

January 17, 2017

## **2016 YEAR-END E-DISCOVERY UPDATE**

To Our Clients and Friends:

In contrast with the turmoil in e-discovery several years ago, e-discovery in 2016 was generally on a stable and very positive trajectory.

### **Highlight of the Year: Courts' Application of the Rule Amendments.**

In our view, the major e-discovery highlight in 2016 was how courts applied the e-discovery amendments to the Federal Rules of Civil Procedure and, for the most part, did so in a fashion that was very consistent with the drafters' intentions. Decisions applying the amended rules addressed many of the prior, oft-cited flaws in the e-discovery process, such as unpredictable and unfair sanctions rulings and runaway discovery.

### **Sanctions Decisions Followed Rule 37(e)'s Requirements.**

Many decisions applied amended Rule 37(e) to deny the most serious sanctions unless the party that lost or destroyed electronically stored information ("ESI") that it had a duty to preserve did so with the intent to deprive the opposing party of the evidence. Similarly, decisions also declined to impose sanctions where there was no showing of actual loss of discoverable ESI or prejudice to the requesting party. Even where a party acted with intent to deprive, courts limited sanctions to fit the wrong instead of automatically imposing the strongest sanctions.

Continuing a trend in recent years, sanctions decisions often involved "non-traditional" sources of ESI such as text messages, mobile devices and call recordings. As the decisions reflect, however, while the sanctions area is undoubtedly becoming more fair and predictable, there are still many ways one can face spoliation sanctions.

### **Courts Required Proportionality in Discovery.**

A substantial number of decisions applied the proportionality requirement of amended Rule 26(b)(1) to rein in overly broad discovery. While in the past courts had often interpreted the scope of discovery very broadly--often allowing a fishing expedition approach--the incorporation of proportionality into the definition of the scope of discovery appears to be leading to a different mindset. As one court stated, "No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. . . . Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case."

### **Cooperation, Ethics and Cost Shifting Were Featured in Several Cases.**

Courts' expectations of cooperation among counsel in the e-discovery process--particularly in light of the amendment to Rule 1, which emphasizes the responsibility of the parties to secure the "just, speedy

and inexpensive determination of every action"--played a role in several cases. Courts also addressed ethical issues in e-discovery and cost shifting in a number of cases.

## **TAR Flowed, Slowly.**

It was a relatively quiet year for predictive coding (also known as technology assisted review or "TAR"). Two cases declined to compel a party to use TAR, at least in the first instance, citing Sedona Principle 6, which provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." A third case denied a post-production challenge to the use of TAR. Courts in Australia, England and Ireland approved the use of TAR.

## **Vendors Consolidated; Technology Drove Market Change.**

On the e-discovery vendor front, the pace of consolidation of large service providers in 2016 was unprecedented compared to prior years. Technological change, including the availability of relatively inexpensive and secure cloud-based data hosting and the availability of e-discovery software through the cloud on a subscription basis, meant that companies and law firms increasingly could handle e-discovery tasks themselves without needing the assistance of an e-discovery services provider. This trend is likely to increase with the coming move of the dominant document search and review software to a cloud-based model. These changes may be detrimental to some service providers, but beneficial to consumers of e-discovery services.

In sum, 2016 was a good year for e-discovery and there is no reason why these overall positive trends should not continue in the coming year.

---

## **Table of Contents**

Sanctions and Amended Rule 37(e)
Scope of Preservation and Legal Holds
Text Messages and Mobile Devices
Proportionality and Amended Rule 26(b)(1)
Cost Shifting
Cooperation in E-Discovery
Ethics in E-Discovery
Technology Assisted Review
Vendor Developments

## **Sanctions and Amended Rule 37(e)**

Amended Rule 37(e) appears to be having a substantial impact in the sanctions area. Key provisions of the amended rule--*i.e.*, the requirement of an intent to deprive for the most serious sanctions, the Rule's application only to ESI, the requirements of an actual loss of ESI and its unavailability from other sources, and the requirement of prejudice to the moving party--played out in a number of cases during the year.

### *Amended Rule's Impact*

Several cases involved sanctions either being denied or limited pursuant to the provisions of the amended rule. The decision in *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016), is perhaps the most powerful example of the amended rule's impact. Before the amendment became effective, the court in *Nuvasive* had granted the sanction of an adverse inference jury instruction because the plaintiff had failed to preserve discoverable text messages. The court imposed the sanction even though it found that the plaintiff had not acted with the intent to deprive the defendant of the text messages.

After the amended rule became effective, the plaintiff in *Nuvasive* moved to vacate the previous order. The court granted the motion, holding that an adverse inference instruction is not permitted under the amended rule unless the party acted with the intent to deprive.

### *Actual Loss and Prejudice Required*

*Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016), is another example of amended Rule 37(e) being applied to deny sanctions despite a failure to preserve. In *Living Color*, the plaintiff sought case terminating sanctions or, alternatively, an adverse inference jury instruction, against an individual defendant who failed to preserve discoverable text messages on his cell phone.

The defendant contended that he always used the cell phone feature that automatically deletes text messages after 30 days and that he had neglected to disable the feature when the lawsuit was filed. The court found that the vast majority of the defendant's text messages were produced from other sources and those that remained lost were unimportant. Having found no loss of important text messages, and therefore no prejudice to the plaintiff, the court denied sanctions under Rule 37(e).

