Beware the Dangers of a "Hands-Off Approach" to Document Collections

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A recent decision from the Northern District of Illinois serves as a reminder to all defendants to periodically take stock of their procedures for collecting documents and electronically stored information. *See Peerless Indus., Inc. v. Crimson AV, LLC*, 2013 WL 85378 (N.D. Ill. Jan. 8, 2013) (Magistrate Judge Susan Cox fined defendants for handing over sole control of a collection to a vendor.)

The predicate for this opinion was an order in which the court found that a nonparty named Sycamore Manufacturing possessed documents within defendants' control. According to Judge Cox, that order "required defendants to contact individuals at Sycamore and play a role in obtaining the necessary discovery." But the evidence presented to the court, she said, was that "defendants took a back seat approach and instead let the process proceed through a vendor." Judge Cox found that defendants had played no part in determining how Sycamore's employees managed their documents or which documents related to opposing counsel's requests for production.

"Such a hands-off approach is insufficient," the court held. "Defendants cannot place the burden of compliance on an outside vendor and have no knowledge, or claim no control, over the process."

Defendants submitted affidavits stating that everything available to Sycamore had been provided, but Judge Cox said the affidavits failed to account for all documents requested. "Defendants must show that they in fact searched for the requested documents and, if those documents no longer exist or cannot be located, they must specifically verify what it is they cannot produce," the court said.

Judge Cox gave defendants three weeks to complete the production and ordered them to pay plaintiff's costs to prepare the motion.

In light of the *Peerless* decision and years of experience in document collection and discovery, we offer the following suggestions:

1. Keep in mind that, in many ways, collections are a "pay me now or pay me later" proposition.

Time invested up front in targeting a collection will not only lower the chance of a sanctions motion, it should also lower downstream costs for processing, hosting and review because fewer irrelevant documents are likely to be swept into the collection.

2. Be clear in your discovery responses regarding the custodians and sources from which collection and production will be made.

In fact, if you and opposing counsel can agree on this point, so much the better. Emphasize the value of first producing from a core group of custodians (often no more than three to five) and your willingness to meet and confer about reasonable requests to search additional sources *after* your opponent has reviewed the initial production.

3. Be systematic and consistent in asking custodians where and how they keep their relevant documents and information.

We believe that an hour spent with a custodian in a collection interview can pay big dividends. That

conversation often is the simplest and easiest way to learn about sample documents, low-hanging fruit that can be produced quickly, folders rich in responsive documents, and concerns about trade secret or privilege issues.

4. Remember also to ask custodians to point out shared locations that they use to store and access relevant information.

Common examples of such locations include department shares, SharePoint sites, document management systems, and databases. Discuss with the custodian how these shared locations are populated, maintained, and used by the custodian and other team members. Data maps are great, but often they track many more information sources than are needed for a particular case. Accordingly, at least in some instances, data maps may work better as "verifiers" of custodians' input than as "identifiers" consulted in a vacuum.

5. Are the custodians far away or far apart? If so, have you tried remote collections?

Recent conversations with fellow discovery counsel suggest that remote collections are sometimes underutilized. We hereby happily vouch for their value.

In answer to a common concern, remote collections do not require a transfer of data to a distant location. Instead, everything is done using a webcast and an encrypted USB drive. The custodian receives the USB drive beforehand and is asked to insert it when the interview begins. From that point forward, thanks to the magic of webcasts, control of the custodian's computer screen is toggled back and forth between the custodian, who can walk the interviewer through the contents of the hard drive, and the interviewer, who unlocks the USB drive and performs the actual collection.

Potentially more importantly, remote collections are custodian-friendly. The process just described gives the custodian some comfort in seeing exactly what is being collected and being able to provide additional input. No one has to hunch over the custodian's shoulder to see the computer screen, and the custodian never has to leave his or her seat for the interviewer to operate the keyboard. This may help explain why, in our experience, custodians in remote collections are very engaged in discussing their roles, the types of documents they create, and where these documents are located.

6. If you ask a custodian to self-collect information, remember that courts that closely scrutinize discovery practices emphasize the importance of providing the custodian with sufficient instructions and supervision.

In the oft-cited *Pension Committee* decision, Judge Shira Scheindlin faulted plaintiff investment organizations for placing "total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel." *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, 685 F. Supp. 2d 456, 473 (S.D.N.Y. January 15, 2010, amended May 28, 2010). "I note that not every employee will require hands-on supervision from an attorney," Judge Scheindlin said. "However, attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important. The adequacy of each search must be evaluated on a case by case basis." *Id.* at n. 68.

More recently, in a challenge to federal agency compliance with the Freedom of Information Act, Judge Scheindlin criticized the agencies before her for instructing employees to develop their own search criteria to identify documents to be disclosed. *Nat'l Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*, 2012 WL 2878130, at *11 (S.D.N.Y. July 13, 2012) ("most custodians cannot be 'trusted' to run effective searches because designing

legally sufficient searches in the discovery or FOIA contexts is not part of their daily responsibilities"). *See also Finley v. Hartford Life and Acc. Ins. Co.*, 249 F.R.D. 329, 332 (N.D. Cal. 2008) (leaving identification of discoverable material to an administrative assistant who failed to locate evidence that was in fact where it was supposed to be was not reasonable).

All of these suggestions originate with the touchstones of reasonableness and proportionality and must be tailored to the circumstances and needs of a particular case. "Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards." *Rimkus Consulting Group Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (emphasis in original). We do not know how to summarize a party's discovery obligations any better. •

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