

Ungaretti & Harris LLP  
**E-Discovery Update**

**Major Tours, Inc. v. Colorel:  
A Reminder to Consider Cost-Shifting When  
Opposing a Motion to Compel**

*By Richard H. Tilghman IV*

One of the most overlooked arrows in the quiver of an e-discovery litigator is the court's ability to impose cost-shifting when the opposing party demands an expensive search of inaccessible data, such as back up tapes. The argument for cost-shifting is often enticing to courts because it seems fair to tell a party demanding an expensive electronic production: "If this information is so important, you pay for it!" A recent case from the United States District Court for the District of New Jersey reiterates the benefit of arguing for cost-shifting.

In *Major Tours, Inc. v. Colorel*,<sup>1</sup> the plaintiffs requested that the defendant produce e-mails from 2,500 back up tapes despite the fact that the defendant had already searched the e-mail records of 37 custodians and harvested 152,000 e-mails from those custodians. The defendant estimated that the cost to retrieve the e-mails from back up tapes would exceed \$1 million dollars. After weighing the relevant factors under FED. R. CIV. P. 26(b)(2)(C), the court found that the plaintiffs could not show good cause for requiring this effort. But the court did find persuasive the plaintiffs' alternative argument that

the defendant should search a limited set of back up tapes. The cost of this effort was estimated to be between \$80,000 and \$160,000. Noting its discretion to shift all or part of the cost of producing electronic discovery, the court required the plaintiffs to share these costs with the defendant.

Often, litigators limit their arguments in opposition to requests for electronic data to the lack of relevance and burden of searching for and producing the requested documents. The *Major Tours* case is a reminder to consider the alternative argument that if the court requires production, the requesting party should pay for it.

<sup>1</sup> 2009 U.S. Dist. Lexis 97554 (D.N.J. Oct. 20, 2009).

**E-Discovery Across International Borders  
Part Three: When Your Case Involves  
International E-Discovery**

*By Lisa C. Sullivan*

When your case involves international e-discovery, your discovery obligations may conflict with international privacy laws – with no easy resolution. Here are some guidelines on handling international e-discovery issues, whether as the producing party or the requesting party. You should always consult with outside counsel about the specifics of your case.

**Guidelines for Discovery Respondents**

Your company has become a party to a lawsuit, and it is likely that some relevant electronic documents are located outside the U.S. The following practices can help you address, and hopefully resolve, any conflicts relating to your discovery obligations:

- Educate yourself on the applicable international laws as soon as litigation seems likely.
- Address all international e-discovery issues with outside counsel as early in the lawsuit as possible, before you make any decisions on what electronic documents should (and should not) be preserved or produced.
- Consult with outside counsel regarding whether electronic data at foreign subsidiaries or parents falls within the "possession, custody, or control" of your company.
- Raise international e-discovery issues, and suggest potential solutions, with opposing counsel at your Rule 26(f) conference. This is especially true if you may rely

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on international laws; Rule 44.1 of the Federal Rules of Civil Procedure requires a party to provide notice of its intent to rely upon foreign law.

- Keep in mind that the majority of U.S. courts have ordered production – sometimes even in the face of blocking statutes that carry criminal penalties. Accordingly, your best approach may be to reach a compromise solution (agreement on what electronic documents can be produced), instead of taking a hard-line stance and refusing international production altogether.
- If your company decides to attempt to produce documents while complying with international prohibitions, it may be useful to discuss the benefits and risks of the following with outside counsel:
  - whether to seek guidance from the international authority regarding your conflicting obligations;
  - whether to propose search terms and date ranges for searching electronic data;
  - whether to propose the identities of the custodians whose electronic documents will be searched;
  - whether to attempt to obtain informed consent from those employees who have relevant documents;
  - whether to have electronic documents reviewed for relevance overseas or in the U.S.;
  - whether to locate a European e-discovery vendor with a safe harbor certification;
  - whether data is available from other sources (such as producing only those e-mail exchanges between your U.S. and your overseas offices that are hosted on a U.S. e-mail server);
  - whether to negotiate or seek a protective order relating specifically to international electronic data; and
  - whether to produce documents on a rolling basis so that production of U.S. documents is not delayed while international documents are reviewed.
- If your company decides to attempt to resist producing international e-discovery, it may be useful to discuss the benefits and risks of the following with outside counsel:
  - whether to seek a protective order, and when;
  - whether your company can establish the risk of criminal prosecution overseas, such as through expert opinion or letters from an international authority;
  - whether to prepare the equivalent of a privilege log listing the documents being withheld and the basis under international law for withholding each; and

- whether your company can deal with the impact of an adverse inference instruction, imposition of a monetary sanction, or a case-dispositive non-monetary sanction.