Similarly, in *FiTeq Inc. v. Venture Corp.*, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016), the court denied the plaintiff's motion for an adverse inference jury instruction under amended Rule 37(e) because emails deleted by the defendant's executive vice president were recovered from his old computer and also obtained and produced from the email accounts of others. The court relied on amended Rule 37(e)'s provisions that sanctions can only be imposed where the ESI "cannot be restored or replaced through additional discovery" and where there has been a "finding [of] prejudice to another party from the loss of the information."

# GIBSON DUNN

In *Best Payphones, Inc. v. New York*, 2016 WL 792396 (E.D.N.Y. Feb. 26, 2016), the defendants argued that the plaintiff failed to preserve both hard copy documents and ESI. Because amended Rule 37(e) only applies to ESI, the court applied the Second Circuit's existing sanctions standards to the lost hard copy documents and Rule 37(e) to the lost ESI. Although the court found that the plaintiff had been negligent in its failure to properly implement a legal hold, and that the lost information was relevant, it nevertheless declined to impose sanctions because the defendants did not demonstrate that they suffered prejudice from the loss of the information.

## *Remedy Should Be Proportional*

*BMG Rights Mgt. LLC v. Cox Comm., Inc.*, 2016 WL 4224964 (E.D. Va. Aug. 8, 2016), illustrates how Rule 37(e) can be applied to limit sanctions even where a party acted with the intent to deprive. The magistrate judge found that the plaintiff intentionally destroyed material information that it had a duty to preserve by altering, deleting and overwriting relevant source code. The district judge gave a permissive adverse inference instruction regarding plaintiff's destruction of ESI to the jury at trial, and the jury nevertheless returned a \$25 million verdict. The defendant moved for a new trial arguing, among other things, that the court should have imposed a stronger sanction, such as evidence preclusion or dismissal. The court rejected this argument, reasoning that even under Rule 37(e)(2) "the remedy should fit the wrong" and the most severe measures that the rule authorizes should not be used when lesser measures would redress the loss.

Similarly, in *First Fin. Sec., Inc. v. Freedom Equity Group, LLC*, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016), the court awarded a permissive adverse inference jury instruction for the deletion of discoverable text messages, but declined to impose a more severe sanction. This court likewise reasoned that "the remedy should fit the wrong" and that because there was some question about the extent to which the plaintiff was prejudiced, a permissive adverse inference instruction would fairly redress the loss.

## *Intent to Deprive Leads to Most Serious Sanctions*

In several cases, however, courts found that the most serious sanctions were warranted under Rule 37(e) where there was an intent to deprive. In *Brown Jordan Int'l, Inc. v. Carmicle*, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016), the court found that the defendant--among other things--remotely wiped his company-owned iPad and locked his company-owned laptop computer, refusing to unlock it even up until trial. He also failed to preserve relevant data on his personal iPad, his personal laptop computer, his personal iPhone and his wife's laptop computer. Pursuant to amended Rule 37(e), the court allowed adverse evidentiary inferences to be made regarding the lost ESI, but declined to grant case terminating sanctions.

In *GN Netcom, Inc. v. Plantronics, Inc.*, 2016 WL 3792833 (July 12, 2016), the court found that a senior executive intentionally deleted thousands of emails for the purpose of making them undiscoverable in the litigation, and that he ordered others to do so as well. Although the company had taken a number of steps to preserve documents--including distributing quarterly legal hold notices and conducting training sessions to ensure compliance--the court held that, because of the executive's intentional spoliation, the company could not be deemed to have acted "reasonably" in preserving documents.

# GIBSON DUNN

The court agreed with the plaintiff that the company's "reliance on these actions to excuse the intentional, destructive behavior" of the senior executive "requires a 'perverse interpretation' of Rule 37(e), one which would set a dangerous precedent for future spoliators." The court ordered an array of sanctions against the company, including an adverse inference jury instruction, monetary sanctions in the form of reasonable fees and costs to the plaintiff, a "punitive" sanction of \$3 million, and possible evidentiary sanctions to be determined before trial.

In *InternMatch, Inc. v. Nxtbigthing, LLC*, 2016 WL 491483 (N.D. Cal. Feb. 8, 2016), the court found that the defendant falsely claimed that a power surge had destroyed computers containing relevant evidence and that the company failed to make any effort to determine if ESI was salvageable from the computers before discarding them. Additionally, eight days before the claimed power surge, the company's owner had called its insurer to find out how a power surge would affect an insurance payout. Pursuant to amended Rule 37(e), the court granted an evidence preclusion order, an adverse inference instruction, and attorneys' fees, but declined to impose case terminating sanctions.

In *O'Berry v. Turner*, 2016 WL 1700403 (M.D. Ga. Apr. 27, 2016), which involved an accident between a big-rig truck and a car, the court found that the defendant's preservation failures constituted an intent to deprive the plaintiff of relevant ESI. Although the plaintiff sent a preservation letter, and the defendant sent a response acknowledging receipt and stating that it would take the necessary measures to preserve evidence, the defendant failed to preserve relevant ESI (an electronic driver's log and data from an application that recorded information about the truck). Instead, the defendant printed out a single, hard copy of the data, which it subsequently could not locate. Making an inference that some might consider controversial, the court found that, in failing to take reasonable steps to preserve ESI, the defendant acted with the intent to deprive the plaintiff of its use in the litigation, and ordered an adverse inference jury instruction.

