Recent Cases

***Maggette v. BL Dev. Corp.,* 2010 U.S. Dist. LEXIS 91647 (N.D. Miss. Sept. 2, 2010) (Click here for a copy of the decision).**

In this case, victims of a bus accident who were traveling to a casino to gamble sought to include the casino as a defendant based on an agency relationship. After a sanctions hearing involving ediscovery, the Court affirmed the magistrate and special master report (issued by Craig Ball) and issued dispositive sanctions against Harrahs (BL Development) gaming company and counsel who attempted to conceal ESI. In this must read decision, the Court outlined clearly the actions by outside and in-house counsel, an IT representative and paralegals in their role in this failure to disclose and attempt to conceal critical ESI discovery.

The Court found the defendant's IT representative performed non-sensical, meaningless searches on ESI that yielded no relevant ESI data. That, "the primary concern of many witnesses at the hearing was protecting their personal and professional reputations by arguing that, while they may have been less than diligent, they committed no knowing deception upon this court. . . The court did find it interesting that a primary concern of BL/Harrah's former general counsel for litigation . . . at the hearing was attempting to convince this court just how little knowledge he had of its discovery orders, even though he was - by his own admission - informed by . . . [outside counsel] that very serious discovery issues were ongoing and actually worked with [outside counsel] . . . in resolving certain discovery issues in this case. This court's orders are readily available on PACER, and it is clear that, as an attorney overseeing a multi-million dollar litigation, [in-house counsel] . . . .could and should have ensured that either he or his paralegal kept close tabs on this court's orders by regularly checking the docket online."

In what appears to be a case of first impression, the defendant's IT representative was provided immunity from prosecution for prior inaccurate affidavits. The Court stated, "[t]he special master obviously believed that [IT respresentative] . . . lied to this court repeatedly in her affidavits and deposition, and she only agreed to testify at the hearing after receiving immunity from prosecution for perjury based on her prior affidavits and testimony in this case. In the court's view, the testimony at the hearing strongly supported a conclusion that [the IT representative} . . . was consciously and repeatedly dishonest with this court, and it is clear that this dishonesty occurred while she was acting in the course and scope of her employment as a manager at [the

defendant's comapny] . . . ."

In commenting upon the defendant's attempt to conceal the ESI, the Court noted, "[t]he central fact of this case remains that [the defendant] . . . was somehow unable - for almost five years - to discover documents at its own facilities which the special master discovered in short minutes, on multiple occasions and at multiple locations."
The Court found as a matter of law an agency relationship between the gaming casino and the bus company who brought gamblers to the casino.

***Rajala v. McGuire Woods, LLP,* 2010 U.S. Dist. LEXIS 73564 (D. Kan. July 22, 2010)(D., Waxse).**

In this noteworthy decision, the Court found that it had the authority to issue a "clawback" agreement over the objections of one of the parties. The Court extensively discussed FRE 502, clawback agreements and authority under FRCP 26(c)(1) that a Court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." For a copy of the order the Court fashioned, click here .

***GFI Acquisition, LLC v. Am. Federated Title Corp. (In re A&M Fla. Props. II, LLC),* 2010 Bankr. LEXIS 1217, 20-21 (Bankr. S.D.N.Y. Apr. 7, 2010).**

The Court imposed monetary sanctions, for 1/2 of the cost of forensic searches and the costs of the opposing party's motion to compel, for failure of counsel to "fulfill its obligation to find all sources of relevant documents in a timely manner. Counsel has an obligation to not just request documents of his client, but to search for sources of information. . . . Counsel must communicate with the client, identify all sources of relevant information, and 'become fully

familiar with [the] client's document retention policies, as well as [the] client's data retention architecture.' . . . A diligent effort would have involved some sort of dialogue with [their client] . . . and any key figures . . . to gain a better understanding of GFI's computer system. *See Phoenix Four, Inc.,* 2006 U.S. Dist. LEXIS 32211, 2006 WL 1409413, at *5 (stating that counsel's effort to discover all sources of relevant information "would involve communicating with information technology personnel and the key players in the litigation to understand how electronic information is stored."). Had he posed the proper questions in these dialogues, Nash would have gained a more nuanced understanding of how GFI employees stored emails much earlier in the discovery process. Assuming [plaintiff] . . . as operating in good faith, it is almost certain that the archive folders would have been mentioned."

