EDDE Case Digest 22 – 2009-04-17

Five decisions for this week's digest (and yes, I'm catching up after RSA 2009). The first, a duty to preserve decision. The second decision reminds us that eDiscovery abuse sanctions can survive summary judgment, and is followed by a two authentication cases (one of which is a criminal matter, but each of which pays some degree of homage to Magistrate Judge Grimm's decision in Lorraine v Markel American Ins.), and a decision discussing the standards of a federal district court's review of a U.S. Magistrate's Report and Recommendation.

Duty to Preserve: The Southern District of New York provides a decision in which negligent failure to preserve (triggering potential spoliation proceedings) was not established. The court also provides a discussion of how, and under what circumstances [in the Second Circuit], a finding of spoliation can support a denial of summary judgment decision in "borderline" cases. In the Adorno decision, below, it did.
Sanctions for Spoliation Survive Summary: Nicely alliterative. Where would we be in a week without a spoliation decisions? Here, from the District of Nevada, a decision involving spoliation by a plaintiff.
ESI Authentication: ESI Authentication decisions are beginning to crop up. Discussed are two decisions; the first providing Indiana decisional authority on the authentication of cell phone text messages, and the second from the Northern District of Ohio on authentication of web page printouts.
Standard of Review for Magistrate Judge Report and Recommendation: For civil procedure fans, a decision from the Northern District of New York outlining the standard of review for objected-to and unobjected-to report and recommendation(s)s from a United States Magistrate Judge. More on review standards in upcoming digests.

SWT

Decisions:

Adorno v. Port Authority of New York and New Jersey, 2009 WL 857495 (S.D.N.Y. 2009)
Coburn v. PN II, Inc., 2009 WL 905057 (D.Nev. 2009)
Hape v. State, --- N.E.2d ----, 2009 WL 866857 (Ind.App. 2009)
Schneider Saddlery Co., Inc. v. Best Shot Pet Products Intern., LLC, 2009 WL 864072 (N.D.Ohio 2009)
Gaffield v. Wal-Mart Stores East, LP 2009 WL 890654 (N.D.N.Y. 2009)

****
Case: Adorno v. Port Authority of New York and New Jersey
Citation: 2009 WL 857495 (S.D.N.Y. 2009)
Date: 2009-03-31
Topics: Second Circuit spoliation requirements, negligent failure to preserve evidence, EEOC filing as preservation duty trigger, extrinsic evidence required to show prejudice in "mere negligence" spoliation cases, negligent spoliation may provide basis for denial of summary judgment

In this Title VII Civil Rights action (42 USC §§1981, 1983), U.S. District Court Denny Chin rules on plaintiff'' sanctions motion under Fed. R. Civ. P. Rule 37. Keep in mind that sanctions motions under Rule 37 first require that a discovery order (compelling production) be granted, and that a violation of that order has been alleged. That said, a spoliation proceeding may be conducted sua sponte by the court under its inherent powers.

In this action, what had been destroyed were handwritten documents, but the Court's analysis clearly pertains equally to ESI, relies on Zubulake IV (an ESI preservation decision) and so is worthy of some discussion. The Court's begins with a review of the Second Circuit spoliation analysis. Note the distinction between elements establishment and the sanctions imposition analyses:

Spoliation of Evidence:

Judge Chin first discusses the elements comprising spoliation in the Second Circuit:

"'Spoliation of evidence is defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." Byrnie, 243 F.3d at 107 (citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir.1999)). When one party alters, destroys, or otherwise fails to preserve key evidence before it can be examined by another party, a court may, pursuant to Fed.R.Civ.P. 37(d) or its inherent power, impose sanctions on the party responsible for the spoliation of evidence. See West, 167 F.3d at 779. The party seeking sanctions bears the burden of establishing all elements of a claim for spoliation of evidence. Byrnie, 243 F.3d at 109.'"

Judge Chin then provides an analysis of the four factors to be taken into account by a court in its determinations. In reality there are five factors. Note the careful wording of the excerpt from Byrnie cited by the Court, which makes control over evidence a pre-requisite to a finding of an affirmative duty to preserve. Although the Court numbers these factors as four, in reality there are five (six if one counts discretionary powers of court to impose sanctions), and each element will be discussed under separate caption.

