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eDiscovery Update

We are at the halfway point of 2018. In this update, we discuss important developments and cases of particular interest to eDiscovery practitioners through the first half of this year.

Update on Proposed Amendments to Michigan Civil Discovery Rules

The State Bar of Michigan Representative Assembly recently approved proposed amendments to the Michigan Court Rules governing discovery in civil actions. The overall goal of the proposed amendments is to improve the civil discovery process by making it more cost effective. In particular, provisions have been suggested concerning cost-shifting and spoliation with regards to electronic data. The proposed amendments now need to be considered and approved by the Michigan Supreme Court before they can take effect.

Significant Expenses of Subpoena Compliance Include Document Review Costs and Attorney Fees:

Linglong Americas Inc. v. Horizon Tire, Inc., 2018 WL 1631341 (N.D. Ohio Apri1 4, 2018)

Why This Case Is Important: "Significant expenses" include all fees and costs associated with responding to a subpoena. Be sure to accurately track all costs of compliance and seek reimbursement for them from the court.

- Non-party estimated the cost of compliance with a subpoena at approximately $150,000. Its counsel contacted counsel for the issuing party and began negotiations over the subpoena's scope that lasted several months.
- As a result of these negotiations, the scope of the subpoena was narrowed to seven custodians against which an agreed set of search terms was applied. The searches returned 7,000 potentially relevant documents. After further negotiations, the search terms were modified. The resulting search returned about 1,300 potentially relevant documents.
- The non-party began review of the documents for relevance and privilege. While the review was ongoing, the non-party presented a bill for over $20,000 to the issuing party for the cost of compliance with the subpoena, including vendor fees for data processing, and attorney fees incurred in negotiating the scope of the subpoena and in reviewing documents to that point. The issuing party refused to pay.
- The non-party stopped its review and moved the court for an order requiring the issuing party to reimburse its reasonable costs of compliance. The court ordered that the review and production of documents continue and held that the non-party was entitled to its reasonable fees and expenses. If the parties could not agree, the court invited the non-party to submit a fee petition. After production of documents under the subpoena was complete, the non-party requested fees and expenses of almost $40,000, which the issuing party refused to pay.
- The non-party presented its final bill to the court. The court ruled that the non-party was entitled to the whole amount. The court found that the vendor fees and attorney fees were "significant expenses" under Rule 45(d)(2)(B)(ii), and as such were required to be reimbursed.

Failure to Take Reasonable Steps to Avoid Imposing Undue Burden or Expense When Issuing Subpoena Results in Attorney Fee Sanction: *In Re: Modern Plastics Corp.*, __Fed. Appx.__, 2018 WL 1959536 (6th Cir. April 26, 2018)

Why This Case Is Important: Subpoenas are subject to the same discovery limitations as requests for production. Failure to narrowly tailor a subpoena or to engage in good faith negotiations regarding scope can lead to a large cost-shifting sanction and possibly a finding of contempt.

- A creditor brought an adversary proceeding against the bankruptcy trustee for breach of fiduciary duty alleging that the trustee had allowed certain bankruptcy estate assets in which the creditor held mortgages to deteriorate in value. Creditor's counsel served subpoenas on five non-parties, including the bank from which it had purchased the mortgages and the bank's counsel.
- The subpoenas sought production of as many as 58 broad categories of documents going back over nine years. Through counsel, the non-parties attempted to narrow the scope of the subpoenas. They informed creditor's counsel that without narrowing the scope, their compliance efforts would be "quite expensive," due to the anticipated volume of potentially responsive and privileged documents that would need to be reviewed. Creditor's counsel was uncooperative. The non-parties filed timely responses and objections to the subpoenas that included a request for reimbursement. They also proposed a protective order and stated that no production of documents would be made until the protective order was entered.
- The non-parties compliance efforts continued. Creditor's counsel was kept apprised of these efforts through periodic updates from the non-parties' counsel. When responsive documents were ready for production, creditor's counsel was informed that no production would be made until a protective order was entered and that the non-parties expected reimbursement of over $150,000 in attorney fees and expenses. Creditor's counsel objected to the reimbursement demand and motions were filed with the court to resolve the issue.
- Citing Rule 45(d), the court awarded over $100,000 in attorney fees and almost $60,000 in costs to the non-parties for their efforts in complying with the subpoena. When creditor's payment was not forthcoming, the non-parties filed a motion for contempt that was granted. The court awarded the non-parties an additional $4,725 for fees and costs incurred in litigating the contempt motion. The creditor paid the outstanding awards, but appealed the court's rulings.

