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LATEST DEVELOPMENTS

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2014 Mid-Year eDiscovery Update: Is This the 'Year of Technology' in eDiscovery?

By Gareth Evans and Jennifer Rearden[1]

The Great Leap Forward In eDiscovery Technology

Electronic Discovery is being impacted like never before by the revolution in big data analytics and new forms of communicating and interacting, such as text messaging, instant messaging and social media—so much so that if current trends continue through the second half of the year, which we expect, then 2014 will be, in our view, the "year of technology" in eDiscovery.

The availability and increased use of powerful new data analytics tools for investigating and identifying the important facts early in a matter are a major development. Big data analytics capabilities that are now being incorporated into some eDiscovery applications may provide powerful insights into large document populations and significant advantages to those who effectively use them.

Replacement for ECA Apps? Visual analytics is one such smart technology that appears to provide capabilities that "early case assessment" or "ECA" applications promised a few years ago but largely did not deliver—*i.e.*, allowing early analysis of a large document population and finding important facts promptly.

Unlike earlier ECA tools, which generally provided relatively limited information about the document population based on metadata, visual analytics tools use latent semantic analysis and other algorithms to analyze the content of documents and group them by various criteria, such as their subject matter and context. These tools can provide visual summaries of the grouped documents that the user can then use to "drill down" to various levels, including individual documents.

Parties seeking to use predictive coding (or to compel its use by the other side) may be well advised not to raise the issue late in the document review and discovery process.

Predictive Coding. Predictive coding also offers the potential for more efficient review of large document volumes, but it is not appropriate in all cases. Although predictive coding technology has been around for several years, few decisions about it have been reported.

Anecdotal evidence suggests, however, that it is more frequently being considered as a methodology for review. That said, at this point the use of predictive cod-

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ing has not become widespread—far from it. Yet litigants and their counsel appear to be gaining more familiarity with predictive coding as an option, and also with the types of factors that should be considered in weighing whether it might be appropriate for their cases.

Various courts' favorable statements about the technology this year (and in the past) also may have allayed some concerns on the part of companies and their counsel regarding the technology.

For example, in *Federal Housing Finance Agency v. JPMorgan Chase & Co., Inc., et al.*, 2014 WL 584300, at *3 (SDNY Feb. 14, 2014), District Judge Denise Cote indicated in a reported decision this year that she had approved the use of predictive coding over the objections of the plaintiff at a hearing earlier in the case. At that earlier hearing, Judge Cote is quoted in the transcript as having stated that:

> ''predictive coding should be given careful consideration in a case like this, and I am absolutely happy to endorse the use of predictive coding and to require that it be used as part of the discovery tools available to the parties.'' *Id.* (transcript of Jul. 24, 2012 hearing at 8).

Additionally, in *Progressive Casualty Ins. Co. v. Delaney*, 2014 BL 203138, at *10 (D. Nev., July 18, amending order entered May 19, 2014), Magistrate Judge Peggy Leen described in very positive terms the potential effectiveness of predictive coding and stated that she would not have hesitated to approve a predictive coding protocol, had it been submitted earlier in the case.

The *Progressive* decision highlights, however, that parties seeking to use predictive coding (or to compel its use by the other side) may be well advised not to raise the issue late in the document review and discovery process.

The parties in *Progressive* had previously agreed to a protocol that provided for the use of search terms and human review, not predictive coding. Several weeks before the discovery cutoff, and in opposition to a motion to compel, the plaintiff unveiled its proposal to use predictive coding to review the 565,000 documents that hit the agreed-upon search terms. The court rejected the plaintiff's proposal, holding that it could not unilaterally and at such a late time ''abandon'' the search-terms-plus-human-review protocol to which it had previously agreed. *See id.* at *9-11.

Information Governance Remains A High Priority

Information governance and defensible deletion of unnecessary data have remained hot topics for companies in the first half of 2014. While technology assisted review seeks to address the burdens and costs associated with large document volumes in the eDiscovery process, information governance seeks to deal with the problem by implementing policies, procedures and technologies that enable companies to delete in a defensible manner and no longer hoard data that they neither need nor are required to keep. Recent studies have shown that, on average, 70 percent of the data companies keep is unnecessary.

Developing an effective information governance program usually means taking a multi-disciplinary approach that breaks through the silos of legal, records and information management, and IT departments, and then implementing reliable, repeatable systems and processes for the disposal of data that no longer has a business or legal purpose.