I. Control

"In assessing whether sanctions are warranted for the spoliation of evidence, the court first must determine whether the party with control of the evidence was under an affirmative duty to preserve the evidence. Id. at 107. "

II. Duty to Preserve

"While a litigant is under no duty to keep or retain every document in its possession, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y.2003) ("Zubulake IV").

III. Relevance

"Relevant documents are those that a party should reasonably know are "relevant in the action, [ ] reasonably calculated to lead to the discovery of admissible evidence, [ ] reasonably likely to be requested during discovery and/or [are] the subject of a pending discovery request." Id. at 217 (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y.1991)). The duty to preserve extends to those employees of a party who are likely to have relevant information. Zubulake IV, 220 F.R.D. at 218.

For those practitioners who litigate Title VII matters, the duty to preserve is enhanced by the CFR:

"Under EEOC regulations, moreover, employers are required to preserve personnel documents relevant to a pending EEOC charge until final disposition. 29 C.F.R. § 1602.14. These include "personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought…""

IV. Culpable State of Mind

Ok, maybe I'm not a math wizard, but the factors articulated by the Second Circuit add up to…5. I counted them myself. That said, the Court cites Second Circuit language in numbering this consideration "second":

"Second, the party seeking sanctions must show that the party with control over the evidence had a "culpable state of mind." Byrnie, 243 F.3d at 109. Spoliation sanctions are not limited to cases where the evidence was destroyed willfully or in bad faith, but may also be imposed when a party negligently loses or destroys evidence. See Zubulake IV, 220 F.R.D. at 220."

V. Relevance

Really, really, there are 5, not three requirements. The Second Circuit might describe three, but I'll stick with my arithmetic.

"Third, the party seeking sanctions must show that the spoliated evidence was relevant to its claims or defenses, such that a reasonable trier of fact could find that it would support those claims or defenses. See Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99, 108-09 (2d Cir.2002); see also Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 ("Zubulake V") ("[T]he concept of relevance encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant."); Treppel v. Biovail Corp., 249 F.R.D. 111, 121-22 (S.D.N.Y.2008)."

Let's parse the term "relevance." It consists of two discrete requirements. The first addresses the requirement that spoliated evidence might support a claim or defense of a non-spoliator. The second addresses the requirement that the spoliation of evidence must somehow prejudice the non-spoliating party. On April 22, 2009, I participated in a mock digital evidence spoliation proceeding at the RSA Security Conference in San Francisco before Magistrate Judge John Facciola (D.D.C.) and argued in favor of the affirmance imposition of sanctions for spoliation in a follow on mock appeals session (Second Circuit decisional authority was controlling) before Judges Shira Scheindlin (SDNY) of Zubulake fame, and San Francisco Superior Court Judge Richard A. Kramer. Both Magistrate Judge Facciola's decision imposing sanctions, and Judge Scheindlin's and Kramer's reversal of M.J. Facciola's decision involved extensive discourse on the issue of prejudice.

So, when arguing relevance, a spoliation movant should also always demonstrate prejudice.

VI. Sanctions Imposition Discretionary with Court

This is really not a demonstration required to establish spoliation sanctions, but guidance (or license) to a District Court to determine sanctions imposition on a case-by-case basis. I'll stick with five factors, and pass the bottle of aspirin:

"Finally, determining the proper sanction to impose for spoliation "is confined to the sound discretion of the trial judge, ... and is assessed on a case-by-case basis." Fujitsu Ltd. v. Federal Express Corp., 247 F.3d

423, 436 (2d Cir.2001). Sanctions should be designed to "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party." West, 167 F.3d at 779 (citations and internal quotation marks omitted); see also Treppel, 249 F.R.D. at 123-24."

EEOC Filing Triggers Preservation Duty

Just in case there is any doubt, the filing of an EEOC action does indeed trigger a duty to preserve, and the duty in turn to preserve relevant personnel documents is codified in the CFR:

"With the filing of the Asian Jade Society's EEOC charge, the Port Authority had reason to anticipate litigation and was under an obligation to "put in place a litigation hold" extending to email as well as paper documents relevant to the charge. Zubulake IV, 220 F.R.D. at 216-18. Personnel documents relevant to the Asian Jade Society charge included documents also sought by plaintiffs as relevant to this action, such as the Handwrittens, CO recommendations, and other documents related to promotions. See 29 C.F.R. § 1602.14."

