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BNA INSIGHT

The first half of 2010 saw a plethora of decisions refining e-discovery case law and building on past trends in a rapidly-evolving field. Attorneys from Gibson Dunn provide an overview of recent e-discovery developments, based on their analysis of 103 e-discovery decisions issued between January 1 and June 17, 2010.

2010 Mid-Year Report on Electronic Discovery and Information Law




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Like last year, sanctions and cooperation were dominant themes in e-discovery decisions in the first half of 2010. Motions to compel and privilege disputes also continued at a steady pace.

The Cases. Compared to 2009, we noted fewer decisions regarding preservation, form of production, and accessibility of data. Courts have concentrated on more nuanced factual scenarios and discovery disputes arising farther along in the discovery process, such as iterative search terms, protective orders, and the application of Federal Rule of Evidence 502. Decisions analyzing the interplay between the Fourth Amendment and electronic discovery, as well as cases analyzing individuals' reasonable expectations of privacy in various electronic data, appear to be on the rise. Courts have begun to engage in the burgeoning arena of e-discovery in the social media context, as the number of cases recognizing evidence from social networking has exploded.

Courts within every federal circuit have issued at least one e-discovery opinion so far in 2010. We have

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observed a more even distribution of opinions among the circuits, however, as opposed to the prevalence of opinions from the Second and Ninth Circuits that we saw in the past. Even the U.S. Supreme Court decided a case which presented potential e-discovery implications, with its opinion in *City of Ontario v. Quon*, No. 08-1332, 560 U.S. ___ (June 17, 2010), (10 DDEE 196, 6/24/10).

State courts remained involved too, and the New Jersey Supreme Court issued an important opinion concerning the attorney-client privilege and an employee's personal use of an employer-issued computer.

Court Initiatives. Certain courts have taken an active role in providing more guidance and certainty to e-discovery practitioners. For example, the Seventh Circuit has created an Electronic Discovery Pilot Program, which developed Principles Relating to the Discovery of Electronically Stored Information (''Principles'') in order to assist with the administration of the Federal Rules of Civil Procedure (''FRCP'') in the context of e-discovery.

The first phase of the Pilot Program concluded in May, and the second phase is expected to develop final Principles. The Seventh Circuit's Pilot Program, if successful, has the potential to be adopted in other circuits as well.

Civil Rules Amendments? The continued calls for overhauling the FRCP to provide greater guidance amidst the ever-growing complexities of e-discovery are gaining momentum. This topic was a focus of the May 2010 Conference on Civil Litigation, sponsored by the Advisory Committee on Civil Rules at Duke University. Potential amendments to the FRCP represent another area that will likely see further development.

2010 Mid-Year Trends in Sanctions

Of the 103 opinions we analyzed, litigants sought sanctions in 30 percent (or 31 cases)—compared to 42 percent in all of 2009—and received sanctions in 68 percent of those cases (or 21)—compared to 70 percent in all of 2009.

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Monetary. The most frequently awarded sanctions were the costs and fees associated with the discovery dispute itself. Of the 21 cases in which courts imposed some kind of sanction, costs and fees were awarded in 14. *See, e.g.*,*Cherrington Asia Ltd. v. A&L Underground Inc.*, 263 F.R.D. 653, 663 (D. Kan. 2010) (Bostwick, Mag. J.) (imposing sanctions for failing to prepare Rule 30(b)(6) witness to discuss party's e-discovery collection efforts); *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, No. 6:07-cv-0222-Orl-35KRS, 2010 WL 55595, at *6-7 (M.D. Fla. Jan. 5, 2010) (awarding $75,000 in sanctions in addition to partial dismissal of plaintiffs' claim for damages).

Outside Counsel. Courts have continued to impose monetary sanctions on outside counsel for failing to adequately supervise a client's collection and preservation of electronically stored information (''ESI''). In *In re A&M Florida Properties*, the court sanctioned both the client and its outside attorney, noting that although neither had acted in bad faith, sanctions were appropriate because outside counsel ''simply did not understand the technical depths to which electronic discovery can sometimes go.'' No. 09-01162, 2010 WL 1418861, at *6-7 (S.D.N.Y. Apr. 7, 2010)(10 DDEE 188, 6/10/10). Pitting the client and counsel against each other, the court required counsel and the client to provide facts regarding how to ''determine an allocation of the fees and costs among [the client] and its attorneys.'' *Id.* at *7.

By contrast, outside attorneys have escaped sanctions where they could demonstrate ''significant efforts to comply with their discovery obligations,'' even if those efforts fell short. See *Qualcomm, Inc. v. Broadcom Corp.*, No. 05-cv-1958, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010)(10 DDEE 105, 4/15/10) (Major, Mag. J.).

In its 2008 opinion in *Qualcomm*, the magistrate judge levied $8.5 million in sanctions against Qualcomm and referred six of its outside counsel to the California State Bar for failing to search the electronic files of key custodians in connection with issues central to the case. Following a reversal and remand by the district judge, the magistrate judge decided against imposing sanctions on outside counsel after reviewing all the evidence. (The outside attorneys had been permitted to introduce in their defense information that previously was protected by the attorney-client privilege.) The magistrate judge observed, however, that ''[t]here is still no doubt in this Court's mind that this massive discovery failure resulted from significant mistakes, oversights, and miscommunication on the part of both outside counsel and Qualcomm employees.'' *Id.*; *see also Lawson v. Sun Microsystems, Inc.*, No. 1:07-cv-196-RLY-TAB, 2010 WL 503054, at *3 (S.D. Ind. Feb. 8, 2010) (overturning magistrate judge's imposition of monetary sanctions on outside counsel, on ground that attorneys' behavior was not ''wanton'').

