



## E-DISCOVERY UPDATE

### January Edition of Notable Cases and Events in E-Discovery

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

1. A pilot program in the United States District Court for the Southern District of New York designed to improve the judicial case management of complex civil cases, with a number of specific provisions addressing e-discovery issues;
2. A Kansas Supreme Court ruling that, in the absence of a duty to preserve, a party was not guilty of spoliation when it intentionally destroyed evidence it knew was relevant to an ongoing lawsuit to which it was not a party;
3. An Iowa federal district court ruling rejecting imposition of a default judgment as sanction for e-discovery violations in the absence of a finding of bad faith; and
4. A Nevada federal court decision refusing to issue a protective order limiting the scope of topics in plaintiffs' Rule 30(b)(6) deposition notice relating to defendants' litigation hold notice and electronically stored information ("ESI").

**1. On November 1, 2011, the United States District Court for the Southern District of New York implemented an 18 month pilot program designed to improve the judicial case management of complex civil cases and to reduce costs and delay, including a number of e-discovery related provisions.**

The program consists of a "set of procedural rules the court can follow in complex civil cases," which "are intended to shorten the timeline for certain actions, reduce motion practice, and flag issues requiring judicial intervention at an earlier stage in the litigation process." Office of the District Court Executive, United States District Court for the Southern District of New York, *SDNY Implements Innovative Pilot Program to Improve the Quality of Judicial Case Management in Complex Civil Cases* (Nov. 4, 2011).

The pilot program includes various rules that expressly address e-discovery. Specifically, the rules provide that the parties, prior to the initial pretrial conference, must file an Initial Report that includes the parties' proposed schedule for fact and expert discovery. *In re Pilot Project Regarding Case Management Techniques for Complex Civil Cases in the Southern District of New York*, Case No. 11-mc-00388-LAP at 1 (S.D.N.Y. Nov. 1, 2011). This schedule must include "[a] protocol and schedule for electronic discovery, including a brief description of any disputes regarding the scope of electronic discovery." *Id.* Additionally, the pilot program requires a joint electronic discovery submission and proposed order that includes a checklist of e-discovery issues to be addressed at the Rule 26(f) conference. *Id.* at 7.

The proposed order states that “[t]his Joint Submission and [Proposed] Order (and any subsequent ones) shall be the governing document(s) by which the parties and the Court manage the electronic discovery process in this action.” *Id.* at 18. In the proposed order, counsel for the parties are required to “certify that they are sufficiently knowledgeable in matters relating to their clients’ technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf.” *Id.* at 19.

Regarding preservation, the proposed order requires that “[t]he parties have discussed the obligation to preserve potentially relevant electronically stored information” and provides a section where the parties must describe the agreed-upon scope and methods for preservation, including but not limited to: “retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.” *Id.* at 20. The parties must also describe “the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of ‘litigation hold’ communications.” *Id.* Regarding search and review, the order requires that the “[t]he parties have discussed methodologies or protocols for the search and review of ESI, as well as the disclosure of techniques to be used.” *Id.* at 21. The proposed order then provides:

“Some of the approaches that may be considered include: the use and exchange of keyword search lists, ‘hit reports,’ and/or responsiveness rates; concept search; machine learning, or other advanced analytical tools; limitations on the fields or file types to be searched; date restrictions; limitations on whether back-up, archival, legacy, or deleted electronically stored information will be searched; testing; sampling; etc.” *Id.* at 21.

Regarding the production of documents, the proposed order provides a section where the parties must describe their respective anticipated sources of ESI. *Id.* at 22. It requires that “[t]he parties have discussed factors relating to the scope of production, including but not limited to: (i) number of custodians; (ii) identity of custodians; (iii) date ranges for which potentially relevant data will be drawn; (iv) locations of data; (v) timing of productions (including phased discovery or rolling productions); and (vi) electronically stored information in the custody or control of non-parties.” *Id.* at 23. The parties are also required to have addressed form(s) of production, including any exceptions such as “word processing documents in TIFF with load files, but spreadsheets in native form.” *Id.* at 24. Additionally, the proposed order requires that the parties discuss method(s) for identifying and logging privileged material and consider the issue of the inadvertent production of privileged material pursuant to Fed R. Civ. Proc. 26(b)(5) and F.R.E. 502(e). *Id.* at 25.

Finally, the proposed order requires that the parties analyze “their client’s data repositories and have estimated the costs associated with the production of electronically stored information” and provides a section for the parties to estimate “[t]he factors and components underlying these costs.” *Id.* at 26. It also provides sections for the parties to detail any cost allocation or cost sharing agreements considered or entered into in connection with the production of ESI. *Id.* at 26-27.