Additionally, in a decision in Delaware Chancery Court--thus not falling under Rule 37(e)--that garnered a lot of attention, the court sanctioned an executive and cofounder of an e-discovery vendor \$7.1 million for having intentionally destroyed evidence from his laptop after he was ordered to submit it during discovery. See *In re Shawe & Elting LLC*, 2016 WL 3951339 (Del. Ch. Jul. 20, 2016). The sanctioned party has appealed the decision.

## **Scope of Preservation and Legal Holds**

The implementation of legal holds (or the failure to do so) and the scope of preservation came up in a number of additional sanctions decisions.

In *Matthew Enter., Inc. v. Chrysler Group LLC*, 2016 WL 2957133 (N.D. Cal. May 23, 2016), the plaintiff failed to preserve emails and customer communications after its duty to preserve was triggered by its own letter threatening the defendant with litigation. In particular, the plaintiff allowed all of the email communications on its email system to be deleted when it changed email vendors, and it failed to notify its customer communications vendor to suspend its auto-delete function.

The court found that the plaintiff failed to take reasonable steps to preserve discoverable information, and that the defendant was prejudiced as a result. It granted curative measures: for example, that the

defendant could present evidence and argument regarding the spoliation. But the court denied the requested sanction of evidence preclusion because it "would effectively decide the case," finding that absent an intent to deprive this would be an excessive and inappropriate remedy.

*Security Alarm Fin. Enters. v. Alarm Protection Tech. Alaska, LLC*, Case No. 3:13-cv-00102-SLG (D. Alaska Dec. 6, 2016), addressed the scope of the preservation with respect to call recordings. The case involved disputes between two alarm companies. The defendant, APT, alleged in counterclaims that the plaintiff, SAFE, defamed APT and interfered with APT's contractual relationships with its customers in telephone calls with consumers. SAFE had recorded all of the calls that came into its call center. After the litigation commenced, however, it allowed all but a sample of those call recordings (largely favorable to SAFE) to be overwritten pursuant to its ordinary database overwriting process.

The court held that SAFE had a duty to preserve all the call recordings, and to suspend any routine disposal of them. The court found it particularly troubling that SAFE had allowed almost all of the recordings to be destroyed after the litigation had commenced, when SAFE was on actual notice of the potential relevance of the recordings. The court imposed several sanctions pursuant to amended Rule 37(e)--including attorneys' fees, prohibiting SAFE from introducing into evidence its favorable call recordings, and a jury instruction that SAFE was under a duty to preserve the call recordings and that it failed to do so. The court did not impose the most serious sanctions available under Rule 37(e), such as entry of judgment or an adverse inference jury instruction, because it did not find that SAFE had acted with the intent to deprive APT of the evidence.

Additional cases involved parties' failure to implement a legal hold and preserve documents after a duty to preserve had been triggered. In *McQueen v. Aramark Corp.*, 2016 WL 6988820 (D. Utah Nov. 29, 2016), the court imposed sanctions due to the defendant's failure to implement a legal hold, resulting in the destruction of relevant documents, despite having received a preservation letter. In *McQueen*, the plaintiff sent a preservation letter in August 2014 notifying the defendant that litigation was imminent and that documentation related to the death of a construction worker should be preserved.

Nevertheless, the defendant did not notify its employees of a legal hold until over a year later, in December 2015, well after the litigation had commenced. As a result, relevant maintenance work orders were destroyed pursuant to the defendant's regular document destruction procedures. The court found that sanctions were appropriate under Rule 37(e), ordering that the plaintiff would be permitted to present evidence to the jury regarding the spoliation and to argue any inferences it wants the jury to draw and also awarding attorneys' fees and costs.

In *Cohn v. Guaranteed Rate, Inc.*, 2016 WL 7157358 (N.D. Ill. Dec. 8, 2016), the plaintiff deleted relevant emails before commencing litigation, but after having communicated on a number of occasions her intent to bring suit and after having retained counsel. The court found that these communications and her retention of counsel had triggered the duty to preserve, which the plaintiff had violated by subsequently deleting relevant emails. The court ordered sanctions allowing the defendant "full access" to the plaintiff's personal Gmail account, with the possibility of an adverse inference jury instruction if such access to the plaintiff's email account did not ameliorate the harm from the destruction.

## **Text Messages and Mobile Devices**

Continuing a trend over the past few years, text messages and mobile devices were often the subject of sanctions decisions in 2016. For example, deleted text messages were the subject of the sanctions decision in *Nuvasive, Inc. v. Madsen Med., Inc.*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016). In *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016), the defendant failed to preserve discoverable text messages on his cell phone but the court decided not to impose sanctions, finding no loss of important text messages and no prejudice to the plaintiff.

In *Keim v. ADF Midatlantic, LLC*, 2016 WL 7048835 (S.D. Fla. Dec. 5, 2016), the plaintiff failed to preserve relevant text messages on his cell phone, but the court found that he deleted the messages before a duty to preserve arose, and thus denied the motion for sanctions under Rule 37(e).

In *Schaffer v. Gaither*, 2016 WL 6594126 (W.D. N.C. Sept. 1, 2016), the plaintiff lost relevant text messages after the time when the court found that the duty to preserve was triggered. The plaintiff presented unrefuted evidence, however, that the text messages were lost when she dropped the cell phone on which her texts were stored, and that she had to turn in the phone and the SIM card to her insurer to support an insurance claim. Consequently, the court could not find that the text messages were destroyed with the intent to deprive and denied the defendant's motion for case terminating sanctions, but left open the possibility of remedial measures.

