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E-Discovery Update

For Richer, Poorer, and Saving E-mails: The Limits of Spousal Privilege Regarding E-mails

Spousal privilege between a man and a woman is not nearly as protective as it may seem. Also known as husband-wife (or marital communication) privilege, this evidentiary privilege provides protection for communications between spouses where both parties can refuse to testify about a private interaction, discussion, or correspondence. The federal courts have presumed that communications between spouses are intended to be confidential. Until recently, courts have found that this privilege may be overcome only by proof of lack of confidentiality (such as a third party presence), separation, or no legal marriage. However, recently, the Central District of California case *U.S. v. Nicholas*[1] has changed the path of evidentiary protection between spouses in an e-mail-friendly world. This case raises a caution sign for the future of perceived privacy in interactions between spouses.

E-mail Between Husband and Wife

In *Nicholas*, the district court denied defendant Henry Nicholas' motion to suppress a privileged e-mail between he and his then-wife. Nicholas, who in 2002 was the Chief Executive Officer of dot-com company Broadcom, sent an e-mail from his Broadcom e-mail account to his wife of an extremely private nature; he described various issues related to Broadcom as well as his drug use. For instance, he noted that he was "seeing the company falling apart;" that he was "willing to lie and bullsh** to get key people in place;" that he was acting in ways that would be "irreparably damaging to the company"; and that he experienced "panic attacks" and "electric shock like flashes before and during a wall-street conference call" as a result of ceasing his drug use. Nicholas' e-mail was not password protected and approximately ten employees at the company had the ability to access information on his laptop. Soon thereafter, a staffer, during a routine maintenance backup of Nicholas' computer, found his incriminating e-mail and showed the e-mail to a handful of Broadcom's executives. On June 1, 2007, the government began a separate investigation of Nicholas and Broadcom's stock option practices.

The Appellate Court and District Court Ruling

Nicholas, in anticipation of a lawsuit, sought to prevent any use of the e-mail during trial. The issue reached the Ninth Circuit, which decided that, even though the e-mail was a privileged marital communication, the District Court may be able to admit the e-mail into evidence after defining the scope of protection afforded to the e-mail.

After the Appellate Court's ruling the District Court decided that the e-mail may be admissible at trial for limited purposes. These purposes included impeaching Nicholas and as evidence against a co-defendant. Most importantly, the Court ruled that the e-mail would not be returned to Nicholas and the parties would have a chance to review and use that e-mail. Normally, there is an attempt to demand the return or "claw back" production of a privilege document. Here the Court denied any such attempt.

Moreover, because of the public nature of the e-mail, which was sent to upper management at Broadcom and published (unknowingly by Nicholas) in a news article in the *Orange County Register*, the Court presumed Nicholas' co-defendant knew of the e-mail already. The public nature of the e-mail content acted as a further waiver of any privilege. The Court held that the government must disclose documents that are vital to the arguments or that the government plans to use at trial.

Contents

For Richer, Poorer, and Saving E-mails: The Limits of Spousal Privilege Regarding E-mails

E-Vendor Bender: Who is at Fault for an E-Vendor's Mistaken Production of Documents?

When Relevant Evidence Isn't Relevant Enough

E-Discovery Developments in Bankruptcy Court

What This Means for You

What was supposed to be a personal and emotional e-mail from one spouse to the other, where the sender and recipient both had a resonable expectation of privacy, ended up being used against Nicholas, exposed to his co-defendant, and made available for the public to read (by publication of the case opinion). *Nicholas* serves as a cautionary tale to employees and employers in large corporations and smaller businesses where e-mail, blackberry, and cell phones are regularly used. A husband or wife who sends and receives e-mails or text messages to and from each other using company-provided technology may have a mistaken belief that his or her communication is private, when in reality it may not be. Moreover, it is almost always beneficial to have a "claw back" agreement regarding wrongly produced electronic documents. While not a perfect solution, it may have been helpful in the *Nicholas* case.

[1] 594 F.Supp. 2d 1116 (C.D. Cal. 2008).

E-Vendor Bender: Who is at Fault for an E-Vendor's Mistaken Production of Documents?

