

eDiscovery

Rulings of Interest

Note: The following cases are in chronological order. The federal rules related to ESI changed effective December 2015.

Capellupo v. FMC Corp., 126 F.R.D. 545 (D. Minn. 1989)

- Court found that defendant corporation “ordered and participated in the knowing and intentional destruction of documents and evidence” relevant to the case after being aware that litigation was reasonably anticipated and even after litigation had commenced. The court deemed that entry of a default judgment was inappropriate. Instead, the Court determined that the appropriate sanction was award to the plaintiff of “all expenditures resulting from defendant’s document destruction” and multiplication of those fees and costs by a factor of two. The court also held open the option of further corrective measures following further estimation of the documents believed to have been destroyed by defendant. Finally, defendant was ordered to pay court costs “for two days of otherwise unnecessary expense.”

Doctor John’s Inc. v. City of Sioux City, Iowa, 486 F.Supp.2d 953 (N.D. Iowa 2007).

- City failed to preserve tape recordings of closed-session meetings of city council. The court retained jurisdiction after the case had settled to address the appropriate sanction for the bad faith destruction of the relevant evidence.
- Ultimately, the court imposed a monetary sanction of \$50,000 and then declined to impose the monetary sanction. “[T]he court finds that the scales of justice tip ever so slightly in favor of declining to impose sanctions against the City for destruction of relevant records. Any similar litigation misconduct in the future, however, will be dealt with severely, in light of the City’s ‘get out of jail free’ card here.”

ADS Holdings, Inc. v. Federal Ins. Co., 2008 WL 2781157 (D. Minn. Mar. 28, 2008)

- Negative inference instruction to be given to jury regarding failure to disclose pursuant to F.R.C.P. r. 26(e)(1), and plaintiff ordered to pay defendant reasonable fees and costs as a sanction for violating court’s preservation order.

Lake v. City of Phoenix, 218 P.3d 1004 (Ariz. 2009)

- Police officer sought to compel the release of metadata in an electronic version of his performance report notes concerning him that included creation date, access date, all access dates for each access, and information of who accessed the file. The court

addressed the question of whether “metadata is a public record.” “The pertinent issue is not whether metadata considered alone is a public record. Instead, the question is whether a ‘public record’ maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata.”

- The court determined that metadata was in fact part of a public record subject to public inspection. “It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document, such as the date of creation, while they would be required to produce the same information if it were written manually on a paper public record.”

In the matter of John M. Irwin, 895 N.Y.S.2d 262 (N.Y. App. Div. 2010)

- Plaintiff sought information under the New York freedom of information statute. He specifically wanted the system metadata associated with certain pictures. The court held that system metadata was in fact a record subject to disclosure. “Records stored in electronic format are subject to FOIL [the state’s Freedom of Information act]. . . . We are therefore constrained to conclude that the subject ‘system’ metadata, which is at its core the electronic equivalent of notes on a file folder indicating when the documents stored there were created or filed, constitutes a ‘record’ subject to disclosure under FOIL.”

Peterson v. Seagate U.S. LLC, 2011 WL 861488 (D. Minn. Jan. 27, 2011)

- RIF at Seagate in 2004 resulted in a number of employment terminations. Others took early retirement soon thereafter pursuant to a retirement incentive program.
- EEOC issues a probable cause determination in Nov. 2006.
- Action filed in May 2007.
- Plaintiff motion filed to authorize nationwide class notice.
- Subsequently, Plaintiffs file a motion for sanctions asserting employee email was destroyed when they were terminated, and other backups of email of key decision makers from the period were either “lost or made inaccessible as a result of normal policies and procedures whereby the computers used by former employees are recycled for use by other employees and e-mails are deleted approximately 30 days after separation,” and other computer backups were deleted “when server storage limits are reached.”
- Plaintiff asserted that Seagate was on notice of the likelihood of litigation, apparently dating back to the R.I.F. firings.
- The Court ruled, “A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’” *Greyhound Lines, Inc., v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting *Stevenson v. Union Pac. R.R. Col.*, 354 F.3d 739, 746 (8th Cir. 2004)). Moreover, imposition of sanctions for destruction of

evidence requires a finding of prejudice to the opposing party. *Id.* (citing *Stevenson* at 748). Justification for spoliation sanctions is typically provided by circumstantial evidence because the requisite intent is rarely shown by direct evidence, *Greyhound* at 1035, and prejudice is established by the nature of the evidence. *Stevenson* at 748.

- In this case, there was no evidence that Seagate intentionally destroyed information. Deletions or archiving of information was “for the purposes of complying with company policy and/or making computer assets available to other employees.” “[T]he record does not support the contention that the defendant should have been aware of a looming nationwide class action with respect to a matter that did not patently appear to reach outside of Minnesota, even as the complaint in the this matter was prepared and filed in May 2007. The court concludes that there is no merit to plaintiffs’ spoliation claim and therefore no basis for sanctions.”
- Per the court, the unavailability of information “is the result of Seagate’s usual and normal computer data retention policy; the unavailability was not a result of a concerted effort to suppress evidence or purge data pertinent to litigation; and Seagate was not under any duty to preserve the evidence in a readily accessible format at the time it was deleted or stored on backup tapes. *See Best Buy Stores, L.P. v. Developers Diversified*, 247 F.R.D. 567, 569-71 (8th Cir. 2007).