By contrast, in *First Fin. Sec., Inc. v. Freedom Equity Group, LLC*, 2016 WL 5870218 (N.D. Cal. Oct. 7, 2016), the court awarded an adverse inference jury instruction for the deletion of discoverable text messages. In *Stinson v. New York City*, 2016 WL 54684 (S.D.N.Y. Jan. 5, 2016), the court awarded an adverse inference jury instruction for failing to institute a litigation hold to preserve relevant text messages for the first three years of litigation and then failing to enforce the hold or collect relevant cell phone data once it was in place.

And in *Timms v. LZM, LLC*, 2016 WL 3611550 (5th Cir. Jul. 05, 2016), the Fifth Circuit affirmed the trial court's award of case terminating sanctions and attorneys' fees after the plaintiff produced her cell phone pursuant to a court order, but had removed relevant text messages and a messaging app from the device.

## **Proportionality and Amended Rule 26(b)(1)**

As former Magistrate Judge Paul Grewal observed in an opinion last January, "Proportionality in discovery under the Federal Rules is nothing new." *Gilead Sciences, Inc. v. Merck & Co.*, 2016 WL 146574 (N.D. Cal. Jan. 13, 2016). Before the December 2015 rule amendments, Rule 26(b)(2)(C)(iii) allowed a court to limit discovery on proportionality grounds, and set forth proportionality factors, but this provision was relatively buried in Rule 26. The rule amendments elevated proportionality to Rule 26(b)(1)'s definition of the scope of permissible discovery. When the amendments took effect in December 2015, one might have wondered whether this mere elevation of proportionality would substantially change discovery in the federal courts.

# GIBSON DUNN

## *Change in Mindset and Legal Framework*

After a full year, it is apparent that courts have often applied the amended rule to limit discovery. Chief Justice Roberts commented in his 2015 Year-End Report that the amended Rule 26(b)(1) "crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality[.]" Courts have heeded this guidance: "As the Chief Justice's comments highlight, a party is not entitled to receive every piece of relevant information." *In re Takata Airbag Prods. Liab. Litig.*, 2016 WL 1460143, at \*2 (S.D. Fla. Mar. 1, 2016).

Indeed, Judge Grewal's opinion in *Gilead Sciences* explained that the framework of discovery had changed: "No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. . . . Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case." *Gilead Sciences*, 2016 WL 146574 at \*2.

## *Scope of Discovery Limited*

In 2016, a substantial number of courts applied the amended rule to limit the scope of discovery.

For example, in *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562 (D. Ariz. 2016), the court emphasized that under the amended rule, discoverable information must be "relevant to any party's claim or defense," and not merely "reasonably calculated to lead to admissible evidence" as was understood (or misunderstood) under the old rule. The plaintiff had requested all communications between the defendant's 18 foreign subsidiaries and foreign regulators, despite evidence that the defendant's domestic operations handled most communications with both U.S. and foreign regulators. The court denied the plaintiff's motion to compel, finding the requested discovery not proportional to the needs of the case. The court concluded that "mere conjecture as to possible information's relevance is not enough for discovery" and that plaintiff had merely demonstrated that the discovery was "more hope than likelihood."

The court in *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*, 314 F.R.D. 304 (S.D. Ind. 2016), also relied on the amended rule to deny the defendant's requested discovery of 23 "wide-ranging" categories of documents from the plaintiff's "major shareholder." The court explained its view that the amended rule's purpose was "to rein in popular notions that anything relevant should be produced and to emphasize the judge's role in controlling discovery. . . . And, once again, the changes were designed to protect against over-discovery and to emphasize judicial management of the discovery process, especially for those cases in which the parties do not themselves effectively manage discovery."

## *Relevance Not Enough*

The court in *Noble Roman's* also noted that although the defendant "beats the drum of relevancy . . . [t]hat's not good enough" because the defendant made no effort to "demonstrate that the discovery is in any way proportional to the needs of this case." Calling the requests "discovery run amok," the court held the requested discovery was "too far afield from the contested issues in this case."

# GIBSON DUNN

The court in *Armstrong Pump, Inc. v. Hartman*, 2016 WL 7208753 (W.D.N.Y. Dec. 13, 2016), viewed the Chief Justice's instruction to "engag[e] in early and effective case management" as an invitation to "discourage discovery overuse" from "the earliest stages of a case." In denying, with limited exceptions, plaintiff's motion to compel, the court considered the prior six years' of discovery, the millions of pages already produced, and the dozen depositions taken, and determined that discovery had "reached the point of diminishing returns." The court concluded that further discovery would not be proportional to the needs of the case, although it did allow the plaintiff "one very narrow path to a limited, and final, production."

## *Particularity Required*

In the employment discrimination case *Odeh v. Baton Rouge*, 2016 WL 1254361 (M.D. La. Mar. 29, 2016), the plaintiff sought the production of his entire email inbox on the defendant's information system, downplaying any burden concerns. In response, the defendant contended that "reviewing all 64,685 emails would be unduly burdensome considering Plaintiff has not shown how his entire email inbox from 2001 until 2014 is relevant or proportional to the needs of the case." The court agreed, explaining that the plaintiff had failed to show how all of his emails from a 13-year period would be "relevant and discoverable." The court criticized the plaintiff for failing to request information with "reasonable particularity," noting that "an email inbox, in general, has little relevance. Instead, it is the information and communications contained within those emails that may be relevant."