Along with the growth of electronic discovery came the harsh reality that parties to a lawsuit must produce a mass quantity of documents. This exponential growth in discoverable documents has led to the development of vendors specializing in digital information, also known as e-vendors. E-vendors are companies who have experience collecting, reviewing, and producing electronically stored information ("ESI") for use both prior to and during litigation. The more talented e-vendors even have the ability to review and produce ESI that has been stored on damaged technology. In fact, some e-vendors can recreate full data productions from deleted and reformatted hard drives or storage devices that have been physically compromised. E-vendors, when working in concert with experienced legal counsel, can effectively review and produce ESI in the most cost effective and legally viable ways.

However, entrusting e-vendors with legal documents raises a potentially significant problem: an e-vendor might mistakenly produce privileged information after documents are properly reviewed and labeled by skilled attorneys.

In fact, this happened in the Northern District case, *Heriot v. Byrne.*[1] In response to a request to produce documents, the plaintiffs in *Heriot* hired an e-vendor to provide scanning and other related services. The plaintiffs' counsel reviewed documents, assigned each document a code pertaining to the subject matter, sent them to the e-vendor to be scanned into a master database of documents, and then searched for responsive documents within that master database to be produced to the other party. At some point during the process, after the plaintiffs' counsel reviewed and sent the documents to the e-vendor, the e-vendor mistakenly produced a scanned document and a series of e-mails protected by the attorney-client privilege.

The defendants, contending that the plaintiffs waived the privilege upon production, argued that parties using an e-vendor have a duty to re-review all documents after turning them over to the e-vendor before they are produced. The *Heriot* Court rejected that argument, finding that the Federal Rules of Evidence do "not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake."[2] Requiring parties to re-review documents after turning them over to an e-vendor, the Court explained, "would be duplicative, wasteful," and "chill the use of e-vendors."[3]

While the Court ultimately held that parties to a lawsuit should be able to rely "on their vendor to faithfully carry out the instructions it has been given," shifting blame onto e-vendors does not change a lawyer's obligation to fully perform his or her job. The *Heriot* Court could have easily sanctioned the plaintiffs' counsel if the number of documents produced was more significant, if counsel had not acted carefully to quickly discover the mistake, or if counsels' paralegals or non-lawyers reviewing the documents had made a minor error.

This decision should not provide comfort, but rather ought to be viewed as isolated, reinforcing the need to act diligently. By exercising extreme prudence in dealing with e-vendors to verify that documents are being correctly labeled and produced, parties can avoid unnecessary pre-trial litigation.

[1] *Heriot v. Byrne*, 2009 WL 742769 (N.D. Ill. 2009).
[2] FED. R. EVID. 502(b) cmt.
[3] *Heriot v. Byrne*, 2009 WL 742769 at * 13.

When Relevant Evidence Isn't Relevant Enough

When parties fail to handle e-discovery properly, they open themselves up to a number of potential penalties. One of the more severe penalties is the adverse inference. An adverse inference is a negative assumption of fact or law made by the court based upon a party's failure to produce relevant evidence. In *Treppel v. Biovai*[1] the United States District Court for the Southern District of New York discussed the burden placed on the movant to obtain an adverse inference. The *Treppel* Court held that in order for an adverse inference to be granted, the moving party must show that destroyed evidence would have been favorable to their case.

In *Treppel*, the defendant, Biovail, apparently failed to properly preserve electronically stored information after an obligation arose. Mr. Treppel sought an adverse inference against Biovail due to that failure. In order to obtain an adverse inference, Mr. Treppel was required to (i) show that Biovail was required to preserve the information, (ii) that it was destroyed with a culpable state of mind and (iii) that it was relevant to one of his claims.[2] The Court found that while Mr. Treppel met the first two requirements, he failed to provide sufficient evidence to prove the relevance of the destroyed information.

Relevance means more in this context than just pertaining to the issue at hand.[3] The party seeking an adverse inference must not only show that the potential evidence is probative, they must also establish that a reasonable trier of fact could find that the missing evidence would support his claim or defense. There are two ways to prove relevance. The movant could show that the evidence was destroyed in bad faith, which alone is sufficient to support an inference that the missing evidence would have been favorable. However, if the evidence was destroyed negligently (as it was in Biovail's case), the movant would have to point to some extrinsic facts tending to demonstrate that the missing evidence would have been favorable.

Mr. Treppel offered a number of deleted e-mails obtained from the systems of other custodians, two of which were sent after preservation was required, in order to show that the destroyed information was beneficial to his case. The court found that while these e-mails do suggest that it is possible and even likely that relevant material was destroyed, they do not demonstrate that the destroyed evidence would have been favorable. In fact, Judge Francis stated in his opinion that the only evidence Mr. Treppel provided to show that the evidence was unfavorable to Biovail was the non-production itself.