Adverse Inference. The most notable and widely reported sanctions cases in the first half of 2010 concerned the imposition of adverse inference sanctions for failure to preserve relevant evidence. These decisions revealed a split in the level of culpability courts will require before imposing this kind of sanction.

In the *Pension Committee* case, Judge Shira A. Scheindlin of the Southern District of New York, author of the famed *Zubulake* opinions, awarded an adverse inference sanction because a party acted with gross neg-

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ligence (as opposed to willfulness) in failing to preserve electronic documents. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 470 (S.D.N.Y. 2010) (10 DDEE 32, 2/1/10). The court reasoned that ''contemporary standards'' of discovery practice rendered the failure to preserve and collect electronic files from key witnesses ''grossly negligent,'' and therefore worthy of the severe sanction of an adverse inference, even without proof of intentional misconduct. *Id.* at 471; *see also Diocese of Harrisburg v. Summix Dev. Co.*, No. 1:07-CV-2283, 2010 WL 2034699, at *1-2 (M.D. Pa. May 18, 2010) (imposing adverse inference despite no allegation of bad faith); *Passlogix, Inc. v. 2FA Tech., LLC*, No. 08 Civ. 10986, 2010 WL 1702216, at *26 (S.D.N.Y. Apr. 27, 2010) (echoing *Pension Comm.* in holding that ''where the spoiling party [is] merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction''); *Kwon v. Costco Wholesale Corp.*, Civ. No. 08-00360, 2010 WL 571941, at *3 (D. Haw. Feb. 17, 2010) (imposing adverse inference sanction because party knew or should have known of relevance of destroyed videotape).

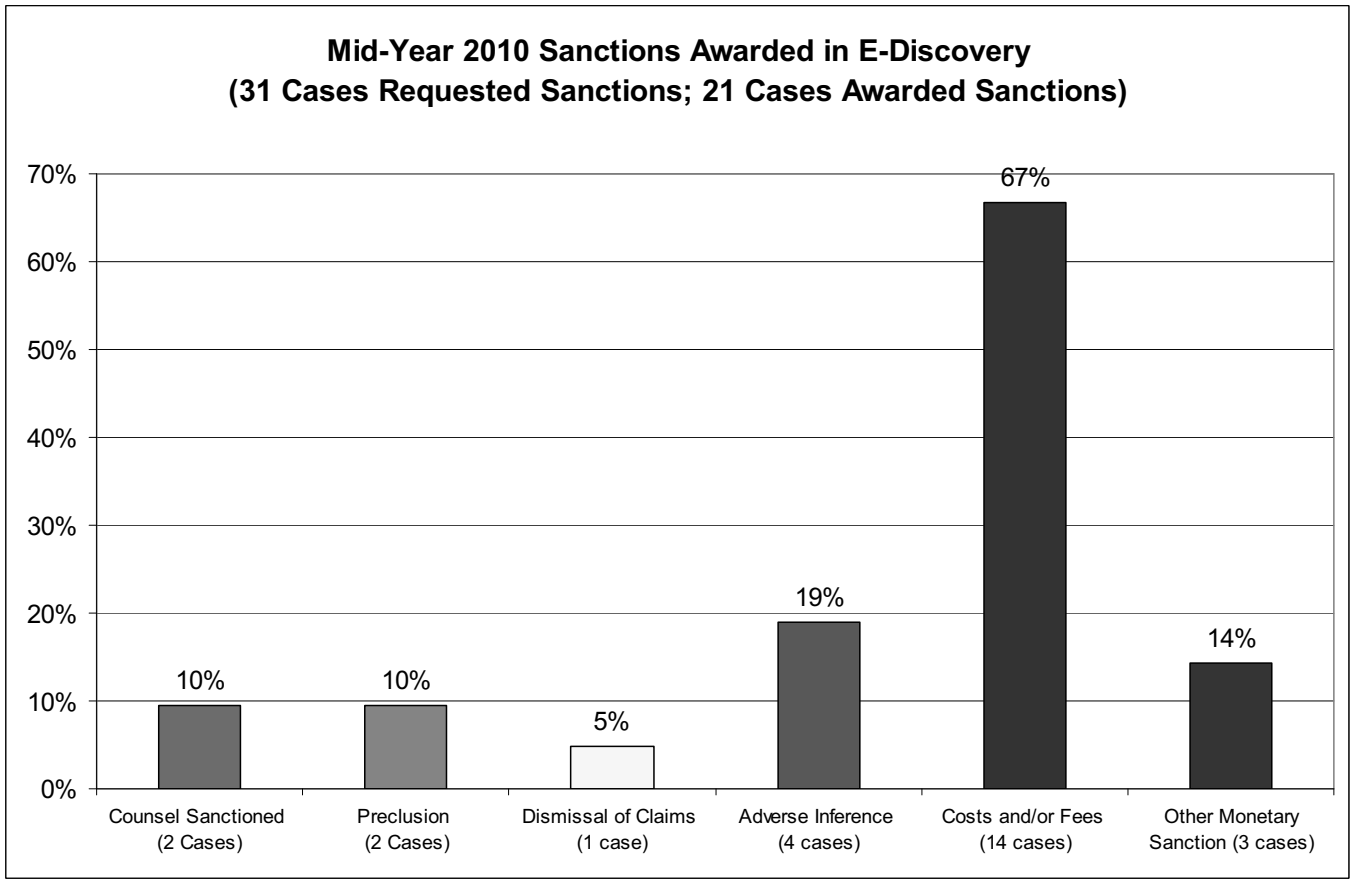
Similarly, in *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009 (FM), 2010 WL 1712236 (S.D.N.Y. Mar. 15, 2010) (Maas, Mag. J.), the court imposed an adverse inference sanction for gross negligence where the defendants had lost all data relevant to a large transaction when a USB drive was erased. *Id.* at *3. The *Wilson* decision declined to apply the protections of Federal Rule of Civil Procedure 37(e), which provides a ''safe harbor'' ''for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system,'' as the erasure occurred outside of any routine document management procedures. *Id.*

