JONATHAN M. REDGRAVE

Needs, Wants, and Civil Discovery: Why Less Can Be More for Requesting Parties

MAGISTRATE JUDGE JOHN Facciola of the U.S. District Court for the District of Columbia once invoked the voice of Mick Jagger to describe lawyers' general mindset when dealing with discovery in civil litigation: "American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent." This observation, which the judge made in 2001, was a prophecy of a phenomenon now being seen in the continuing evolution of e-discovery—bombastic requests in too many cases for the preservation and production of all potentially relevant electronically stored information as well as the identification of every type of data system, information management system, database, computer, and program in existence anywhere in the organization involved in the litigation.

This trend is not what was intended by the 2006 amendments to the Rules of Civil Procedure, nor is it consistent with the ultimate touchstone, Rule 1, nor is it the wisest advocacy for requesting parties. The 2006 amendments were intended to open the eyes of all to the reality that discovery clearly involves the preservation and production of electronically stored information at all stages of the process. This new world creates new demands on *both* requesting and producing counsel. For producing parties, much has been said about needs for diligence and greater transparency. But requesting parties have commensurate obligations to know what the case is about and target requests and demands for information limited to what is needed.

All participants in the federal civil justice system are admonished to understand that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." What does this requirement mean practically for requesting parties?

Not every case demands the exposition and description of all data systems, databases, information management systems, computers, and programs. Certainly, clients and counsel need to have a good understanding of where relevant electronically stored information may reside as well as how it will be preserved and produced. Often, large organizations will engage in prudent data mapping efforts in order to gain this knowledge. But that due diligence requirement does not mandate all concerned to know all minutiae of an organization's systems and computer technology, nor does it mean that any and all requesting parties are entitled to gain immediate access to all information that may exist or could be gathered about hardware and software systems.

Few cases require extraordinary steps to preserve data, such as making forensic images of computer devices or stopping the ordinary course of creating or destroying backup media developed for the purpose of disaster recovery. Of course, counsel must be aware of what may be needed for the case, be able to make reasoned judgments, and be in a position to discuss the issues intelligently with opposing counsel.

The fascination with metadata and native files does not correlate with the ultimate need for data and discovery in litigation. Few cases turn on when a document was created, who inserted changes, and when the document was printed. Again, counsel need to have an understanding that such information may matter and should also understand that, for a variety of reasons, production of some documents in native format may be advantageous to both sides.

The amended rules ultimately demand a dramatic shift in the culture of discovery from all-out warfare to greater collaboration. This transition may be hard for some and confusing to others. The approach is a marked departure from unyielding advocacy and confrontation. Nevertheless, a shift to the culture of dialogue is an absolute necessity in a world of petabytes of information. (For those keeping track, a petabyte is a unit of information or computer storage equal to one quadrillion bytes, or 1,000 terabytes.)

Parties requesting documents stored electronically will have understandable discomfort, because most of the time they are not familiar with the opposing parties' data systems (hardware and software). Thus, parties will experience a feeling of risk in trusting that the right things have been done or, in a worst-case scenario, a cynical suspicion that the producing party is playing "hide the ball" with relevant elec-

SIDEBAR *continued on page 11*

SIDEBAR *continued from page 5*

tronically stored information. However, demanding to know everything is not the best way to manage this risk and to learn what is important (and this approach is likely to be counterproductive). Instead, requesting parties must adopt a measured and steady approach to seeking information when it is necessary for understanding preservation and production efforts. In addition, at the outset of litigation, the parties must also be capable of having informed discussions about the bounds of relevance and what is needed for discovery and, more important, for a trial on the merits of the case.

The keys to success for a requesting party today are the following:

- knowing and being able to articulate the claims and defenses in the case;
- being armed with a good general awareness of modern electronic information systems (get help if needed);
- being prepared to ask informed questions at the initial meet-and-confer session (get help if needed);
- specifying the requested form(s) of production wanted at the outset of discovery and being able to defend the choices when questioned;
- targeting discovery inquiries and requests as narrowly as possible in the circumstances; and
- always being able to tie requests and demands (and even calls for sanctions for discovery failures) back to legitimate and demonstrable needs for preservation and production.

Ultimately, striving to be the most reasonable person in the room will build credibility and prove to be more effective advocacy for the client in the emerging era that demands greater collaboration when it comes to e-discovery.

And yes, this is why asking for less may well get you more. **TFL**

Jonathan M. Redgrave is a partner with the firm of Redgrave Daley Ragan & Wagner LLP in its Washington, D.C., office and a member of the FBA editorial board.

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FBA members — as well as chapters, sections, and divisions — are invited to nominate issues for inclusion in the FBA Government Relations Issues Agenda for 2008–09.

The deadline for all agenda nominations is Friday, May 23.

The Issues Agenda, updated annually, provides the focus for FBA's Government Relations program. The agenda is a prioritized list of FBA advocacy issues in major areas of Congressional and Executive Branch activity that impact the federal legal system. Upon review of the issue nominations received, the FBA Government Relations Committee will prepare a proposed Issues Agenda for 2008–09, for approval by the FBA Board of Directors.

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The Government Relations Committee will review all nominations and submit a proposed Issues Agenda to our Board of Directors for consideration at its meeting in Huntsville, Ala., in September.