Western District News

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Western District of Wisconsin Bar Association

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The Patriot Act and Its Effect on Civil Liberties

By J. B. Van Hollen

Since the passage of the PATRIOT Act in late 2001, there has been much public debate over the supposed assault made by that Act on the privacy of communications and the civil liberties of individuals in the United States. Immediately after the passage of the Act, the United States Attorney's Office for the Western District of Wisconsin began reaching out to educate attorneys and opinion leaders on the facts of the Act, in contrast to many myths circulating in the public through the media, so that these leaders would be able to make judgments based on accurate information. By educating opinion leaders, this office hoped to have a multiplier affect and to reach many more members of the general public than might otherwise be reached through general presentations to the public. In short, it has been the goal of our prior presentations, and is the goal of this brief article, to provide attorneys, as opinion leaders in Wisconsin, the tools to understand the changes and to form opinions regarding the PATRIOT Act based on accurate information.

First and foremost, the PATRIOT Act is not a sweeping expansion of federal law creating new crimes and new investigative tools. Instead, the Act primarily brought the law up-to-date with current technology and solved evidence gathering problems which were presented by the expansion of and new forms of electronic communications. Law enforcement officers no longer have to fight a digital-age battle with antique weapons such as legal authorities left over from the era of rotary telephones.

The Act provided solutions in several areas including:

(1) Adding terrorism crimes to the pre-existing list of offenses for which the government can request a wiretap order for communications content from a United States District Court. These additional listed offenses include chemical weapons offenses, killing United States nationals abroad, using weapons of mass destruction, and providing material support to terrorist organizations.

(2) Allowing victims of computer hacking to request law enforcement assistance in monitoring the "trespassers" on their computers. This change made the law technology-neutral and placed electronic trespassers on the same footing as physical trespassers.

(3) Allowing law enforcement to seek court orders for business records in national security cases. While law enforcement has always been able to obtain business records in criminal investigations through grand jury subpoenas, it was difficult to obtain these records in national security investigations. Under the PATRIOT Act, the government can now ask courts for the same records in national security investigations and might seek, for example, records from chemical plants to find out who purchased materials capable of making a bomb, or bank records to see who might be sending money to terrorist organizations. These orders can only be issued after the government demonstrates to a federal judge the need for the records, and the Act specifically protects First Amendment activities.

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Theresa Owens To Succeed Joseph Skupniewitz As Clerk

By Margery Tibbetts
Brennan, Stiel & Basting

Theresa Owens
Clerk for Western District

A warm welcome to Theresa Owens. Upon Joe Skupniewitz's retirement on January 2, 2004, Theresa will assume the duties of Clerk for the Western District of Wisconsin. Theresa has served as the Chief Deputy Clerk for the Western District since July 7. The Chief Deputy Clerk position has enabled Theresa to work with Joe to ease the transition. Theresa credits Joe and the staff at the Western District for what she views as a quick transition.

Most of Theresa's legal career has involved court administration. She graduated from Luther College in Decorah, Iowa and Drake University Law School in Des Moines, Iowa in 1992. After that she served as a law clerk for the Iowa Court of Appeals for two years. Theresa then served as the Chief Deputy Clerk for the Iowa Supreme Court and Court of Appeals until moving to Wisconsin in January 2000. Theresa served as the Chief Deputy Clerk for the Wisconsin Supreme Court and Court of Appeals from then until coming to the Western District.

It is too early in the transition for Theresa to predict whether there are any looming issues for her to tackle after January. Theresa plans to meet with members of various groups, including the Bar and the U.S. Attorney's Office about pending issues and concerns they may have about court services and needs. Theresa does hope to increase the marketing efforts for electronic filing. A decision has not been made as to whether Theresa will serve as a part-time magistrate. It is anticipated that a decision will be made on that late this winter.

Theresa is looking forward to working with our Bar Association. She views the function of the Clerk's office as providing service and support for the court and the Bar.

On a personal note, Theresa's husband is a senior investment manager for a subsidiary of Cuna Mutual. They have two dogs, a border collie and a beagle. Theresa's hobbies include recreational basketball and rollerblading.

The President's Corner

By
Todd Smith
President

The Western District of Wisconsin Bar Association's mission statement states that the WDBA exists to promote the just, speedy, respectful and efficient determination of every action filed in the U.S. District Court. As the WDBA begins its second decade, the organization has developed many tools to help lawyers practicing in federal court and the clients they serve. Among the resources developed by the WDBA are the Practice Expectations (which are updated annually), the example jury instructions, our quarterly newsletter, the WDBA website, the maintenance of the attorney's room, along with our annual meeting and CLE materials.

