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The Duty To Know Your Client's Computer System

Lessons learned from I-Med Pharma v. Biomatrix

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Even the most junior litigators are aware of the importance of electronic discovery. Over the past two decades, the manner and means by which we communicate electronically have grown exponentially. As a result, the number and nature of our electronic "conversations," which previously would have taken place through paper correspondence, over the telephone or in person, have grown dramatically as well. As one court noted, e-mail has not just become a substitute for more traditional forms of communication; its ease and informality have led to the transmission of "many informal messages that were previously relayed by telephone or at the water cooler" in electronic form. *Byers v. Ill. State Police*, 2002 WL 1264004 at *10 (N.D.Il. 2002).

The sheer volume of these electronic communications — and the permanent record they create — have made the costs and risks associated with litigants involved in e-discovery greater than ever. Indeed, it is now difficult to imagine a case that does not turn, in large part, on the contents of a party's hard drive or e-mail server. It has therefore become incumbent upon litigation counsel to understand the client's computer system and how data is stored and maintained within it.

In the words of the court, a recent case, *I-Med Pharma v. Biomatrix*, 2011 WL 6140658 (D.N.J. 2011), "highlights the dangers of carelessness and inattention in e-discovery." *I-Med* involved an alleged breach of medical distribution contracts between the parties. During discovery, the parties stipulated that the defendant could utilize an expert to conduct a forensic examination and keyword search of the plaintiff's computer network, server and related storage devices. As the court noted in its opinion, the search the plaintiff agreed to was overly broad in at least two critical respects:

(1) The search was not limited to targeted document custodians or relevant time periods; instead, it consisted largely of the product names and contract terms, such as "quota," "profit," "minimum" and "revenue;" and

(2) The search was not limited to active files, and the defendant's expert ran searches across all of the data stored on the plaintiff's computer system, including "unallocated space" — areas of memory in which deleted files and temporary data are often found.

The use of these overly broad search terms in just the unallocated space resulted in hits that represented 95 million pages of data, results that the court stated "should come as no surprise." Faced with the incredibly onerous and costly task of reviewing and producing these materials, the plaintiff filed an application with the magistrate seeking to be relieved from its obligations under the stipulation. The magistrate found "good cause" to modify the prior order based on the undue burden it placed on the plaintiff and because, given the overbroad search terms, the likelihood of finding relevant and admissible evidence was "minimal."

Accordingly, the magistrate allowed the plaintiff to withhold the data found in the unallocated space, but permitted the defendants to seek reimbursement of the costs associated with searching for and extracting the data. Although the district court upheld the magistrate's decision, it admonished the plaintiff for agreeing to such broad search terms and suggested that it could have properly limited the search by, among other things, restricting it to specific file systems, document custodians or dates.

As the *I-Med* case illustrates, litigation counsel must have at least a basic knowledge of the client's servers, operating systems, software and back-up procedures. Only then can the lawyer truly understand how and where the

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relevant data (be it in the form of active data, back-up data or residual data) is stored, and the difficulties and costs associated with retrieving it. The cost of retrieving electronic data varies considerably, depending on whether it is stored in currently accessible form, or archived or deleted files. In the now seminal e-discovery case of *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*), the court identified five levels of data accessibility, with active, online data being the least expensive to retrieve, and deleted data that can be recovered only through forensic techniques being the most expensive. Data in unallocated space, such as that identified by the expert in *I-Med*, is among the most expensive to produce.

The blueprint by which a lawyer is required to familiarize himself with a client's computer system is embodied in the Federal Rules of Civil Procedure and the local rules. Local Rule 26.1(d)(i) requires counsel, prior to the initial scheduling conference, to familiarize themselves with the client's information management systems, meet with the client to review the client's computer files and identify a person from the client with sufficient knowledge of such systems to facilitate discovery. D.N.J. Civ. R. 26(d)(1)(i).

In order to anticipate what must be disclosed under the initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1), the local rule obligates counsel "to review with the client the client's information files," which are defined to include current, as well as all historical, archived and back-up materials. The local rules further require counsel to confer with opposing counsel — both before and during the discovery conference held pursuant to Fed. R. Civ. P. 26(f) — to identify the categories of electronic information that will be sought, as well as to attempt to agree on discovery matters relating to the production of electronic and digital information, including the necessity of restoring deleted material and which party will bear the costs of preservation, production and restoration. D.N.J. Civ. R. 26(d)(2) and (d)(3). These obligations exist in addition to those imposed by Fed. R. Civ. P. 26(f)(3)(c), which mandates that the parties formulate a discovery plan at the initial conference that includes the parties' views and proposals as to how to address any issues concerning the disclosure or discovery of electronically stored information.

Not only do the federal rules require a lawyer to familiarize himself with a client's computer system prior to embarking on discovery, it makes absolute good sense for counsel to do so. For example, it appears that many of the issues raised in *I-Med* could have been avoided if counsel had a better working knowledge of the client's computer system. Had counsel taken the time to familiarize itself with the client's computer system in advance, it would have most likely known of the potentially enormous amount of data the agreed-upon searches would generate, as well as the associated costs, and never have entered into the stipulation in the first place. Luckily for the plaintiff in *I-Med*, the magistrate and district court relieved it of its obligations to retrieve and produce this material — which the court estimated would have cost "millions of dollars."

One cost-effective way for counsel to gain knowledge of the nature and scope of its client's relevant data is through sampling. Through sampling, one can draw inferences about a universe of electronically stored information by evaluating a reasonably sized and randomly chosen sample. Sampling provides a sense of the amount of relevant data likely to be found within a given universe, and its reliability as a method of narrowing the scope of e-discovery has been acknowledged by the courts. See *Zubulake I*, 216 F.R.D. at 289.

Indeed, had counsel in *I-Med* been aware of the scope of the potentially relevant documents, through sampling or other methods, it could have worked with opposing counsel, as contemplated under the rules, to negotiate more limited search terms and/or an equitable sharing of production costs. In the absence of such an agreement, counsel could have applied to the court to either limit the universe of production or shift some of the costs to the requesting party under Fed. R. Civ. P. 26(c).

Fed. R. Civ. P. 26(b)(2)(B) permits a party to withhold discovery of electronically stored information when, as was the case with the data from the unallocated space in *I-Med*, it is "not easily accessible" because of undue burden or cost. Familiarity with the client's computer system would have allowed plaintiff's counsel in *I-Med* to demonstrate to the court that relatively little relevant data could be found in the unallocated space, that it was duplicative of information that could be found in more accessible files or that its relevance was outweighed by the substantial costs and burden its production imposed. See, e.g., *Major Tours v. Colorel,* 720 F.Supp. 2d 587 (D.N.J. 2010) (holding that of the "not easily accessible" data, only the most recent, relevant and noncumulative data was discoverable, and shifting at least half the cost of production of such discoverable data to the requesting party).

As *I-Med* demonstrates, if lawyers adhere to the front-loaded e-discovery process contemplated under the Federal Rules, and familiarize themselves with a client's computer systems early on, they will be in a much better position to anticipate potential e-discovery issues and protect their clients from being unnecessarily exposed to undue burdens and costs down the road.■