



Mid-Year EDD Case Law Roundup by Paul J. Neale

Judges continue to grapple with issues arising from electronic discovery and evidence, as demonstrated by the record number of opinions that have been handed down from both the state and federal judiciary in the past six months. Here are brief summaries of some recent e-opinions. They illustrate how broadly electronic data is affecting trial practice.

Haynes v. Kline, 2003 WL 23138761 (D. Kan., decided January 8)

An employer's policy stating that employees had no expectation of privacy in using their computers did not negate an employee's expectation of privacy in the use of electronic communications where he was informed during orientation that his computer contained private files inaccessible by others and there was no evidence that his employer had ever monitored or viewed other employees' private information. In so finding, the court granted the plaintiff employee's motion for a preliminary injunction, preventing his employer from accessing, copying, reading, reproducing or distributing the plaintiff's private files, e-mails or other electronic communications, pending a final determination of the case on the merits. The court also ordered the defendants to provide the plaintiff with access to his private materials so that he could decide what to copy and to provide copies of the documents he requested. It also instructed the plaintiff not to delete any information on his computer.

In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 2004 WL 305601 (S.D. N.Y., issued February 18)

The automatic stay of discovery mandated by the Private Securities Litigation Reform Act (PSLRA) during the pendency of a motion to dismiss in securities litigation can be lifted only in the presence of "exceptional circumstances," according to Senior Judge Milton Pollack. The plaintiffs sought a lift of the automatic stay in order to preserve and restore e-mails that one of the defendants, both personally and through his subordinates, deleted. But the PSLRA directs that all discovery be stayed during the pendency of a motion to dismiss. To be sure, in exchange for the stay, the Act imposes on all parties a contemporaneous duty to preserve all relevant evidence "as if they were the subject of a continuing request for production of documents," in order to maintain the status quo. Judge Pollack reads that mandate, and previous precedent interpreting it, as authorizing a lift only in the face of exceptional circumstances, such as the necessity to preserve evidence or to prevent undue prejudice to a party.

Here, the defendants avowed that they are aware of their obligations and have taken and are continuing to take all necessary steps to preserve all potentially relevant electronic evidence. Relying on these representations, the court concludes, "There is nothing [the defendants can be ordered] to do to preserve the relevant evidence that they have not already done or represented to the court that they will do. Therefore, an order lifting the mandatory, automatic stay of discovery is not warranted. There is no 'imminent risk' established that any deleted data will be overwritten and rendered irretrievable." Accordingly, the defendants' motion for a lift of the automatic stay is denied.

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Baptiste v. Cushman & Wakefield Inc., 2004 WL 330235 (S.D. N.Y., decided February 20)

An employee who claimed a printed copy of a supervisor's e-mail relaying information and advice obtained from outside counsel was left on her desk anonymously must return it to her employer so that the privileged portions may be redacted, a federal magistrate judge in New York has ruled, rejecting her arguments that the e-mail was not privileged or that privilege had been waived.

"[T]he Court has little difficulty in concluding that the first four paragraphs of the e-mail are protected by the attorney-client privilege," Magistrate Judge Theodore H. Katz wrote. "It is of no moment that the e-mail was not authored by an attorney or addressed to an attorney. The e-mail was clearly conveying information and advice given to [Director of Commission Accounting Dennis] Waggner by [Cushman & Wakefield Inc.'s] outside counsel. That advice pertained to the effect of the termination of the EEOC proceeding on Plaintiff's claims, what the attorney anticipated would occur, and his advice as to how C&W supervisors should conduct themselves in dealing with Plaintiff."

"Plaintiff further contends that there was a voluntary waiver of privilege by C&W because of Defendant's two-month delay in asserting attorney-client privilege after receiving the document from the Plaintiff as part of the discovery process," Katz noted. "The Court disagrees," he said, finding that any delay by C&W was caused by its efforts to determine how Celeste Baptiste had come to possess the e-mail so that it could determine whether a claim of privilege remained valid.

