ETHICS WATCH

Technology and Ethics ("Technethics") 2015 Year in Review

By Nathan M. Crystal

2015, like prior years, has been filled with significant developments in technology and ethics. This article only touches some of the many important decisions and opinions in this area. For a database of material on this topic, see www.technethics.com.

National developments

Amendments to Federal Rules of Civil Procedure, effective December 1, 2015

Rule 26 previously defined the scope of discovery broadly to include any information "reasonably calculated to lead to the discovery of admissible evidence." That language has been replaced by "proportional to the needs of the case" considering various specified factors. Rule 26(b)(1). In addition, Rule 26(c)(1)(B) authorizes courts to issue cost-shifting orders, determining the "allocation of expenses" for certain discovery.

Under revised Rule 34, objections to productions must be stated with specificity and must state if materials are being withheld. A response that identifies the limits of a search, for example by date range, qualifies as a statement that materials are being withheld.

Rule 37(e) deals with sanction for spoliation. The revised rule is intended to limit sanctions. It applies when ESI "that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery." In that case if a court finds that a party has been prejudiced by the loss of the ESI, a court "may order measures no greater than necessary to cure the prejudice." Rule 37(e)(1). Where the party acted intentionally to prevent the other party from obtaining ESI a court may (A) "presume that the lost information was unfavorable to the party"; (B) "instruct the jury that it may or must presume the information was unfavorable to the party"; or (C) "dismiss the action or enter a default judgment." Rule 37(e)(2).

Fourth Circuit rules that litigation hold does not require party to completely suspend document destruction

In *Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 Fed. Appx. 689, 2015 U.S. App. LEXIS 5166 (4th Cir. Va. 2015), the court concluded that the magistrate judge applied an incorrect legal standard by requiring the defendants to preserve all documents once they were put on notice of pending litigation. Instead, the defendants were required to preserve documents that they knew, or should have known, were relevant to the parties' dispute. The court rejected the view that document destruction should stop because "you don't know what may or may not be relevant."

Federal court holds "predictive coding" and other TAR are now well-accepted methods of document review

Four years after *Da Silva Moore v. Publicis Groupe.*, 287 F.R.D. 182 (S.D.N.Y. 2012), laid the foundation for use of predictive coding or technology assisted review (TAR) in electronic discovery, Judge Peck has issued a new opinion dealing with predictive coding. In this fraud case, he stressed that it is "inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review." According to Judge Peck, one TAR issue that remains open is "how transparent and cooperative the parties need to be with respect to the seed or training set(s)." In the case at hand, the court did not rule on the issue of seed transparency, because the parties agreed on an ESI protocol that "disclosed all non-privilege documents in the control sets." The approved TAR protocol was the result of the parties' agreement, not of a court order. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125 (S.D.N.Y. 2015).

Insurer's obligations under a cyber insurance E&O are not triggered by an allegation of intentional misconduct

Travelers Property Casualty Co. of America v. Federal Recovery Services, Inc., 103 F. Supp. 3d 1297 (D. Utah 2015), was a declaratory judgment action in which the court found that the defendant's cyber insurance policy did not provide either coverage or defense of claims brought against it. Federal Recovery provided various electronic data services to its clients, including Global Fitness. Global Fitness sued Federal Recovery claiming that Federal wrongfully refused to return member account data to Global. Travelers refused to provide coverage or a defense to Federal, claiming that an intentional wrongful act was not covered by the policy. The policy defined an "errors and omissions wrongful act" to include any "error, omission or negligent act." The court agreed with Travelers, finding that the policy did not provide coverage or an obligation to defend. Other courts, however, have found that similar policy language provides coverage for intentional acts; otherwise, the language covering an "error" or "omission" would be redundant with "negligent act." See Robert D. Anderson, *Five Takeaways from the*

First Cyber Insurance Case, K&L Gates blog (May 21, 2015).

Litigation hold triggered for foreign companies when litigation in the U.S. can be reasonably anticipated

The court held that the obligation to preserve evidence arises for a foreign company when the company reasonably anticipated litigation in the U.S. Accordingly, and in the absence of contrary evidence, the court found that the Australian company should have placed a litigation hold starting from the date on which it was served with the complaint. While the court recognized that the power to require compliance with U.S. discovery rules does not exist until the court has jurisdiction over a party, the duty to preserve may arise earlier, when the party reasonably anticipates litigation in the U.S. *Lunkenheimer Co. v. Tyco Flow Control Pac. Party Ltd.*, 2015 U.S. Dist. LEXIS 17962.