'Willfulness' Standard. In contrast with these cases, courts in other circuits have required a showing of willfulness before imposing an adverse inference, and have held that even grossly negligent electronic discovery failures are insufficient to impose such a severe sanction. See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615-17 (S.D. Tex. Feb. 19, 2010) (10 DDEE 57, 3/1/10); *see also OCE N. Am., Inc. v. Brazeau*, No. 09 C 2381, 2010 U.S. Dist. LEXIS 25523 at *19 (N.D. Ill. Mar. 18, 2010) (refusing to impose adverse inference sanction because defendant ''did not know he had the option or ability'' to preserve instant messages until after litigation began and plaintiff had no evidence of harm).

Circuit Split? Judge Lee Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, noted in *Rimkus* that the Fifth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits all appear to require bad faith to impose adverse inference instructions, while the First, Fourth, and Ninth Circuits ''hold that bad faith is not essential . . . if there is severe prejudice.'' *Rimkus*, 688 F. Supp. 2d at 614.

The Second Circuit allows an adverse inference sanction for ''negligent destruction of evidence because each party should bear the risk of its own negligence.'' *Id.* at 615 (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)).

The Third Circuit ''balance[s] the degree of fault and prejudice.'' *Id.* at 614-15.



While acknowledging that *Pension Committee* did a ''great service by laying out a careful analysis of spoliation and sanctions issues in electronic discovery,'' *id.* at 611, Judge Rosenthal observed in *Rimkus* that ''circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the *Pension Committee* approach.'' *Id.* at 615.

Harsh Sanctions Rare. Although courts demonstrated their willingness to impose sanctions on parties and counsel, there appears to be reluctance in most circuits to impose the harsher sanctions of dismissal and adverse inferences, particularly in the absence of intentional misconduct. Only one court thus far in 2010 has granted dismissal or default judgment for electronic discovery shortcomings—and even in that case, the court limited the dismissal to only certain claims and allowed the remainder of the plaintiff's claims to proceed. *Bray & Gillespie*, 2010 WL 55595, at *6.

In *Bray & Gillespie*, the plaintiff failed to produce electronic records in response to a clearly worded request from the defendant and three court orders compelling the plaintiff to produce the records. *Id.* at *5. The court found this conduct ''willful and in bad faith,'' and dismissed with prejudice certain claims relevant to the unproduced records. *Id.* at *6.

2010 Mid-Year Trends in Preservation

The 2010 opinions addressing the preservation of electronic evidence continued to emphasize that the duty to preserve ESI may be triggered before the filing of a complaint. *See, e.g.*, *Pension Comm.*, 2010 WL 184312, at *4 (noting that plaintiff's ability to control timing of lawsuit can trigger plaintiff's duty to preserve evidence prior to litigation); *Crown Castle USA Inc. v. Fred A. Nudd Corp.*, No. 05-CV-6163T, 2010 WL 1286366, at *6, 10 (W.D.N.Y. Mar. 31, 2010) (Payson, Mag. J.) (finding that plaintiff's duty to preserve documents arose several months before litigation commenced when plaintiff began labeling communications as privileged and hired litigation counsel).

There's More Than E-Mail. Courts also continued to hold that parties need to preserve ESI that is stored in formats other than e-mail, including ''outlier ESI'' and ephemeral data that might otherwise be overlooked. *See OCE N. Am.*, 2010 U.S. Dist. LEXIS 25523, at *18 (duty to preserve instant messages); *Passlogix*, 2010 WL 1702216, at *24, 28 (duty to preserve Skype messages); *Wilson*, 2010 WL 1712236, at *2 (duty to preserve USB flash drive).

In the first half of 2010, courts placed increased responsibility on parties and counsel to ensure that preservation measures are effectively implemented. *See, e.g.*, *Pension Comm.*, 685 F. Supp. 2d at 473 (remarking that litigation hold memo must ''direct employees to *preserve* all relevant records'' and noting that counsel should ''specifically instruct'' parties not to destroy their records (emphasis in original)); *Jones v. Bremen High Sch. Dist. 228*, No. 08 C 3548, 2010 WL 2106640, at *10 (N.D. Ill. May 25, 2010) (Cox, Mag. J.)(10 DDEE 205, 6/24/10) (imposing sanctions where in-house counsel relied on employees to self-identify whether to preserve documents); *John B. v. Goetz*, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *85 (M.D. Tenn. Jan. 28, 2010) (concluding that ''even if the . . . litigation hold memorandum were distributed, there was not any implementation of its provisions,'' constituting gross negligence).

