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FEDERAL E-DISCOVERY

'Mancia' Applies ESI Rules To Broader Discovery Practice

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We have long seen general principles of discovery inform the development of the law in the realm of electronic discovery. With Magistrate Judge Paul Grimm's recent decision in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354 (D. Md. 2008), however, we now see that the lessons of e-discovery have the potential to spur enhancements in overall discovery practices.

Regular readers of this column are by now familiar with the works of Magistrate Judge Grimm. From his bench in the U.S. District Court for the District of Maryland he has provided some of the most important rulings on e-discovery of the last few years,[1] and we have not hesitated to pass along his wisdom.[2] His latest opinion in the field, however, has even broader implications.

On Oct. 15, Magistrate Judge Grimm issued an opinion in *Mancia* that sends all attorneys engaged in discovery a message that we have been preaching with respect to electronically stored information (ESI) for years: Advanced knowledge of the data in your control and cooperation with your adversary will get you everywhere. What makes *Mancia* notable, however, is that it suggests such cooperation, in addition to reflecting best practices, may be mandated by the Federal Rules.

This ruling may come as a surprise to attorneys who have dealt primarily with "traditional" paper discovery. But for those who are familiar with the Federal Rules regarding e-discovery, and the procedures and practices that have developed thereunder, it appears Magistrate Judge Grimm has simply taken the lessons learned from dealing with ESI and translated them to broader discovery practice.

The claim in *Mancia* and the conduct at issue are both fairly pedestrian. A group of employees filed a purported collective action against their employers under the Fair Labor Standards Act of 1938 and Maryland state law for violations of statutory wage and overtime pay requirements. Plaintiffs initiated discovery and served interrogatories and document requests on the defendants that, judging from the excerpts cited by the court, seem fairly typical. For example, plaintiffs sought to acquire all documents reflecting agreements between Mayflower Textile Services Co. and two of its co-defendants, an employment service and consulting firm.

The various defendants responded to many of the discovery requests with what the court described as "boilerplate, nonparticularized objections," such as the following:

> Objection. This request is overly broad and unduly burdensome, and is not reasonably calculated to lead to the discovery of material admissible in evidence at the trial of this matter in that it contains no time limitation whatsoever, and clearly seeks documents outside of the limitations period governing this action.

In ruling on plaintiffs' subsequent motions to compel discovery, the court held that the defendants' objections were wanting because they failed to particularize the grounds on which they were based. The court also suggested, sua sponte, that the plaintiffs' discovery requests may have been excessive or unduly burdensome given what the court perceived to be the modest monetary value of the claim.

At oral argument on the motions to compel, the court instructed the parties to meet and confer in order to share estimated "worst case" and "best case" damage scenarios for the claim, as well as expected attorney's fees. This way, the parties could assure that the breadth and depth of discovery was proportional to the amount at stake in the claim, with the burden remaining on the defendant to show undue burden if it existed.

Finally, the court suggested that the parties consider phased discovery, in which the most relevant, but least burdensome, data could be exchanged first, followed by the production of a narrower range of documents from other sources.

In making these specific rulings on the parties' moving papers, Magistrate Judge Grimm embarked on a detailed discussion of the bases for his opinion. He concluded that the Federal Rules require that the parties make a reasonable inquiry into the propriety of every discovery request, objection, or response, and furthermore, that they must actively cooperate during the discovery process.

The court based the first part of its ruling on the text of FRCP 26(g), which requires by its terms that an attorney sign every discovery paper submitted during the litigation. This signature acts as a certification that the attorney has conducted a "reasonable inquiry" prior to submitting it, and has determined that the discovery request or response is consistent with the rules of procedure and governing law; not interposed for an improper purpose, and is not unreasonable or unduly burdensome or expensive. Failure to comply with Rule 26(g) is grounds for sanction.[3]

The court also held that underlying the entire discovery process is a requirement that the parties and lawyers involved in litigation cooperate throughout. *Mancia* quotes extensively from courts and legal scholars discussing the adversary system and explains that its nature does not preclude, but indeed requires, collaboration between the parties to reveal and develop the facts underlying their dispute. In particular, the adversary system requires litigants to cooperate in discovery so that cases can be resolved efficiently through settlement, summary disposition, or trial. And, in this vein, the court highlighted a promising initiative upon which the Sedona Conference recently embarked.

'Cooperation Proclamation'

The Sedona Conference is a nonprofit, educational research institute best known for

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publishing the highly influential Best Practices Recommendations and Principles for Addressing Electronic Document Production.[4] In its latest initiative, perhaps motivated by its work in the e-discovery field, the Sedona Conference has issued a Cooperation Proclamation to announce "a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."[5]

Given this context, the court found that the parties failed to fulfill their discovery obligations in two respects. First, by making boilerplate objections with little or no factual specificity, the defendants violated their obligation to conduct a reasonable inquiry in response to plaintiffs' discovery requests. If they had conducted such an inquiry, they presumably would have been able to either produce the information requested or provide the plaintiffs with the particularized objections required by the Federal Rules.[6] Second, by exchanging overly broad discovery requests and generalized responses, the parties failed to cooperate in the manner required by the Federal Rules, relevant statutes, and their ethical obligations to the court and to the profession.

Magistrate Judge Grimm's opinion in *Mancia* makes clear that he has learned much from his encounters with e-discovery over the years. The requirements that he identifies as implicit in the law with respect to all discovery are explicit under the Federal Rules with respect to e-discovery. They should be familiar to any lawyer who has had to produce electronic data to, or request it from, an adversary.

