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E-DISCOVERY

'Healthy Paws' Offers E-Discovery Practice Reminders

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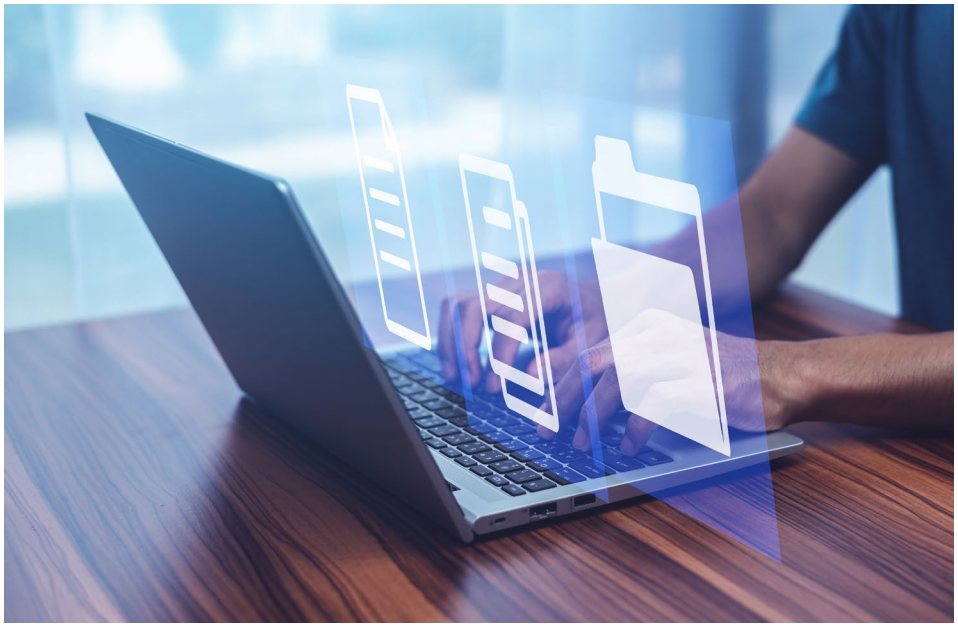

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Long-time e-discovery practitioners have become accustomed to a number of accepted truths. For example, Excel files never look right when printed, processing data will take longer than you would like it to, and you should not wait until Friday night to submit a document production request to your vendor.

Recently, though, some aspects of e-discovery practice that have seemed well-settled have, well, seemed to return. Are privilege logs burdensome? (Yes, they can be.) Are 502(d) orders a good idea? (Yes, almost always.) Is there a right way do to TAR? (Yes, reasonably and proportionally.)

So it should perhaps not come as a surprise that a district court recently was pressed to revisit issues that many may consider settled as part of today's standard practice. In granting a motion to compel, the court provided useful guidance—and reminders—on well-worn topics, including compliance with an ESI protocol (yes, please), the propriety of self-searching and self-collection of email by custodians (no, thank you), and whether a party is required to produce metadata (yes, please).

'Benanav v. Healthy Paws'

In the class action *Benanav v. Healthy Paws Pet Ins. LLC*, 2022 WL 3587982 (W.D. Wash. Aug. 22, 2022), defendant Healthy Paws questioned the steps taken by the plaintiffs to search for and produce responsive electronically stored information (ESI). The defendant had served the plaintiffs with discovery requests on Oct. 22, 2021. On Jan. 6, 2022, "[t]he Court entered a Stipulation and Order Regarding Discovery of Electronically Stored Information ('ESI Protocol')," an agreement between the parties stating that they would "work in good faith" to agree on search terms and search parameters and that also established the

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format for document production—a standard format of Bates numbered images with a metadata load file and searchable full document text. Id. at *1, *4.

On February 11, the plaintiffs made their first production, "without indicating whether it was based on Healthy Paws' proposed search terms or in accordance with the ESI Protocol" and without providing metadata." Id. at *1 (citation omitted). After additional inquiry from the defendant, on March 29 the plaintiffs "clarified that they did not agree to the proposed search terms, and that 'at this juncture, Plaintiffs have self-searched and produced all responsive documents in their possession.'" Id. at *1 (citation omitted).

The parties reached an impasse, with the defendant objecting to the plaintiffs' self-searching, their continued refusal to produce load files or metadata, and to deficiencies in their production including missing attachments. Id. at *1, *2. Ultimately, the plaintiffs stated they could not run the searches requested by the defendant because they "did not do a collection of their entire email accounts that would allow such searches to be ran [sic], and instead conducted self-searches with the assistance of counsel to find documents that each Plaintiff knew existed." Id. at *2. In response, the defendant filed the motion to compel at issue in this decision.

The Perils of Self-Searching

In its analysis, the court first addressed the propriety, or lack thereof, of relying on a custodian to search for and collect responsive ESI on their own—a practice that has raised eyebrows for many years. As noted in the decision, "self-collections by document custodians tend to give rise to 'questions regarding the accuracy and completeness of collections if directions and oversight by legal counsel or forensics experts are poor or non-existent.'" Id. at *4 (citation omitted).