Put It in Writing. Several courts emphasized that the litigation hold must be written (as opposed to oral) and communicated to all key employees. Judge Scheindlin in *Pension Comm.* went so far as to presume that relevant documents had been destroyed where a proper litigation hold was not implemented. *See, Pension Comm.*, 685 F. Supp. 2d at 463 (opining that where a party ''fail[s] to timely institute written litigation holds, there can be little doubt that some documents were lost or destroyed.'').

Similarly, in *Crown Castle* the court found that the failure of outside and inside counsel to undertake any efforts ''to implement'' a litigation hold constituted gross negligence. *Crown Castle*, 2010 WL 1286366, at *13; *see also Melendres v. Arpaio*, No. CV-07-2513, 2010 WL 582189, at *7 (D. Ariz. Feb. 12, 2010) (same).

Applying Standards. Historically, the propriety of preservation efforts had been judged in a fact-specific manner according to what was reasonable under the circumstances of a given case. Reflecting the maturation of e-discovery law, courts this year have stated that, going forward, what is reasonable will be judged instead according to ''clearly established applicable standards,'' *Rimkus*, 2010 WL 645253, at *6, which ''have been set by years of judicial decisions.'' *Pension Comm.*, 685 F. Supp. 2d at 464.

According to Judge Scheindlin, the failure to take certain actions will almost certainly constitute gross negligence, including ''issu[ing] a litigation hold; identify[ing] all of the key players and ensur[ing] that their electronic and paper records are preserved; ceas[ing] the deletion of e-mail or preserv[ing] the records of former employees that are in a party's possession, custody, or control; and preserv[ing] backup tapes when they are the sole source of relevant information.'' *Id.* at 471.

Another court noted that parties would be well advised to proactively document all specific preservation efforts they have taken. *See Crown Castle*, 2010 WL 1286366, at *12 (noting that record failed to reveal steps taken to implement litigation hold and issuing monetary sanctions).

2010 Mid-Year Trends in Search Methodology

The growing body of law regarding the adequacy of search terms reflects that courts are increasingly examining the mechanics of e-discovery. So far this year, several courts have refused to compel productions where the requesting party could not justify its proposed search terms. *See, e.g.*, *Seger v. Ernest-Spencer, Inc.*, No. 8:08CV75, 2010 WL 378113, at *9 (D. Neb. Jan. 26, 2010) (Thalken, Mag. J.) (denying motion to compel where defendant failed to show relevance of information sought by each of its 24 proposed search terms); *Bellinger v. Astrue*, CV-06-321 (CBA), 2010 WL 1270003, at *6-7 (E.D.N.Y. Apr. 1, 2010) (Gold, Mag. J.) (denying motion to compel where plaintiff offered no reason for propounding broad range of search terms long after initial searches were conducted and results culled).

One court sanctioned a requesting party that refused to ''reasonably narrow'' document requests through specific search terms or place limits on the number of

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custodians whose files would be searched, despite the responding parties' ''numerous attempts'' to meet and confer. *See Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 683, 692-93 (N.D. Ga. 2010).

Choosing Search Terms. Several courts nevertheless declined to take an active role in the design of search terms or specific search methodology. In a dispute over keyword search techniques, one court observed that ''[n]either lawyers nor judges are generally qualified to opine that certain search terms or files are more or less likely to produce information than those keywords or data actually used or reviewed.'' *Eurand, Inc. v. Mylan Pharms., Inc.*, 266 F.R.D. 79, 84 (D. Del. Apr. 13, 2010) (Thynge, Mag. J.). While the court ordered the producing party to conduct another search, it refused to ''enter the wilderness of keyword search usage and is not directing the appropriate search terms for plaintiffs to employ.'' *Id.* at 85 n.31. This echoes similar discomfort expressed last year in *William A. Gross Constr. Assocs. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 135-36 (S.D.N.Y. 2009) (Peck, Mag. J.)(9 DDEE 107, 4/1/09) and *United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (Facciola, Mag. J.)(8 DDEE 64, 3/1/08).

Fourth Amendment Cases. In a growing number of Fourth Amendment cases involving e-discovery, courts tended to uphold the government's search of ESI even where a search warrant lacked particularized search methodologies. *See United States v. Kernell*, No. 3:08-CR-142, 2010 WL 1491873, at *7-9, *14 (E.D. Tenn. Mar. 31, 2010)(Shirley, Mag. J.)(10 DDEE 148, 5/13/10)(holding that forensic analysis of data on defendant's computer did not violate Fourth Amendment, even though search warrant did not contain written search methodology); *United States v. Blake*, No. 1:08-cr-0284 OWW, 2010 WL 702958, at *4 (E.D. Cal. Feb. 25, 2010) (stating it would be ''unrealistic'' to require that warrant specify ''a particular program or specific search terms''); *United States v. Bowen*, No. S1 07 Cr. 961 (LBS), 2010 WL 710829, at *3 (S.D.N.Y. Feb. 17, 2010) (''Courts are ill-suited to constrain law enforcement to certain search-terms or methodologies in advance'' and Fourth Amendment does not require search warrant to specify computer search methodology).