Currently, the WDBA is developing a voluntary early neutral evaluator program to assist litigants and counsel resolve their federal civil disputes at an early stage. While the details of the program are still under consideration, the WDBA has envisioned a program where experienced member-attorneys can volunteer their time to evaluate newly-filed cases within their area of expertise. The evaluator would likely advise each party about the likely resolution of the case, by identifying its strengths and weaknesses along with the critical factual and legal issues raised.

The WDBA believes that this type of early evaluation is particularly helpful in federal court, where many cases require specialized substantive and procedural expertise. It is my hope that the program will eventually become an asset to the WDBA membership and the court. Of course, the ultimate goal of the program is to aid our Association's mission to foster the "just, speedy, respectful and efficient" resolution of cases.

The WDBA needs your help, advice and input to make the early neutral evaluator program a success. I would ask you to consider what you would like to see in our program that would make it a resource you are likely to use. In particular, we would like to hear your thoughts on how to publicize the program, how to select evaluators, how the evaluators should work with counsel and parties, and whether the WDBA should approach the court about mentioning the program in its preliminary pretrial orders. In short, we want our members to use the program so we want to hear from you on these issues!

In addition, if we are going to implement this program we need your help to serve as evaluators. If you believe you have expertise in a particular substantive area of federal practice, and would be willing to donate a small portion of your time in furtherance of the WDBA's mission, we want to know! Please contact me at tsmith@gklaw.com with your ideas or to become an evaluator.

Association Web Site

Have you visited the Internet home of the Western District Bar Association yet? The website may be accessed at the following address: http://www.wisbar.org/bars/west/.

The site is home for basic Association information, including newsletters, bylaws and organizational rosters. It is linked to the 7th Circuit Bar Association and other locations of interest to our members.

The WDBA website appears within the State Bar of Wisconsin's website under the heading "local bars." The WDBA website is provided and maintained without cost. Its contents are determined by the Website Committee, in consultation with the executive board and, of course, the members.

Comments and suggestions for improvement are welcome. Please direct them to Brian Hodgkiss, whose email address is bph@andlaw.com.

Patriot Act

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The new technological investigative tools were useful during the investigation of Wall Street Journal reporter Daniel Pearl's murder when law enforcement used one of the Act's surveillance authorities to intercept critical Internet communications to help identify and locate some of the killers. In addition, after the 2001 anthrax attacks, a federal court in Washington, D.C., used the Act's "nation-wide search warrants" authority to issue an order authorizing law enforcement to search the premises of the first anthrax victim's employer in Florida. Investigators saved valuable time because they were able to ask the local federal judge, who was most familiar with the case and who was overseeing the nation-wide investigation, for this order.

Perhaps most importantly, the PATRIOT Act facilitates information sharing and cooperation among government agencies so that they can better investigate complicated criminal terrorist organizations. The Act removed legal barriers that prevented law enforcement, intelligence, and defense communities from sharing information and coordinating activities in a common effort to protect national security and to also prosecute persons violating federal laws. In short, the Act dismantled walls of separation and began building a culture of cooperation which will be essential to effective anti-terrorism efforts. For example, prosecutors can now share grand jury evidence with the intelligence community and the Act also permits the sharing of intelligence information with the federal prosecutors. Recently, a federal grand jury indicted Sami al-Arian for funding Palestinian Islamic Jihad, one of the world's most violent terrorist groups. Palestinian Islamic Jihad is responsible for murdering more than 100 innocent people, including Alisa Flatow, a young American killed in a bus bombing near the Israeli settlement Kfar Darom. The indictment of al-Arian was made possible because the Act allowed criminal prosecutors to use foreign intelligence information gathered by intelligence agents.

As briefly described above, a key goal achieved by the PATRIOT Act was updating electronics evidence gathering to reflect new modes of electronic communications. The Act provides very useful, wide-ranging tools to investigative and intelligence agencies. There has, of course, been significant public discussion regarding the privacy of our communications and claims that the PATRIOT Act eviscerates judicial oversight of law enforcement activities. This is a myth which should be quashed. In fact, the PATRIOT Act does not in anyway abrogate the role played by the judiciary in the oversight of the activities of federal law enforcement agencies but instead it expands judicial oversight to areas where it previously did not exist. Judicial approval must be obtained before agents can search a residence; judicial approval must be obtained before agents can install a wiretap; and judicial approval must be obtained before agents can even install pen registers and trap and trace devices which simply record numbers, without content, of calls coming into and going out of targeted phones. Finally, district courts retain power to suppress evidence obtained in violation of the Constitution or federal statutes and to dismiss improper or insufficient indictments. The PATRIOT Act has provided great tools for agents and prosecutors, but all of these tools are only available with judicial oversight. Used lawfully, with judicial approval, the PATRIOT Act tools do not undercut the privacy of law-abiding citizens and significantly increase the protections that can be provided to them.

