

2. A decision from the U.S. District Court for the Northern District of Illinois finding that “discovery on discovery” was warranted regarding Plaintiff’s document preservation in light of lost ESI and requiring Plaintiff to produce documents regarding when it reasonably anticipated litigation, including its retention letter with counsel and a privilege log of communications with counsel related to potential claims against the Defendant.

In *Linnet Americas, Inc. v. Hill-Rom Holdings, Inc.*, 2023 WL 9119836 (N.D. Ill. Dec. 1, 2023), U.S. Magistrate Judge Jeffrey T. Gilbert addressed the standards for “discovery on discovery” related to Plaintiff’s document retention policies and practices and its retention of counsel for purposes of filing a lawsuit.

Plaintiff in this antitrust suit alleged that Defendant, a medical technologies supplier, participated in a scheme to force hospital systems into exclusive supply agreements. During discovery, it came to light that ESI from four of Plaintiff’s former employees was discarded or destroyed after those employees stopped working for Plaintiff. *Id.* at \*1. Defendant sought discovery from Plaintiff designed to determine when Plaintiff reasonably anticipated litigation with Defendants, which in Defendant’s view would be relevant to when Plaintiff may have had a duty to preserve the ESI from those four employees.

Plaintiff claimed that the four custodians at issue left their employment in August 2018, October 2019, and December 2019, and that Plaintiff discarded their ESI either in accordance with what it characterized as its regular business practice within three months of those employees leaving the company or at least by April 2020 when it transferred only active accounts to the company’s new cloud-based email system. Plaintiff retained the law firm that ultimately filed the litigation in January 2020. In response to Plaintiff’s arguments, Defendant claimed that the disposal of the former employees’ ESI “coincident with the company’s retention of the counsel handling this case” provided an adequate factual basis for the limited discovery Defendant sought regarding whether the ESI should have been retained “in case litigation materialized.”

Magistrate Judge Gilbert noted that Defendant’s requests could be characterized as “discovery on discovery” but found that the requests were not improper under the circumstances of the case because “courts acknowledge that ‘discovery about discovery’ can be appropriate ... when one party’s discovery compliance has reasonably been drawn into question, so that there is an adequate factual basis for an inquiry.” *Id.* (internal quotations omitted). Noting that there was no dispute that the ESI for the four former employees was discarded, Magistrate Judge Gilbert found that Defendant had established an adequate factual basis on which to seek information regarding when Plaintiff reasonably anticipated this litigation.

Magistrate Judge Gilbert began his analysis by noting that “federal courts across the country have recognized that a plaintiff’s duty to preserve is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.” *Id.* at \*2 (internal quotations omitted). Thus, if Plaintiff’s duty to preserve was triggered around the time it retained counsel and Plaintiff failed to preserve documents after that date, that would present “a sufficient factual basis to explore what steps were taken to preserve those records and why they no longer exist.”

Plaintiff argued that a duty to preserve “adheres only when the party knew or should have known litigation was imminent,” but Magistrate Judge Gilbert explained that following the 2015 amendments to Rule 37(e), courts have found “the uniform understanding is that the duty to preserve is triggered when litigation is commenced or reasonably anticipated.” Under this standard, he found that Defendant had brought forth sufficient facts to justify the limited discovery it sought about whether Plaintiff may have reasonably anticipated litigation around the time it discarded or destroyed certain former employees’ ESI, and discovery was appropriate as to when the duty to preserve arose.

Plaintiff also argued that its retention of counsel was not “dispositive” of when it reasonably anticipated litigation, but Magistrate Judge Gilbert noted that did not undermine the potential relevance of the discovery sought because “[c]ourts routinely consider the retention of counsel to be a relevant factor in determining when a party had a duty to preserve evidence.” Accordingly, he found that discovery about Plaintiff’s retention of litigation counsel was relevant to determining when Plaintiff had a duty to preserve evidence.

Magistrate Judge Gilbert ordered Plaintiff to produce its retention letter with its law firm and a log of communications between Plaintiff and its law firm, finding that this discovery was “narrowly tailored” to determining when Plaintiff anticipated litigation. Magistrate Judge Gilbert also ordered Plaintiff to produce its document retention policies in effect from December 2019 through April 2020, finding that this discovery was “directly relevant to the location of evidence for this case and whether that evidence should have existed when the duty to preserve was triggered.” He found in particular that these policies were relevant to Plaintiff’s disposition of ESI from two custodians who left the company less than three months before the retention letter with the law firm was signed in January 2020, and whose ESI therefore may have still existed when Plaintiff retained counsel.

Magistrate Judge Gilbert denied Defendant’s request for Plaintiff’s document retention policies prior to December 2019. Defendant argued that Plaintiff’s allegations in its complaint suggested that Plaintiff’s employees were aware of the alleged anticompetitive contracts as far back as 2013, but Magistrate Judge Gilbert found that mere awareness of the contracts or conduct at issue was not a sufficient basis for discovery of Plaintiff’s document retention policies from January 2018 through November 2019.