2010 Mid-Year Trends in Cooperation

Courts continue to urge counsel to avoid or resolve discovery disputes through cooperation, often explicitly relying on The Sedona Conference® Cooperation Proclamation (''Cooperation Proclamation''). *See Home Design Servs., Inc. v. Trumble*, 09-cv-00964, 2010 WL 1435382, at *5 (D. Colo. Apr. 9, 2010) (Shaffer, Mag. J.) (quoting Cooperation Proclamation and stating that counsel ''bear a professional responsibility to conduct discovery in a diligent and candid manner''); *JSR Micro, Inc. v. QBE Ins. Corp.*, C-09-03044, 2010 WL 1338152, at *3 (N.D. Cal. Apr. 5, 2010) (Laporte, Mag. J.) (citing Cooperation Proclamation in holding that proper response to uncertainty in definition of term in 30(b)(6) notice would have been to meet and confer rather than ''to unilaterally assume a narrow interpretation''); *Cartel Asset Mgmt v. Ocwen Fin. Corp.*, 01-cv-01644, 2010 WL 502721, at *14 (D. Colo. Feb. 8, 2010) (Shaffer, Mag. J.) (instructing counsel ''to work together consistent with . . . *The Cooperation Proclamation*'')(10 DDEE 62, 3/1/10); *Bldg. Erection Servs. Co. v. Am. Bldgs. Co.*, 09-2104, 2010 WL 135213, *1 (D. Kan. Jan. 13, 2010) (Waxse, Mag. J.) (directing counsel to read Cooperation Proclamation to understand their obligations to work cooperatively).

Even when not specifically citing the Cooperation Proclamation, courts encouraged parties to reach agreement on solutions to e-discovery problems. *See, e.g., Burt Hill, Inc. v. Hassan*, No. Civ. A. 09-1285, 2010 WL 419433, at *8, *10 (W.D. Pa. Jan. 29, 2010) (Bissoon, Mag. J.) (ordering parties to meet and confer on scope of defendants' request and search terms) (10 DDEE 36, 2/1/10); *Ross v. Abercrombie & Fitch Co.*, Nos. 2:05-cv-0819, *et al.*, 2010 WL 1957802, at *13 (S.D. Ohio May 14, 2010) (Kemp, Mag. J.) (ordering parties to meet and confer to devise search protocol).

Form of Production. An area ripe for increased cooperation is the form of production of ESI, notwithstanding the explicit requirement in Federal Rule of Civil Procedure 26(f) that parties address form of production in their proposed discovery plan.

Recent decisions reinforce that specifying the form of production in discovery protocols or requests for production could avoid many disputes. *See Secure Energy, Inc. v. Coal Synthetics*, 4:08CV01719, 2010 WL 597388, at *4 (E.D. Mo. Feb. 17, 2010)(10 DDEE 89, 4/1/10) (denying plaintiff's motion to compel production of engineering drawings in native format because plaintiff did not specify native production, and defendants ''fulfilled their discovery obligations by producing the engineering documents in PDF'').

One court required re-production in native format, showing little patience for a party that had produced spreadsheets and e-mails in a printed format ''for no apparent reason other than to make searching their content much more difficult.'' *Covad Commc'ns Co. v. Revonet, Inc.*, 06-1892, 2010 WL 1233501, at *3 (D.D.C. Mar. 31, 2010) (Facciola, Mag. J.).

2010 Mid-Year Trends in Proportionality

Courts continued to demonstrate an awareness of the burdens associated with collecting, searching, and producing ESI. In evaluating claims of burden thus far in 2010, courts have often relied on statements from parties' technical consultants, suggesting that parties would do well to submit such statements in disputes over burden. *See, e.g., Universal Delaware, Inc. v. Comdata Corp.*, 07-1078, 2010 WL 1381225, *7 (E.D. Pa. Mar. 31, 2010) (Perkin, Mag. J.) (relying on opinion of ''electronic evidence consultant'' for advice on construction of least-expensive search database) (10 DDEE 150, 5/13/10); *Seger*, 2010 WL 378113, at *8 (reviewing affidavit from ''the Director of Information Technology and Architecture'' that production requests are ''overly broad'' and would be ''costly''); *Rodriguez-Torres v. Gov't Dvlp't Bank of Puerto Rico,*, 265 F.R.D. 40, 44 (D.P.R. Jan. 20, 2010) (10 DDEE 65, 3/1/10)(citing consultant's report regarding cost of producing requested ESI).

Undue Burden. Where litigants made a sufficient showing of undue burden—*e.g.*, that the expense was disproportionate to the anticipated benefit—courts denied discovery. *See, e.g., Rodriguez-Torres*, 265 F.R.D. at 44 (denying plaintiff's motion to compel production of e-mails over 3-year period on grounds that ''the ESI

requested is not reasonably accessible because of the undue burden and cost'').

Courts also ordered limitations on the number of search terms, the number of custodians, and the length of time covered. *See, e.g.*, *Edelen*, 265 F.R.D. at 693; *Rosenbaum v. Becker & Poliakoff, P.A.*, 08-CV-81004, 2010 WL 623699, at *9 (S.D. Fla. Feb. 23, 2010) (Johnson, Mag. J.) (applying ''rule of proportionality'' to limit defendant's search for responsive documents to 6-month period, rather than plaintiff's requested 18-month period).

2010 Mid-Year Trends in Privilege Waiver

Courts continued to interpret the requirements of Federal Rule of Evidence 502, enacted in 2008 to provide uniform rules governing the waiver of attorney-client privilege and work product protection due to inadvertent disclosure of privileged communications. Several decisions addressed Rule 502(b), which provides that disclosure of privileged or protected material is not a waiver if the disclosure is ''inadvertent,'' the holder of the privilege or protection took ''reasonable steps to prevent the disclosure,'' and upon discovery the holder ''promptly took reasonable steps to rectify the error.''