One of the significant trends this year has been an increasing interest in using predictive coding and other analytics tools to automatically classify documents for retention or disposal.

Technology may be a key component of an effective information governance program. Tools are becoming available that inject transparency into the data on companies' information systems and allow actions—whether retention, archiving or disposal—to be taken regarding the data. One of the significant trends this year has been an increasing interest in using predictive coding and other analytics tools to automatically classify documents for retention or disposal.

Text and Instant Messaging

Text and instant messages have become an increasingly common form of communication and may be the subject of litigation holds and discovery requests when they are relevant to the issues in dispute. Of course, many or even all of these messages, even in the work context, may be non-substantive and personal, as texts and IMs tend to be used for particularly informal communications.

As discovery disputes involving text and instant messages have increased, however, so have decisions regarding whether a duty existed to preserve and produce this type of data under the circumstances of the case. *See, e.g.*, *Calderon v. Corporacion Puertorrique a de Salud*, 2014 BL 12645 at *2, 121 FEP Cases 941, (D.P.R. Jan. 16, 2014) (finding the plaintiff had a duty to preserve text messages on his phone relevant to his discrimination claim); *Ewald v. Royal Norwegian Embassy*, 2013 BL 323394 (D. Minn. Nov. 20, 2013) (holding that the plaintiff was entitled to discovery of text and voice messages contained on the company-issued mobile phone of the defendant's employee).

In *Hosch v. BAE Systems Information Solutions, Inc.*, 2014 BL 114226, at *1 (E.D. Va. Apr. 24, 2014), for example, the court adopted the magistrate judge's findings that the plaintiff had engaged in a series of intentional and bad faith discovery violations, including the permanent deletion of all text messages and voice mails, by wiping his iPhone just two days before turning it over to counsel. The court dismissed the plaintiff's action with prejudice and awarded the defendant attorney's fees and costs incurred in bringing motions to compel and a motion for sanctions. *Id.*

Mobile Devices

In a landmark decision, the U.S. Supreme Court unanimously held in *Riley v. California* on June 25, 2014, that the Fourth Amendment generally requires law enforcement to obtain a warrant before reviewing

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digital information that is stored on a smart phone seized incident to arrest. In its opinion, the Court emphasized the privacy interests involved, stating that ''it is no exaggeration to say that more than 90% of American adults who own a cellphone keep on their person a digital record of nearly every aspect of their lives.'' *See Riley v. California*, No. 13-123, slip op. at 9, 19-20 (June 25, 2014).

While the impact of the Supreme Court's decision on eDiscovery in civil litigation remains to be seen, it has already been cited in at least one lower court decision denying the plaintiffs' request to inspect the data from the cell phones of several of the defendant's employees on the ground that the request was overly broad and too intrusive. *See Bakhit v. Safety Marking, Inc.*, 2014 BL 178367 at *3 (D. Conn. Jun. 26, 2014).

Social Media

The number of cases focusing on the discovery of social media continued to skyrocket in the first half of 2014. Reflecting that the use of social media continues to proliferate in business and social contexts, courts and commentators alike have noted that discovery of social media is now routine. Courts are still struggling, however, to develop rules and protocols applicable to social media evidence, including whether special authentication rules should govern social media evidence, and what threshold showing of relevance must be made before discovery of personal social media data should be allowed.

Maryland Versus Texas? Courts have taken two basic approaches to the authentication of social media evidence, which the Delaware Supreme Court recently coined ''the Maryland approach'' and ''the Texas approach.'' *Parker v. State*, 85 A.3d 682, 684 (Del. 2014).

The Maryland approach consists of three permissible methodologies for authenticating social media evidence:

> ''the testimony of the creator, documentation of the Internet history or hard drive of the purported creator's computer, or information obtained directly from the social networking site.'' *Id.* at 683 (citing *Griffin v. State*, 19 A.3d 415 (Md. 2011)).

Unless the proponent can ''convince the trial judge that the social media post was not falsified or created by another user'' through one of these methods, the evidence ''will not be admitted and the jury cannot use it in their factual determination.'' *Id.*

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Conversely, under the Texas approach, ''a proponent can authenticate social media evidence using any type of evidence so long as he or she can demonstrate to the trial judge that a jury could reasonably find that the proffered evidence is authentic.'' *Id.* (citing *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012)).