Attorney Grievance Commissions of Maryland v. Steven John Potter, 2004 WL 422548 (Md., decided March 9)

An associate leaving the employ of one small law firm to hang out his own shingle engaged in criminal conduct by deleting client files from the firm computer when he was not authorized to do so. The court found by clear and convincing evidence that the associate's conduct violated Maryland Code (2002, 2003 Cum. Supp.) §7-302 of the Criminal Law Article, and ordered that his license to practice law be suspended for 90 days. Although the appeals court essentially adopted the findings of fact made by the Circuit Court for Baltimore City, which initially considered the case, it completely rejected the lower court's proposed conclusions of law finding the attorney had not violated any of the Maryland Rules of Professional Conduct.

Invision Media Communications Inc. v. Federal Insurance Company, 2004 WL 396037 (S.D. N.Y., decided March 2)

The plaintiff in an action for breach of an insurance contract arising out of the September 11 terrorist attack on at least four occasions made false or misleading statements either in response to formal or informal document requests from its adversary or in response to inquiries made by the court. While the court found bad faith was evidenced, particularly regarding e-mails, spoliation as a result of hard drive erasures has not been established. Accordingly, the plaintiff's sanctions are limited to costs and attorneys fees.

The most serious spoliation charge failed because in order to prevail on this point, the defendant was required to make some showing that relevant evidence might have been deleted when computer hard drives that had been used by terminated employees were erased. No such showing was made.

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Anderson v. Crossroads Capital Partners, L.L.C., 2004 WL 256512 (D. Minn., decided February 10).

The plaintiff in a sexual harassment action has avoided the ultimate sanction—dismissal of her case—even though, contrary to her representations to the court, her computer's hard drive was evidently replaced after litigation began and she used a data wiping software application while discovery was ongoing.

Plaintiff filed suit on November 1, 2001. Eventually, defendants sought to recover the hard drive to plaintiff's personal computer because it allegedly contained a document that outlined the harasser's conduct. At issue were the exact date the chronology had been created and whether differing versions of the document existed.

After informal efforts to recover the hard drive were unsuccessful, the court on June 3, 2003 ordered the plaintiff to furnish the defendant with copies of the documents that were created on the hard drive. Defendant's computer expert ascertained that the hard drive that was produced for examination was manufactured in August 2002, nine months after the suit commenced, and that the CyberScrub program had been run on it on April 18, 2003, the same date that defendant's motion to compel production of the hard drive was served on the plaintiff. According to the court, "CyberScrub essentially erases all data from the hard drive and precludes both software and hardware recovery." Despite plaintiff's protestations that she used CyberScrub for the sole purpose of protecting her computer files, defendants moved to dismiss plaintiff's complaint for discovery violations. Although the court denied the motion to dismiss, it sanctioned "plaintiff's flagrant discovery violations and intentional destruction of potential evidence" with an adverse jury inference instruction.

Sonnino v. University of Kansas Hospital Authority, 2004 WL 764085 (D. Kan., decided April 8)

A university medical center's referral of a physician plaintiff to its web site's faculty and staff handbook in response to the plaintiff's discovery request for documents concerning all policies and practices related to the compensation of employees for leave time was sufficient to comply with the discovery request. The plaintiff objected to the form and substance of this response, arguing that the medical center's homepage contained too much information unrelated to personnel policies. In addition, the plaintiff asserted that web site information was not fully responsive since it contained only formal policies and procedures, not all informal practices or procedures that "related to" or "concerned" such policies.

The court narrowed the request somewhat, and ruled in favor of the defendant, largely because the web site was organized in such a way as to enable the plaintiff to "easily locate" the requested policies in a "very short amount of time."

Zakre v. Norddeutsche Landesbank Girozentrale, 2004 WL 764895 (S.D. N.Y., decided April 9)

A document production consisting of two compact discs containing over 200,000 e-mails and over 4,000 offline e-mails respectively, that have been reviewed by the defendant for privilege but not for responsiveness to the plaintiff's specific document request, complied with Fed. R. Civ. P. 34 (b) according to the U.S. District Court for the Southern District of New York, because the e-mails had been provided in a text-searchable format. The court was persuaded by the defendant's argument that the text search function will allow the plaintiff to locate those files responsive to her requests. The court relies on Sedona Principle 11 and *In re Lorazepam and Clorazepate Antitrust Litig.*, 300 F.Supp.2d 43 (D. D.C. 2004) in finding

that a party is not obligated to provide more than a searchable CD-ROM to comply with the requirement of Rule 34(b) that documents be produced in a form as close as possible to the way they are kept in the usual course of business. Their searchability, concludes the court, absolves the defendant of any obligation to "organize and label [the e-mails] to correspond with [the plaintiff's] requests."