Defining 'Reasonable Steps.' Under the second element of Rule 502(b)—whether a party took ''reasonable steps'' to prevent disclosure—courts continued to develop methods to analyze whether a party reasonably designed its production methodology. In doing so, courts have considered the volume of documents produced as compared to the number of inadvertent disclosures; the use of third-party vendors and software to assist the review and production; and the use and reliability of keyword searches. *See, e.g.*, *Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, No. 3:09-CV-00481, 2010 WL 1990555, at *13 (S.D. W. Va. May 18, 2010) (Stanley, Mag. J.) (holding that precautions taken to prevent disclosures were not reasonable, as large number of inadvertent disclosures demonstrated lack of care, and party had failed to test keyword searches by appropriate sampling, therefore waiving any protections under Rule 502(b) (10 DDEE 187, 6/10/10)); *Edelen*, 265 F.R.D. at 682 (holding no waiver under Rule 502(b) ''[g]iven that only four pages out of a more than 2000 page production were privileged [and] the documents were checked by three different attorneys prior to production'').

2010 Mid-Year Trends in Employer/Employee Data Privacy

Two notable cases from the first half of 2010 addressed the issue of electronic communications in the employment context. These cases highlight the importance of an employer's technology usage policy to determine whether employees have a reasonable expectation of privacy in their electronic communications.

Stengart. In March, the Supreme Court of New Jersey decided *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010) (10 DDEE 109, 4/15/10), and held that the attorney-client privilege protected e-mail messages sent by an employee-plaintiff to her attorney on her work-issued laptop through a personal, web-based e-mail account.

The court also held that the employer-defendant's attorneys could be subject to sanctions because they had read the e-mails and failed to notify the plaintiff. The employer's technology-usage policy warned that e-mails were ''not to be considered private or personal,'' but did not address personal, web-based e-mail accounts, and also permitted ''occasional'' personal e-mail use. *Id.* at 657.

The court further held that the employee had a reasonable expectation of privacy in her e-mails due to (1) the ambiguity in the technology usage policy; (2) her use of a personal, password-protected, web-based e-mail account; and (3) the reasonable steps she took to keep her attorney-client discussions confidential, including not saving her password on her work computer. *Id.* at 665. Indeed, noting ''the important public policy concerns underlying the attorney-client privilege,'' the court expressed doubt whether any technology-usage policy could trump attorney-client privilege in this situation. *Id.*

Quon. Additionally, on June 17, the United States Supreme Court decided *City of Ontario v. Quon,*No. 08-1332, 560 U.S. ___ (June 17, 2010) (10 DDEE 196, 6/24/10).

Quon involved a SWAT-team member who had used his city-issued, text-messaging pager for personal communications. No official city policy governed use of the pagers in particular, but the city's general technology usage policy specified that e-mail and Internet usage would be monitored. The formal policy, however, was accompanied by an informal policy that supervisors would not audit employees' text messages as long as the employees paid any overage fees. After a supervisor requested transcripts of Quon's text messages, Quon sued, alleging, among other claims, violations of the Stored Communications Act and the Fourth Amendment.

On appeal, the Ninth Circuit held that users of text messages have a reasonable expectation of privacy in the content of their text messages, analogizing text messages to letters and e-mails. In particular, the Ninth Circuit held that the ''operational realities'' of the employer—which had given employees reason to believe that their text messages would not be audited as long as they paid any overage fees—created a reasonable expectation of privacy for the employee, despite the employee's assent to a contrary formal policy. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 907 (9th Cir. 2008). The Ninth Circuit held that the city's search of Quon's text messages was not reasonable in scope. *Id.* at 908.

In an opinion authored by Justice Kennedy, the Supreme Court reversed and held that the city's search of the text messages was reasonable. The court declined, however, to address the privacy expectations of employees using employer-provided communications devices. The court cautioned against the judiciary ''elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.'' *Quon*, No. 08-1332, slip op. at 10. Fearing that a ''broad holding concerning employees' privacy expectations vis-á-vis employer-provided technological equipment might have implications for future cases that cannot be predicted,'' the court decided the case on narrow grounds by assuming *arguendo* that Quon had a reasonable expectation of privacy in his text messages

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before finding the city's search to be reasonable. *Id*. at 12.

The court's ruling in *Quon* revealed the court's hesitancy to tackle issues of privacy relating to emerging technologies. As Justice Kennedy explained: ''[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior . . . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.'' *Id*. at 11.

Justice Scalia took a contrary view in his concurrence, stating that ''[a]pplying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. . . . The-times-they-are-a-changin' is a feeble excuse for disregard of duty.'' *Quon*, No. 08-1332, slip op. at 2 (Scalia, J., concurring in judgment).

Although *Quon* failed to offer new guidance on key areas of best practices and principles for technology and information management, it highlights the importance of employer technology usage policies. A prudent employer may wish to expressly include text messaging (or other forms of electronic communications) in its written technology usage policies or else risk waiving its right to audit such data.

Furthermore, the Supreme Court has left the door open for other courts to address the issue of an employee's right to privacy in his or her electronic communications.

2010 Mid-Year Trends in Social Networking and E-Discovery

Information found on social networking sites continues to appear regularly as evidence in courtrooms around the country in both civil and criminal cases. In a termination of parental rights case, the child's use of inappropriate language on Facebook after midnight was offered as proof of lack of parental supervision. *In re S.A.*, No. 10-0203, 2010 WL 1881524, at *2 (Iowa Ct. App. May 12, 2010).