That said, the Court in this instance discusses that, under the circumstances of this case, a mere "meeting" about promotions did not result in an earlier than EEOC filing date preservation trigger:

"Plaintiffs claim the Port Authority should have reasonably anticipated this litigation in 2003, following a series of meetings between Department leadership and the Hispanic Police Society about promotion of Hispanic officers. (Pls. Mem. at 11). I am not persuaded that such meetings prompted the Port Authority to reasonably anticipate litigation."

The Court goes on to find that the destruction of documents by the defendant was "at least negligent" under Zubulake IV, but as there was no showing of a "wholesale failure" by defendant to put in place a litigation hold, there was insufficient evidence for the Court to make a finding of "gross negligence":

"Second, I conclude the Port Authority's failure to preserve documents relevant to this litigation was at worst negligent. See Zubulake IV, 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."). The Port Authority does not dispute that it failed to retain at least some of the documents at issue here. I am not convinced, however, that plaintiffs have shown a wholesale failure by the Port Authority to put in place a "litigation hold" or otherwise communicate document preservation or destruction policies to its employees, such that a finding of gross negligence by defendant would be appropriate. Cf. Heng Chan v. Triple 8 Palace, No. 03 Civ. 6048(GEL)(JCF), 2005 WL 1925579, at *7 (S.D.N .Y. August 11, 2005) (finding gross negligence where defendant "systematically destroyed evidence because they had never been informed of their obligation to suspend normal document destruction policies")."

"Th[e] evidence alone is insufficient to demonstrate the lack of any such policies; I decline to draw such a conclusion here. Nor is there anything in the record to suggest that the Port Authority acted willfully or with the intent to destroy evidence that it believed would be adverse to its interests. Indeed, as Judge Cedarbaum noted in the Asian Jade Society case, the Port Authority's failure to preserve personnel materials is no doubt related in part to the attack on the World Trade Center on September 11, 2001, "which destroyed the Port Authority's executive offices and killed many of its employees." Port

Authority Police Asian Jade Society of New York & New Jersey, No. 05 Civ. 3835(MGC), 2009 WL 577665, at *2 (S.D.N.Y. Mar. 5, 2009)."

"Arguable" Relevance

Judge Chin then notes that "some" of the categories of the documents in question were arguably relevant:

"Third, of the five categories of documents that are the subject of this motion, some have arguable relevance. The Handwrittens for the Detective promotions, for example, would help establish the size of the applicant pool and identify the applicants. The Rivera Memorandum, as described by plaintiffs, arguably provides support for both the discrimination and retaliation claims. The CO recommendations are arguably relevant because they could shed light on the qualifications of both successful and unsuccessful candidates."

Lack of Prejudice

What sunk (technical term of art, folks) plaintiffs' motion for spoliation was a finding by the Court that on the basis of the record before it, there was no prejudice to the non-spoliating party:

"Ultimately, however, the request for sanctions is denied, for I am simply not persuaded on this record that a reasonable jury could find that the evidence was harmful to the Port Authority's defense of the case. Indeed, this was precisely Judge Cedarbaum's conclusion in denying the motion for sanctions in the Asian Jade Society case. See 2009 WL 577665, at *2."

Extrinsic Evidence Needed to Show Prejudice in "Ordinary Negligence" Spoliation

Following Southern District precedent, Judge Chin denies the motion for spoliation, ruling that a finding of prejudice must be predicated on some extrinsic evidence where spoliation results from "ordinary" or "mere" negligence:

"Although "the burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous," Heng Chan, 2005 WL 1925579, at *7, when "the culpable party was negligent, there must be extrinsic evidence to demonstrate that the destroyed evidence was relevant and would have been unfavorable to the destroying party," Great Northern Ins. Co. v. Power Cooling, Inc., No. 06 Civ. 874(ERK)(KAM), 2007 WL 2687666, at *11 (E.D.N.Y. Sept. 10, 2007) (citation omitted)."