Arkfeld on Electronic Discovery and Evidence (2nd Ed.), § § 7.9(A)(5), *Litigation Hold Court Directives; Arkfeld's Best Practices Guide for Litigation Readiness and Hold (2009-2010 ed.).*

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*Covad Communs. Co. v. Revonet, 2010 U.S. Dist. LEXIS 31165, at *9-12 (D.D.C. Mar. 31, 2010).*

The Court ordered the producing party to reproduce ESI that had been degraded to a nonsearchable format to be reproduced in a searchable, usable format.
The Court noted:

In writing the December 24, 2008 Order, I had in mind Revonet's inexplicable conversion of e-mail data from its native format to TIFF and then producing it in hard copy. . . . Further, I was stunned by Revonet's production of other documents that were completely useless to Covad, producing, for example, spreadsheet printouts that ran "horizontally across several sheets of paper, resulting in a sea of random numbers and data" and then telling Covad to paste together the hundreds of pages. . . . . Yet, as I indicated in Covad II and reiterated in Covad V, Covad did not effectively specify the form in which it wanted electronic documents to be produced. . . . Further in Covad V, I noted that Federal Rule of Civil Procedure 34(b)(E)(ii) requires, when a request does not specify a form for producing electronically stored information, that "a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." . . . I noted that the strips of spreadsheet were clearly not produced in the form that they were ordinarily maintained, nor were they produced in a reasonably usable form. Id.

Revonet's suggestion that the documents be pasted together was pure impertinence and simply not acceptable to the Court; I found that it is improper to "take an electronically searchable document and either destroy or degrade the document's ability to be searched." Id. (citing Dahl v. Bain Capital Partners, Inc., 655 F. Supp. 2d 146, 150 (D.Mass. 2009) (requiring production of spreadsheets in native format); In re Classicstar Mare Lease Litig., No. 07-CV-353, 2009 WL 260954, at *3 (E.D.Ky. Feb. 2, 2009) (production may not degrade searchability); Goodbys Creek, LLC v. Arch Ins. Co., No. 07-CV-947, 2008 WL 4279693, at *3 (M.D.Fla. Sept. 15, 2008) (same; conversion of e-mails from native to PDF not acceptable); White v. Graceland Coll. Ctr. for Prof'l Dev. & Lifelong Learning, 586 F. Supp. 2d 1250, 1264 (D.Kan. 2008) (same); L.H. v. Schwarzenegger, No. 06-CV-2042, 2008 WL 2073958, at *3 (E.D.Cal. May 14, 2008) (same); United States v. O'Keefe, 537 F. Supp. 2d 14, 23 (D.D.C. 2008) (applying same principle in criminal case)).

Cross-reference:

- *Arkfeld on Electronic Discovery and Evidence* (2nd Ed.), § 7.7(E), *Kept in the Usual Course of Business or Labeled;*
§ 7.7(F),
Translated Into Reasonably Usable Form or Ordinarily Maintained
; § 7.7(G),
ESI Form(s).

***Rimkus Consulting Group, Inc. v. Cammarata,* 2010 U.S. Dist. LEXIS 14573, 2-6 (S.D. Tex. Feb. 19, 2010).**

(For a copy of the decision click here),

In this noteworthy opinion the Court summarized their findings in this case:

"Spoliation of evidence--particularly of electronically stored information--has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution. The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential

future sanctions than on reasonable need for information. Much of the recent case law on sanctions for spoliation has focused on failures by litigants and their lawyers to take adequate steps to preserve and [*2] collect information in discovery. n1 The spoliation allegations in the present case are different. They are allegations of willful misconduct: the intentional destruction of emails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation. The alleged spoliators are the plaintiffs in an earlier-filed, related case and the defendants in this case. The allegations include that these parties--referred to in this opinion as the defendants--concealed and delayed providing information in discovery that would have revealed their spoliation. The case law recognizes that such conduct is harmful in ways that extend beyond the parties' interests and can justify severe sanctions. n2

FOOTNOTES

n1 *See, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec.,* LLC, No. 05 Civ. 9016, 2010 U.S. Dist. LEXIS 4546, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

n2 *See, e.g., Leon v. IDX Sys. Corp.,* 464 F.3d 951, 958 (9th Cir. 2006) ("Dismissal is an available sanction when 'a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings' because 'courts have inherent power to dismiss an action when a party has willfully deceived [*3] the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'" (quoting Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995))); Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("The policy underlying this inherent power of the courts [to impose sanctions for spoliation] is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.").