Federal court awards defendant e-discovery expenses as "copying costs" under 28 U.S.C. § 1920(4)

The District Court of Colorado granted the defendant's request for award of costs under FRCP 54(d)(1) and 28 U.S.C. §1920(4) for the hiring of a private consulting company to retrieve and convert ESI to the format requested by plaintiffs. The court found these expenses to be "costs of making copies" under the statute. The court noted that the plaintiff's requested document collection was difficult to retrieve and the parties had to enter into three consecutive tolling agreements due to the time required for the collection. Moreover, the requesting party did not initiate discussions aimed at limiting the scope of the request, nor did it take any measures to reduce the production cost. *Comprehensive Addiction Treatment Center, Inc. v. Leslea*, 2015 U.S. Dist. LEXIS 17878 (D. Colo. 2015).

New York Supreme Court grants permission to serve summons through Facebook

In this matrimonial action, the issue before the court, by way of plaintiff-wife's *ex parte* application, was whether the wife may serve defendant-husband with the divorce summons solely by sending it through Facebook by private message to his account. According to the court, plaintiff met the requirement of demonstrating that she was unable to effect personal service on defendant. The court was satisfied that Facebook was a method reasonably calculated to give defendant notice that he was being sued for divorce; it also agreed to make Facebook service the sole, rather than the supplemental, means of service. *Baidoo v. Blood-Dzraku,* 5 N.Y.S. 3d 709 (Sup. Ct. 2015).

Attorney suspended for breach of confidentiality in responding to clients' online criticism

A Colorado attorney was suspended from the practice of law for 18 months on several grounds, including answering to clients' criticism online by disclosing confiden-

tial information. *People v. Underhill*, 2015 Colo. Discipl. LEXIS 72. For a discussion of the ethics of responding to online criticism see Nathan M. Crystal, *Defending Against Internet Criticism: "Silence is Golden,"* 26 S.C. Lawyer 12 (January 2015).

South Carolina developments

Technology and the duty of competence

Technology is now a central factor in almost all aspects of the practice of law. The ABA Model Rules have recognized this development by the addition of comment 8 to Model Rule 1.1, which provides: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology …" (emphasis added). South Carolina has not adopted this comment, but lawyers should recognize that the general duty of competency probably already incorporates knowledge of technology. It would be impossible to include in this article a complete (or even a substantial partial) discussion of aspects of technology that lawyers should be aware of to comply with their duty of competency. A few examples from reported decisions in 2015 illustrate the importance of lawyers' keeping abreast of developments in technology:

- *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 776 S.E.2d 575 (S.C. Ct. App. 2015) (holding that written notice of entry of order beginning the running of a thirty-day appeal period may be served by e-mail);
- Order dated October 28, 2015, adopting South Carolina Electronic Filing Policies and Guidelines, Pilot Version Common Pleas, including guidelines on redaction;
- *State v. Cardwell*, 778 S.E.2d 483 (S.C. Ct. App. 2015) (defendant did not have a reasonable expectation of privacy in her computer when she had delivered it to a technician for repair);
- *State v. Brown*, 414 S.C. 14, 776 S.E.2d 917 (Ct. App. 2015) (warrantless search of cell phone permissible when phone was abandoned, distinguishing *Riley v. California*).

Violation of Lawyer's Oath of Office in advertising using Google AdWords

In *In re Naert*, 414 S.C. 181, 777 S.E.2d 823 (2015), respondent conducted an Internet marketing campaign using Google AdWords, in which he purchased the name of the potential defendant company in time share litigation and the names of several attorneys who represented the potential defendant in order to obtain favorable results in Google searches. The Court accepted an agreement for discipline by consent in which respondent admitted to violation of the Lawyer's Oath under which the lawyer pledges to opposing parties and their counsel fairness, integrity, and civility in all written communications and to employ only such means consistent with trust, honor, and principles of professionalism. Respondent's advertisement also did not contain the name of a responsible attorney in violation of Rule 7.2(d). ⚖