**2. In *Superior Boiler Works, Inc. v. Kimball*, 259 P.3d 676 (Kan. Aug. 12, 2011), the Kansas Supreme Court held that, in the absence of a duty to preserve, a party was not guilty of spoliation when it intentionally destroyed evidence it knew was relevant to an ongoing lawsuit to which it was not a party.**

In the spring of 2002, Superior Boiler Works, Inc. (“Superior”) asked Ferris Kimball Company and its related partners (collectively “FK Company”) for information about the possible existence of asbestos in materials and products FK Company sold to Superior for use in Superior’s boilers. *Id.* at \*678. FK Company responded by providing certain information, including a list of all products sold to Superior during the relevant time (including one product that “may or may not have contained some asbestos”), and a document analyzing the volume of sales from FK Company to

Superior between 1967 and 1983. *Id.* In its submission to Superior, FK Company also made reference to certain “company index cards” that contained the names of customers, dates of orders, and the types of materials ordered.

Five years later, in 2007, Superior again contacted FK Company informing it that Superior was involved in asbestos litigation involving products sold to it by FK Company, and stating that Superior “intended to subpoena any and all documents related to the sale” of these products, including the material used to prepare FK Company’s submission to Superior in 2002, as well as the “company index cards.” *Id.* at \*679. Shortly thereafter, FK Company sought the advise of counsel and shredded company records dating as far back as the 1930s, including the company index cards. *Id.* Less than a month later, Superior subpoenaed documents from FK Company, but the documents had already been destroyed. Superior brought suit against FK Company alleging intentional interference with a civil action by destruction of evidence (*i.e.*, an independent tort for spoliation of evidence). At no time had FK Company been made a party to the underlying asbestos lawsuit.

The Kansas District Court granted summary judgment to FK Company, relying primarily on *Koplin v. Rosel Well Perforators, Inc.*, 241 Kan. 206, 734 P.2d 1177 (1987), which held:

“[A]bsent some independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties, the new tort of ‘the intentional interference with a prospective civil action by spoliation of evidence’ should not be recognized in Kansas.” *Superior*, 259 P.3d at \*678 (quoting *Koplin*, 241 Kan. at 215).

In reaching this result, the *Koplin* Court had noted that there was no common-law duty to preserve evidence and emphasized that it is “fundamental that before there can be any recovery in tort there must be a violation of a duty owed by one party to the person seeking recovery.” *Superior*, 259 P.3d at \*682 (quoting *Koplin*, 241 Kan. at 212). In refusing to recognize spoliation of evidence as an independent tort, the *Koplin* Court cited several factors, including, the potential for the “generation of endless litigation,” the “rank speculation as to whether the plaintiff could have ever recovered in the underlying action, and if so, the speculative nature of damages,” the “limitless scope of the new duty,” and the “unwanted intrusion on the property rights of a person who lawfully disposes of his own property.” *Superior*, 259 P.3d at \*683 (quoting *Koplin*, 241 Kan. at 215). The *Koplin* Court left open whether it would recognize an independent tort imposing liability on a “defendant or potential defendant in an underlying case [who] destroyed evidence to their own advantage.” *Superior*, 259 P.3d at \*678 (quoting *Koplin*, 241 Kan. at 215).

In light of *Koplin*, the Kansas District Court concluded that “neither the parties’ past commercial relationship, nor defendants’ knowledge of [Superior’s] pending litigation created a duty to preserve [evidence]” and because there was “no agreement, contract, statute, voluntary assumption of duty, or other special circumstances creating a duty to preserve records,” FK Company was “entitled to destroy them.” *Superior*, 259 P.3d at \*679. Superior appealed to the Kansas Supreme Court, arguing that FK Company “had a duty to preserve evidence that they knew or should have known was important to Superior’s defense in pending asbestos litigation.” *Id.*

The Kansas Supreme Court upheld the lower court ruling. The Court agreed with the District Court that there was no contract, implied agreement, or other special relationship between Superior and FK Company that would give rise to a duty for FK Company to preserve evidence. Superior argued, in part, that a special relationship was formed because the two companies were in the same chain of product distribution, and that FK Company knew that Superior was involved in asbestos litigation and that FK Company could potentially become involved as well. *Id.* at \*684. The Court rejected this argument, finding no support in the case law for this position and expressing concern that “if we were to recognize a duty to preserve evidence by all those who stand at a point in the stream of commerce” the duty would be “limitless” and essentially require “most businesses to preserve all records.” *Id.* at \*685.