- The Sixth Circuit Court of Appeals affirmed the lower court's awards of costs and fees. With respect to costs and fees associated with subpoena compliance, the court held that the awards were proper under Rule 45(d)(1) which requires an issuing party to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" and provides that the "court ... enforce this duty and impose an appropriate sanction — which may include ... reasonable attorney's fees — on a party or attorney who fails to comply."
- The court reasoned that the creditor's counsel was an experienced commercial litigator who should have known compliance with the subpoenas "would involve considerable time and resources, implicate significant concerns about customer privacy ... and require review for privileged communications and attorney work product." Creditor's counsel could have avoided "much of the expense ... either initially, or by engaging with [non-parties'] counsel to address the concerns ... [and] tailor the document requests."

District Court May Order Cost-Shifting For Compliance With Administrative Subpoenas:

United States v. Tennessee Walking Horse Breeders' And Exhibitors' Association, __Fed. Appx.__, 2018 WL 1219313 (6th Cir. March 8, 2018)

Why This Case Is Important: Administrative subpoenas do not fall under Rule 45, but Rule 81 provides a district court with discretion to apply the cost-shifting mechanism in appropriate cases.

- The Administrator of the USDA's Animal and Plant Health Inspection Service (APHIS) began an investigation pursuant to the Horse Protection Act into the practice of "soring" horses — an unlawful practice of using chemical irritants on horse hooves to achieve the distinct gait of a Tennessee Walking Horse. In aid of that investigation, APHIS issued a series of administrative subpoenas to the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA) to determine the ownership of certain horses. The TWHBEA is a not-for-profit organization promoting awareness, appreciation and general welfare of the breed. It maintains a database with detailed ownership and other information on horses sold or entered into shows and exhibitions.
- TWHBEA complied with the first three subpoenas and submitted invoices of $100 each for reimbursement for employee time spent in compiling the records. APHIS denied the request for reimbursement stating that the Horse Protection Act did not provide for reimbursement for producing records pursuant to subpoena. TWHBEA subsequently refused to comply with other subpoenas it received from APHIS.
- APHIS filed an action before the district court to obtain TWHBEA's compliance. TWHBEA moved for a protective order, asserting that compliance would pose an undue burden and significant expense. The court ordered TWHBEA to comply, but allowed that it could apply for reimbursement afterwards. On application, the court found that the administrative subpoenas were encompassed by Rule 45 and that TWHBEA was a non-party to the proceedings and entitled under Rule 45(d)(2)(b)(ii) to reimbursement at the rate of $50/hour for employee time spent on its compliance efforts.
- APHIS filed a motion to alter or amend the judgment under Rule 59(e) arguing that the action was filed against TWHBEA to obtain its compliance with the administrative subpoenas, making it a party to the proceedings and that the subpoenas were issued by an administrative agency which removed them from the scope of Rule 45 and its cost-shifting mechanism. The district court agreed and vacated its judgment in favor of TWHBEA, and the organization appealed.

- Examining the history of Rule 45, the Sixth Circuit Court of Appeals determined that the 1937 Advisory Note stating the rule "does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority," was still in effect. Nevertheless, the court found that Rule 81(a)(5) gave district courts discretion to apply Rule 45 to administrative subpoenas. Rule 81(a)(5) provides that the Federal Rules of Civil Procedure "apply to proceedings to compel...the production of documents through a subpoena issued by a United States officer or agency under a federal statute...." The 1946 Advisory Note explains that this provision "is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful."
- Ultimately, the court affirmed the district court's decision not to reimburse TWHBEA's expenses because its compliance efforts were unreasonable. APHIS only sought database records, whereas TWHBEA manually pulled hard copy records and checked them against the database records for accuracy prior to production.