### **Guidelines for Discovery Proponents**

You have discovered that the opposing party likely has electronic documents located outside the U.S., and you believe those documents to be relevant to the litigation. The following practices may facilitate obtaining international electronic documents.

- Discuss all issues with counsel knowledgeable in e-discovery issues before you engage in discussions with opposing counsel or issue discovery requests. The more knowledgeable you are about what data may and may not be transferred, the better a negotiating position you will have.
- Be mindful that courts often look more favorably on a party that is willing to compromise in discovery disputes, including e-discovery disputes.
- Be prepared to discuss international e-discovery issues as early in the litigation as possible, including at the Rule 26(f) conference. It is often better to know early about problems than to be surprised by written objections to a discovery request.
- For electronic documents located in Europe, inquire whether your opponent has received safe harbor certification, and determine whether your company, too, has received safe harbor certification.
- Discuss with outside counsel whether to request that your opponent obtain informed consent from individuals that you believe have the most critical documents.
- Avoid, when possible, having to obtain discovery from a party via the Hague Convention. In many circumstances, obtaining evidence in this manner is an incredibly lengthy process, and the scope of permissible discovery is typically much more limited than the scope of discovery under U.S. law. If you are seeking international e-discovery from a third-party, however, the Hague Convention may be your only option.

\* \* \* \*

These guidelines, when discussed with counsel, can go a long way toward ameliorating, or even resolving, issues that may arise with respect to international e-discovery.

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***Vagenos v. LDG Financial Services, LLC:*  
The Grey Area In Between Bad Faith Failure  
to Preserve Evidence and Good Faith  
Efforts to Comply**

*By Kamau A. Coar*

The Eastern District of New York recently gave valuable insight into how courts view the grey area between bad faith and discovery compliance. In *Vagenos v. LDG Financial Services LLC*,<sup>1</sup> the court addressed the question of what happens when a party has not engaged in bad faith tactics, but its failure to preserve documents still caused prejudice to the opposing party. This decision indicates that even in the absence of bad faith, courts will not reward inaction when it comes to e-discovery.

In *Vagenos*, the plaintiff alleged that the defendant left certain messages which violated the Fair Debt Collections Practices Act. The plaintiff, however, deleted the original message. Prior to deleting the message, the plaintiff claimed he played the message for his attorney, who re-recorded it. The defendant filed a motion in limine to exclude the re-recording from evidence claiming that the alleged duplicated version was not consistent with any standard recordings it uses.

The facts revealed that the plaintiff's counsel made no effort to preserve evidence, and even acted "surprised" that he had any duty to preserve the original recording. Under the circumstances, the court decided not to exclude the secondary recording, "because it would be the death knell of this case." But the court still noted that some reprimand was appropriate.

After ruling that the re-recorded message met the threshold requirements of Fed. R. Evid. 1004(1), pertaining to the use of secondary evidence when all originals are lost or destroyed, the court found that the importance of this particular evidence to the claims "heightened the obligation to preserve the original." The court specifically noted that plaintiff's counsel took no steps toward this preservation obligation. The court also found that the defendant had been prejudiced because it could not perform a forensic analysis on the original.

Accordingly, the court ruled that the jury be instructed that "a party in possession of material evidence has a duty to preserve it, and the jury may consider plaintiff's failure to preserve the original recording as evidence that the destroyed portion of the message contained information harmful to plaintiff's case." As the *Vagenos* decision makes clear, it is no longer enough to avoid bad faith conduct. Parties must affirmatively work to preserve evidence or face the consequences their inaction may cause.

<sup>1</sup> *Vagenos v. LDG Fin. Servs., LLC*, No. 09-cv-2672, 2009 WL 5219021 (E.D.N.Y. Dec. 31, 2009).

**\$8 Million Dollar Discovery Sanctions  
Against Hyundai**

*By Nile N. Park*

On November 25, 2009, the Supreme Court of Washington affirmed a default judgment and award of \$8 million dollars against Hyundai as a discovery sanction in *Magana v. Hyundai Motor America*.<sup>1</sup> This significant judgment reminds litigants that failure to take discovery seriously may have grave consequences.

The plaintiff, Jesse Magana, was rendered a paraplegic after he was thrown out of a 1996 Hyundai Accent. Magana sued the car manufacturer for defective design, specifically a seat back failure which allowed the seat to collapse. During discovery, Magana requested documents regarding complaints about the seat back failure on all Hyundai products from 1980 to present. Hyundai limited the scope of its response to 1995-1999 Accents, claiming that there were no complaints regarding these models. Magana also requested Hyundai to identify all Hyundai vehicles that used the same right front seat as the 1996 Hyundai Accent, and Hyundai responded that no other Hyundai models used the same design for the right front seat.