AtHome Care, Inc. v. Evangelical Lutheran Good Samaritan Society, No 1:12-cv-00053-BLW (D. Ohio Apr. 30, 2013) (slip copy)

- Defendant Good Samaritan agreed to produce metadata but inadvertently changed the creation date of some documents.
- Plaintiff requested “system metadata” of certain document in an effort to confirm the creation dates.
- “System metadata reflects information created by the user or by the organization’s information management system. . . . This type of metadata can generally be retrieved from whatever operating system is in use Examples include ‘data concerning the author, date and time of creation, and the date a document was modified.’ System metadata may be relevant ‘if the authenticity of a document is questioned or if establishing who received what information and when is important to the claims or defenses of a party.’” Citing *Aguilar v. Immigration and Customs Enforcement Div of U.S. Department of Homeland Security*, 255 F.R.D. 350, 357 (S.D.N.Y 2008).
- Court rules that requiring production of metadata for certain documents is appropriate.

In re Waste Management of Texas, Inc., 392 S.W.3d 861 (Tex. Ct. App. 2013)

- In response to a court order, Waste Management produced documents in a format of its choice – PDF. The production excluded metadata.
- Three years later, the trial court ordered Waste Management to produce the data again, this time in native, electronic format with all metadata. This order followed a request

from the plaintiff in the case to have Waste Management produce “electronic discovery in its native format, that is, the same format in which Waste Management maintains the data in the regular course of business.” Waste Management claimed that producing in native format was a “do over” of prior discovery, that the production in native format made redaction impossible, and that producing metadata in native format was more costly, among other things.

- The court disagreed. The court found that the claimed additional cost of producing in native format was only \$3,000 more than the cost of producing PDFs. The Court cited *In re Payment Card Interchange Fee*, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007), for the proposition that “documents stripped of metadata do not comply with Rule 34(b) of the Federal Rules of Civil Procedure.” Ultimately, Waste Management was compelled to produce the native files.

Home Instead, Inc. v. Florance, 2013 WL 5979629 (D. Neb. Nov. 8, 2013).

- Defendants were alleged to have committed various discovery abuses including destroying evidence, deleting files, selling relevant information, shredding information, and otherwise discarding files. The court noted that the defendants admitted through testimony that they did not review client paper files, did not review employee files, did not look at relevant caregiver logs or client care plans, did not review relevant service contracts, and were “unable to explain what efforts their employees used to find responsive information.” “The defendants’ electronic search consisted of looking for the words ‘Home Instead,’ and then deleting any documents found without retaining a copy or forwarding it to counsel for this litigation.”
- The plaintiff sought, among other things, an affidavit addressing whether or not a litigation hold was ever put in place, “the people to whom a litigation hold letter was sent, the directions for preservation, the sources identified for search, the terms used for the search, Defendants’ continued efforts to ensure compliance, and any other information relevant to the scope and depth of the preservation or search for documents.”
- The Court held, “The court will order the defendants to provide the requested affidavit, not only to determine the extent of the defendant’s search for production of responsive discovery, but to assess the defendants’ degree of culpability in failing to preserve evidence for use in this litigation.”
- Defendants also printed relevant documents, scanned them, and then produced all relevant documents in one large PDF file without any organization. The court ordered that all documents be “produced in electronic form and where reasonably feasible, shall be produced as searchable TIFF images with load files (that indicate the beginning and ending of each document and preserve the parent-child relationship) to allow the images to be loaded into a document production database.”

Fidelity National Title Ins. Co. v. Captiva Lake Investments, LLC, 2015 WL 94560 (E.D. Mo. Jan. 7, 2015).

- In *Fidelity*, on Captiva’s fourth discovery-related motion, the Court appointed an expert to inspect the plaintiff’s computer systems and report back findings to the court. The expert found (1) as of the date of his report – more than three years after the first discovery request was issued – Fidelity had not instituted a litigation hold; (2) Fidelity had not conducted a systematic search of its computer systems, including email archives, for discoverable information prior to May 2013; (3) in 2011 and 2012 – after the case was filed and after discovery had been served – “a contractor lost as many as 13 million email messages while implementing an email retention program”; (4) although a relevant employees PC files were able to be recovered, information in his network share was not recoverable; and (5) relevant data systems were permitted to delete relevant information, and logs of conduct in those systems was deleted after 30 days without being preserved.
- Captiva granted an adverse inference instruction, as well as an award of 50% of the forensic expert’s fees.