Given the nature of the allegations, it is not surprising that the past year of discovery in this case has focused on spoliation. The extensive record includes evidence that the defendants intentionally deleted some emails and attachments after there was a duty to preserve them. That duty arose because the defendants were about to file the related lawsuit in which they were the plaintiffs. The individuals who deleted the information testified that they did so for reasons unrelated to the litigation. But the individuals gave inconsistent testimony about these reasons and some of the testimony was not supported by other evidence. The record also includes evidence of efforts to conceal or delay revealing [*4] that emails and attachments had been deleted. There is sufficient evidence from which a reasonable jury could find that emails and attachments were intentionally deleted to prevent their use in anticipated or pending litigation.

The record also shows that much of what was deleted is no longer available. But some of the deleted emails were recovered from other sources. While some of the recovered deleted emails were adverse to the defendants' positions in this litigation, some were favorable to the defendants. The record also shows that despite the deletions of emails subject to a preservation duty, there is extensive evidence available to the plaintiff to prosecute its claims and respond to the defenses. These and other factors discussed in more detail below lead to the conclusion that the most severe sanctions of entering judgment, striking pleadings, or imposing issue preclusion are not warranted. Instead, the appropriate sanction is to allow the jury to hear

evidence of the defendants' conduct--including deleting emails and attachments and providing inaccurate or inconsistent testimony about them--and to give the jury a form of adverse inference instruction. The instruction will [*5] inform the jury that if it finds that the defendants intentionally deleted evidence to prevent its use in anticipated or pending litigation, the jury may, but is not required to, infer that the lost evidence would have been unfavorable to the defendants. In addition, the plaintiff will be awarded the fees and costs it reasonably incurred in identifying and revealing the spoliation and in litigating the consequences.

The opinion first sets out the pending motions. Before analyzing the spoliation allegations, related sanctions motions, and the summary judgment motions (which are also impacted by the spoliation allegations), the opinion sets out some of the analytical issues that spoliation sanctions raise. The relevant factual and procedural history is then set out and the evidence on breach of the duty to preserve, the degree of culpability, relevance, and prejudice is examined. The opinion then analyzes the evidence to determine the appropriate response.

The defendants' motion for summary judgment based on claim and issue preclusion arising from the related, earlier-filed, state-law case are then analyzed in detail. That motion is denied in part because of the spoliation and withholding [*6] of evidence relevant to that case. Finally, the opinion examines the parties' cross-motions for summary judgment on the defendants' counterclaims for attorneys' fees.

The opinion results in narrowing and defining the issues to be tried. . . . "

Cross-reference:

- *Arkfeld on Electronic Discovery and Evidence* (2nd Ed.), § 7.9, *Litigation Hold and Sanctions*

United States v. La. Generating LLC, 2010 U.S. Dist. LEXIS 20207, 2-3 (M.D. La. Mar. 5, 2010).

(Click here for a copy of the decision).

In this environmental action, the Court entered an order affirming the stipulation of the parties as to the non-preservation of specific ESI and also the return of ESI pursuant to FRE 502. The parties agreed not to preserve:

i. Data duplicated in any electronic backup system for the purpose of system recovery or information restoration, including but not limited to, system recovery backup tapes, continuity of operations systems, and data or system mirrors or shadows, if such data are routinely purged, overwritten or otherwise made not reasonably accessible in accordance with an established routine system maintenance policy;
ii. Voicemail messages;
iii. Instant messages that are not ordinarily printed or maintained in a server dedicated to instant messaging;
iv. Electronic mail or pin to pin messages sent to or from a Personal Digital Assistant (e.g., BlackBerry Handheld) provided that a copy of such mail is routinely saved elsewhere;
v. Other electronic data stored on a Personal Digital Assistant, such as calendar or contract data or notes, provided that a copy of such information is routinely saved elsewhere;
vi. Logs of calls made from cellular phones;
vii. Deleted computer files, whether fragmented or whole;
viii. Temporary or cache files, including internet history, web browser cache and cookie files, wherever located;
ix. Server, system or network logs; and
x. Electronic data temporarily stored by laboratory equipment or attached electronic equipment, provided that such data is not ordinarily preserved as part of a laboratory report; . . .

