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New Model Order Limiting E-Discovery Can Substantially Lower Cost

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On September 27, 2011, at the Eastern District of Texas Bench Bar Conference, Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit revealed a model order that places dramatic limits on e-discovery in patent cases. Judge Rader spoke on the status and direction of patent litigation in the United States, contending that "the greatest weakness of the U.S. court system is its expense. And the driving factor for that expense is discovery excesses." While specifically addressed to patent cases, this model order is easily adaptable to all cases and can be a powerful tool to limit the cost and inconvenience of electronic discovery.

What Limitations Are Included

The model order places much tighter and more specific constraints on discovery of electronically stored information ("ESI") than those currently provided by the Federal Rules of Civil Procedure.

The limitations include:

- Cost shifting for disproportionate ESI production requests.
- Exclusion of peripheral metadata from ESI requests absent a showing of good cause.
- Exclusion of email or other forms of electronic correspondence (collectively "email") from "general" ESI requests. To obtain email, parties must set out specific email production requests.
- Email production requests shall only be submitted for specific issues, not "general" discovery of a product or business.
- Email production requests must identify the custodian, search terms and time frame.
- Requesting parties are limited to five custodians per producing party for email requests absent an agreement amongst the parties or a showing of "distinct need" to the Court.
- Requesting parties are limited to a total of five search terms per custodian per party, and the search terms must be narrowly tailored.
- The receiving party shall not use ESI that the producing party asserts is attorney-client privileged or work product protected to challenge the privilege or protection.
- Inadvertent production of a privileged work product protected ESI is not a waiver.

- Mere production of ESI in a litigation as part of a mass production shall does not constitute a waiver for any purpose.

Additionally, there is one limitation that specifically addresses e-discovery in patent cases:

- Email production requests shall be phased to occur after the parties have exchanged initial disclosures and basic documentation about the patents, the prior art, the accused instrumentalities, and the relevant finances. While this provision does not require the production of such information, the Court encourages prompt and early production of this information to promote efficient and economical streamlining of the case.

This provision can be easily adapted for broader application to all other areas of litigation. Although the model order comes from the Federal Circuit (as it was written specifically for patent litigation), it should be persuasive to other courts given that it addresses fundamental problems with e-discovery faced by all litigants.

What This Means for You

By insisting on incorporating these provisions into a court order at the onset of litigation, these limitations will help curb unnecessarily burdensome and costly requests for irrelevant material. By laying out specific stipulations regarding what can and cannot be requested, ESI production will be more focused and less wasteful.

If you are the party requesting production, these provisions place an onus on you to more carefully determine what information you need and how to efficiently search for it. By limiting the number of custodians and search terms, requesting parties must exercise due diligence on the front end of the process to ensure they provide targeted and specific information needed for litigation purposes. The payoff should be a substantial reduction in the volume of irrelevant material. In other words, the discipline the proposed order encourages will produce savings for both the requesting and the producing parties. On the other hand, because the limitations are substantial, parties will want to assess the cost savings versus their strategic needs for broad discovery on a case by case basis in determining whether to advocate or object to imposition of these restrictions.

"Our courts are in danger already of becoming an intolerably expensive way to protect innovation or prove freedom to operate," Rader said in his remarks at the conference. "We simply can't afford to allow discovery to endanger the entire system. The current expense is such a burden on the system that it really does outweigh any benefit." Altogether, the model order has the potential to reduce ESI production costs dramatically and make the e-discover process more streamlined.