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Citing Failure to Cooperate, Court Orders Cost Shifting for Nonparty's Electronic Production

February 9, 2011

In a recent opinion addressing a motion to compel compliance with a nonparty subpoena, *DeGeer v. Gillis*, 2010 WL 5096563 (N.D. Ill. Dec. 8, 2010), the U.S. District Court for the Northern District of Illinois found that the absence of a "spirit of cooperation [and] efficiency" was the controlling factor in determining whether cost shifting was warranted for discovery of nonparty electronically stored information (ESI). Magistrate Judge Nan R. Nolan, who is instrumental in the Seventh Circuit eDiscovery Pilot Program,[1] emphasized the need for cooperative, meaningful discussion regarding ESI at the outset of a case to prevent discovery disputes.

Background

The plaintiff sued the defendants for allegedly failing to abide by the terms of their partnership agreement, and during the course of discovery, the defendants served a subpoena on nonparty Huron Consulting Services LLC. Huron objected to the subpoena as overly broad and unduly burdensome, and indicated that an agreement as to search terms would be necessary before any reasonable search for responsive documents could be conducted. The defense counsel and Huron's counsel traded contentious correspondence regarding search terms and the scope of the subpoena. However, in this correspondence, the defense counsel failed to suggest search terms and Huron's counsel failed to disclose the custodian list or search terms that it had developed to identify responsive documents. Huron also demanded cost shifting for the costs related to any further efforts required to respond to the subpoena.

Analysis

Because both sides failed to engage in meaningful discussions toward a working list of search terms and reasonable discovery, the court held that, with one exception,[2] both the defendants and Huron should share financial responsibility for any future electronic discovery.

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1. Further information regarding the pilot program can be found at http://www.7thcircuitbar.org/displaycommon.cfm?an=1&subarticlenbr=109.

2. Huron was ordered to bear the expense of restoring backup tapes containing its CEO's data, "given [his] policy of immediately deleting emails to avoid production during discovery."

In reaching its conclusion, the court acknowledged that nonparties are protected from unduly burdensome discovery under Federal Rule of Civil Procedure 45, and relied on The Sedona Conference Cooperation Proclamation's call for "cooperative, collaborative, [and] transparent discovery" as well as analysis in *The Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas.*[3]

The court utilized *The Sedona Conference Commentary*'s suggested factors to be considered in determining whether cost shifting for nonparty discovery is warranted: (a) the scope of the request, (b) the invasiveness of the request, (c) the need to separate privileged material, (d) the nonparty's interest in the litigation, (e) whether the party seeking production of documents ultimately prevails, (f) the relative resources of the party and the nonparty, (g) the reasonableness of the costs sought, and (h) the public importance of the litigation.

After applying these factors, the court found that the controlling factor in this case was the failure of both Huron and the defendants to approach discovery "with a spirit of cooperation [and] efficiency." The opinion repeatedly referenced the need for meaningful collaboration and cooperation, and chided that merely exchanging letters and emails was insufficient. In fact, the court ordered counsel to confer "*in person* – (not via email, letters, or phone)" to establish the scope of Huron's future ESI production.

The court also noted that because they were aware early on that a substantial amount of ESI relevant to the claims was in the sole possession of nonparty Huron, the parties should have addressed how to acquire this ESI with the least burden on the nonparty at the Rule 26(f) conference, and that the defendants and Huron should have come to an agreement as to search terms and scope limitations before Huron began retrieving data for review.

Conclusion

The court emphasized that most discovery disputes could be prevented "by the exercise of a little more cooperation and compromise among counsel," thus avoiding court intervention and the substantial time and expense involved in such disputes. This court's concluding directive, which stated that "counsel are on notice that going forward the Court expects them to genuinely confer in good faith and make reasonable efforts to work together and compromise on discovery issues whenever possible," highlights the increasing expectation of judges that parties and nonparties will engage in cooperative, collaborative, and transparent discovery as outlined in The Sedona Conference Cooperation Proclamation by creating an open dialogue and working together toward agreements in the discovery process. In order to meet these expectations, counsel in all cases should work toward cooperation during discovery.

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3. The Sedona Conference's publications are available under "Publications" at http://www.thesedonaconference.org/.

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