Cross-reference:

- *Arkfeld on Electronic Discovery and Evidence* (2nd Ed.), § 7.3(C), *Discovery and Preservation Orders - Rule 16(c);*
§ 8.8,
Inadvertent Disclosure, Attorney-Client Privilege and Work Product and Limitations on Waiver

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John B. v. Goetz, **2010 U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010).**

The Court on January 27, 2010, corrected certain errors and omissions from their original opinion issued on October 9, 2007. Though dated in some areas, the opinion provides an in depth look at how a government agency improperly handled a number of ediscovery issues which led to sanctions.

In this lengthy class action settlement opinion (187 pages), the Court discusses many ediscovery issues in the context of a consent degree entered into in 1998 by the government defendant and the Tennessee Justice Center protecting the health care of 640,000 children. The settlement was based upon a federal law that provides for regular check-ups and health care for children. The plaintiffs based their motion on the Federal Rules of Civil Procedure and the Consent Decree. In addition, the defendants sought to vacate the Consent Decree which the Court denied.

The Court set forth the following table of contents for their opinion:

(ii) Defendants' and MCCs' Databases
(iii) The Costs of Production
6. The Good Cause Showing and the Rule 26(b)(2)(C) factors
7. Privilege Issues
a. Attorney -Client Privilege
b. Work Product Privilege
c. Joint Defense Privilege
d. Deliberative Process Privilege
e. State Statutory Privileges
8. Defendants' Failures to Answer Plaintiffs' Requests for Admissions and to Comply with the January 14th Order
III. Remedies

For a copy of this lengthy opinion click here .

Cross-reference:

- *Arkfeld on Electronic Discovery and Evidence* (2nd Ed.), § 7.9, *Litigation Hold and Sanctions*

***Vagenos v. LDG Fin. Servs., LLC,* 2009 U.S. Dist. LEXIS 121490, 2-7 (E.D.N.Y. Dec. 31, 2009).**

In this Fair Debt Collection Practices Act case the plaintiff deleted the original allegedly unlawful pre-recorded message and sought to introduce a purported duplicate. The Court found that the secondary evidence would be admitted, but found that the failure to retain the original violated counsel's duty to preserve and noted that "[t]he preservation obligation 'runs first to counsel, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" In addition, the Court issued an adverse inference instruction against the plaintiff for destroying the evidence and noted that "[t]he neglect is particularly egregious because plaintiff's counsel appears to have been unaware of his client's obligation to preserve evidence, and thus took no steps towards preservation, even though counsel assisted in the creation of the secondary evidence."

(For a copy of the opinion click here .)

Cross-reference:

- *Arkfeld on Electronic Discovery and Evidence* (2nd Ed.), § § 3.20, Audio; § 7.9, *Litigation Hold and Sanctions* and 8.22, *Voice Mail.*

***Accessdata Corp. v. Alste Techs. Gmbh,* 2010 U.S. Dist. LEXIS 4566 (D. Utah Jan. 21, 2010).**

In this breach of contract case, the defendants objected to disclosure of ESI related to the case since disclosure is blocked by German law and the Hague Convention rules. The basis of their objection is that it would be a "huge breach of fundamental privacy laws in Germany" and subject the defendants to "civil and criminal penalties for violating the German Data Protection Law . . . and the German Constitution." The Court disagreed and ordered disclosure of ESI and stated that

[E]ven assuming that the GDPA [German private data law] prohibited disclosure of personal third-party information, the United States Supreme Court has addressed this issue. *See Societe Nationale Industrielle Aerospatiale v. United States District Court,* 482 U.S. 522, 544 (1987). In that case, the Supreme Court held 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." *Id.* at 544 n.29.

(Click here for a copy of the opinion).

Cross-reference:

Arkfeld on Electronic Discovery and Evidence (2nd Ed.), § 7.7, *Request to Produce and Inspect.*

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