Superior alternatively argued that their case presented the issue not addressed in *Koplin*, *i.e.*, whether the Court would recognize an independent tort imposing liability on a defendant or potential defendant that destroyed evidence to its own advantage. *Id.* The Court concluded that the situation contemplated in *Koplin* was one in which a plaintiff, or an adverse party, in an underlying lawsuit made a spoliation claim against a defendant or potential defendant (a “first-party

spoliation case”), not the situation in this case, where a defendant made a spoliation claim against another potential defendant. *Id.* at \*686. The Court emphasized on several occasions that FK Company, while a potential party to asbestos-related lawsuits, had not, in fact, been made a party to this particular lawsuit. *Id.* at \*685.

The Court accepted, *arguendo*, Superior’s argument that it might have a potential spoliation claim against FK Company, such as a possible cross-claim or third-party claim against the defendants in the underlying litigation, or a comparative implied indemnity claim in a collateral action, but the Court still found FK Company had no duty to preserve. *Id.* The Court was not persuaded by Superior’s reliance on several federal cases suggesting that a duty to preserve arose if the party “knew or should have known” that the evidence was relevant to pending litigation. *Id.* at \*687. The Court accepted that FK Company could have foreseen that it might become involved in litigation in which the evidence it destroyed was relevant; however, it noted that in each case cited by Superior, unlike in the case at hand, the alleged spoliator was either a party to the underlying litigation, or eventually became a party to the litigation. *Id.* The Court further explained that in its view, foreseeability only became relevant if a relationship existed that gave rise to a duty to preserve in the first instance, a fact not present in this case. Quoting the Illinois Supreme Court, the Kansas Supreme Court explained:

“As a general rule, there is no duty to preserve evidence. However, . . . the existence of two elements will create a duty. First, a duty to preserve evidence may arise through an agreement, a contract, a statute, or another special circumstance, or where a defendant voluntarily assumes a duty by affirmative conduct. This element is commonly referred to as the ‘relationship prong.’ Once a plaintiff proves the relationship prong, the plaintiff must establish the ‘foreseeability prong.’ That is, the plaintiff must demonstrate that a reasonable person in the defendant’s position should have foreseen that the evidence was material to a potential civil action, and the pleadings must allege facts describing such circumstances. In the absence of either the relationship or the foreseeability prong, there is no duty to preserve evidence.” *Superior*, 259 P.3d. at \*687-88 (citing *Village of Roselle v. Comm. Edison Co.*, 859 N.E. 2d 1 (Ill. App. 2006) (internal citations omitted)).

Finally, Superior made the practical argument—that failure to recognize an independent tort of spoliation under these circumstances would encourage potential defendants to “make a mad dash [to] the nearest document shredder upon realizing their potential liability.” *Id.* at \*688. The Court weighed the “policy rationale of preserving evidence against the burdens caused by imposing a preservation duty on a third party” and concluded that imposition of a duty to preserve would be “an ‘intolerable burden’ on the right of a property owner.” *Id.* at \*689 (citing *Koplin*, 214 Kan. at 212).

**3. In *Cedar Rapids Lodge & Suites, LLC v. JFS Development, Inc.*, 2011 WL 5975127 (N.D. Iowa Nov. 29, 2011), the Court held that a default judgment sanction for spoliation of evidence after litigation commenced was not an appropriate absent a finding of bad faith. In reaching this decision, the U.S. District Judge Linda R. Reade declined to extend a previous Eight Circuit decision holding that an adverse inference instruction was an appropriate sanction for destruction of evidence during litigation even without an explicit finding of bad faith.**

In a long running discovery dispute related to a failed investment lawsuit, plaintiffs filed a motion with the Magistrate Judge seeking a default judgment sanction against one of the defendants, claiming he failed to adequately respond to discovery requests and intentionally destroyed evidence after the litigation had commenced. *Id.* at \*2. Plaintiffs argued that a forensic analysis of multiple laptops, external hard drives and CDs produced by the defendant showed irregularities indicating spoliation, including damaged equipment, evidence indicating that some external drives had not been produced, and deleted folders and other files that appeared relevant to the dispute. *Id.* at \*2-3. The defendant offered explanations for many of these alleged irregularities, and the Magistrate Judge found that the evidence did not support a finding that the defendant had intentionally destroyed evidence with a desire to suppress the truth (*i.e.*, destruction in bad faith). *Id.* at \*5. Plaintiffs appealed to Judge Reade, claiming that “intent to destroy documents can

be inferred if the destruction happened after litigation commenced.” *Id.* at \*5. Plaintiffs based their argument on *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739 (8th Cir. 2004), in which the Eighth Circuit held that an adverse inference instruction was an appropriate sanction for ongoing destruction of evidence during the pendency of litigation, even absent an explicit finding of bad faith. Given this ruling, plaintiffs argued that the defendant’s destruction of evidence after commencement of the litigation satisfied the intent requirement.