Contrary to much of what is printed in the press and what many of our elected representatives believe, (many of whom admit they are ignorant to the actual content of the law) the PATRIOT Act is not causing innocent civilians to have their privacy invaded. The Act simply allows law enforcement to further investigate individuals when probable cause exists to believe they are involved in terrorism. For further information, please visit the website at http://www.lifeandliberty.gov.

Electronic Evidence And The Duties Of Preservation and Disclosure

By Greg Everts - Quarles & Brady, LLP

Fed.R.Civ.P. 34 was amended in 1970 to clarify that the term "document" includes "electronic data compilations"—i.e., computer data and other electronic records. Fed.R.Civ.P. 34 & Advisory Committee Notes (1970 Amendments); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1383 (7th Cir. 1993). In the more than three decades since, the volume of electronic records has exploded. By one estimate, more than 90 percent of all information is now generated in digital form. *In re Bristol-Meyers Squibb Securities Litigation,* 205 F.R.D. 437, 440 n.2 (D.N.J. 2002).

Most obviously, computer "documents" include items such as email messages, word processing records, data spreadsheets, and electronic calendars. Less obviously, computer "documents" include virtually every possible type of electronically created information. Such information, for example, includes html code and embedded data showing when a file was created, when it was edited, and by whom. It further includes "deleted documents still located in a computer's hard drive." *Danis v. USN Communications, Inc.,* 2000 U.S. Dist. LEXIS 16900, *15 n.5, 53 Fed.R.Serv. 3d 828 (N.D. Ill. 2000); *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D.Ind. 2000) ("computer records, including records that have been `deleted,' are documents discoverable under Fed.R.Civ.P. 34."). Such data is included, moreover, whether it resides on a central server, individual desktop units, or back-up tapes.

The Seventh Circuit has underscored each of these points. In *Crown Life,* it rejected the argument that a request for "written documents" failed to ask for computer records. 995 F.2d at 1382-83. It rejected the argument that information in an electronic database, relevant to the case but not readily accessible, was not subject to discovery. *Id.* at 1383 ("While it may be true that Crown Life could not access the data at the time of the request, that does not mean that the data did not exist or was not discoverable."). *See also Minnesota Mining Co. v. Pribyl*, 259 F.3d 587, 606 n.5 (7th Cir. 2001) (affirming adverse inference instruction where defendant downloaded data onto computer hard drive just before producing it).

This article looks at the duties of disclosure and preservation as they relate to computer "document" discovery—and recent cases that illustrate some potential pitfalls.

Fed.R.Civ.P. 26/Duty of Disclosure

Fed.R.Civ.P. 26(a)(1) requires for the exchange of mandatory disclosures at the outset of most litigation. Without waiting for discovery requests, each party must provide "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Fed.R.Civ.P. 26(a)(1)(B). Rule 34 and related case law make clear that relevant "computerized data and other electronically recorded information" must be part of these disclosures. *In re Bristol-Myers Squibb,* 205 F.R.D. at 440-41.

Rule 26 imposes an affirmative duty to identify responsive documents and information. The rule provides that the initial disclosure be signed by at least one attorney of record, and that this signature "constitutes a certification that to the best of the signer's knowledge, information, and belief, *formed after a reasonable inquiry,* the disclosure is complete and correct as of the time it is made." Fed.R.Civ.P. 26(g)(1) (emphasis added).

A similar certification requirement, and duty of "reasonable inquiry," applies to supplementation of the Rule 26(a)(1) disclosures, where required, and further applies to a party's responses to interrogatories and requests for the production of documents. Fed.R.Civ.P. 26(g)(1) and (2). *See also Metropolitan Opera Association, Inc. v. Restaurant Employees International Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003) (attorneys need not supervise every step of the discovery process, and may rely on their clients in some respects, but "attorney's certification under Rule 26(g) signifies 'that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand.'") (quoting Advisory Committee notes).

Metropolitan Opera is a case where counsel for the defendant did nearly everything wrong in discovery that could be done wrong. The court, citing defendant's "utter and complete disregard for the rules of the truth-seeking process in civil discovery," entered a default judgment for the plaintiff as a sanction. 212 F.R.D. at 181. The case, however, contains an instructive discussion of the requirement of "reasonable inquiry"—and offers a cautionary tale about the risks of delegating the duty of discovery to the client, without actively supervising the process.