## *Burdensome and Speculative Discovery Disallowed*

Courts in 2016 also relied on proportionality to disallow discovery that was deemed to be unduly expensive or speculative. In *Elkharwily v. Franciscan Health Sys.*, 2016 WL 4061575 (W.D. Wash. July 29, 2016), the court determined that the defendant did not need to pay for the costly restoration of backup tapes where "Plaintiff ha[d] not exhausted more easily accessible information and ha[d] not identified what kind of material Plaintiff believes will be found on the backup tapes, so compelling production of archive emails amounts to an extremely expensive fishing expedition."

In finding no good cause to order production, the court pointed out that the plaintiff had not "name[d] individuals that Plaintiff believes exchanged emails about Plaintiff, nor does Plaintiff describe suspected content of the emails. Plaintiff does not even represent with any surety that responsive emails exist. Because Plaintiff has not met his burden for good cause, compelling production of the discovery at expense to Defendant is not warranted." Instead, the court ordered the defendant to make information from the tapes accessible only if the plaintiff paid for the restoration.

Likewise, in *Hespe v. City of Chicago*, 2016 WL 7240754 (N.D. Ill. Dec. 15, 2016), the court refused to order the forensic inspection of the employee plaintiff's electronic devices because the defendant had "not demonstrated that the contents of plaintiff's devices are likely to go to the heart of this case." Plaintiff had produced hundreds of emails and text messages in support of her charge of sex discrimination. Later, her mother produced thousands of additional text messages that the plaintiff had given to her because she lacked sufficient space on her own computer.

Defendant claimed that this showed a deficient search and collection by the plaintiff and requested a forensic inspection of all of plaintiff's devices. The court agreed with the plaintiff that the extraordinary privacy intrusion of such inspection was not proportional to the needs of the case. Calling the defendant's request "generic" and of an "apparently inconclusive nature," the court concluded the request "is closer to a blind attempt to find something useful . . . than to a request to search devices that have been shown to contain information" necessary to resolve the case.

### *Proportionality Applied to Third-Party Discovery*

And in *Hahn v. Hunt*, 2016 WL 1587405 (E.D. La. Apr. 20, 2016), the court applied these principles to limit discovery from a third party, explaining that "although the parties' resources appear more or less equivalent, [the subpoena target] is not a party to this action" and "[t]he potential for burden, annoyance and oppression appears substantial, in light of the vast scope of the discovery requests." After balancing the factors, the court granted the third party's motion to quash the deposition subpoena and limited the document subpoena to information with direct relevance to the claims and defenses in the litigation.

### *Expenses Not the Only Proportionality Factor*

Courts in 2016 did not always apply the proportionality factors of amended Rule 26(b)(1) to limit discovery, of course. In some cases, courts pointed to proportionality factors that countervailed the expenses involved.

For example, in *Mitchell v. Reliable Sec., LLC*, 2016 U.S. Dist. LEXIS 76128 (N.D. Ga. May 24, 2016), for example, the defendant refused the plaintiff's request to produce documents, including email and Excel spreadsheets, in native format because the defendant could save "approximately \$3,000" by converting all file formats to PDF, and the case was worth, in its opinion, "likely less than \$10,000." But the defendant failed to explain to the court "the reason for the additional costs" of native production, leaving the court "at a loss to understand why the production of native documents is more costly than production of PDF files."

The court ordered the defendant to comply with the plaintiff's requested production format despite the claimed increased cost, explaining that "the public value of allowing a civil-rights plaintiff opportunity to access information relevant and quite possibly necessary to her pregnancy-discrimination suit far outweighs the asserted \$3,000 cost." The court concluded with a threat that a failure to comply within 14 days "may result in sanctions, which could include the striking of pleadings."

In *Wagoner v. Lewis Gale Med. Ctr., LLC*, 2016 WL 3893135 (W.D. Va. July 14, 2016), a wrongful termination suit, the plaintiff sought discovery from his two former supervisors over a four-month period. The defendant argued that the search was unduly burdensome, requiring that it hire a third-party vendor to search its email archive because its active email system stored some emails for only three days, "making it costly to produce relevant e-mails when faced with a lawsuit."

These arguments and the \$70,000 price tag defendant asserted for the collection, review, and production did not impress the court. It responded that "[p]roportionality consists of more than whether the particular discovery method is expensive." In granting plaintiff's motion, the court found the requested discovery

proportional to the needs of the case "in light of the limited request, restricted by custodian, search terms, and time period."

Finally, in *First Niagara Risk Mgt., Inc. v. Folino*, 317 F.R.D. 23 (E.D. Pa. 2016), the court granted the plaintiff bank's motion to compel further searches and production from the personal and business electronic devices of the defendant, the bank's former Vice-President and Regional Director. Other evidence in the case indicated that the defendant had breached his non-compete and non-solicitation agreement with the bank. Although the court agreed the burden on defendant was "substantial," "[w]eighing these factors makes clear that the potential harm [plaintiff's] discovery requests may impose on [defendant] does not outweigh the presumption for disclosure of those requests."

Accordingly, thanks to amended Rule 26(b)(1), proportionality was a major issue in many cases in 2016. We expect 2017 will see further development and application of the proportionality factors as courts continue to interpret the amended rule.

## **Cost Shifting**

At least two courts issued noteworthy e-discovery cost-shifting decisions in 2016.

