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E-DISCOVERY ALERT

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Courts Call for Cooperation in E-Discovery

Every litigant laments the cost of judicial proceedings. While expenses are incurred throughout the pendency of an action, often much of the cost is related to discovery–the lengthy, labor-intensive, and dispute-laden process by which parties disclose facts about their own case and provide documents related to the dispute to the opposing party.

In recent years, much of the tension–and cost–of discovery has stemmed from electronic discovery, commonly referred to as "e-discovery." E-discovery is the process by which electronically stored data ("ESI") is sought, located, searched, reviewed, and provided to the opposing party in the context of litigation. ESI consists of any information stored electronically–including, but not limited to, emails, instant messages, meeting requests, documents, dynamic databases, and images. Given the quantity of ESI generated by a single individual every day, the cost of e-discovery has the potential to surpass any potential recovery in the underlying action.

While opposing parties have been required to cooperate in the discovery process for years through mandatory "meet and confer" discussions, recently courts have begun requiring more significant collaboration. Noting the importance of "transparency in the discovery process," in Moore v. Publicis Groupe, Magistrate Judge Andrew Peck of the Southern District of New York applauded the parties' openness in developing an ESI search protocol, and "recommend[ed] that counsel in future cases" discuss, if not agree to, such transparency. No. 11 Civ. 1279 (ALC)(AJP), 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012). Likewise, in National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency, Judge Shira Scheindlin required the litigants to "work cooperatively to design and execute" targeted searches, including "agree[ing] on search terms and protocols." 877 F. Supp. 2d. 87 (S.D.N.Y. 2012).

Significantly, failure to collaborate may also lead to negative consequences for the uncooperative party. In Pippins v. KPMG LLP, Judge Colleen McMahon chastised defendant KPMG for failing to cooperate with plaintiffs in the discovery process. KPMG refused to provide sample hard drives containing ESI to plaintiffs, and instead sought an order that it had no obligation to preserve them. KPMG's refusal to cooperate, and its motion to limit its discovery obligations, led Magistrate Judge Cott to require KPMG to preserve every hard drive for thousands of former employees, despite the significant cost, noting that KPMG's "ongoing burden is self-inflicted" because of its "recalcitrance." No. 11 CIV. 0377 CM JLC,

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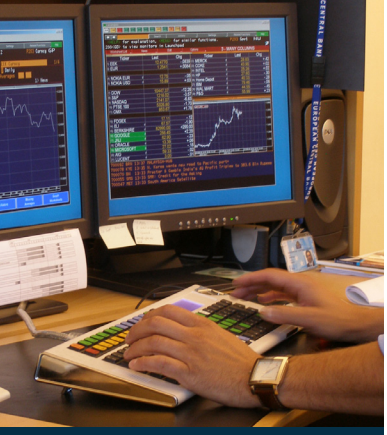

2011 WL 4701849 (S.D.N.Y. Oct. 7, 2011). Declining to reverse Judge Cott's ruling, Judge McMahon called KPMG's conduct "unreasonable," "nonsense" and "inappropriate[]" behavior, that "smacks of chutzpah." Pippins v. KPMG LLP, 279 F.R.D. 245, 253-56 (S.D.N.Y. 2012).

In addition to the goal of transparency, courts hope that a judicial mandate of cooperation will also yield time and cost savings for all parties. In Kleen Products LLC v. Packaging Corp. of America, Judge Nolan of the Northern District of Illinois advised the parties on the merits of engaging in a collaborative approach early in the case. No. 10 C 5711, 2012 WL 4498465 (N.D. Ill. Sept. 28, 2012), objections overruled, 10 C 5711, 2013 WL 120240 (N.D. Ill. Jan. 9, 2013). Adjudicating a number of outstanding discovery disputes, Judge Nolan noted that the court had already conducted two full days of evidentiary hearings, eleven status hearings and three conferences on ESI disputes -- all of which were in addition to the parties' private meet and confer sessions conducted over five months. The Court highlighted its endorsement of The Sedona Conference Cooperation Proclamation, an effort by a third party legal think tank "to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'" The Cooperation Proclamation urges counsel to collaborate in the e-discovery process, and offers specific methods for accomplishing this goal.

Because litigation is necessarily adversarial, the concept of cooperation may seem somewhat foreign in the context of a pending lawsuit. However, as The Sedona Conference and judges are emphasizing, antagonistic conduct in discovery is often counterproductive, resulting in unproductive disputes, excessive motion practice, and escalating costs, all of which preclude timely adjudication of an action on the merits.

The e-discovery process will vary in each case. Although there is no set of procedures that may be universally applied, and the technologies for implementing an ESI protocol are continuing to evolve, each new judicial opinion helps solidify an understanding of litigants' e-discovery obligations. As seen from recent decisions, the clear trend in e-discovery is collaboration.

Questions or Assistance?

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