Much of the problem in *Metropolitan Opera* concerned the disclosure of computer records, including document drafts and electronic mail. In discussing the defendant's failure to preserve and produce such records, the court placed blame on the defendant, but focused even more on the actions and failures of defendant's counsel. "Reasonable

inquiry," the court said, included at a minimum: (1) asking the client how and where relevant documents may be maintained; (2) identifying the quantity, nature and location of electronic records and the persons with knowledge about such records; (3) explaining to the client the type of information that must be produced (including the scope of the term "document"); (4) distributing discovery requests to all employees and agents of the client potentially possessing responsive information; and (5) accounting for the collection and subsequent production of information. 212 F.R.D. at 221-22 (citations omitted).

Counsel in *Metropolitan Opera* was harshly criticized for these discovery failings, among others:

- Failing to adequately instruct the client about its discovery obligations, including, most basically, what constitutes a "document." Delegating the document production to a layperson who did not understand (and was never told by counsel) that "document" included a draft or other non-identical copy, a computer file and email.
- Failing to advise the client about plaintiff's specific document requests.
- Not going back to the person assigned to obtain information sought in plaintiff's discovery to see if he had "established a coherent and effective system to faithfully and effectively respond."
- Despite knowing that the client had no document retention or filing system, not implementing any procedure for document production or for retention of documents, including electronic evidence.
- Assuming for more than a year after the start of litigation, without verifying this, that the client's emails were stored automatically on servers when, in fact, this storage was only temporary.
- Insisting, in the face of plaintiff's persistent questioning, that all responsive documents were already produced without taking steps to verify this to be so.
- Failing to supplement prior discovery responses once it was obvious they were false or incomplete.

212 F.R.D. at 190, 222-23.

Given the requirements of Rule 26, attorneys would be wise to inquire early on in any litigation about the client's computer system and computer records. Through such inquiries, counsel should identify the types of electronic files and records that exist, where this information is kept, and the systems in place for preserving this information. If such systems (e.g., tape rotation, file back-up) are not sufficient to ensure preservation, this issue should be discussed. Counsel should establish effective communication with the client or client organization, as early as possible, concerning these issues.

Counsel, of course, will want to focus on the type of electronic information likely to be discoverable from the opposing party. At least one court has advised using the Rule 26(f) meeting to begin the process of obtaining this information. *In re Bristol-Myers Squibb,* 405 F.R.D. at 444. As part of this meeting, counsel may want to discuss (1) whether each side possesses information in electronic form, (2) whether and how they intend to produce this information, (3) whether each other's software is compatible, (4) whether privilege issues exist that may require redaction, and (5) how the parties might allocate the costs involved with such matters. *Id.*

Counsel may also choose to serve early discovery to learn the nature of the other party's computer system, including the types of documents routinely created, how and where these documents are maintained, and for how long. A letter requesting, or a motion for an order requiring, that electronic records be backed-up or otherwise preserved may be advisable if such records are considered critical to the proof.

Negligent Spoliation/Duty to Preserve

The duty to preserve relevant evidence in a litigation is a "fundamental" corollary to Rule 26's duty of disclosure. *Danis,* 2000 U.S. Dist. LEXIS 16900, *5 ("duty of disclosure would be a dead letter if a party could avoid the duty by the simple expedient of failing to preserve documents that it does not wish to produce.") Complying with this duty in the case of electronic records can be a major undertaking given that such documents may exist on central servers, desktop units, notebooks, back-up tapes, and even handheld devices.

The duty to preserve evidence arises once actual notice of a lawsuit is received; however, it may arise even earlier if a party has notice, and should be aware, that litigation may be commenced. *Kronisch v. United States,* 150 F.3d 112, 126-27 (2d Cir. 1998) (obligation to preserve evidence arises "most commonly when suit has already been filed, providing the party responsible for the destruction with express notice, but also on occasion in other circumstances, as for example *when a party should have known that the evidence may be relevant to future litigation*.") (emphasis added); *Kucala Enterprises, Ltd. v. Auto Wax Company, Inc.,* 2003 U.S. Dist. LEXIS 8833, *15 (N.D. Ill. May 23, 2003) (same). Such notice might exist where a party is preparing to file suit or where it has received a claim or letter that threatens litigation. *Rambus, Inc. v. Infineon Technologies, Inc.,* Case No. 3:00cv524 (E.D. Va. August 9, 2001) (destruction of documents prior to suit, but after receipt of letter that accused party of infringement "qualifies as litigation misconduct").