In *Wagoner v. Lewis Gale Med. Ctr., LLC*, cited above, the court denied the defendant's request for cost-shifting. The court's analysis turned on whether the defendant had proven that its email was "inaccessible"--i.e., whether it had to be "restored, de-fragmented, or reconstructed." The court found the defendant had not met this burden, and refused to shift costs. The court reasoned that the defendant had chosen an information system that made it "costly to produce relevant e-mails when faced with a lawsuit," and should bear the costs of that choice.

By contrast, in *Elkharwily v. Franciscan Health Sys.*, 2016 WL 4061575 (W.D. Wash. Jul. 29 2016), the court ruled that the plaintiff who sought production of the defendant's email had to pay any costs of retrieving, restoring and reviewing email back-up tapes. The defendant had chosen to implement an email retention system that only preserved emails on backup tapes. The plaintiff argued that the defendant should be "at fault" and bear the cost of retrieving the emails because the defendant was on notice of the plaintiff's litigation before the emails were moved to the back-up tapes, and that the defendant should have preserved the emails in a readily-searchable format.

The court rejected these arguments, calling the plaintiff's "blame-shifting" "unpersuasive." The court's reason for imposing the costs of any email collection on the plaintiff were that that the plaintiff had failed to prove that there were any responsive emails on the back-up tapes, and the defendant should not be required to expend the estimated 1,400 hours of labor and \$157,000 in costs to restore emails without any such proof.

## **Cooperation in E-Discovery**

When the 2015 amendments to the Federal Rules of Civil Procedure went into effect, Supreme Court Chief Justice Roberts noted in his 2015 Year-End Report on the Federal Judiciary that Rule 1 had "been expanded by a mere eight words, but those are words that judges and practitioners must take to heart." In

# GIBSON DUNN

particular, the amendment added the words "and employed by the court and parties" to the existing language of Rule 1 that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

The Advisory Committee Note emphasizes that, under the amended rule, "the parties share the responsibility to employ the rules" to secure the "just, speedy, and inexpensive determination" of every action. The Note also states that "discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay." Although a proposed explicit requirement of "cooperation" was dropped from the final rule amendment, the Advisory Committee Note states that "[e]ffective advocacy is consistent with--and indeed depends upon--cooperative and proportional use of procedure." The Note is careful to point out, though, that the amendment "does not create a new or independent source of sanctions."

Courts in 2016 referred to amended Rule 1 in addressing lawyers' cooperation--or lack thereof--in the discovery process. In *Blake v. Batmasian*, 2016 WL 4618931 (S.D. Fla. Sept. 2, 2016), the court was presented with "a plethora of discovery motions, responses, replies and notices which are too numerous to account" and held multiple, lengthy discovery hearings. Moreover, the court observed that the "obvious animus" among the parties and their counsel "has made the discovery process unnecessarily combative, excessively litigious, and wasteful of the Court's limited judicial resources." In response, the court further stated that the amendment to Rule 1 "makes crystal clear" lawyers' obligation "to cooperate and control the expense of litigation." The court further stated that "[t]his Court takes the amendments to the Federal Rules of Civil Procedure seriously and demands that counsel also take them seriously." Similarly, in *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp.*, 2016 WL 277721, at \*1 (D. Colo. Jan. 22, 2016), the court--also referring to Justice Roberts' report--noted that "the amendment to Rule 1 underscores that lawyers and the court have an affirmative duty work together."

In *In re Takata Airbag Prods. Liab. Litig.*, 2016 WL 1460143 (S.D. Fla. Mar. 1, 2016), the court also cited Justice Roberts' 2015 Year-End Report, which stated that "for the lawyers, most will readily agree--in the abstract--that they have an obligation to their clients, and to the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship.... The test for plaintiffs' and defendants' counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve just results."

Lawyers' refusal to work with one another in discovery became an issue in *Pyle v. Selective Ins. Co. of Am.*, 2016 WL 5661749 (W.D. Pa. Sept. 30, 2016). There, the requesting party refused to discuss with the responding party search terms to locate documents responsive to its document requests. The court stated that the requesting party's refusal to discuss search terms "borders on the incomprehensible." "Among the items about which the court expects counsel to reach practical agreement without the court having to micro-manage e-discovery are search terms, date ranges, key players and the like." The court therefore issued an order compelling the requesting party to confer and reach an agreement on search terms.

# GIBSON DUNN

A similar issue arose in *Venturedyne, Ltd. v. Carboynx, Inc.*, 2016 WL 6694946 (N.D. Ind. Nov. 15, 2016). The parties began to meet and confer over document requests, but the defendant cut off contact in the midst of whittling down a list of search terms. In the ensuing dispute, the court refused to edit the list of terms any further. Noting that "the better solution" was mutual agreement, the court found that the defendants had already squandered their opportunity to propose a narrower set of search terms by abandoning negotiations that "appeared to be making progress." The parties' inability to work together was likely costly for the defendants, as the court ordered them to use 78 search terms that the plaintiffs requested.

## **Ethics in E-Discovery**

Several 2016 decisions reflect ethical issues in e-discovery. *In re Eisenstein*, Case No. SC95331, slip op. (Mo. Apr. 5, 2016), for example, involved an attorney's use of electronically stored information that his client had obtained illegally. The attorney's client, the husband in a divorce case, had improperly obtained access to his estranged wife's personal email account and took various documents, including a list of direct examination questions the wife's attorney had sent her in preparation for trial.

The husband's attorney sought to use the illegally acquired evidence at trial, and claimed that doing so was proper because he did not use illegal means to obtain the evidence--rather, his client had done so. The Supreme Court of Missouri held that the attorney had violated a number of ethical rules and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. It suspended the attorney indefinitely, with leave to reapply for admission to the bar only after six months.