Author's note: A duty to preserve may be bilateral, and apply to both plaintiff and defendant. It appears that the court would entertain an argument to the effect that a duty to preserve may be waived (or extinguished) where both parties are in possession of, and where both do not retain, a relevant document. In this case, one plaintiff did not retain a copy of a memorandum also not retained by defendant. While not made the sole basis for the denial of the motion, this certainly had some impact on the Court's decision:

"Moreover, Rivera himself did not keep a copy of the memorandum, and thus he can hardly complain that the Port Authority did not retain one."

Negligent Spoliation Supports Denial of Summary Judgment

The Court also notes that in the Second Circuit, a motion for summary judgment may be defeated in certain circumstances where spoliation has occurred:

"Because "[i]n borderline cases, an inference of spoliation, in combination with 'some (not insubstantial) evidence' for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment," Byrnie v. Town of Cromwell, Bd of Educ., 243 F.3d 93, 107 (2d Cir.2001)

This appears to be one of the first decisions in which negligent spoliation is found, sanctions are denied, but where the spoliation itself is used as the basis for denial of a summary judgment motion. It appears that the "borderline" here was crossed (and summary judgment denied) on the discrimination and retaliation claims. Keep in mind that although the "Rivera Memorandum" was one of the documents destroyed by defendants, there was some extrinsic evidence (testimony) as to the content of that memorandum:

"The Rivera Memorandum, as described by plaintiffs, arguably provides support for both the discrimination and retaliation claims."

****

Case: Coburn v. PN II, Inc.
Citation: 2009 WL 905057 (D. Nev. 2009)
Date: 2009-03-31
Topics: Spoliation proceedings survive grant of summary judgment; motion to dismiss for destruction of evidence

In another Title VII case alleging disparate treatment, this time before U.S. District Judge Dawson of the District of Nevada, defendant filed a "Motion to Dismiss for Destruction of Evidence." In that motion, defendant alleged that plaintiff "manually deleted almost 4,000 files containing relevant search terms before her computer hard drive was cloned for examination."

Ok, this case just graduated into the "what-not-to-do" hall of fame. The envelope, please:

"When the forensics examiners recovered those portions of the deleted files that had not yet been permanently overwritten with other data, Plaintiff refused to produce them to Defendants."

"Plaintiff ran a "'cleaner'" program that systematically destroyed certain documents from her computer just two days before the court-ordered production."

"Plaintiff asserts that such activities were automatic or part of scheduled service…"

Nice try, but the court wasn't buying:

"[H]owever, this explanation is contradicted by her own technician who claims that he did not set the program to automatically remove user created data files. The computer settings were manually altered on July 21, 2007, and again on May 7, 2008 at 8:15 p.m. according to Vestige, the court appointed forensics examiner assigned to examine Plaintiff's computer. As stated, Plaintiff was under a court order to allow a forensics examination of the computer two days later."

Judge Dawson granted defendant's motion for summary judgment on bases other than spoliation, but noted first that had summary judgment been denied, there would have been an evidentiary hearing on the spoliation motion, leaving little doubt what would have ensued. The Court also left open the door for a subsequent sanctions motion:

"The foregoing allegations are sufficient that the Court would have held an evidentiary hearing were summary judgment not to be granted. Such a hearing may still be necessary in the event attorney fees or sanctions become an issue. For present purposes, the Court denies the Motion to Dismiss as moot, but without prejudice to renewal on proper showing."

****

Case: Hape v. State
Citation: --- N.E.2d ----, 2009 WL 866857 (Ind. App. 2009)
Date: 2009-03-31
Topics: Text messages in cell phone held not testimonial, no confrontation clause violation, text messages must be separately authenticated, presentation of text messages to jury without proper authentication no fundamental error

In this decision from the Court of Appeals of Indiana, the Court held that text messages saved in defendant's cell phone were "part and parcel" of the telephone in which they were stored, "just as the pages in a book belonged to the book by their very nature" and accordingly, like the telephone itself, not impeachable.

Of course, the argument might have been made that text messages are not "part and parcel" of a phone that, unlike "pages in a book" text messages might be easily and undetectably inserted or deleted.