Biovail was able to avoid an adverse inference in this case, however, they were very fortunate to have done so. Had the rulings regarding either the culpability of the destruction of the evidence or the relevance of the missing information changed even slightly, the results could have been devastating to their case. This is why it is important to be both aware of and be in compliance with e-discovery requirements.

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[1] *Treppel v. Biovail,* 249 F.R.D. 111 (S.D.N.Y. Apr. 2, 2008).
[2] *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108-109 (2d Cir. 2002).
[3] *Byrnie v. Town of Cromwell,* 243 F.3d 93, 107-12 (2d Cir.2001) (explaining that relevance in this context is a higher standard than FRE 401).

E-Discovery Developments in Bankruptcy Court

As the economy lingers in recession, developments in e-discovery are emerging in bankruptcy court. E-discovery sanctions can be devastating in this context, as can be seen in a recent case, *Grochocinski v. Schlossberg*.[1] The case teaches two important lessons. First, a court need not identify "intent" to severely sanction a party for violating a discovery order. A party's unintentional, but "reckless," disregard is sufficient. Second, and perhaps more importantly, e-discovery sanctions severely hurt a party's chance of success on the merits.

In *Grochocinski*, the e-discovery sanctions arose out of a fraudulent transfer proceeding in bankruptcy. The fraudulent transfer involved two pre-petition real estate transactions between the debtor, Jeffery Eckert, and David Schlossberg and Gary Laliberte. In the first transaction, Eckert assigned his interest in his house to Schlossberg and Laliberte. Eckert continued to make payments on his home, but Schlossberg and Laliberte legally owned it. After the transfer, Eckert sent an e-mail to Schlossberg saying, "[T]his contract for deed is a great way to protect my assets . . . I am asset free almost . . . i.e. 'why sue Jeff, he ain't got nothing!'"

In the second transaction, Eckert sold his interest in another property to Schlossberg for $95,000 less than the property's appraised value. In return, the parties "agreed to share in the profits of the resale of the property."

After Eckert filed for bankruptcy, the Chapter 7 Bankruptcy Trustee filed an adversary complaint against Schlossberg and Laliberte. The Trustee alleged that the real estate transactions were fraudulent transfers. He sent notice to Schlossberg to "retain all electronic discovery" related to the transfers and moved to compel e-discovery from Schlossberg. The Court granted the motion and issued a protective order for relevant data on Schlossberg's hard drives.

But the data was nowhere to be found. According to the bankruptcy judge's findings, Schlossberg had used "nCleaner," a hard drive erasing program, to delete over 16,000 computer files within a week after the Trustee's retention notice. Schlossberg had also installed overwriting operating systems earlier in the year, as well as a program to "verify the integrity of the data destruction."[2]

The court ordered sanctions against Schlossberg for his egregious discovery violation. Schlossberg was to pay for both the Trustee's counsel and computer expert. But far more costly, all the facts alleged by the Trustee were to be taken as proof against Schlossberg who was prohibited from refuting them. As a result of this adverse inference, the court held in favor of the Trustee, finding that both transactions were fraudulent transfers. Schlossberg and Laliberte were liable for over $280,000 to the bankruptcy estate.

On appeal to the federal district court, Schlossberg argued that the bankruptcy court erred in sanctioning him because there was no finding that he had acted willfully or in bad faith. Schlossberg had not intentionally violated the discovery orders, he claimed, and thus should not have been sanctioned.

The district court disagreed. Intent is not required for an offense to be sanctionable. A party's bad faith includes "reckless disregard" of a discovery order, even if the party hasn't willfully thwarted the order. Deleting the computer files was sufficiently "reckless" behavior to warrant a finding of bad faith. Moreover, the sanction – the adverse inference, plus fees – was not unreasonable. Judges have "broad discretion" in sanctioning, and are not required to "select the least severe sanction."

Grochocinski shows us that a party need not *intend* to violate a discovery order to be sanctioned, and reminds us of the harsh penalties of noncompliance.

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[1] 402 B.R. 825 (Bankr. N.D. Ill. 2009).
[2] *Grochocinski v. Schlossberg*, 402 B. R. at 833.

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