The court in *Arrowhead Capital Fin. v. Seven Arts Ent.*, No. 14 Civ. 6512 (KPF), 2016 U.S. Dist. LEXIS 126545 (S.D.N.Y. Sept. 16, 2016), also imposed sanctions against an attorney for alleged misconduct in e-discovery. Specifically, the attorney had forwarded electronically stored information collected by his client to the opposing party without reviewing the documents, designating them all as confidential.

The court found that the attorney had abdicated his duty to supervise the document search, review, and production. The attorney also had made untimely and improper objections to the plaintiff's discovery requests, amplified his client's production with non-responsive documents, and simultaneously refused to produce obviously responsive documents. The court called the attorney's misconduct "as deep as it is wide" and issued severe sanctions against him and his client, including spoliation instructions, issue preclusion, a contempt finding, and attorneys' fees.

*Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA (N.D. Cal. Sept. 27, 2016), arises from the plaintiff's motion for a new trial in a copyright infringement case in which the jury found that the defendant's alleged infringement constituted fair use. The plaintiff's motion accused the defendant of withholding key evidence in discovery, creating the misimpression that the defendant had completely concealed a project. To the contrary, the defendant had in fact had produced numerous documents in a timely fashion about the project.

The plaintiff's counsel was compelled to acknowledge their legal team never reviewed those documents before trial. The court stated that it was "disappointed" that the plaintiff had created a misimpression regarding the defendant's discovery conduct, and said that the plaintiff's failure to review and introduce

those documents into evidence was "its own fault." Accordingly, the court rejected the plaintiff's argument that the defendant had engaged in discovery misconduct as a basis for the plaintiff's request for a new trial.

Similarly, in *Fulton v. Livingston Fin., LLC*, 2016 WL 3976558 (W.D. Wash. Jul. 25, 2016), the court derided an attorney's reliance in a brief on pre-amendment case law applying outdated standards regarding the scope of discovery, calling it "inexplicable" and "inexcusable" because of the "dramatic change[s]" to Rule 26(b)(1).

The court imposed monetary sanctions and ordered the attorney to provide the "offending brief" to senior members of his firm, explaining that the court was "entering sanctions ... for quoting provisions of the civil rules that are badly out of date, and also [for] making direct misrepresentations to the court." In addition, the court ordered that if a federal court sanctioned or even threatened to sanction counsel within the next five years, counsel must disclose and provide a copy of the court order and the offending brief to the court.

## **Technology Assisted Review**

### *Few Cases, But Significant Ones*

The year was relatively quiet with respect to cases dealing with technology assisted review ("TAR" aka predictive coding), but the three U.S. decisions issued were nevertheless significant. In two, the courts rejected the requesting party's motion to compel the responding party to use TAR. And in the third, the court rejected a post-production challenge to the responding party's use of TAR.

In *Hyles v. New York*, 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016), the court concluded that defendant New York City could not be required to use predictive coding, at least in the first instance, against its wishes. The court agreed with the plaintiff that, "in general, TAR is cheaper, more efficient and superior to keyword searching."

Nevertheless, the court cited Sedona Principle 6, which provides that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information." The court suggested, however, that the answer could be different if the search term and manual review-based production were later found to be deficient.

The court concluded that while the plaintiff "may well be correct that production using keywords may not be as complete as it would if TAR were used, the standard is not perfection, or using the 'best' tool, but whether the search results are reasonable and proportional."

Similarly, in *In re Viagra (Sildenafil Citrate) Prods. Liab. Litig.*, Case No. 16-md-02691-RS (SK), slip. op. at 1-3 (N.D. Cal. Oct. 14, 2016), the court denied the requesting party's motion to require that the responding party use predictive coding. The responding party instead planned to employ an iterative search-term process, which it would test and validate through sampling.

Relying upon the reasoning of *Hyles*, the court held that it was not up to the court or the requesting party to force the responding party to use TAR when it preferred to use search terms. The court concluded that "[e]ven if predictive coding were a more efficient and better method, which [the responding party] disputes, it is not clear on what basis the Court could compel [the responding party] to use a particular [search method], especially in the absence of any evidence that [the responding party's] preferred method would produce, or has produced, insufficient discovery responses." The court therefore denied the motion, without prejudice to revisiting the issue if the requesting party later contended that the production was deficient.

In *Dynamo Holdings Lt. P'ship v. Comm'r of Internal Revenue*, No. 2685-11 (T.C. Jul. 7, 2016) ("*Dynamo Holdings II*"), the tax court addressed a post-production challenge to the sufficiency of a predictive coding process. The court had previously authorized the petitioners' use of predictive coding over the objection of respondent Commissioner of Internal Revenue. The parties then agreed to a predictive coding protocol in which the requesting party--*i.e.*, the Commissioner--trained the predictive coding tool. Nevertheless, the Commissioner was dissatisfied with the results. The Commissioner therefore sought to have the court order the responding party to start over with a manual review. The court denied the motion, holding that the responding party made a "reasonable inquiry" in using predictive coding and producing documents "that the algorithm determined was responsive[.]"

In particular, the court reasoned that the respondent's motion was "predicated on two myths." The first, according to the court, is the "myth of human review," *i.e.*, "that manual review by humans of large amounts of information is as accurate and complete as possible--perhaps even perfect--and constitutes the gold standard by which all searches should be measured." Citing studies, the court stated that "research shows that human review is far from perfect."