The *Parker* court explained that,

> ''[t]he Texas approach involves a lower hurdle than the Maryland approach, because it is for the jury—not the trial judge—to resolve issues of fact, especially where the opposing party wishes to challenge the authenticity of the social media evidence.'' *Id.*

The *Parker* court found that the Texas approach ''better conforms to the requirements'' of the Delaware Rules of Evidence. *Id.*

Applying the Texas approach, the *Parker* court determined that testimony from a witness who viewed a Facebook post, as well as circumstantial evidence such as the related profile picture, were sufficient to authenticate the Facebook entries in question. *Id.* at 688. *See also State v. Jones*, 318 P.3d 1020 (Kan. Ct. App. Feb. 28, 2014) (finding that where the ''Defendant admitted the Facebook page was his,'' it was for the jury to decide whether the Defendant actually authored the posts in question).

In contrast, the Mississippi Supreme Court, considering similar facts, implicitly followed the Maryland approach, holding that to authenticate social media evidence, the proponent must make a showing that the account in question belongs to the purported creator, and the purported creator also authored the content in question. *Smith v. State*, 136 So.3d 424, 433 (Miss. 2014).

The Duty to Preserve

In two separate cases, courts considered whether the duty to preserve for unrelated but similar litigation filed years earlier could constitute a duty to preserve for later actions.

In the controversial decision of *In re Actos (Pioglitazone) Prods. Liab. Litig.*, 2014 BL 179175 (W.D. La. June 23, 2014) (supplementing and amending 2014 BL 171899 (W.D. La. Jan. 30, 2014), the court held that the continuing obligations of a litigation hold implemented in connection with a 2002 lawsuit concerning the company's bladder cancer drug mandated preservation for a later MDL proceeding involving the same product and similar allegations. *Id.* at *11.

In 2002, the defendant had issued a broad litigation hold that the court determined applied in the later-filed MDL proceedings, in part because the company never withdrew that hold and instead ''refreshed'' it at least five times over the next nine years. *Id.* at *11.

Despite the hold, the files of 46 custodians with information subject to the original hold were lost or destroyed over time, generally as employees departed the company. *Id.* at *6.

The *Actos* decision is controversial because the court held that the 2002 lawsuit and resulting preservation obligations made later litigation ''reasonably anticipated'' and, therefore, within the scope of the defendant's preservation obligations.

The court also faulted the defendant for allegedly ''obfuscat[ing]'' its spoliation in part by offering as its 30(b)(6) witness on document retention issues an IT consultant who had never worked for the company. The court found that the consultant had no personal knowledge of any of the company's policies and gave conflicting, contradictory testimony that reflected his lack of familiarity with the testimony topics. *Id.* at *8.

Does the duty to preserve for unrelated but similar litigation filed years earlier constitute a duty to preserve for later actions?

In a bellwether case trial in the *Actos* MDL, the court read a permissive adverse inference instruction, allowing the jury ''to infer those [destroyed] documents and files would have been helpful to the plaintiffs or detrimental to [defendant].'' *Id.* at *18. The jury returned a damages award against the company of $6 billion, in addition to compensatory damages.

In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig., MDL No. 2327, 2014 BL 204248, __ F.R.D. __ (S.D. W. Va. Feb. 4, 2014), presented a similar question regarding whether preservation obligations for prior litigation could ''continue.''

In *Ethicon*, the court held that a litigation hold issued for a case filed in March 2003 and resolved in January 2004 had not triggered the duty to preserve for later-filed cases involving the same line of medical devices. *Id.* at *8. The court noted that ''an isolated lawsuit, or even two, would not reasonably lead [a party] to believe that large scale nationwide products liability litigation was down the road.'' *Id.* at *11.

Proposed Federal Rule Amendments

Finally, the proposed Federal Rule Amendments have entered their next phase, with further revised proposed amendments recently being issued and approved by the Committee on Rules of Practice and Procedure of the Judicial Conference. Most noteworthy is a complete reworking of the proposed amendment to the Rule 37(e) sanctions provisions intended to address concerns raised during the public comment period last year.

The next step in the process will be the Judicial Conference's approval of a set of proposed amendments in September 2014.

We look forward to reporting further on these and other trends in our Year-End Update, which will be released in the first quarter of 2015.

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