I suspect this criminal matter represents a clear case of what Magistrate Judge Facciola commonly refers to as "asymmetric litigation." There was no objection raised at trial regarding the introduction of defendant's cell phone or the messages contained in it, leaving the Court of Appeals free to review for "fundamental error" (which I presume presents a very high bar). Quite possibly it was either lack of defendant's resources or counsel competency (compared with the State's resources and competency) that frequently characterizes criminal proceedings as "asymmetric" in nature.

The issue presented for review: Whether the text messages represented "testimonial hearsay." If so, the defendant asserted, he should have been provided with the opportunity to cross examine that hearsay.

A little constitutional law review is appropriate. The Sixth Amendment's right to witness confrontation extends to the states courtesy of the Fourteenth Amendment. So, in a state law criminal action, a defendant is afforded the same Sixth Amendment right of confrontation as is afforded a defendant in a federal criminal proceeding. 'Nuff said.

Ok, back to the decision. The defendant was arrested and removed from his truck, which contained bags of methamphetamine, some cash, two cellular telephones, a box of plastic bags, and implements of methamphetamine production. The arresting officers also found bags containing methamphetamine in defendant's pocket.

It was discovered after the trial (and defendant's conviction) that during deliberation, the jurors were able to retrieve text messages from defendant's cell phone by turning it on (it appears that the arresting officers never turned on the phone, or had it forensically examined). The message on the phone from one "Brett":

"Hey man do you think that you can do something 4 one of what I gave you the other night. I could care less about ours right now but my other dude keeps asking & I don't even have the funds to pay him back guess I will freakin tell him to get it off the water tower."

"Accidental Exposure" of Text Messages Saved On Cell Phone to Jury

We get a sense of where the court is headed by its use of the term "accidental exposure." On appeal, the Court notes, defendant:

"…alleges that the accidental introduction of the text messages violated the Confrontation Clause, Indiana hearsay rules, and the requirement that evidence be properly authenticated before admission."

Cell Phone Text Messages are "Intrinsic" to a Cell Phone

Indiana decisional authority provides that "as a general matter, a jury's verdict may not be impeached by evidence from the jurors who returned it. Stephenson v Sate, 742 N.E. 3d 463, 277 (Ind. 2001). Indiana decisional authority has drawn a distinction however, between the types of evidence from a juror, labeling them either "intrinsic" or "extrinsic":

"However, "extrinsic or extraneous material brought into deliberation may be grounds for impeaching a verdict where there is a substantial possibility that such extrinsic material prejudiced the verdict." Id. The burden rests with the defendant to prove that material brought into the jury room was extrinsic. Id. The burden then shifts to the State to prove the introduction of extrinsic material harmless. Id. Absent a "substantial possibility that [the] ... material prejudiced the verdict," its introduction is harmless, and jurors may not impeach the verdict by testifying about it. Id."

The Court then notes that the evidence was admitted without objection. Another telltale sign of asymmetric litigation:

"The jury discovered the text messages at issue by turning on a cellular telephone that was admitted into evidence without objection.

Extrajudicial Jury Experimentation

The Court of Appeals then analyzes "extrajudicial" jury experimentation resulting in jury possession of extrinsic evidence and acknowledges its impermissibility:

"In Bradford v. State, our Supreme Court addressed a defendant's claim that jurors improperly obtained and considered extraneous evidence by conducting extrajudicial experiments. The Court cited with approval the rule that experiments conducted by the jury improperly inject extraneous information into deliberations when the results "amount[ ] to additional evidence supplementary to that introduced during the trial."*988 Bradford v. State, 675 N.E.2d 296, 304 (Ind.1996) (quotation omitted), reh'g

denied; Kennedy v. State, 578 N.E.2d 633, 641 (Ind.1991) (citing In re Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir.1982)).

