



E-DISCOVERY UPDATE

August Edition of Notable Cases and Events in E-Discovery

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

1. A Pennsylvania Magistrate Judge conducted an *in camera* review of plaintiff's Facebook account and ordered plaintiff to produce specified information from that account in response to defendants' discovery requests;
2. A California court refused to impose sanctions against a defendant for producing documents from a proprietary database in a non-searchable PDF format, finding there was insufficient evidence that the defendant had converted the data to PDF format to intentionally hinder plaintiff's ability to search the data; and
3. A Mississippi federal court decision largely adopted a Special Master's finding of gross negligence and bad faith in defendant's discovery conduct and imposed sanctions including an order that the defendant not be allowed to seek indemnification from its insurer for the costs, fees, and penalties it was required to pay.

1. In *Offenback v. L.M. Bowman, Inc.*, 2011 WL 2491371 (M.D. Pa. June 22, 2011), United States Magistrate Judge Carlson conducted an *in camera* review of plaintiff's Facebook account and ordered plaintiff to produce specified information from that account in response to defendants' discovery requests.

The lawsuit arose from a car accident that plaintiff claimed had caused him various physical and psychological injuries. *Id.* at *1. Plaintiff specifically alleged that these injuries "limited his ability to sit, walk, stand, ride in a vehicle, bend, stoop, push, pull, and lift" and that "he could not drive for any period of time and is physically limited as to riding his bicycle or motorcycle." *Id.* Plaintiff also alleged that the injuries "decreased sociability" and that "he is fearful and nervous in traffic and around other vehicles." *Id.*

Defendants argued that information in plaintiff's social media accounts—MySpace and Facebook—were potentially relevant for purposes of refuting those allegations and sought broad access to information on those websites. Plaintiff admitted that limited public information in his Facebook account was properly subject to discovery, but generally objected to production of all materials on the basis of relevance. *Id.* The Magistrate Judge ultimately held a case management conference to address the discovery dispute and ordered that plaintiff to provide login information for plaintiff's MySpace and Facebook accounts to allow the Magistrate Judge to perform an *in camera* review for relevance under Rule 26.

After reviewing plaintiff's Facebook account (plaintiff represented that his MySpace account had not been active since the accident), the Magistrate Judge found that the vast majority of information was irrelevant to the litigation.

He did, however, identify several types of information that were potentially relevant and that should be produced to defendants, including:

- Photographs post-dating the alleged injuries indicating that plaintiff continued to ride a motorcycle;
- Information regarding long distance trips by motorcycle and car;
- Photographs and information regarding a hunting trip;
- Photographs and information regarding riding a mule;
- Photographs and comments regarding the purchase of a new motorcycle. *Id.* at *2-3.

In concluding the decision, the Magistrate Judge criticized that parties for not resolving this dispute on their own and “express[ed] confusion about why the parties required the Court’s assistance in deciding what information within Plaintiff’s Facebook account is responsive to Defendants’ discovery requests.” *Id.* at 3 n.3. The Magistrate Judge acknowledged that the scope of social media and discovery raises some novel issues, but in this case, “Plaintiffs do not appear to have argued that the information ... should be protected from disclosure in this lawsuit. It is thus unclear why the Court was called upon to conduct an initial review of Plaintiff’s entire Facebook account to determine whether it contained potentially responsive, non-privileged information that should be produced as part of discovery in this case.” *Id.* “[W]e believe it would have been both possible and proper for Plaintiff to have undertaken the initial review of his Facebook account to determine whether it contained potentially relevant and responsive information.” *Id.*

2. In *Adams v. AllianceOne, Inc.*, 2011 U.S. Dist. LEXIS 56357 (S.D. Cal. May 25, 2011), Magistrate Judge William V. Gallo declined to impose sanctions against a defendant for producing documents from a proprietary database in non-searchable PDF format, finding there was insufficient evidence that the defendant had converted the data to PDF to intentionally hinder plaintiff’s ability to search the data. Magistrate Judge Gallo accepted defendant’s representation that the data could not be produced in a readily searchable form and that the conversion to PDF format allowed the data to be usable in accordance with Federal Rule of Civil Procedure 34.

Plaintiff had requested that sanctions be entered against defendant following a hearing at which the Magistrate Judge advised defendant’s counsel that he was seriously considering imposing sanctions for defendant’s “very lackadaisical, irresponsible approach to discovery” and invited statements from both parties regarding sanctions. *Id.* at *8. Plaintiff argued that sanctions were warranted because (1) Defendant had produced documents in unsearchable PDF format without its prior consent; and (2) the three persons produced for depositions as defendant’s Rule 30(b)(6) witnesses had insufficient knowledge. *Id.*

After hearing from both parties, the Magistrate Judge found insufficient grounds to impose sanctions against Defendant for producing documents in PDF format. *Id.* at *17. The Magistrate Judge explained that federal courts have an inherent power to levy sanctions in response to abusive litigation practices and “may award sanctions in the form of attorneys’ fees against a party or counsel who acts ‘in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* at *13-14 (citation omitted). In this case, however, the Magistrate Judge found that defendant’s behavior did not constitute, nor was tantamount to, bad faith. *Id.* at *14, *23-24. The Court highlighted that Fed. R. Civ. P.34 “provides that ‘[i]f a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.’” *Id.* at *17 (quoting Fed. R. Civ. P. 34(b)(2)(E)(ii)).

