

U.S. Electronic Discovery Practices Continue to Evolve

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In the United States, courts are demanding lawyers search for and produce electronic documents in litigation. The court system is working proactively to better understand electronic evidence and its implications, while also sanctioning lawyers who do not apply or understand the principles of electronic evidence. In today's environment, the information that was once known only to computer experts has now filtered into all aspects of the American legal system. Noteworthy cases in recent months include the following:

Court Grants Motions to Quash Subpoenas Seeking Records, Reports, and Electronic Evidence

In *Trammell v. Anderson Coll.*, 2006 WL 1997425 (D.S.C. July 17, 2006), the court quashed a plaintiff's subpoena seeking third-party records of a computer consultant hired by the defendant. The court held that the plaintiff failed to show that the information on the plaintiff's hard drive had been altered by the defendant and that a substantial need for the computer consultant's analysis was not demonstrated. Additionally, the court found that the plaintiff would not suffer undue hardship or costs in obtaining the relevant information through other similar means.

Court Orders Defendant to Explain Search Efforts Used to Locate Discoverable Documents

A Washington D.C. District court recently ordered the defendant in *Peskoff v. Faber*, 2006 WL 1933483 (D.D.C. July 11, 2006) to provide a detailed affidavit specifying the nature of the defendant's search for two years of missing email communications requested during discovery. The court noted that there were several possible locations for the missing emails, including the plaintiff's email account at work, other employee accounts, on hard drives of company computers and on backup tapes of the law firm's server and that the defendant must document the electronic sources searched during discovery.

Court Finds Privilege Not Waived for Inadvertent Disclosure of Electronic Spreadsheets

In *Williams v. Sprint/United Mgmt. Co.*, 2006 WL 1867478 (D. Kan. July 1, 2006), the court determined that 65 confidential spreadsheet documents inadvertently disclosed by the defendant did not waive any attorney-client privileges. The court ordered the spreadsheets were not meant to be disclosed since the defendant converted the documents to TIFF images viewable only by defence counsel. Furthermore, the court found that defendant implemented reasonable steps to immediately recover the documents once they discovered the error.

Court Awards Sanctions for Inadequate and Untimely Production of Electronic Documents

The plaintiff in *Omega Patents, LLC v. Fortin Auto Radio, Inc.*, 2006 WL 2038534 (M.D. Fla. July 19, 2006) sought sanctions against defence counsel for inadequately producing a limited number of financial documents and no email communications during discovery. The court awarded sanctions despite defendant's arguments that they eventually provided plaintiff with over 2,000 pages of electronic documents following an exhaustive search of over 17,000 documents which needed to be organized, compiled, properly formatted, Bates stamped and reviewed for substance. In a clear message to other attorneys involved with electronic discovery, the court sanctioned the defendant for \$1,500 since the defendant failed to provide sworn affidavits supporting its assertion that the delay was necessary to avoid undue burden and expenses.

District Court Adopts Special Master's Recommendation to Deny Defendant's Motion to Compel

In *Eastman Kodak Co. v. Sony Corp.*, 2006 WL 2039968 (W.D.N.Y. July 20, 2006) the court affirmed the Special Master's denial of defendant's motion requesting the plaintiff to further organize almost 3 million pages of electronic information found on a computer server, CD-ROMs and DVDs produced during discovery. The Special Master held that the potential costs of organization for defendant would be reasonable in light of the billions of dollars at issue in the case. Furthermore, the Special Master found that documents were accessible, had been produced in the form in

which it is usually maintained, and that the defendant was just as capable of organizing the electronic documents as plaintiff.

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