Proposed Search Terms Rejected Where Results Would Be Disproportionate to the Needs of the Case:

American Mun. Power, Inc. v. Voith Hydro, Inc., Case No. 2:17-cv-708 (S.D. Ohio June 4, 2018)

Why This Case Is Important: Proportionality factors also apply to a party's proposed search terms. If the terms would generate a large volume of irrelevant data or are otherwise unduly burdensome, the court may reject the proposed terms.

- In a construction litigation case concerning four construction projects, defendant proposed that plaintiff run the four single-word project names against its electronic data to find potentially relevant documents. Plaintiff demonstrated that this simple search would hit on many irrelevant records significantly increasing its discovery costs — including an estimated $100-125,000 for privilege review.
- Plaintiff proposed a list of search terms that included defendant's employees' names and other common construction terms but not the names of the projects. Defendant demonstrated that using these search terms without limiting them to the projects at issue would return thousands of confidential records concerning other projects.
- The court noted that defendant's proposal "would yield a significant amount of discovery that has no bearing on the construction of the power plants or [defendant's] involvement in it, including but not limited to documents related to real property acquisitions, licensing, employee benefits, facility tours, parking lot signage, etc." And, with respect to plaintiff's proposal, the court said, "running the searches AMP proposes would impose on [defendant] the substantial and expensive burden of manually reviewing the ESI page by page to ensure that it does not disclose confidential and sensitive information of other customers."
- The court rejected both proposals finding that each was "overly burdensome and not proportional to the needs of the case" under Rule 26(b)(1).

Court May Not Use Federal Rule of Evidence 502 to Compel Disclosure of Privileged Information:

Winfield v. City of New York, 2018 WL 2293070 (S.D.N.Y. May 18, 2018)

Why This Case Is Important: An order entered under Federal Rule of Evidence 502(d) can protect against a waiver challenge in subsequent federal and state proceedings. However, the court may not use the rule to compel disclosure of privileged materials over the objection of a party. "Quick peek" arrangements must be voluntarily entered by the parties.

- At a case management conference, plaintiffs raised a concern about the number of privileged documents appearing on the defendant's privilege log. Plaintiff proposed that the court order defendant to produce the documents on its privilege log for a "quick peek" review so that plaintiff could limit the number of documents it would subject to challenge. Defendant objected and the court requested briefing on the issue.
- The court reviewed the parties briefing and concluded it could not order the "quick peek" procedure over defendant's objection. Existing precedent — precluding a court from compelling disclosure of privileged information absent waiver or other applicable exception — would stand.
- First, the court noted that under Rule 26(b)(1), privileged material is expressly outside of the scope of discovery. Parties are only entitled to discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case...."
- Next, the court examined the impact of Federal Rule 502 on the discovery of privileged information. The court recognized that Rule 502 was designed to provide a uniform standard for addressing issues of waiver and to alleviate the high cost of privilege review during discovery by allowing for parties to voluntarily enter into "quick peek" or similar arrangement through the use of a 502(d) order that would protect against a waiver challenge in any subsequent federal or state proceeding. The court noted that there was no provision in Rule 502 allowing a court to compel the parties to enter into such an arrangement.

- The court then addressed case law which held or suggested that the court did have the power to force the parties into a "quick peek" arrangement under Rule 502. The court rejected those decisions finding that 1) Rule 502 did not change the scope of discoverable information under Rule 26(b)(1) and 2) that the Federal Rules of Evidence did not abrogate common law privileges. The Advisory Committee Notes to Federal Rule of Evidence 501 state that the rule "left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases." Finally, the court noted that attorney-client privilege is a substantive right. The Rules Enabling Act, under which the federal court rules are promulgated, "prohibits such rules from abridging, enlarging, or modifying any substantive right."
- As for work product protection, the court acknowledged that it was a judicial creation and its protection could be abrogated by court rule. However, the court found that both the Federal Rules of Civil Procedure and of Evidence incorporated protection of attorney work product. The court also noted that Rule 502 only addressed attorney-client and work product privileges. A 502(d) could not protect the documents withheld on the basis of deliberative process or other privilege.

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