The District Court denied the motion for default judgment and declined to extend the *Stevenson* reasoning to relieve parties of the obligation of showing intent when seeking a default judgment spoliation sanction. In reaching this result, the Judge noted that “whether to impose a sanction and which type of sanction to impose is within the district court’s discretion.” *Cedar Rapids*, 2011 WL 5975127 at \*5. Judge Reade agreed with the Magistrate Judge’s finding that the record did not establish that the defendant had destroyed evidence with bad faith intent, and she concluded that a sanction for default judgment was “not appropriate without sufficient evidence of intentional destruction of evidence with a desire to suppress the truth.” *Id.* The Court also held that the plaintiffs had failed to demonstrate that they had been sufficiently prejudiced by the destruction of evidence (*i.e.*, that the missing evidence would likely have supported plaintiff’s claims) to justify imposition of the severe sanction of a default judgment. *Id.* at \*6. The Court concluded by noting that the plaintiffs were free to seek an adverse inference instruction at the time of trial. *Id.* at \*7.

**4. In *Cannata v. Wyndham Worldwide Corp.*, 2011 WL 3495987 (D. Nev. Aug. 10, 2011), Magistrate Judge Lawrence R. Leavitt denied the defendants’ motion for a protective order seeking to limit the scope of topics in plaintiffs’ Rule 30(b)(6) deposition notice, which included the defendants’ litigation hold notice and ESI, finding that such topics were reasonable and would help the parties craft a narrow, manageable e-discovery plan.**

In this sexual harassment and workplace discrimination lawsuit, the Court had ordered the parties to proceed with a Rule 30(b)(6) deposition of defendants’ person most knowledgeable on certain topics, including defendants’ litigation hold and ESI. *Id.* at \*1. The Court had also directed the parties to make “an effort to narrow the scope of the electronic discovery to be undertaken in this case, including the sources of ESI and the list of terms and individuals that will govern the search for e-mails.” *Id.* Defendants moved for a protective order because “[t]he parties were unable to reach an agreement with respect to limiting the scope of ESI discovery or narrowing the topics included in the [Rule 30(b)(6) deposition] Notice.” *Id.*

In evaluating defendants’ request for a protective order under Rule 26(c)(1), the Magistrate Judge explained that “the party seeking a protective order must point to specific facts that support [the] request” and that “[a] showing that the discovery may involve merely some inconvenience or expense does not suffice to establish good cause under Rule 26(c).” *Id.* The Magistrate Judge rejected Defendants’ argument that the litigation hold notice topic was overbroad and sought disclosure of privileged information, stating that “[a]lthough the letters themselves may be privileged, the basic details surrounding the litigation hold are not.” *Id.* at \*3. The defendants had asked the Court to limit the scope of the litigation hold topic to the identity of persons who received the litigation hold notices and the instructions given to the recipients to preserve evidence. *Id.* at \*1. The Magistrate Judge acknowledged that “unless spoliation is at issue, a litigation hold letter is not discoverable, particularly where it is shown that the letter includes material protected by the attorney-client privilege or the work product doctrine.” *Id.* at \*2. However, Magistrate Judge Leavitt noted that defendants could not “foreclose *any* inquiry into the contents of those notices at deposition or through other means,” *id.* (quoting *In re Ebay Seller Antitrust Litig.*, 2007 WL 2852364 (N.D. Cal. Oct. 2, 2007) (emphasis in original)), and pointed to the Advisory Committee’s comments to Rule 26(b)(2) stating that “[t]he responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing.” *Id.* Thus, plaintiffs were allowed to seek answers concerning “when and to whom the litigation hold letter was given, what kinds and categories of ESI were included in defendants’ litigation hold letter, and what specific actions defendants’ employees were instructed to take to that end.” *Id.* at \*3. The Magistrate Judge further reasoned

that such requests were reasonable and could “ultimately benefit defendants if questions ever arise concerning defendants’ efforts to preserve relevant ESI.” *Id.*

Plaintiffs had also raised the issue of defendants’ automatic deletion function, which defendants asserted had occurred prior to when the litigation hold went into effect. *Id.* The Magistrate Judge explained that the Advisory Committee’s comments to Rule 37(e) provided that “any automatic deletion feature should be turned off once a litigation hold is imposed.” *Id.* Magistrate Judge Leavitt stated that defendants’ vague assertions on this issue “did not indicate whether defendants disabled all automatic deletions once the litigation hold was in place.” *Id.* For this reason, the Magistrate Judge refused to issue a protective order limiting the Rule 30(b)(6) Notice to exclude questions regarding automatic deletion issues. *Id.* In so ruling, the Magistrate Judge found that the litigation hold and automatic deletion questions would “allow the parties to craft a narrow, manageable ESI plan” as contemplated by the Court’s earlier order. *Id.*

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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