{New Federal Rules of Civil Procedure addressing ESI became Effective 12/2015}

Elkharwily, M.D. v. Franciscan Health System, 2016 WL 4061575 (W.D. Wash. July 29, 2016)

- Defendant archived email was discoverable. However, Defendant met its burden of showing that retrieval of the electronically stored information was unduly burdensome and costly (\$157,500 in cost to retrieve, restore, and review).
- Plaintiff entitled to the discoverable information if it first pays Defendant the cost of retrieving and restoring the information, including prior privilege review costs.

State v. Wemer, 882 N.W.2d 873 (2016) (Table).

- Metadata of a police dash camera was lost when video was transferred to a server. Defendant asserted that the court erred in admitting the tape that was not properly authenticated. Court held that even if the loss of metadata was a “loss of the original recording, Wemer furnished no evidence the department acted in bad faith.”

In re Subpoena of American Nurses Ass’n, 2016 WL 1381352 (4th Cir. 2016)

- Non-litigant’s costs and attorneys’ fees associated with responding to a third-party subpoena granted as appropriate fee shifting because (1) the Association had notified the appellants that the requested production would “entail significant expense,” (2) the appellants had delayed discussion with the association about the requested discovery, and (3) the appellants had frequently changed the scope of discovery”).

Bazzi v. YP Advertising & Publishing, LLC, 2016 WL 404059 (E.D. Mich. Feb. 3, 2016).

- Plaintiff downloaded documents from defendant's computer system onto a USB drive before leaving employment.
- Defendant sought a forensic image of the drive to obtain the documents and associated metadata.
- Plaintiff ordered to turn over the USB drive to a third party for forensic imaging.

Internmatch, Inc. v. Nxtbigthing, LLC, 2016 WL 491483 (N.D. Cal. Feb. 8, 2016)

- Defendant made no attempt to recover relevant electronic evidence that was allegedly destroyed by a power surge while the litigation was pending. Instead, defendant discarded the computer in question. Court granted the motion seeking an adverse inference instruction and precluded the defendants from offering argument or testimony that the destroyed evidence supported their arguments. Plaintiff also awarded fees for bringing the motion for sanctions.

Living Color Enters., Inc. v. New Era Aquaculture, Ltd., 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016)

- Defendant deleted text messages potentially relevant to the litigation.
- Adverse inference instruction and monetary damages sought.
- Court noted that it must find prejudice to the complaining party and, for imposition of more severe sanctions, an "intent to deprive."
- Court found that there was no evidence that the plaintiff had been prejudiced by the loss of the text messages insofar as the plaintiff failed to "explain[] any direct nexus between the missing text messages and the allegations in the complaint. Also, the court found that there was no intent to deprive the plaintiff of the evidence noting that the defendant was "relatively unsophisticated" and acted negligently at worst.

Spring v. Board of Trustees of Cape Fear Community Coll., 2016 WL 1389957 (E.D.N.C. Apr. 7, 2016)

- Court ruled that it was unduly burdensome for defendant to have to reproduce all ESI in its native format because production had already occurred in non-native format without objection from plaintiff. However, plaintiff allowed to specify specific documents or categories of documents for which it needed metadata, and the defendant would be required to provide those documents in native format.

Fiteq Inc. v. Venture Corp., 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016)

- Sanctions not appropriate where deleted emails were largely recovered from other sources and plaintiffs could not show that other responsive documents ever existed. Therefore, plaintiffs could not establish that spoliation occurred.

Crown Battery Mfg. Co. v. Club Car, Inc., 2016 WL 2625010 (N.D. Ohio May 9, 2016)

- Nonrebuttable adverse inference instruction given for defendant's failure to preserve evidence held by third parties.

Mitchell v. Reliable Security, LLC, 2016 WL 3093040 (N.D. Ga. May 24, 2016) (slip copy)

- Dispute over Defendant's proposed production in PDF, whereas Plaintiff wanted native format. Defendant claimed production of native format would cost an additional \$3,000 over PDF production in a case Defendant claimed was worth less than \$10,000. Plaintiff asserted the case was potentially worth \$50,000 to \$300,000 plus lost wages and benefits and reasonable fees and costs.
- Court found that Defendant had not shown that the claimed additional costs was in fact supported by evidence or was cost prohibitive. In addition, the court found the Plaintiff had shown good cause for the production. "[I]t is not at all unreasonable for Plaintiff to wish to verify herself whether the emails or spreadsheets had been subsequently manipulated, modified, altered, or changed. Moreover, while it does appear that Plaintiff's suit is unlikely to be of an especially high dollar value, the Court finds that the public value of allowing a civil-rights plaintiff opportunity to access information relevant and quite possibly necessary to her pregnancy-discrimination suit far outweighs the asserted \$3,000 cost."

Matthew Enter., Inc. v. Chrysler Group LLC, 2016 WL 2957133 (N.D. Cal. May 23, 2016)

- Plaintiff made no attempt to preserve email after threatening litigation. Defendant sought preclusion of witnesses as a remedy. The court fashioned a unique remedy allowing novel use of evidence that was not destroyed to be used as surrogate information that was destroyed and awarding attorneys' fees and costs.