At trial, Magana's expert testified that Hyundai should have used an alternative seat design over Hyundai's objection that the alternative design was not discussed during the expert's deposition. The court decided four days later that it should have sustained Hyundai's objection but did not tell the jury to disregard the testimony to avoid highlighting the evidence. The jury awarded Magana \$8 million, but the Court of Appeals reversed and remanded the case, finding that the trial court should have instructed the jury to disregard the expert's evidence and that this error was not harmless.

Before the second trial date, Magana requested Hyundai to update its discovery responses. During this second round of discovery, Magana uncovered critical omissions and misrepresentations by Hyundai in its initial discovery responses. Specifically, after the court ordered Hyundai to produce complaints regarding seat back failure on all Hyundai vehicles regardless of model year or incident date, Hyundai produced numerous documents relating to several complaints of seat back failure, including documents from its consumer hotline database. Hyundai also contradicted its earlier representation that no other vehicles had the same right front seat as the 1996 Accent by now stating that 1995-1999 Accents and 1992-1995 Elantras had the same or similar design.

In light of Hyundai's misrepresentations and failure to produce responsive documents, Magana moved for default judgment for Hyundai's discovery abuses. The trial court found that Hyundai's discovery violations substantially prejudiced Magana in preparing for trial and granted the default judgment. The Court of Appeals reversed the lower court's judgment, finding that Magana was not prejudiced. However, the Supreme Court of Washington affirmed the trial court's grant of default judgment.

Interestingly, only after being ordered by the court to respond to Magana's discovery did Hyundai go beyond its legal department in search of responsive documents. Prior to the first trial, Hyundai only searched its legal department claiming to do otherwise "would have taken an extensive computer search." The court rejected Hyundai's argument and granted Magana's motion to compel before the second trial, stating that "[a] corporation must search all of its departments, not just its legal department, when a party requests information about other claims during discovery ... [T]here is no legal basis for limiting a search for documents in response to a discovery request to those documents available in the corporate legal department." The court also quoted the trial court's finding that "Hyundai had the obligation not only to diligently and in good faith respond to discovery efforts, but to maintain a document retrieval system that would enable the corporation to respond to plaintiff's requests."

This case shows that corporate litigants must be diligent in responding to discovery, and search through all its documents and records, not just materials from its legal department. Moreover, litigants must implement a document retrieval system to ensure discovery responses are adequately supplemented while a case is pending. Although these measures may result in higher costs, *Magana* demonstrates that failure to do so may lead to discovery sanctions, even one as severe as default judgment.

<sup>1</sup> *Magana v. Hyundai Motor America*, 167 Wash. 2d 570, 220 P.3d 191 (2009).

### TECH CORNER

#### Have You Really Redacted that Document?

By Heidi Goldwater

In this technological age, we are all trying to streamline as many tasks and processes as possible to eliminate dealing with physical paper. Nothing is more labor intensive than having to redact and remove sensitive information from a large stack of documents. In the past, everything was redacted

with redaction tape, white out or white labels. Those days are gone and now many individuals use electronic redacting. You must, however, take caution in your method of electronically redacting documents for production.

There are many products on the market that enable you to redact electronically. While this is helpful, it is critical to utilize a product that is created specifically for this task. Otherwise, you risk providing sensitive information. Simply put, you can go into a number of applications and draw a white box around sensitive information to redact it. But unless you take other precautions, this can be a dangerous journey. Most word processing products have drawing tools. For example, in Microsoft Word you can utilize the drawing tools and draw a white box around an area of a document. While the document appears to be redacted, that box you drew to redact sensitive information can later be moved to reveal what is behind it.

Even more alarming is the situation in which a document is produced in native format. In this scenario, the underlying metadata will still be there for the redacted portion. A better solution than producing in native format would be to draw your box around the sensitive information, print out the document and then scan it into a different format such as .tif, .jpg or .pdf. Using this process, the document would be an image and the redactions would be permanent. If the Word document is produced, you have included the sensitive information you were working so hard to remove.

There are many products created specifically for the purpose of redacting. Some are more expensive than others but the end result is a permanently redacted document. Adobe Acrobat does a fine job, however you need the "Professional" version 8.0 or greater to have the redaction tool. Other products that can redact include the iPro Suite, pdfDocs, Nuance PDF Creator, and RapidRedact just to name a few.

Electronically redacting documents is efficient and cost-effective if you are utilizing a tool that truly redacts and removes the information you don't want viewed by your opponent.

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