In *Evans v. Bayer*, a high school student successfully claimed that her free speech rights were violated when she was suspended for creating a group on Facebook entitled ''Ms. Sarah Phelps is the worst teacher I've ever met.'' 684 F. Supp. 2d 1365, 1377 (S.D. Fla. 2010) (Garber, Mag. J.). The court held that the student's right to off-campus free speech was clearly established, even if a social networking website was a novel medium. *Id.* at 1375; *see also Partee v. United Recovery Group,* No. CV 09-9180, 2010 WL 1816705, at *2 (C.D. Cal. May 3, 2010) (introducing evidence from plaintiff's MySpace page); *Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ.*, No. 07 C 1586, 2010 WL 1781771, at *6 (N.D. Ill. Apr. 29, 2010) (noting number of people joining Facebook page as evidence); *United States v. Gagnon*, No. 10-52-B-W, 2010 WL 1710066, at *3 (D. Me. Apr. 23, 2010) (Kravchuk, Mag. J.) (accepting evidence from Facebook page); *Sedie v. United States,* No. C-08-04417, 2010 WL 1644252, at *23 (N.D. Cal. Apr. 21, 2010) (Laporte, Mag. J.) (introducing evidence from plaintiff's MySpace and Facebook pages to dispute personal injury claims); *Steinberg v. Young*, No. 09-11836, 2010 WL 1286606, at *7-8 (E.D. Mich. Mar. 31, 2010) (accepting evidence from LinkedIn profile); *United States v. Beckett*, No. 09-10579, 2010 WL 776049, at *2 (11th Cir. Mar. 9, 2010) (accepting evidence from MySpace page).

Courts that have considered the issue acknowledge that discovery from social networking sites might carry different privacy concerns than traditional discovery. In *EEOC v. Simply Storage Management, LLC*, No. 1:09-cv-1223 (S.D. Ind. May 11, 2010) (Lynch, Mag. J.), the defendant sought discovery from the plaintiffs' Facebook and MySpace accounts, because plaintiffs' ''emotional health'' was in issue. *Id.* at 3. The court allowed the discovery, observing that ''[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social networking] content.'' *Id.* at 8.

Plaintiffs and defendant disagreed on the scope of information to be discovered, with plaintiffs fearing that the information discovered could embarrass them. *Id.* at 12. The court discounted this argument, noting that the production of information posted to Facebook or MySpace had already been shared ''with at least one other person through private messages or a larger number of people through postings.'' *Id.*

In another case where a party raised privacy concerns about the public dissemination of photographs she had already posted to her Facebook account, the magistrate judge offered to create a Facebook account for himself ''[i]f [the parties] will accept the Magistrate Judge as a 'friend' on Facebook for the sole purpose of reviewing photographs and related comments *in camera*.'' *Barnes v. CUS Nashville, LLC*, No. 3:09-cv-00764, 2010 WL 2265668, at *1 (M.D. Tenn. June 3, 2010) (Brown, Mag. J.).

While to our knowledge no court has yet imposed an obligation to preserve and search electronic data located on social networking sites, we expect that such decisions may not be far off.

2010 Mid-Year Trends in Cross-Border and International Discovery

We have observed an increasing trend of United States courts compelling cross-border discovery from both parties and non-parties, even where foreign law bars production of the information. In three decisions involving blocking statutes from foreign countries, courts ordered the requested discovery over the objection that foreign law prohibited the disclosure. *See AccessData Corp. v. ALSTE Techs.*, No. 2:08cv569, 2010 WL 318477, at *7 (D. Utah Jan. 21, 2010) (Warner, Mag. J.) (ordering party discovery from Germany); *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458, 2010 WL 808639, at *8 (S.D.N.Y. Mar 8, 2010) (Katz, Mag. J.)(ordering non-party discovery from Malaysia); *In re Air Cargo Shipping Srvs. Antitrust Litig.*, No. 06-MD-1775, 2010 WL 1189341, at *5 (E.D.N.Y. Mar. 29, 2010) (Pohorelsky, Mag. J.)(ordering party discovery from France).

In *AccessData* and *Air Cargo*, defendants each resisted document requests by claiming that the blocking statutes of Germany and France, respectively, barred the discovery. In each case, the court reaffirmed that ''[i]t is well settled that such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.'' *AccessData*, 2010 WL 318477, at *2 (quoting *Societe Nationale Industrielle Aerospatiale v. United States*

District Court, 482 U.S. 522, 544 (1987)); *Air Cargo*, 2010 WL 1189341, at *1 (citing same).

The *Gucci* decision is particularly notable in that it involved discovery sought from a non-party, as courts are generally less willing to impose burdens on non-parties. *Gucci Am.*, 2010 WL 808639, at *2. The plaintiff sought documents from the parent of a Malaysian bank, which objected on the grounds that disclosure of the documents could result in a three-year prison sentence or $900,000 fine under Malaysian banking law. *Id.* at *7. The U.S. court balanced the possibility of criminal sanctions against the plaintiff's need for the documents and ability to get the information from other sources, and concluded that the documents should be produced.

As for the potential hardship to the non-party, the court stated that, ''[w]hile the penalties are not insignificant, the Court cannot conclude that the prospect of significant hardship is anything more than mere speculation.'' *Id.* Without any compelling evidence that the blocking statute would in fact be enforced against the non-party, the court discounted the potential hardship. When several weeks later the non-party still had not complied with the order, the court held the non-party in contempt and subjected it to a daily fine of $10,000.00. *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458 (RJS) (S.D.N.Y. May 28, 2010).

