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E-Discovery Update 2019-2020

Hon. Xavier Rodriguez

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E-Discovery Update 2019-2020

Judge Xavier Rodriguez

A. Introduction

Despite hopes that the 2015 amendments would bring clarity to the discovery process and help reduce costs, challenges remain.

B. Preservation

"Generally, federal courts have stated that the 'obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.'" *Bellamy v. Wal-Mart Stores, Tex., LLC*, No. SA-18-CV-60-XR, 2019 WL 3936992, at *4 (W.D. Tex. Aug. 19, 2019) (internal citations omitted). After the duty to preserve has been triggered, parties should disable any auto-delete functions from email and other platforms that contain relevant evidence. Reasonable and proportional efforts should be made to understand where relevant data might exist and who may be custodians of such data.

1. *DR Distribs., LLC v. 21 Century Smoking, Inc.*, No. 12-CV-50324, 2021 WL 185082 (N.D. Ill. Jan. 19, 2021)[1] (trademark and defamation case). Counsel allowed his client to self-collect ESI and failed to issue a litigation hold notice or instruct his client to disable any autodelete functions. The court chastised counsel for failure to conduct a thorough initial client interview or any custodian interviews or to document and monitor the collection processes. The court further took lead counsel to task for failure to adequately supervise the ESI collection process and merely relying on a junior associate. The client represented to his attorneys that all relevant ESI was contained on four hard drives that he and his company used. Defense counsel then had agreed upon keyword searches run against these hard drives. Unbeknownst initially by counsel was that the client, Brent Duke, used GoDaddy and Yahoo email accounts, and used Yahoo! chat. Because that data was stored in the cloud, it was not to be found on the four hard drives. Duke initially represented to his attorneys that they "had all the data" and they had everything. Approximately three years later, counsel became aware that Duke had used a Yahoo email account. Another year later counsel became aware of the GoDaddy email

[1] This very lengthy order raises several issues about the role of outside counsel in the preservation and collection of ESI. In summary, this order seems to imply that outside counsel may not rely upon a client's representation regarding the existence of data. As more corporate clients have taken preservation, collection, review, and production of data "inside" as a means to control "legal spend," tension will obviously be introduced as outside counsel navigate what independent actions they are required to perform. No doubt once outside counsel has become aware that there are deficiencies in the production, trial counsel should engage in appropriate inquiries to determine if there has been in fact a deficiency in the discovery process. Self-collection by a client should also be guided by trial counsel to ensure that relevant data is sought and produced. Counsel facing this predicament may want to consider whether the client should be signing any FED. R. CIV. P. 26(g) ("complete and correct as of the time it is made") certification arising from any disclosures and having the client sign any responses to requests for production. This order also imposes upon outside counsel obligations to affirmatively inspect the client's IT systems to locate data. Left unsaid is what counsel should do in the event such unfettered access is not given. No doubt discovery production works best when client and counsel work cooperatively to preserve, search, review and produce relevant data. However, in the "real world" clients will concern themselves with discovery costs and business impact. Because *DR Distributors* apparently involved an "eight figure" amount in controversy, the court appears to assume that greater attorney involvement was justified. Proportionality may dictate lesser involvement by counsel in the self-collection process in appropriate cases.

account. Counsel was not aware that email cloud account storage would not be stored on the hard drives. Counsel did not immediately disclose to the court or opposing counsel the existence of the lost emails or chats when they became aware of the situation. Citing to Model Rules of Professional Conduct 3.4 and 8.4, the court stated that this failure to timely disclose the destroyed evidence violated the rules of candor to the court and opposing party. After the close of discovery and after the filing of dispositive motions, a partial search of Duke's Yahoo revealed thousands of responsive documents. The court held a multi-day evidentiary hearing regarding the plaintiff's motion for sanctions.

As technology morphs, preservation of some data has proved difficult. Messaging apps are becoming very prevalent and the apps vary greatly in the user's ability to customize destruction settings. Traditional messaging apps (e.g., iMessage on Apple phones) generally stores messages for 30 days or one year after a user sends or receives the message. The deletion of a message by one user does not impact the retention of the message on the device of another party to the communication. Non-standard (sometimes called ephemeral messaging) apps (e.g., Wickr) generally allow a user to delete messages from both the user's device and the device of the party sending or receiving the message. If the app can preserve the message and the duty to preserve has been triggered (see above), failure to preserve relevant, unique, non-privileged messages could lead to sanctions. In addition, collaboration platforms like Slack and Microsoft Teams will also introduce preservation, search, and production challenges.

2. *Williams v. UnitedHealth Grp.*, No. 2:18-cv-2096, 2020 WL 528604 (D. Kan. Feb. 3, 2020). The court denied the plaintiff's motion to compel text messages where the defendant represented that it had produced relevant screenshots of Cisco Jabber/Instant Messenger messages exchanged between the plaintiff and the named co-workers, and the defendant employer's e-discovery director represented by affidavit that the defendant did not store these instant messages.[2]
3. *King v. Catholic Health Initiatives*, No. 8:18CV326, 2019 WL 6699705, at *5 (D. Neb. Dec. 9, 2019). "Given that CHI believed terminating Kelly's employment was a 'high risk decision,' and considering the other circumstances known to CHI prior to receiving King's demand letter, CHI should have taken the reasonable step of suspending its 30-day deletion policy of Kelly's and King's email correspondence, particularly when considering CHI's policy provides for 1-year retention of inconsequential items like calendars and notepads." The court ordered the defendant to attempt to retrieve certain emails. The court further concluded that CHI had no further duty to supplement instant messages, voicemails, and text messages. CHI explained that it used Microsoft Lync as its internal messaging system during 2015 and 2016, and that instant messages sent through Microsoft Lync were saved in Outlook only if the save feature was enabled on a user-by-user basis. CHI switched to Skype for Business in 2017. CHI represented that it had produced non-privileged, responsive Skype messages and any user-saved Microsoft Lync messages. CHI represented that it "does not save voicemails or utilize any program to forward voicemails to email," so that data never was available. CHI also represented that "none of the custodians identified by King use or used company-issued

[2] Author's note. This opinion failed to discuss whether a duty to preserve had been triggered requiring that messages be preserved. It appears that implicitly what the court decided is applying the proportionality factors (see D, below) that the screenshots produced were sufficient.

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