Defendant had previously produced data to plaintiff in a format called comma-separated value format (CSV), which is searchable, but this time had taken the extra step of converting the data into non-searchable PDF files, which Plaintiff claimed made them “useless.” *Id.* at *8. The Magistrate Judge noted that plaintiff had not specified a particular format for the disputed discovery and explained that neither Rule 34 nor the Advisory Committee Notes “address the

significance that the parties' history has on future production." *Id.* at *23. In fact, the Magistrate Judge pointed out that the Advisory Committee Notes "strongly suggest that production of electronic data should be considered on a case-by-case basis because data may exist in a wide range of formats." *Id.* Thus, the Magistrate Judge concluded, "[t]o now find that Defendant's history of producing documents in CSV format bound it to continue to produce documents in that format would run counter to this reality." *Id.*

The Magistrate Judge also relied on defendant's explanation that it had produced the files in PDF format because the data was stored in proprietary software and, when extracted, "existed in a jumbled mess" that was "mush" and "could not be uploaded into a searchable database or viewed as an organized database." *Id.* at *20-21, *23-24. Accepting defendant's explanation, the Magistrate Judge found that defendant "chose to produce [the data] in a format that allowed Plaintiff to easily view data on a computer screen as it would appear when printed." *Id.* at *24.

The Magistrate Judge ruled "that Defendant's 'translation' of the CSV data to PDF format was not improper because it attempted to produce the data in a format it believed would be reasonably usable," which was allowed under the Advisory Committee Notes to Rule 34. *Id.* The Magistrate Judge concluded that, although the Advisory Committee Notes state that a party "may not convert data to hamper its original search capabilities," insufficient evidence existed in this case to suggest that defendant converted the data to PDF format to hinder plaintiff's ability to search the data. *Id.* Therefore, because there was insufficient evidence that defendant "acted with willful intent to sabotage Plaintiff's pursuit of truth," the Magistrate Judge declined to impose any sanctions in connection with the document production format issue. *Id.* at *24-25. Finally, the Magistrate Judge noted that the parties had held a meet and confer conference, and the defendant provided the Plaintiff with the disputed data in CSV format. *Id.* at *25.

The Magistrate Judge also found insufficient grounds to impose sanctions against defendant for designating its Rule 30(b)(6) witnesses, accepting defendant's explanation that, due to the broadly-worded deposition notice, defendant reasonably produced three persons it believed had the most knowledge of the range of broad topics in plaintiff's deposition notice. *Id.* at *27, *29. The Court withdrew its earlier letter indicating that monetary sanctions were proper and stated, "[w]hile Defendant's past conduct certainly set the stage for Plaintiff's request for sanctions, there is insufficient evidence to conclude that Defendant willfully intended to obstruct the litigation process by producing documents in PDF format or when designating its Rule 30(b)(6) witnesses." *Id.* at *29-30.

3. In a long-running dispute in *PIC Group, Inc v. LandCoast Insulation, Inc.*, 2011 WL 2669144 (S.D. Miss. Jul. 7, 2011), the Court appointed a Special Master to investigate the defendant's alleged failures in discovery. The Special Master uncovered serious instances of gross negligence and bad faith in defendant's conduct, and the Court adopted nearly all of the Special Master's recommendations for sanctions, including an order that the defendant not be allowed to seek indemnification from its insurer for the costs it was required to pay in fees and penalties.

On March 4, 2011, pursuant to Federal Rule of Civil Procedure 53, the U.S. District Judge Keith Starrett appointed a Special Master to investigate the defendant's preservation and production of ESI related to this dispute. *Id.* at *1. After a lengthy investigation which included site visits and document collection, the Special Master found "no evidence of any corporate policy, procedure or concerted effort" by the defendant to preserve ESI. *Id.* at *2. Defendant did not issue a litigation hold and made no attempt to identify, preserve, or collect ESI until "long after" it should have. *Id.* The Special Master concluded that defendant's counsel treated collection of ESI as a "nuisance" and had no appreciation as to how severely it failed to meet its discovery obligations. *Id.* The Special Master found that had the defendant expended even minimal energy in looking for responsive documents, it would have found the relevant ESI was "readily available and . . . in places that one would routinely look." *Id.* For example, the defendant's Information Technology expert, characterized by the Special Master as a "well-intentioned novice," had been told that the email server had been erased and, rather than attempt to verify this statement, had accepted the proposition without question. *Id.* Upon a simple inspection, however, the Special Master located a portable hard drive connected to the

email server entitled “Backups” that contained a nearly complete copy of the email server before it had been erased. *Id.* The Special Master concluded that for all its deficiencies, the defendant “was wholly devoid of competence, yet only once motivated by guile.” *Id.*

