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FEDERAL E-DISCOVERY

No Special Treatment: The Government and E-Discovery

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Whereas there are now a wealth of decisions discussing the e-discovery obligations of private litigants, comparatively few consider the implications of these decisions for government entities. U.S. District Judge Shira A. Scheindlin of the Southern District of New York, an e-discovery heavyweight, delved into these issues in *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency (NDLON)*, a well-publicized decision in which Judge Scheindlin held that the federal government must include metadata in FOIA productions because it constituted an integral part of a public record. To the surprise of many in the e-discovery community, however, Judge Scheindlin withdrew the decision soon thereafter.

Although it remains the case that few courts have squarely considered the issue, a recent opinion by Chief Judge Royce Lamberth of the U.S. District Court for the District of Columbia—*DL v. District of Columbia*—appears to confirm that public litigants can expect to be held to the same exacting standards as everyone else.[1] In his colorful decision, Judge Lamberth declined to reconsider a sanctions order in which he had not only directed the District to produce e-mails it had yet made available to the other side, but also decided that the District had waived all objections to production, including those based on attorney-client privilege. Judge Lamberth imposed this sanction after learning, on the first day of trial, that the District was still producing e-mails that it had been ordered to produce years ago and planned to continue rolling productions until after the trial had ended. A "discovery violation of this exotic magnitude," explained Judge Lamberth, was "literally unheard of in this Court."[2]

Comparing the District's proposed post-trial production to "a standup comic who delivers the punch-lines of jokes first" or "a plane with landing gear that deploys just *after* touchdown," Judge Lamberth's opinion recounts in detail the series of egregious discovery violations that prompted the severe sanctions. But the opinion is perhaps most notable for the way it treats the District with respect to its discovery obligations: precisely like any private litigant. The District received no special consideration by virtue of its status as a government entity, even one that claimed to lack the resources fully to comply with the court's production schedule. This holding re-affirms decisions by other courts that government entities are not entitled to special treatment when it comes to discovery.[3] The opinion also highlights the importance of prompt communication with the court about difficulties encountered in the discovery process.

Background

In *DL*, a group of preschool children brought an action against the District for declaratory, injunctive, and compensatory relief under 42 U.S.C. §1983. They challenged the District's alleged "policy, pattern, and practice of failing to identify, locate, evaluate, and offer special education and related services to [pre-school] children with disabilities" as a violation of the Individuals with Disabilities in Education Act, the Due Process Clause of the Fifth Amendment, and District of Columbia Law.[4] The plaintiffs filed their original complaint in 2005 and an amended complaint in 2006.

District's Previous Violations

Between 2005 and 2008, the plaintiffs filed three sets of document requests that sought e-mails. On Feb. 4, 2008, the plaintiffs finally filed a motion to compel because, among other reasons, the District had produced a total of just 17 e-mails. In June 2008, after additional motion practice, the court granted the plaintiffs' motion in part, holding among other things, that because the District had failed to produce a satisfactory privilege log it could "not rely on privilege as a grounds for withholding any documents or other information from plaintiffs."[5] The court faulted the District's "completely inadequate" performance of its discovery obligations to date. The court also "condemned" the District's strategy of "rolling" document production.

The June 2008 order also included several "very specific directives to help [the District] succeed in navigating the discovery phase" of the case.[6] One such directive required the District to submit by August 2008 a certification that its production was complete, along with a detailed explanation of the steps it had taken to search for responsive documents. The Court extended that deadline to October 2008, but the District still missed it, submitting its certification one day after the deadline and its privilege log nearly a month later.

District's New Violation

Several years later, on April 6, 2011, the parties gathered for the first day of trial. Before trial began, plaintiffs' counsel revealed to the court that the District had produced thousands of e-mails "just days" before the trial was set to begin and indicated that it would continue to produce thousands more e-mails on a "rolling" basis even after the trial had concluded. Plaintiffs' counsel asked for an order compelling production of all remaining e-mails within one week and holding that the District had waived any objections, including privilege, with regard to producing those documents.

The District's delayed production revealed violations of multiple discovery orders and rules. First, in compliance with the Court's June 2008 order, the District had certified that it had completed production of e-mails. That was revealed to be untrue. Second, the late production violated a December 2008 court order requiring that all fact discovery be completed by March 2009. It clearly was not. But, for the court, "as bad as the District's

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violation of multiple discovery orders was, that wasn't its most appalling discovery abuse." The court awarded that "ignominious designation" to the District's violation of F.R.C.P. 26(e)(1), which requires a party that has responded to a request for production to supplement its response in a timely manner.

After the revelation by plaintiffs' counsel, the court questioned counsel for the District, who explained that the e-mails had been identified as part of a series of supplemental searches that had been on-going for months. The District's counsel explained that the District had not alerted the court because it believed it would finish production before trial. Counsel added that the "District was understaffed, the discovery was voluminous, and there simply were not enough bodies to process it all before trial."[7]

The court, to put it mildly, was not amused with the District's behavior. From the bench, and later in writing, the court ordered the District to produce all remaining e-mails within one week of the close of trial and ruled that the District had waived all objections to production of the remaining e-mails.

Court Denies District's Motion

On May 9, 2011, the court denied the District's motion for reconsideration of its sanctions order. In a detailed opinion, the court explained its rationale for granting the original order and for denying the motion for reconsideration.