Once the duty to preserve relevant evidence attaches, spoliation occurs where a party, even through ordinary

negligence, fails to preserve such evidence. *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (reversing district court's denial of motion for sanctions where court applied standard requiring "bad faith" or "gross negligence," stressing that sanctions are proper where evidence is destroyed or not produced "knowingly, even if without intent to [breach a duty to preserve it], or *negligently."*) (emphasis in original); *Beverly Riddle v. Liz Claiborne*, 2003 U.S. Dist. LEXIS 14327, *2 (N.D. Ill. 2003) (spoliation includes not merely destruction, but "failure to preserve . . . evidence, in pending or reasonably foreseeable litigation").

Sanctions for spoliation can range from dismissal or entry of default judgment, to fines and attorneys' fees, and to exclusion of evidence and "adverse inference" jury instructions. As the Seventh Circuit recently held, a court may enter default judgment or an order of dismissal as a discovery sanction—even "without 'a clear record of delay, contumacious conduct or prior failed sanctions'"—if it finds conduct involving "willfulness, bad faith or fault" and "first considers and explains why lesser sanctions would be inappropriate." *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003). The required finding must be made by clear and convincing evidence. *Id. Cf. Metropolitan Opera,* 212 F.R.D. at 222 (default judgment given as sanction for discovery failures that were "not merely negligent but aggressively willful").

A court's decision to impose sanctions for discovery violations, including dismissal, is subject to review on appeal for abuse of discretion. *Dotson v. Bravo*, 321 F.3d 663, 666 (7th Cir. 2003). In issuing sanctions for discovery violations, a court must apply proportionality. *Crown Life,* 995 F.2d at 1382 (sanctions "must be proportionate to the circumstances surrounding the failure to comply with discovery").

There are several rules that authorize sanctions, including:

- Fed.R.Civ.P. 37, which requires automatic exclusion of witnesses or information not disclosed as part of the initial disclosures *unless* the failure to disclose was "substantially justified" or "harmless." Rule 37(c)(1). *See also Crown Life,* 995 F.2d at 1381 (affirming order that plaintiff would not be allowed to present evidence relating to defendant's counterclaim).
- Fed.R.Civ.P. 26, which requires that, where an attorney has violated the rule of "reasonable inquiry," the court "shall impose"—upon the attorney making the certification, the party on whose behalf the certification is made, or both—"an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." Fed.R.Civ.P. 26(g)(3).
- 28 U.S.C. § 1927, which authorizes imposing costs and attorneys fees on an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."

Another source for sanctions is the court's "inherent authority to rectify abuses to the judicial process . . . ." *Dotson v. Bravo,* 321 F.3d at 667.

An adverse inference instruction seems particularly appropriate for negligent spoliation of evidence. Such an instruction imposes the cost of negligent spoliation on the party that could have avoided the loss of evidence but did not do so. *Residential Funding Corp.,* 306 F.3d at 108 ("[i]t makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently"). A party seeking an adverse inference instruction should be prepared to show (1) that the party having control over the evidence had an obligation to preserve it; (2) the records were destroyed (or not produced) "with a culpable state of mind"; and (3) the evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support the claim or defense. *Id.* ("culpable state of mind" requirement met by showing of ordinary negligence where there was a duty to preserve). *See also Minnesota Mining Co. v. Pribyl,* 259 F.3d at 606 (approving negative inference instructions for party's downloading of data onto hard drive just prior to producing computer, but also stating that court "could have rightly imposed [other] sanctions").

Conclusion

Attorneys disregard electronic evidence, and the discovery obligations that relate to this evidence, at their peril. The definition of "documents" is extremely broad and includes computer records of all types.

In making initial disclosures under Rule 26(a)(1), counsel has a duty to make "reasonable inquiry," which includes making an active inquiry concerning the existence and nature of the client's computer records. As part of this conversation, counsel would be wise to give clear instructions concerning the type of information falling within the definition of "document"—and to warn of the duty to preserve it. This message should be directed to all individuals who are in potential possession of such records.

Failure to observe these basic steps may result in sanctions if evidence is lost through negligence once the duty to preserve such evidence has attached. Such sanctions may include dismissal or default, in the most egregious case; costs and attorneys' fees for the opposing party's discovery motion(s); an order excluding evidence or argument; and/or an instruction to the jury commenting on the party's failure to preserve or produce evidence.

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