With that analysis out of the way, the Court then makes the quantum leap of logic in deciding that there was not extrajudicial experiment because there was no "extrinsic" evidence provided to the jury. The reason: text messages are "intrinsic" to a cellular telephone. Support for that proposition? Black's Law Dictionary:

"Here, turning on the telephone did not constitute an extrajudicial experiment that impermissibly exposed the jury to extraneous information. First, the text messages themselves are not extraneous to the cellular telephone. We agree with the State that text messages are intrinsic to the cellular telephones in which they are stored. "Intrinsic," as defined by Black's Law Dictionary, means "[b]elonging to a thing by its very nature; not dependent on external circumstances; inherent; essential." Black's Law Dictionary 842 (8th ed.2004). We conclude that the text messages at issue here are part and parcel of the cellular telephone in which they were stored, just as pages in a book belong to the book by their very nature, and thus they are intrinsic to the telephone."

The Court then in this portion of its decision (and purely imo) blithely ignores the fact that a cell phone is a computing device, and the very act of turning it off and on may have severe evidentiary consequences.

"Turning on a device that is made to be turned on constitutes a permissible examination of the evidence before the jury. Pursuant to Indiana Evidence Rule 606(b), Hape may not impeach the jury's verdict with affidavits regarding the text messages. The trial court did not abuse its discretion in denying Hape's motion to poll the jury."

Since a cell phone is a computing device, text messaging is accomplished through the use of an application running on a cell phone. Moreover, since a text message is sent to a phone (rather than being part and parcel of same) a cogent argument might have been made that the text message was extrinsic evidence. No such argument appears to have been made by defendant.

<u>Fundamental Error</u>

Defendant also argued that the introduction of the text messages violated his Sixth Amendment right of confrontation, that the text messages constituted inadmissible hearsay, and that they were not properly authenticated. Since no objections on these bases were raised at the trial level, the Court was constrained to review only for fundamental error. Counsel competency (or resources) must have been a factor, but this was not discussed. How high is the bar for reversal based on fundamental error? Very:

"We will only find fundamental error "when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and [where the] violation is so prejudicial to the rights of the defendant as to make a fair trial impossible." Jewell v. State, 887 N.E.2d 939, 942 (Ind.2008). "In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial." Townsend v. State, 632 N.E.2d 727, 730 (Ind.1994). "The element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled." Id."

Ok, on to the arguments.

Confrontation Clause

I expect that Confrontation Clause assertions involving ESI will become quite frequent in the not-too-distant future. Unfortunately, where asymmetric litigation finds a defendant with limited legal and technical resources, such assertions are likely to fail. When it comes to digital evidence and criminal proceedings, decisions involving poor defendants and asymmetric litigation are almost guaranteed to make bad law, and imo, this decision stands at the vanguard.

The Court of Appeals first makes its Confrontation Clause analysis, and not surprisingly, winds up with a discussion of the Supreme Court's 2004 decision in Crawford v Washington:

""The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." This right of confrontation is applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *989 Howard v. State, 853 N.E.2d 461, 464 (Ind.2006). The essential purpose of the Sixth Amendment's "Confrontation Clause" is to ensure that the defendant has the opportunity to cross-examine the witnesses against him or her. Howard, 853 N.E.2d at 465. The Supreme Court has held that "the admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." Id. (citing Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). As the Indiana Supreme Court has explained, "A critical portion of the [Crawford] Court's holding was the phrase 'testimonial evidence.' " Id.

The Court then applies the Indiana definition of what is "testimonial evidence." This appears to be somewhat broader in definition than that given to the phrase by the Supreme Court:

Evidence is testimonial if it "is one given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." Frye v. State, 850 N.E.2d 951, 955 (Ind.Ct.App.2006), trans. denied.""

The Court of Appeals nevertheless rules that cell phone text messages are not testimonial for two reasons: First, there was no evidence that the messages were made by "Brett" (the sender of the text messages) with any intention that they be used in future legal proceedings, and second, that the defendant (recipient of the statements) did not collect them for the purposes of any future legal utility.

Accordingly the Court ruled that "[T]he Confrontation Clause does not act to bar these text messages because they are not testimonial."

That was clear. Maybe.

Authentication

The Court of Appeals next discusses defendant's assertions that the cell phones and the text messages were not properly authenticated, and that their admission constituted fundamental error. The Court

first addresses the authentication of the cell phone, and after describing the acquisition and chain of custody, rules that they were properly authenticated.

Separate Authentication of Cell Phone Text Messages

The Court then addresses the authentication of the text messages, and notes that it has "unearthed" no Indiana authority "involving discussion of authentication of text messages generated and stored in telephones."