Here, the plaintiffs "provide[d] only a vague explanation of how counsel supervised and directed each Plaintiff in searching for and identifying responsive documents" and did not provide the defendant with additional explanation it requested of the search criteria used by each of the plaintiffs. Id.

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Criticizing such efforts when conducted without appropriate guidance by counsel or experts, and noting the deficiencies in the plaintiffs' productions, the court wrote, "[t]hese defects in Plaintiffs' manual self-search are sufficient to highlight the risks of such self-search processes: 'parties and counsel that embark on self-collection can soon encounter multiple pitfalls that can sidetrack the litigation and lead to motions to compel, spoliated evidence, and even sanctions.' The pitfalls include the client's failure (1) 'to identify all sources of responsive information,' (2) 'to preserve ev idence,' (3) to 'find or provide to counsel all responsive documents and ESI,' or (4) to 'fully document how they conducted their searches.'" Id. (citation omitted).

Based on this, the court found that "Plaintiffs' unilateral 'self-search" is inconsistent with Plaintiffs' commitment, undertaken in the ESI Protocol, to 'work in good faith to agree on the use of reasonable search terms … along with any other relevant search parameters,'" id. at *3 (citation omitted), and ordered the parties "to meet and confer in good faith to negotiate search terms that are designed to capture documents that are responsive to Healthy Paws' discovery request." Id. at *5.

Proportionality

The plaintiffs also protested that requiring them to conduct additional searching would represent a disproportionate burden. Under Federal Rule of Civil Procedure 26(b), a "court must limit discovery when the discovery is not proportional to the needs of the case." Id. at *2.

Turning away this argument, the court pointedly found "Plaintiffs have filed a nationwide class action, and '[i]t is way too late in the day for lawyers to expect to catch a break on e-discovery compliance because it is technically complex and resource-demanding." Id. at *4 (citations omit-

ted). Recognizing the asymmetrical nature of the litigation, the court added "[n]or are Plaintiffs disproportionately burdened relative to Healthy Paws: by their own admission, Plaintiffs have produced 490 pages, whereas Healthy Paws has produced over 105,000. Neither Plaintiffs nor the evidence they cite suggests that conducting a more thorough ESI search would result in a burdensome hit count: either way, Healthy Paws will bear the bulk of the document collection and production burden in this case." Id. (citation omitted).

The ESI Protocol; Production Format

In opposing the defendant's motion to compel, the plaintiffs argued that they should not be expected to comply with the ESI Protocol—the document they had already agreed to with the defendant and that was entered as an order by the court. Having already determined that the plaintiffs were required to comply with the ESI Protocol with respect to working with the defendant to agree on search terms, the court then addressed whether the plaintiffs were also required to comply with the Protocol's production format specifications.

The production format specified in the ESI Protocol has been a standard format for e-discovery productions for many years—"single-page TIFF-image format with extracted or OCR text and the associated Metadata … ." Id. at *5. The plaintiffs, though, "argue[d] that it would be 'unduly burdensome' to collect and produce metadata because Plaintiffs did not forensically collect their email inboxes." Id. Additionally, they maintained that they should be relieved of the obligation to produce "most of the metadata on the grounds that it is 'facially obvious' and for the rest, they seek to shift this burden to Healthy Paws by having it 'ask the Plaintiffs in their depositions from where [they] collected the documents.'" Id.

The court rejected the plaintiffs' arguments and ordered them to produce documents in a format in line with the ESI Protocol. It found that "the fact that Plaintiffs have failed thus far to collect documents in a manner that permits the production of metadata does not mean that the metadata is not 'available and reasonable to collect and produce,' only that Plaintiffs haven't done so yet, and are disinclined to do so now." Id. (citation omitted). On the issue of burden, the Court found that "[t]he only burden Plaintiffs face is the burden of collecting and producing documents in accordance with the ESI Protocol—an obligation they voluntarily agreed to undertake." Id.

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Lessons Learned

In its decision granting the defendant's motion to compel, the court in *Healthy Paws* offers several discovery lessons—or perhaps reminders—for parties and their counsel.

First, courts expect parties to act in a reasonable, good faith manner in the search and retrieval process. In circumstances such as those in *Healthy Paws,* relying on custodians to self-search and self-collect is unlikely to meet those expectations. This is perhaps not surprising to practitioners who have for many years acknowledged that such efforts may not be a good idea.

Second, ESI protocols matter. Parties should take care when negotiating such discovery agreements and should expect to be bound by the terms, especially if a protocol has been entered as a court order.

And third, parties are expected to produce metadata when they produce ESI (and especially when they have agreed to do so in the ESI protocol). While this may seem an unnecessary statement to make in 2022, *Healthy Paws* demonstrates otherwise. Although some newer communication technologies may present challenges, the days of taking searchable email and producing it as paper, or as an electronic equivalent, are long gone.