Litigation Alert: Not All E-Discovery News is Bad

October 30, 2014

Not All E-Discovery News is Bad

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It's been said that bad news will travel a thousand leagues, but good news sometimes doesn't get past the door. So seems to be the case with electronic discovery. It is well-documented that more electronically stored information (ESI) is being saved than ever before, emails are sent casually and continually, and deleting an electronic file doesn't actually erase it. We all know that litigation discovery requires searching not only filing cabinets, but also laptops, servers, iPhones, and the cloud. Everyone has heard multiple horror stories of how much it can cost to search for and review all of these sources of ESI, and how much companies have been sanctioned for not performing those tasks adequately.

But e-discovery doesn't have to be as unwieldy, time consuming, and expensive as you may have been led to believe. A multitude of vendors and products have surfaced in recent years offering solutions to better manage e-discovery. Those solutions come with varying pricing models that can be custom-tailored to the needs and budget of a particular case. As importantly, judges have taken notice of the toll that burgeoning ESI places upon litigants, counsel, and the courts, and they are taking steps to address the problem. Several cases decided in recent months signal a refreshing trend of emphasizing proportionality and reasonableness in e-discovery. Judges are increasingly approving measured approaches to search for and produce ESI without requiring a party to look at every conceivable source of information, employ every available data-gathering technology, or search every document containing every possible relevant keyword. Three decisions from the past several months highlight recent positive developments in e-discovery case law:

In April, a federal district court in New Jersey held that a company need not utilize its cloud-based document search tools to meet its discovery obligations. The case, *Koninklijke Philips N.V. v. Hunt Control Sys., Inc.*, No. 11-3684, 2014 U.S. Dist. LEXIS 52347 (D. N.J. Apr. 16, 2014), involved a multi-billion dollar trade dispute. To respond to discovery, Philips gathered information from eight specific employees. Hunt objected to the response, claiming Philips' document production was missing several significant documents. Hunt

asked the court to require Philips to use its "sophisticated and comprehensive state-of-the-art document search and location tools," which Hunt claimed were "design[ed] to accommodate eDiscovery," to conduct a new, more comprehensive search for responsive documents. The court rejected that request. It found that Philips' approach for gathering ESI was reasonable and that Hunt had failed to show that Philips' production was materially deficient. The court's decision reinforces that parties need not use the most advanced methods available to collect and review every speck of ESI. While a party can always argue that more could have been done to gather ESI, discovery obligations are driven by what is reasonable and sufficient, not what is technologically possible.

In a June decision, *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504 (6th Cir. 2014), the Sixth Circuit Court of Appeals held that a party was not obligated to preserve information on backup tapes. Citing the landmark *Zubulake* opinion from 2003, the court reaffirmed that a "litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in [a] company's [data preservation and destruction] policy." Companies can take comfort that potentially disruptive and expensive efforts required to preserve and produce information from backup tapes remain the exception, not the rule.

Finally, in August in *United States v. Univ. of Nebraska at Kearney*, No. 4:11cv3209, U.S. Dist. LEXIS 118073 (D. Neb. Aug. 25, 2014), the United States District Court for the District of Nebraska rejected the government's demand that the defendant conduct a broad search of its electronic documents. While the court acknowledged that the requested search may produce relevant documents, it also noted that the request for ESI would generate over 50,000 responsive documents that would cost over $150,000 to review. Accordingly, the court accepted the defendant's more modest proposal, which required review of only one-fifth as many documents. In a nod to traditionalists, the court concluded that "ESI is neither the only nor the best and most economical delivery method for obtaining the information the government seeks. Standard document production requests, interrogatories, and depositions should suffice - with far less cost and delay."

Potential litigants can take heart that e-discovery news isn't all doom and gloom. New technology tools and a growing body of favorable case law make informed parties and counsel better equipped than ever to cost-effectively manage ESI in litigation.