Eldaghar v. City of New York Department of Citywide Administrative Services, 2004 WL 421789 (S.D. N.Y., decided March 5)

A defendant in an employment discrimination case was denied a protective order that would have enabled it to redact addresses and telephone numbers of its current and former employees from records sought by the plaintiff in discovery. The court denied the request because the information in issue is available on the Internet, nullifying any protectable interest the defendant could assert.

The defendant had argued that the redaction was necessary to protect privacy interests of the non-party employees. The court rejects this argument on the grounds that it "ignores the fact that we now live in an age where the Internet has made a wealth of identifying information available. Through publicly available databases, it is now possible for a person with only modest knowledge of the Internet to find out an individual's address, telephone number, his/her spouse's name and date of birth, the names, addresses and telephone numbers of the individual's neighbors and the number of years they have lived at their current address. ... Given the fact that the information in issue could almost certainly be found on the Internet, there is not a protectable privacy interest in addresses and telephone numbers."

Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corporation, 2004 WL 870659 (W.D. Pa., decided April 21, 2004)

Although the use of preservation orders is increasing, the case law that governs their application is not well developed. In an effort to fill the void, the District Court for the Western District of Pennsylvania proposes a three-part test for deciding motions for the preservation of documents and things, consisting of the following factors:

1. the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence;
2. any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and
3. the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

United States v. Segal, 2004 WL 635065 (N.D. Ill., decided March 31)

In a prosecution against a corporation and individual executives for mail and wire fraud, violating the Racketeer Influenced and Corrupt Organizations Act, and making false statements to the state insurance department, the government did not violate the defendants' due process rights by failing to use appropriate screening procedures in reviewing seized electronic communications.

The defendants sought to bar the government from introducing at trial any

evidence derived from its violation of their attorney-client privilege with regard to the electronic communications. They asserted the suppression of the derivative evidence was warranted because the government's disregard for their attorney-client privilege violated their constitutional right to due process. The court held that while the government's "sloppy handling" of the electronic information should not be condoned, it was not of sufficient magnitude to constitute a constitutional violation or warrant the "strong medicine" of derivative evidence suppression. Instead, the court ordered the government not to review any of the documents from the defendants' privilege log or to introduce any of those documents as evidence at trial, unless the court determines the defendant's claim of privilege is unfounded.

N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co., 2004 WL 784400 (N.Y. Civ. Ct., decided April 12).

A New York court has approved judicial reference to information available on a state governmental web site, even though the information was not offered into evidence by a party proponent. It also finds that a judge's independent research of and citation to a party's publicly posted web site was proper.

At issue was the court's jurisdiction over the defendant, who is the insurer for U-Haul International, Inc. The defendant argued that the court erred in looking for information posted on the web site of the Department of Insurance of the State of New York. The web site, which the court cited in its opinion, disclosed that the defendant is authorized to engage in the business of insurance in New York. The defendant also argued that the court erred in searching the web sites of the defendant and its sibling corporations. The judge learned from that web research that U-Haul has "numerous facilities in each of the five boroughs of New York and that each of those U-Haul vehicles is insured by the defendant." The court not only condones the judge's use of the state web site, it encourages it, writing: "For a researcher not to employ information placed on a governmental web site, by a civil servant, for the benefit of the public would, indeed, be negligent and ridiculous. For a judge to ignore these new technological changes, made available by government and encouraged by court systems, would be to blind oneself."

With regard to the court's exploration of the party's web site, the opinion makes three points:

1. the statements made on the web sites were made by the parties and operate as admissions;
2. by the very definition of "the world wide web," the postings were not targeted to a selected audience, to be privately guarded, but were electronically made available for everyone on the face of the earth with access to a computer to see; and
3. the facts secured by the court were not derived by framing term requests on a search engine and using the resulting information to fashion a factual argument to "sandbag" counsel.

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