For example, FRCP 26(b)(2)(B), which was added to the Federal Rules as part of the 2006 amendments pertaining to electronic discovery, explicitly sets the tone for e-discovery that Judge Grimm establishes in *Mancia* regarding all forms of discovery. That rule states that a party need not produce electronic data "from sources that the party identifies as not reasonably accessible because of undue burden or cost."

This mirrors the requirement that *Mancia* sets for responses and objections to document requests: In order to determine what sources of information it is unable to produce, a party served with a request for ESI must undertake an investigation—or "reasonable inquiry"—of its electronic databases, assess the expense and time associated with producing the information contained on them, and be prepared to tell its adversary, specifically, what its limitations in production are.

Driving Force

The Advisory Committee notes to the 2006 amendments reflect the fact that undue cost and burden are the driving forces behind this provision of the Federal Rules. For example, they state that "some sources of [ESI] can be accessed only with substantial burden and cost…these burdens and costs may make the information on such sources not reasonably accessible"; and with respect to the producing party's obligation to identify sources of ESI, it should "provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery."

Likewise, because of the potentially large and complex issues that have grown up around e-discovery, rules and practices with respect to the production of ESI, require the parties to collaborate from the start on the treatment of such data during discovery. For example, FRCP 26(f)(3)(C) specifically instructs the parties to discuss, during their initial discovery conference, issues regarding the production of ESI. The Advisory Committee notes to the 2006 amendments of Rule 26(f) suggest that when it comes to ESI, "discussion at the outset may avoid later difficulties or ease their resolution." The Committee notes also recommend that counsel gain knowledge and awareness of its client's information systems prior to the conference, so that the parties can share data about the reasonableness and expense of conducting discovery of ESI from those systems.

These recommendations are reflected in the earlier-published Manual for Complex Litigation (4th), which states that "the judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case," and addresses methods for narrowing the scope of electronic discovery to control the costs of litigation.[7]

Moreover, the Sedona Principles for Electronic Document Production (2d ed.),[8] which Magistrate Judge Grimm refers to in his decision, are replete with references to the duty of litigants to conduct a reasonable investigation as part of ESI production and to cooperate with one another. For example, various Sedona Principles indicate that the parties should confer early in the litigation to discuss ESI production, that a responding party is "best situated to evaluate" the manner in which its electronic data should be produced, and that requests for data and objections and responses thereto should be as clear and informative as possible.

What makes 'Mancia' notable is that it suggests that cooperating with your adversary, in addition to reflecting best practices, may be mandated by the Federal Rules of Civil Procedure.

The specific provisions of law that address the diligence and inquiry required of the parties in the e-discovery realm do so because the bar and their clients have long realized that extensive electronic discovery can be prohibitively expensive. Dealing with ESI requires not only a great deal of time to determine where it is located and how it is stored, but also generally requires the technology and expertise provided by an outside vendor who can collect the data and produce it in usable form. Furthermore, the amount of material that can be recovered during an electronic document collection is potentially overwhelming.

Conclusion

It is no wonder, then, that Magistrate Judge Grimm instructed the parties in *Mancia* to resolve their dispute with reference to the same kinds of tools that are frequently used in electronic discovery. Although the Federal Rules explicitly mandate cooperation and investigation in e-discovery matters because of the high costs that are inherent in the production of ESI, they are not as explicit when it comes to traditional paper discovery. But in *Mancia*, the court noted that given "the few number of named Plaintiffs and the relatively modest amounts of wages claimed for each," it appeared that the stakes were relatively low, and that overbroad discovery or protracted disputes would undermine an effective resolution of the litigation for both parties.

So, relative to the damages potentially available to the plaintiffs, even traditional forms of paper discovery, especially when used excessively, may have been too costly and burdensome given the amount in controversy.

The court in *Mancia* was faced with a case that demanded that the parties do their research, narrow their discovery requests and responses, and sit down at the table and agree as to how they could minimize the costs of proceeding. The case offers lessons to all practitioners who have to assess their rights and duties during discovery. They must undertake a reasonable inquiry before requesting discovery, or responding to requests and, to the extent possible, should avoid doing so in a vague or generalized fashion. They must always be mindful of the costs of discovery and the matters at stake in litigation. And they should not hesitate to look to the ever-growing law and practices developing in the area of e-discovery, which can be applied to matters even when ESI production is not the order of the day.

1. See *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005); *Lorraine v. Markel American Insurance*, 2007 WL 1300739 (D. Md. May 4, 2007); *Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251 (D. Md. 2008).

2. For discussions of *Hopson* and *Victor Stanley*, respectively, see John F. Baughman and H. Christopher Boehning, "'Hopson' Is a Good Reminder That There Are No Short Cuts" NYLJ (Feb. 28, 2006), and H. Christopher Boehning and Daniel J. Toal, "Poorly Executed Privilege Review Can Lead to Waiver" NYLJ (June 17, 2008).

3. Citing the Advisory Committee's notes to Rule 26(g). The language reflects that of FRCP 11, which provides for sanction against an attorney who signs a pleading, motion, or other court paper in bad faith or for an improper purpose.

4. The Sedona Conference, Best Practices Recommendations and Principles for Addressing Electronic Document Production (Rev. 2004), available at http://www. thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf.

5. The Sedona Conference, The Sedona Conference Cooperation Proclamation (2008), available at http://www.thesedonaconference.org/content/miscFiles/ cooperation_Proclamation_Press.pdf.

6. See also FRCP 33(b)(4) and 34(b)(2)(B).

7. Manual for Complex Litigation (4th) §11.446 (2004).

8. Available at http://www.thesedonaconference.org/content/miscFiles/ TSC_PRINCP_2nd_ed_607.pdf (last accessed Dec. 8, 2008).