2010 Mid-Year Trends in Government E-Discovery Responsibilities

Courts have continued to treat the government no differently from private parties in the e-discovery context, suggesting they do not believe that the government has any duties or responsibilities distinct from those of private litigants. *See Melendres*, 2010 WL 582189, at *6 (refusing to distinguish local sheriff's office from private entities when applying sanctions for document destruction); *MVB Mortgage Corp. v. FDIC*, No. 2:08-cv-771, 2010 WL 582641, at *4 (S.D. Ohio Feb. 11, 2010) (Kemp, Mag. J.)(10 DDEE 61, 3/1/10) (including FDIC in requirement to produce otherwise privileged e-mails released to expert witnesses); *Gerber v. Down East Community Hospital*, 266 F.R.D. 29, 35-36 (D. Me. 2010) (Kravchuk, Mag. J.)(10 DDEE 124, 4/29/10) (imposing identical ESI privilege log obligations on government and private parties).

Fourth Amendment. We have observed a growing number of cases in which courts have struggled to define the scope of Fourth Amendment limitations on the government's power to collect and review electronic information. A number of decisions examined the extent of a user's reasonable expectations of privacy when sharing information electronically. For example, courts have continued to hold that no reasonable expectation of privacy exists in files accessed from peer-to-peer file sharing networks. *See United States v. Borowy*, 595 F.3d 1045, 1048 (9th Cir. 2010) (10 DDEE 91, 4/1/10); *United States v. Ladeau*, Crim. No. 09-40021-FDS, 2010 WL 1427523, at *5 (D. Mass. Apr. 7, 2010) (10 DDEE 122, 4/29/10).

E-Mail. Courts also considered whether a reasonable expectation of privacy exists in e-mail correspondence, and concluded that it does not. In *Rehberg v. Paulk*, the Eleventh Circuit held that a person ''loses a reasonable expectation of privacy in e-mails, at least after the e-mail is sent to and received by a third party.'' 598 F.3d 1268, 1281 (11th Cir. 2010) (10 DDEE 107, 4/15/10).

Although not a Fourth Amendment case, a New York court opined that ''the concept of internet privacy is a fallacy upon which no one should rely,'' and while ''some may view e-mails as tantamount to a postal letter which is afforded some level of privacy . . . in general, e-mails are more akin to a postcard, as they are less secure and can easily be viewed by a passerby.'' *People v. Klapper*, No. 2009NY032282, 2010 WL 1704796, at *1, *5 (N.Y. City Crim. Ct. Apr. 28, 2010) (10 DDEE 148, 5/13/10).

Circuit Split. The first half of 2010 saw two circuit splits on Fourth Amendment e-discovery issues.

First, in *United States v. King*, the Third Circuit held that where an owner of a computer consented to its seizure, a device owned by a third party that was installed on that computer (such as a hard drive) also could be seized and searched, despite that third party's objection. No. 09-1861, 2010 WL 1729733, at *7 (3d Cir. Apr. 30, 2010) (10 DDEE 147, 5/13/10). This opinion limited the Supreme Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), which had held that a present and objecting resident can override another resident's consent to search, to residences *only* and not personal property. 2010 WL 1729733, at *5-6. In so holding, *King* explicitly disagreed with the Ninth Circuit's holding in *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008), which had interpreted *Randolph* to include not only residences but also personal property. 2010 WL 1729733, at *7.

Second, both the Seventh and Fourth Circuits issued opinions that contrasted with last year's Ninth Circuit decision in *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (9 DDEE 272, 9/1/09).

In *United States v. Mann*, the Seventh Circuit determined that a ''plain view'' exception existed in searches of computers using forensic software where the search exceeded the scope of the warrant. 592 F.3d 779, 782-85 (7th Cir. 2010) (10 DDEE 63, 3/1/10). The court stated that the problem inherent in attempting to strictly limit computer searches to fit within the direct scope of a warrant is ''in the fact that [the sought images] could be nearly anywhere . . . [and] may be manipulated to hide their true contents.'' *Id.* at 782.

The Fourth Circuit also found a ''plain view'' exception in *United States v. Williams*, 592 F.3d 511 (4th Cir. 2010). There, the court expressly rejected the Tenth Circuit's opinion in *United States. v. Carey*, 172 F.3d 1268 (10th Cir. 1999), which had held that the inadvertence requirement of the plain view exception disallowed the search of computers and electronic media when evidence indicated that the officer's actual purpose was to use the warrant to find ''unauthorized'' evidence. *Williams*, 592 F.3d at 522. The panel held that *Carey* directly conflicted with Supreme Court precedent holding that the scope of a warrant is defined objectively by its terms and not by an officer's subjective expectations. *Id.* (citing *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

First Amendment. In two First Amendment decisions, courts denied subpoena requests to obtain from internet service providers the identity of parties anonymously posting controversial electronic communications. *See A.Z. v. Doe*, No. A-5060-08T3, 2010 WL

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816647, at *1 (N.J. Mar. 8, 2010) (applying strict standard to hold that First Amendment did not allow issuance of subpoena to retrieve identity of anonymous e-mail sender sought in defamation claim); *McVicker v. King*, No. 02-09-cv-00436, 2010 WL 597468, at *8 (W.D. Pa. Mar. 3, 2010) (quashing subpoena request on First Amendment grounds).

Addressing the Fifth Amendment's testimonial privilege, the court in *Burt Hill* held that this privilege did not attach to electronic documents whose existence and exact location were a foregone conclusion. 2010 WL 55715, at *2-3.

Conclusion. This year has already been an exciting one for e-discovery developments and we look forward to reporting on additional trends at year-end.