The bulk of the opinion recounts the District's "repeated, flagrant, and unrepentant failures to comply with Court orders," as described above.[8] This egregious conduct provided the primary justification for Judge Lamberth's decision to impose sanctions. As the court explained, the "District had countless opportunities to stop ignoring its discovery obligations. It chose not to, and it should not be surprised that its misconduct has caught up with it."[9]

But the court had other reasons for imposing sanctions beyond the District's "bare discovery violations." First, the District had "absolutely no excuse for its behavior" because it had every opportunity to file a motion for an extension of time or at least to file a status update. For those same reasons, the court was unmoved by the District's protestation that it lacked the resources to complete discovery on time. Second, the court imposed sanctions to deter future bad conduct by the District and by other parties in similar situations. Third, the Court believed its only other option was to enter a default in the case, which it did not want to do.

As the court feared that the time required for the plaintiffs to review all the previously unproduced documents and to litigate the District's objections would "overcrowd[]" the court's "already congested trial calendar" and "unfairly increase[] the costs for both parties," it considered waiver of the District's objections as to the remaining e-mails a measured and appropriate sanction.[10]

Judge Lamberth "easily dispatched" the District's arguments for reconsideration. The District contended it had made a good faith effort to produce all responsive e-mails before the trial. Judge Lamberth concluded, however, that the Federal Rules governing discovery "require more than simply making a good faith effort" and instead demand "adherence to a very precise framework for navigating the discovery process."[11]

The District next argued that the plaintiffs were not prejudiced by the late production. The court explained that although prejudice was one consideration, it had sanctioned the District primarily for violating the court's order and as a deterrent to other parties from behaving in the same way in the future. The court added, however, that it believed plaintiffs had been prejudiced because the delayed production left the plaintiffs with a "compromised trial strategy."[12] Finally, the District pointed out that the plaintiffs had themselves committed discovery violations, but, dismissing any effort to "count the parties' various rights and wrongs," the court noted that its sanctioning of the District would also deter the plaintiffs from violating discovery orders in the future.

Lessons Learned

The most obvious lesson of *DL* is that parties violate discovery orders at their peril and court disaster when they do so repeatedly. As the court explained, quoting a recent decision by the Tenth Circuit, "no one…should count on more than three chances to make good a discovery obligation."[13] The District's pattern of flouting the rules presents an extreme example—and a cautionary tale—on that point. But *DL* teaches several other lessons of which all parties involved in e-discovery should take note:

> The 'DL' opinion highlights the importance of prompt communication with the court about difficulties encountered in the discovery process.

Government entities will not get special treatment. Far from giving the District special treatment or holding it to a lower standard because of its status as a government entity, the court treated the District no differently than any other litigant. Judge Lambert's decision teaches that governmental entities should expect no indulgence from courts simply because they are public, rather than private, parties. Governmental entities therefore will have to take their discovery obligations every bit as seriously as private parties. To the extent public entities have come to view electronic discovery exclusively as a weapon to be wielded against their hapless adversaries, they must now take care to ensure they are not hoist by their own petard.

Communication is critical. The *DL* court saved some of its sharpest criticism for the District's failure to communicate with the court. It expressed confusion at the District's choice "to undertake this process in secret without informing [the court] of what was happening" and lamented that the District "simply sprung the news on the first day of trial."[14] That pitfall is one that parties can happily and easily avoid. Although parties should always keep a court updated about the progress of discovery, it is imperative to flag potential problems well in advance of any missed deadlines.

Secure sufficient resources. As Judge Lamberth made clear, "lack of resources" is no excuse for failing to follow through on a court order about discovery. Specifically, the court explained in no uncertain terms that the "District's complaints of lack of resources and time pressure fall on deaf ears."[15] The decision makes clear that no litigant should expect resource constraints to relieve them of their obligations to meet court-imposed discovery deadlines, and government entities are no exception.

Conclusion

Judge Lamberth's decision in *DL* suggests that courts will hold government entities to the same exacting standards for e-discovery to which they hold private parties. As government entities continue to be involved in cases with large amounts of e-discovery, we can expect more decisions and additional guidance. For now, however, the trend seems to be toward parity in the discovery obligations of public and private parties.

1. No. 05-1337 (D.D.C. May 9, 2011).
2. Slip Op. at 1.
3. See, e.g., *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009) (Scheindlin, J.) ("Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery…."). A recent decision from the Western District of New York further emphasizes the broad discovery obligations of government entities. In *United States v. Briggs*, a magistrate judge addressed the manner in which the government in a criminal case must produce electronically stored information (ESI). No. 10CR184S, 2011 WL 4017886 (W.D.N.Y. Sept. 8, 2011). Recognizing that the Federal Rules of Criminal Procedure do not address that subject, the court relied upon its inherent power over discovery issues to order the government to produce, over its objection, searchable versions of certain transcripts instead of the ".tiff" image files of those transcripts that it had already produced. Id. at *8. The court explained that the government must "bear the burden of reproducing these ESI materials in a fashion that defendants can retrieve and manipulate." Id. at *9.
4. First Amended Complaint, Docket No. 61.
5. Mem. Op. at 9-11, June 27, 2008, ECF No. 107.
6. Slip Op. at 11.
7. Slip Op. at 3.
8. Slip Op. at 11.
9. Slip Op. at 15.
10. Slip Op. at 15.
11. Slip Op. at 16.
12. Slip Op. at 16-17.
13. *Lee v. Max Int'l, LLC*, No. 10-4129, 2011 WL 1651640, at *1 (10th Cir. May 3, 2011).
14. Slip Op. at 3, 14.
15. Slip Op. at 14.