laws), video files from the website, and emails. *Id.* at *5.

The defendants offered no justification for the deletion of the takedown notices and video files, but said they were required to delete emails under the DPA which they argued “does not permit them to retain personal data for longer than is necessary” and in fact required defendants to delete emails. *Id.* at *6. Magistrate Judge Ryu did not accept this argument. First, the defendants provided no supporting authority for their proposition that the DPA required them to delete emails. *Id.* Second, even if the emails were subject to the terms of the DPA, “it is well settled that such [foreign ‘blocking’] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute.” *Id.* (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 544 n.29 (1987)).

Magistrate Judge Ryu declined to impose terminating sanctions as a result of the spoliation. Instead, she ordered an adverse inference instruction in the form of the following rebuttable factual presumptions: (1) the defendants had posted material to their websites that infringed plaintiffs’ copyrights; (2) plaintiffs had submitted “takedown” notices to the defendants after becoming aware that infringing materials had been posted; and (3) defendants did not take steps to remove the disputed material. *Id.* at *8. In reaching this decision, Magistrate Judge Ryu first concluded that the documents were clearly relevant to the case at hand and that defendants’ spoliation had been willful. *Id.* at *7. The Magistrate Judge also found that the plaintiffs were prejudiced by the destruction because the destroyed evidence touched on issues central to the plaintiffs’ claims. *Id.* Magistrate Judge Ryu concluded, however, that even under these circumstances, terminating sanctions were not warranted. In the Ninth Circuit, the courts must “consider whether lesser sanction[s] [are] appropriate” and may reject lesser sanctions only if “(1) no lesser sanction could both punish Defendants and deter others similarly tempted and (2) the facts show that deceptive conduct has occurred and will continue.” *Id.* at *8. Magistrate Judge Ryu concluded that in this case “a lesser sanction, such as an adverse inference instruction, could both punish Defendants and deter others similarly tempted.” *Id.* She noted that the defendants’ conduct was not likely to continue to occur—defendants had already stopped the automatic deletion of email—and that they had already made attempts to retrieve some of the files that were thought to have been destroyed. *Id.*

3. In *Pacific Coast Steel v. Leany*, 2011 WL 4573243 (D. Nev. Sept. 30, 2011), Magistrate Judge Peggy A. Leen ruled that a former employee had waived privilege regarding certain materials left on his work computer when he was terminated, finding that the employee had failed to take reasonable steps to protect the confidentiality of the materials in question.

The underlying dispute arose from an alleged violation of the terms of an asset purchase agreement (APA) pursuant to which defendant Todd Leany sold certain corporate entities he owned (Century) to plaintiffs. *Id.* at *2. Subsequently, Leany became plaintiffs’ employee but continued to use the same computer he had been using prior to plaintiffs’ acquisition of Century. *Id.* Leany was later terminated, and plaintiffs seized his work computer. *Id.* Plaintiffs then brought claims against defendants and disclosed emails that Leany, from his work computer, “sent and received . . . from his attorneys, accountants, his wife and members of his church congregation.” *Id.* at *1. Plaintiffs claimed that the communications at issue established that defendants acted to defraud plaintiffs and frustrate the purpose of the APA and Leany’s employment and non-compete agreements. *Id.* at *2. In response, Leany moved for (1) a protective order prohibiting plaintiffs from inquiring into certain matters reflected in privileged, confidential documents that plaintiffs obtained when they seized Leany’s computer; and (2) an order requiring plaintiffs to return privileged and confidential documents and barring their use in the litigation. *Id.* at *1. The plaintiffs agreed to the return of a majority of the allegedly privileged material that was irrelevant to the issues in the litigation, including the marital and ecclesiastical communications, but pressed for an order that Leany had waived privilege with respect to the disputed materials.

The Magistrate Judge found that “Leany waived any privilege he may have had to privileged or confidential materials he left on the Century computer he used by failing to take reasonable means to preserve the confidentiality of the privileged matter.” *Id.* at *8. She reasoned that there was “no evidence in the record that Leany did anything, either before or after the APA transaction, to preserve the confidentiality of materials he now claims are privileged.” *Id.* at *7. Magistrate Judge Leen noted that, after the APA transaction, Leany’s work computer belonged to plaintiffs and that Leany later consented to an e-mail migration that effectively merged all of Century’s pre-acquisition communications onto one of plaintiffs’ servers. *Id.* at *6. She found that “Leany knew about the migration, and had an opportunity to remove the e-mails from the system, but did not do so.” *Id.* at *8. In addition, almost all the e-mails and documents that Leany claimed were privileged and improperly in plaintiffs’ possession were “on a company server, not on the computer maintained in Leany’s office.” *Id.* at *7.