The principal exception to the Special Master’s conclusion that the ESI production inadequacies were the product of incompetence and not bad faith involved the actions of defendant’s Manager of Legal Affairs, Craig Marks. Marks was the “principal liaison with outside counsel,” functioned as the “unofficial” general counsel in this particular matter, and was responsible for ensuring the defendant met its obligations to preserve and produce ESI. *Id.* On the morning of a planned visit by the Special Master during which he was scheduled to collect ESI, Marks used an electronic privacy “cleaning” tool to destroy information on his computer, including information about online activities, unused files and other data. *Id.* at *3. Marks claimed that his computer had been infected with a virus the day before the Special Master’s visit and that the cleaning tool was necessary to make the computer operable again. *Id.* at *6. Marks previously had pled no contest to one felony count of indecent behavior with a juvenile in which he had been implicated, in part, by ESI. *Id.* at *2. As a result, Marks had been barred permanently from practicing law in Louisiana. *Id.* The Special Master did not find Marks’ explanation regarding the virus credible and concluded that Marks had intentionally destroyed data and did so “with contempt for the rights of the parties and the Court.” *Id.* at *3. The Special Master could not determine with certainty whether data relevant to the case had been destroyed. *Id.* In addition to the issues regarding Marks, it appeared that the contents of two computers had been lost in unusual circumstances. *Id.*

The Special Master concluded that the plaintiff had been prejudiced by defendant’s action and recommended that discovery be reopened, that the plaintiff be allowed to re-depose certain witnesses based on newly produced documents, and that the defendant bear the cost of these depositions. *Id.* at *4. The Special Master also recommended that the defendant: (1) be ordered to pay all costs and fees that arose as a consequence of its failure to meet its discovery obligations and be assessed a \$50,000 fine; (2) be prohibited from seeking indemnification for these costs from its insurer; and (3) produce the entire contents of Marks’ computer and that any objections on grounds of relevance or attorney client privilege be deemed waived. *Id.* at *5.

The defendant objected to the Special Master’s recommendation arguing that the sanctions were more severe than the circumstances warranted, particularly with respect to Marks. The Court disagreed, and like the Special Master, found Marks’ explanation that he had a virus and therefore had to run the cleaning software to be unpersuasive. In reaching its conclusion, the Court stated:

“The timing of events is simply too suspicious in light of Marks’ knowledge and experience as a former attorney, and his actions cannot be set aside as if they were missteps by a low-level employee. . . . Regardless of whether he intended to delete relevant and discoverable information, clear a virus from his computer, or conceal other matters not related to this litigation, he knowingly defied a Court order.” *Id.* at *6 (internal citations omitted).

The Court agreed with the defendant that there was no conclusive evidence that Marks’ actions led to the destruction of relevant evidence or that the plaintiff was prejudiced by his as a result, but, it observed that the degree of prejudice that may have been caused was “less troubling than the cavalier attitude of which his actions are indicative.” *Id.* at *7. The Court found that Marks “would not have committed such actions without a nefarious purpose.” *Id.* at *9. The Court acknowledged that the rest of defendant’s failures with respect to its discovery obligations was “at best” gross negligence, but when Marks’ conduct was combined with the numerous missteps in discovery, including the erasure of evidence from the two computers, the Court believed that there was “sufficient evidence to cast doubt on Defendant’s representation of good faith.” *Id.* Accordingly, the Court concluded that Defendant’s conduct as a whole warranted imposition of severe sanctions. *Id.* at *10-11.

The Court upheld the Special Master’s recommendation that the defendant be required to produce the contents of Marks’ computer, but permitted the defendant to withhold documents protected by the attorney-client privilege and documents related to settlement. *Id.* at *8. The Court further upheld the Special Master’s recommendation that the

defendant pay all costs incurred as a result of its discovery failures and that it not be permitted to seek indemnification from its insurer for these costs. *Id.* at *10. On this point the Court said:

“If corporate parties believe that they will be indemnified by their liability insurer for sanctions imposed due to misconduct in litigation, the punishment necessarily loses some of its sting. The Court’s primary purpose in imposing sanctions here is to ensure that the party responsible for this discovery dispute bears the resulting costs.” *Id.* at *11.

The Court agreed to reopen discovery, but decided not to impose the additional monetary fee of \$50,000 as recommended by the Special Master. *Id.* at*12.

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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