The Court first notes that computer data is required to be authenticated, and that such authentication under the Indiana Evidence Rule 901(a) is "satisfied by a showing that [data] was recovered from [the defendant's] computer. Bone v. State, 771 N.E. 2d at 716. " [Complete citation added]

Separate Purpose, Separate Authentication

Relying in part on Magistrate Judge Grimm's decision in Lorraine v Markel American Ins. Co, the Court then finds that a text message, even if "intrinsic" to a cell phone, must be separately authenticated where the purpose for which admission is sought is differs from the purpose of admitting the phone itself.

"Even though we have determined that a text message stored in a cellular telephone is intrinsic to the telephone, a proponent may offer the substance of the text message for an evidentiary purpose unique from the purpose served by the telephone itself. Rather, in such cases, the text message must be separately authenticated pursuant to Indiana Evidence Rule 901(a). See also Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 546 (D.Md.2007) (observing that federal courts have recognized Federal Rule of Evidence 901(b)(4) as a means to authenticate electronic data, including text messages); Dickens v. State, 175 Md.App. 231, 927 A.2d 32, 37 (2007) (reviewing whether text messages saved on a cellular telephone were properly authenticated); *991 State v. Taylor, 178 N.C.App. 395, 632 S.E.2d 218, 230-31 (2006) (reviewing whether the State properly authenticated text messages)."

In what may best be described as an intriguing exercise in logic, the Court finds that the State did not admit the text messages for an evidentiary purpose distinct from the cell phone (indeed, the State appears to have been unaware of the text messages) and so they could not have been offered for any reason other than that defendant possessed them in the same way he possessed the cell phone. This provided sufficient cover for the Court's next quantum leap in logic:

"Nevertheless, the presentation of the text messages to the jury without proper authentication did not rise to the level of fundamental error because the jury's exposure to the text messages was harmless error. See Stephenson, 742 N.E.2d at 477."

The Court's ultimate reasoning was that the other evidence against the defendant was strong enough to overshadow any potential prejudice presented by the jury's exposure to the text messages:

"Unlike cases in which the appellate court has reversed convictions after evidence was accidentally provided to a jury because the evidence against the defendant is otherwise circumstantial, Franklin v. State, 533 N.E.2d 1195, 1196 (Ind.1989); Schlabach v. State, 842 N.E.2d 411, 416-17 (Ind.Ct.App.2006), trans. denied, here the evidence against Hape is strong. Having reviewed the evidence presented to the jury, we conclude that there is not a substantial possibility that the text messages prejudiced the verdict.

See Stephenson, 742 N.E.2d at 477. The evidence against Hape with regard to possessing methamphetamine with the intent to deliver was compelling."

While this no doubt was true, the Court might have avoided eviscerating technological definitions along the way. It didn't and we'll have to see what reliance is made on this decision in future actions.

Some additional observations: It is surprising that a forensic examination of the phone did not take place. One might also have made the argument that the cell phone itself was spoliated by the very fact of turning it on and viewing the text message. Chalk this up to the dangers of asymmetric litigation and an overworked and undertrained (in matters technological) public defender

A final observation: If a text message is "intrinsic" to a cell phone, must other computer data be considered "intrinsic" to a particular computer? Think, *inter alia*, of "cloud computing."

****

Case: Schneider Saddlery Co., Inc. v. Best Shot Pet Products Intern., LLC,
Citation: 2009 WL 864072 (N.D.Ohio 2009)
Date: 2009-03-31
Topics: Authentication of web content, trademark decisional authority and judicial notice under Fed.R. Evid. 202(b)(2)

In this trademark infringement case from the U.S. District Court for the Northern District of Ohio, District Judge Kathleen O'Malley addresses the authentication of web content.