The second myth, according to the court, "is the myth of a perfect response." The court stated that the respondent was "seeking a perfect response, but our Rules do not require a perfect response." Specifically, in response to discovery requests, Tax Court Rule 70(f), which is analogous to Federal Rule of Civil Procedure 26(g), "requires the attorney to certify, to the best of their knowledge formed after a 'reasonable inquiry,' that the response is consistent with our Rules, not made for an improper purpose, and not unreasonable or unduly burdensome given the needs of the case." The court stated that "when the responding party is signing the response to a discovery demand, he is not certifying that he turned over everything, he is certifying that he made a reasonable inquiry and to the best of his knowledge, his response is complete."

The court concluded that "it is inappropriate to hold TAR to a higher standard than keywords or manual review." It concluded that "there is no question" that the responding party satisfied its production obligations in using predictive coding.

### *Foreign Adoption of Predictive Coding*

Courts in Ireland, England and Australia approved the use of predictive coding in 2016. In February 2016, the Irish Court of Appeal in *Irish Bank Resolution Corp. v. Quinn* upheld the 2015 decision of the Irish High Court granting a responding party's motion to use predictive coding over the requesting party's

objection. See *Irish Bank Resol. Corp. v. Quinn*, [2015] IEHC 175 (H. Ct.) (Ir.), upheld by the Irish Court of Appeal (see *Court of Appeal Approves use of TAR for Discovery*, McCann Fitzgerald (2016)).

The English High Court in *David Brown v. BCA Trading*, [2016] EWHC (Ch) 1464 (Eng.), approved the use of predictive coding over the objection of the requesting party. And in *Pyrrho Investments Ltd. v. MWB Property Ltd.*, [2016] EWHC (Ch) 256 (Eng.), the parties jointly sought and obtained the approval of the English High Court to use predictive coding.

In Australia, the Federal Court of Australia in *Money Max v. QBE Ins. Group*, [2016] FCAFC 148 (7 November 2016) 3-4 (Austl.), issued the first decision of an Australian court addressing the use of predictive coding. The court ordered the responding party to provide several categories of information about its predictive coding process and for the parties to meet and confer about any disputes regarding the process. Soon thereafter, in *McConnell Dowell v. Santam Ltd*, [2016] VSC 734 (2 December 2016) (Austl.), the Supreme Court of Victoria issued another opinion approving the use of TAR, which the parties had agreed to use and a special discovery master had recommended to the court.

## Vendor Developments

The pace of consolidation of large e-discovery service providers was unprecedented in 2016 compared to prior years.

The acquisitions and combinations were likely needed as large vendors appear to be increasingly squeezed into a relatively narrow market segment, *i.e.*, large-scale litigation and governmental investigations, often with a cross-border element. Larger vendors have distinct advantages in this segment, as they can bring substantial depth in human resources and global coverage.

But technological change, including the availability of relatively inexpensive and secure cloud-based data hosting and e-discovery software available through the cloud on a subscription basis, means that companies and law firms can handle more e-discovery tasks themselves without necessarily requiring the assistance of an e-discovery services provider. This trend is likely to increase with the coming move of the dominant document search and review software to a cloud-based model.

As a result, in many cases, e-discovery service providers will have to compete on the basis of their professional services rather than on their technology and data hosting offerings, which are increasingly commoditized and being provided separately through the cloud by software vendors. Service providers that can offer outstanding professional services, whether the providers are large or small, should benefit. But the days of providers making a large chunk of their profits from data hosting and marking up software costs appear to be numbered.

## Conclusion

In sum, 2016 was a good year for e-discovery. As reflected in many decisions over the course of the year, the long-awaited e-discovery amendments to the Federal Rules of Civil Procedure had a significant salutary effect, particularly in helping to ensure that courts render sanctions decisions in a more consistent and fair fashion and that they rein in excessive and unnecessary discovery. Cost shifting,

# GIBSON DUNN

cooperation and ethics in e-discovery gained the attention of some courts. And the jurisprudence regarding technology-assisted review advanced somewhat, albeit in baby steps. Finally, as always, technological change is impacting the e-discovery vendor market, but in ways that are likely to benefit consumers of e-discovery services.



*The following Gibson Dunn lawyers assisted in the preparation of this client update: Gareth Evans, Jennifer Rearden, Chip Nierlich, Ethan Dettmer, Jessica Brown, Heather Richardson, Jenna Yott, Julian Wolfe Kleinbrodt, and Chelsea Mae Thomas.*

*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. The *Electronic Discovery and Information Law Practice Group* brings together lawyers with extensive knowledge of electronic discovery and information law. The group is comprised of seasoned litigators with a breadth of experience who have assisted clients in various industries and in jurisdictions around the world. The group's lawyers work closely with the firm's technical specialists to provide cutting-edge legal advice and guidance in this complex and evolving area of law. For further information, please contact the Gibson Dunn lawyer with whom you usually work or the following leaders of the *Electronic Discovery and Information Law Practice Group*:*

*Gareth T. Evans - Orange County (+1 949-451-4330, [gevans@gibsondunn.com](mailto:gevans@gibsondunn.com))  
Jennifer H. Rearden - New York (+1 212-351-4057, [jrearden@gibsondunn.com](mailto:jrearden@gibsondunn.com))*

© 2017 Gibson, Dunn & Crutcher LLP

*Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.*