Additionally, following his termination, Leany and his counsel met with plaintiffs, who allowed Leany to take copies of his computer and files. *Id.* Magistrate Judge Leen found it significant that, at that meeting, neither “he or his counsel asked or demanded an opportunity to remove any confidential or privileged information from his computer or files.” *Id.* She also relied on the fact that both Century and the plaintiffs “had a written policy that was disseminated to employees.” *Id.* at *8. Century had a corporate policy, developed by Leany himself, allowing the company to monitor the use of its employees’ computer or e-mail, and plaintiffs had a corporate policy under which “any software or files, including mail downloaded via the internet into the company network, became the property of the company.” *Id.* at *7. Therefore, the Magistrate Judge concluded that “Leany simply could not have a reasonable expectation of privacy in e-mails he failed to remove or otherwise protect from disclosure after the acquisition of the Century entities’ assets by [plaintiffs].” *Id.* at *8. Accordingly, the Magistrate Judge denied defendant’s motion but ordered that plaintiffs should not be permitted to use “Leany’s personal financial documents, including tax records . . . because general policy and equity considerations protect Todd Leany’s taxpayer privacy.” *Id.* at *1, *8.

4. In *In re Aspartame Antitrust Litigation*, 2011 WL 4793239 (E.D. Pa. Oct. 5, 2011), U.S. District Judge Legrome D. Davis provided guidance on the e-discovery costs that are recoverable by a prevailing party under the federal rules, awarding costs for the creation of databases, imaging hard drives, keyword searches, deduplication, data extraction, data processing, and data hosting, but denying costs associated with sophisticated document review technologies and costs for Bates labeling and confidentiality designations.

In an antitrust class action, certain defendants prevailed on summary judgment. *Id.* at *1. The Clerk of the Court then granted costs for the defendants under Fed. R. Civ. P. 54(d)(1), which provides that “[u]nless a federal statute, these rules or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” Plaintiffs then moved the Court to deny or reduce defendants’ bill of costs. *Id.* at *1. The Court, noting that the largest portion of the disputed costs were e-discovery costs resulting from the “staggering” volume of discovery in the case, explained that “[t]axing e-discovery is a new area of law where courts have diverged in their approaches.” *Id.* at *2.

Under 28 U.S.C. § 1920(2) and (4), “[a] court may tax ‘[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case’ and ‘fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case,’ as well as other specifically enumerated fees.” *Id.* at *1 (quoting 28 U.S.C. § 1920(2), (4)). The Court noted that it could “exercise its discretion in awarding costs within the categories set out in the statute.” *Id.*

The Court, relying on other court orders awarding such costs, granted defendants’ request for various e-discovery costs but denied a handful of requested fees. The Court awarded costs “for the creation of a litigation database, storage of data, imaging hard drives, keyword searches, deduplication, data extraction and processing,” reasoning that “defendants’ use of third part[y] vendors to conduct keyword searches and remove duplicate documents allowed

[them] to reduce their pool of potentially responsive documents . . . at significant cost savings.” *Id.* at *3. And, reasoning that “[b]ecause a privilege screen is simply a keyword search for potentially privileged documents,” the Court awarded that cost as well. *Id.* In addition, the Court awarded costs “associated with the technical support necessary to complete these tasks” as well as costs for optical character recognition, stating that “[s]earchable documents are essential in a case of this complexity and benefit all parties.” *Id.* The Court also granted costs covering “the creation of load files that allow documents saved as TIFFs to be loaded onto review platforms,” noting that “Plaintiffs themselves requested documents to be accompanied by load files.” *Id.* Over plaintiffs’ objections, the Court taxed plaintiffs with the costs of electronic data recovery and tape restoration, explaining that “[t]hese are technical processes that would not be done by an attorney.” *Id.* at *4.

The Court stated, however, that it would “draw the line” with defendants’ use of a “sophisticated e-discovery program” and that it would not tax plaintiffs with the costs of “applications used to efficiently and accurately separate responsive and nonresponsive documents.” *Id.* The Court noted that those services were “advanced technology that falls squarely within the realm of costs that are not necessary for litigation but rather are acquired for the convenience of counsel.” *Id.* Additionally, the Court followed the majority of court rulings that the costs of bates labeling were not recoverable under Section 1920, and applied the same reasoning to confidentiality labeling. *Id.* at *5. The Court did allow, however, some of defendants’ requested costs for “Production Support Services,” explaining that it “believes that metadata extraction and compliance with production requirements are appropriate costs.” *Id.* at *6.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

The E-Discovery Task Force of Sidley Austin LLP

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 interdisciplinary 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:

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