Here, Judge O'Malley first rules that although unauthenticated printouts of web site content are normally inadmissible, an exception lies in trademark dispute, a court may take judicial notice of images that are the subject of the dispute, and if they are not objected to as inaccurate:

"Best Shot has attached a number of unauthenticated photographs to its motions, most of which are printed directly from the parties' web-sites. (See, e.g., Doc. 74 Ex. I.) Courts are usually hesitant to accept any unauthenticated material for purposes of summary judgment, but here, the images of Best Shot's and Schneider's products are admissible. In a trademark dispute, a court may choose to take judicial notice of the very images that are the subject of the dispute, so long as there is no contention by either party that the images are inaccurate or could not be properly admitted before a jury. See Comedy III Prods., Inc. v. New Line Cinema, 200 F.3d 593, 594 (9th Cir.2000)"

This was not the case for all for all the image evidence sought to be admitted:

"Conversely, the other images on the web-pages provided by Schneider fall under no such exception. See Nightlight Sys. v. Nitelites Franchise Sys., No. 1:04-CV-211, 2007 U.S. Dist. LEXIS 95538, at *16 (N.D.Ga. May 11, 2007) ("[T]o authenticate a printout from a web page, the proponent must present evidence from a percipient witness stating that the printout accurately reflects the content of the page and the image of the page on the computer at which the printout was made."); cf. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 561 (D.Md.2007) ("Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene.).FN10 Similarly, Best Shot attached unauthenticated photographs of an unknown origin depicting images such as toothpaste, popcorn, and other equine-care products. (See, e.g., Doc. 86 at 7.) These images must also be

disregarded. See Magnum Towing & Recovery v. City of Toledo, 287 Fed. Appx. 442, 448 (6th Cir.2008) ("[The district] court properly did not consider any documents ... that were unauthenticated or otherwise failed to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure.") (citations omitted); see also Lorraine, 241 F.R.D. at 561.

The Court also provides an interesting comment (and appears to take issue) with the decisional authority considering it inappropriate to take judicial notice of publicly available websites for purposes of summary judgment in an interesting footnote. Note that the Court appears to follow the Hape "purpose of authentication" approach, but couches its language in hearsay terms:

"FN10. The Court does, however, question the case law indicating that it is generally inappropriate to take judicial notice of the content of publically available websites for purposes of summary judgment, particularly to the extent that these cases frequently fail to distinguish between material offered for the truth of the matter asserted and material offered for the fact of its publication."

In an even more interesting aside, the Court muses on the benefits of what might best be described as a rebuttable presumption of authenticity:

"It might well be preferable to require parties to assert a good-faith belief that proffered evidence was inauthentic as a predicate to challenging its authentication. This is not, however, the evidentiary rule. Consequently, the Court declines to take notice of the images attached to Best Shot's briefing, except with respect to the images depicting the use of the very marks that are the subject of the instant dispute."

If wishes were fishes…

****

Case: Gaffield v. Wal-Mart Stores East, LP
Citation: 2009 WL 890654 (N.D.N.Y. 2009)
Date: 2009-03-31
Topics: Standards for review of U.S. Magistrate Judge Report and Recommendtion(s)

This decision from the United States District Court for the Northern District of New York set out the standards for a District Judge's review of a U.S. Magistrate Judge's report and recommendation, and discusses the standard to be followed both in the presence and absence of objections.

No Objections to Report and Recommendation – Clear Error

"Where the parties do not object to a report and recommendation, the court reviews the report and recommendation for clear error. See Farid v. Bouey, 554 F.Supp.2d 301, 306 (N.D.N.Y.2008) (citation omitted).

Objection Made to Report and Recommendation – De Novo Issue Review

Where a party makes specific objections addressed to portions of the report and recommendation, the court conducts a de novo review of the issues raised by the objections. See id. at 307 (citation omitted).FN1"

In this case, Senior District Judge Scullin noted that there were no objections to defendant's motion for dismissal of plaintiff's motion for sanctions and applied the appropriate standard:
"Since there was no objection to Magistrate Judge's Lowe's recommendation of dismissal of Plaintiff's motion for spoliation sanctions against Wal-Mart and there being no clear error, the Court adopts this recommendation."

Steven W. Teppler, Esq. is senior counsel at KamberEdelson, LLC in Sarasota, FL. He serves as Vice of Chair of SciTech's E-Discovery and Digital Evidence and Information Security Committees. He sends these updates to share cutting edge news with E-Discovery and Digital Evidence committee members. Join the committee today for free to receive your committee when news breaks! He can be reached at steppler@timecertain.com.