New Case Alert - Federal Court Shines New Light On Electronic Discovery Obligations, Document Custodians And The Use Of Keyword Search Terms

WILENTZ, GOLDMAN & SPITZER P.A.
Commitment to Make a Difference™

By: Donald E. Taylor, Esq. & James E. Tonrey, Jr., Esq. *August 2012*

On the heels of the *Zubulake* line of cases wherein United States District Judge Shira A. Scheindlin doled out harsh sanctions for a litigant's failure to preserve evidence relevant to an impending litigation, in *National Day Laborer Org. Network v. U.S. Immigration and Customs Enforcement, et al.*, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012) ("*National Day*"), Judge Scheindlin issued another blockbuster opinion that promises to change the fabric of electronic discovery, and will undoubtedly become a heavily-cited decision in future discovery disputes. Although factually set in the context of a federal Freedom of Information Act ("FOIA") request, *National Day* is significant for two points that extend beyond FOIA to electronic discovery in general civil litigation: (1) document custodians cannot be trusted to perform the searches required to mine and produce electronic information; and (2) the use of keyword searches is often an inadequate procedure to locate responsive data and information.

In *National Day*, the plaintiffs were three public interest groups that sought records under FOIA from several federal agencies, including the Federal Bureau of Investigation, Immigration and Customs Enforcement, and the Department of Homeland Security, relating to national immigration policy. As a result of thousands of hours of searches by hundreds of employees, the government agencies produced tens of thousands of responsive records. At issue in *National Day* was the adequacy of the searches performed and the completeness of the records produced. After generally describing the searches performed by the government agencies as

falling into three categories -- "extremely rigorous", "woefully inadequate", and "documented with detail insufficient to permit proper evaluation" -- Judge Scheindlin quoted the government agencies' legal brief regarding the custodians' searches of their own files and cast doubt on whether a document custodian can ever be trusted to search for responsive records:

> They [the government agencies] argue that "it is also unclear why custodians could not be trusted to run effective searches of their own files, a skill that most office workers employ on a daily basis." Id. at 45 (footnotes omitted).

Judge Scheindlin provided two answers to defendants' question. First, custodians cannot "be trusted to run effective searches," without providing a detailed description of those searches by way of affidavit that specifically describes the search terms used, how they were combined, and whether the searches were full text of document searches. Judge Scheindlin described the second answer to the question as follows:

> The second answer to defendants' question has emerged from scholarship and caselaw only in recent years: most custodians cannot be "trusted" to run effective searches because designing legally sufficient searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for *an* answer on Google (or Westlaw or Lexis) is very different from searching for *all* responsive documents in the FOIA or e-discovery context. (emphasis in original). Id. at 46 (footnote omitted).

Thus, specifically extending her analysis beyond the FOIA context and into the litigation e-discovery field, Judge Scheindlin required the parties to meet, confer and agree upon a protocol for a more thorough, specific and documented search of the government records.

With regard to the adequacy of utilizing keywords as the sole method of locating responsive records, Judge Scheindlin opined:

> There is increasingly strong evidence that "[k]eyword search[ing] is not nearly as effective at identifying relevant information as many lawyers would like to believe." As Judge Andrew Peck -- one of this Court's experts in e-discovery -- recently put it: "In too many cases, however, the way lawyers choose keywords is the equivalent of the child's game of 'Go Fish' . . . keyword searches are usually not very effective."

* * *

There are emerging best practices for dealing with these shortcomings and they are explained in detail elsewhere. There is a "need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms of 'keywords' to be used to produce emails or other electronically stored information." And beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents. Through iterative learning, these methods (known as "computer-assisted" or "predictive" coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches. In short, a review of the literature makes it abundantly clear that a court cannot simply trust the defendant agencies' unsupported assertions that their lay custodians have designed and

conducted a reasonable search. Id. at *46 - *47; *49 - *50 (footnotes omitted).

National Day is a significant decision that will likely change the landscape of electronic discovery. Judge Scheindlin's sweeping references to "the old way" of doing things and new emerging technology reflects a willingness to move beyond the mere mechanics of electronic discovery towards fine-tuning those mechanics and making them more efficient. Attentive counsel is well-advised to stay ahead of the curve and become familiar with this decision. We welcome an opportunity to discuss the decision with you and any questions that you may have.

WILENTZ
WILENTZ, GOLDMAN & SPITZER P.A.
Commitment to Make a Difference™

Donald E. Taylor, Esq.
Commercial Litigation Team
phone: 732.855.6434
email: dtaylor@wilentz.com

James E. Tonrey, Jr., Esq.
Commercial Litigation Team
phone: 732.855.6199
email: jtonrey@wilentz.com

Donald E. Taylor is a shareholder and James E. Tonrey, Jr., is counsel in the complex commercial litigation department at Wilentz, Goldman & Spitzer, P.A.

90 Woodbridge Center Drive
Woodbridge, NJ 07095

Meridian Center I, Two Industrial Way West
Eatontown, NJ 07724

110 William Street
New York, NY 10038

Two Penn Center Plaza, Suite 910
Philadelphia, PA 19102