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Sedona Provides Updated, Practical Guidance for Legal Holds

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Sedona Provides Updated, Practical Guidance for Legal Holds

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Agenda

- Introductions and Overview
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- The Preservation Trigger
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The Sedona Conference

- Nonpartisan, nonprofit research and educational institute dedicated to the advanced study of law and policy
- Includes counsel on both sides, academics and jurists
- E-discovery publications include:
  - *The Sedona Principles* (originally published in January 2004)
    - Best Practices for Electronic Document Retention and Production
    - Influential, cited frequently
    - Now in its Third Edition (October 2017)
  - *Cooperation Proclamation*
    - Judicial endorsement
  - *Commentary on Legal Holds: The Trigger & The Process*
    - First edition 2010
    - Second edition, Public Comment Version, December 2018

The Preservation Trigger

- *Sedona Guideline No. 1*
  - A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation.
- *Sedona Guideline No. 2*
  - Adopting and consistently following a policy governing an organization's preservation obligations are factors that may demonstrate reasonableness and good faith.
- *Sedona Guideline No. 3*
  - Adopting a procedure for reporting information relating to possible litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith.

The Preservation Trigger

- *Sedona Guideline No. 4*
  - Determining whether litigation is or should be reasonably anticipated should be based on a good-faith and reasonable evaluation of relevant facts and circumstances.
- *Sedona Guideline No. 5*
  - Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions (including whether a legal hold is necessary and how it should be implemented) at the time they are made.

Ballard v. Wal-Mart Stores E., LP

No. 17-cv-03057, 2018 WL 4964361 (S.D. W.Va. Oct. 15, 2018)

- Ballard alleged that on June 6, 2016, she slipped in liquid and fell while shopping at Wal-Mart.
- Immediately after fall, Wal-Mart initiated an investigation. Asset Protection Manager took photographs of subject area (with her cell phone), including liquid on floor, and completed a Customer Incident Report.
- As part of investigation, Asset Protection Manager reviewed surveillance footage to track Ballard while in store to see if she had behaved in a way indicating she was responsible for the accident. She also took a few images from the footage. Prints of the digital photographs were included in accident file.
- Ballard notified Wal-Mart by letter dated July 25, 2016, that she was represented by counsel.

Ballard (cont.)

- In discovery, Wal-Mart provided the surveillance video of the fall area, including the video of her fall, and the copies of the still photos from the video.
- Wal-Mart did not preserve the surveillance footage of Ballard's time in the store because the store had upgraded its surveillance system and additional post-fall surveillance video was not recoverable. Cell phone photos likewise not available.
- Plaintiff contended Wal-Mart failed to preserve video footage of her in Wal-Mart before and after her fall.

Ballard (cont.)

- Wal-Mart argued
  - Its duty to preserve did not begin until it received the letter from Ballard on July 25, 2016.
  - It had retained footage of the fall in accordance with its own policies which did not require employees to retain either native versions of photos or all surveillance video.
  - Evidence preserved was sufficient to render the additional evidence irrelevant and/or duplicative.
- Court "strongly" disagreed with Wal-Mart's position:
  - It conducted an investigation into the accident because it anticipated a claim or litigation, and the materials created or reviewed in the course of that investigation consisted of evidence it believed might be relevant. To permit Wal-Mart to conduct such an investigation but choose which evidence to retain would interfere with the functioning of the judicial process.

Ballard (cont.)

- Distinguishing the case from a products liability case where the vendor has no warning that a customer might bring a suit, the court found that Wal-Mart had a duty to preserve the evidence related to that investigation, including all photographs and surveillance video.
- Court stated that Wal-Mart's concession that it acted in accordance with company policy in failing to preserve that evidence demonstrated that it acted willfully.
- Court ordered Ballard could introduce evidence of spoliation and discovery abuses during trial and held the request for a negative inference instruction in abeyance.

The Scope of the Hold

- *Sedona Guideline No. 6*
  - Fulfilling the duty to preserve involves reasonable and good-faith efforts, taken as soon as is practicable and applied proportionately, to identify persons likely to have information relevant to the claims and defenses in the matter and, as necessary, notify them of their obligation to preserve that information.
- *Sedona Guideline No. 7*
  - Factors that may be considered in determining the scope of information that should be preserved include the nature of the issues raised in the matter, the accessibility of the information, the probative value of the information, and the relative burdens and costs of the preservation effort.

What Types of Data Should be Preserved

- Emails and electronic documents
- Mobile data
  - Texts, chats, and instant messages
  - Ephemeral communications (e.g., Snapchat)
- Collaboration tools (e.g., SharePoint)
- Social media platforms
- Cloud-based sources (e.g., Dropbox, Google Drive)
- Non-custodial sources (e.g., structured databases)
- Other sources to consider:
  - Personal/home devices
  - Backup/disaster recovery systems

Social media considerations

- In addition to the traditional document preservation and collection requirements related to emails, loose files and hard copy documents, the parties must also focus their legal hold and collection efforts on other types of data, such as social media.
- When determining whether specific social media data must be preserved, the parties should consider the following factors:
  - whether social media sources are likely to contain relevant information;
  - who has possession, custody, or control of the social media data;

Social media considerations (cont.)

- the date range of discoverable social media content;
- the value of the information to the needs of the case;
- the dynamic nature of the social media and user-generated content;
- reasonable preservation and production formats; and,
- confidentiality and privacy concerns related to parties and non-parties.

- The Sedona Conference Primer on Social Media, Second Edition (forthcoming 2019)

Gordon v. T.G.R. Logistics, Inc.

No. 16-cv-00238-NDF, 2017 WL 1947537 (D. Wy. May 10, 2017)

- Gordon filed a personal injury lawsuit against T.G.R. Logistics, Inc. in connection with an auto accident. Plaintiff claimed numerous physical injuries (neck, back, traumatic brain injury) as well as PTSD, anxiety and depression.

Gordon (cont.)

- During discovery defendants served the following discovery request to plaintiff: “Utilizing the instructions attached hereto, download and produce an electronic copy of your Facebook account history to the enclosed flash drive.” Plaintiff responded that the discovery request exceeded the permissible discovery limits of FRCP 26 and that the request was unduly burdensome, lacked relevancy and was overly invasive of plaintiff’s privacy.

Gordon (cont.)

- In response, plaintiff noted that she had already downloaded and produced information from Facebook related to the accident or her injuries. In addition, plaintiff applied the keywords set forth in the defendant's discovery requests related to the lawsuit (names of the defendants, location of the accident and terms related to the medical claims).
- In making its determination, the court applied three basic steps to consider whether the scope of discovery was reasonable. Those steps are: (1) is the information privileged; (2) is it relevant to the case or defense; and (3) is it proportional to the needs of the case. Since there were no claims of privilege the court focused on the final two criteria.

Gordon (cont.)

- In addressing proportionality, the court noted that just because the information can be retrieved quickly and inexpensively does not resolve the issue. Discovery can be burdensome even if it is inexpensive. The defendants have a legitimate interest in discovery which is important to the claims and damages that it is being asked to pay. However, requests should be tailored to the litigation related issues rather than issuing discovery requests for any and all Facebook information.
- Social media presents some unique challenges to courts in their efforts to determine the proper scope of discovery of relevant information and maintaining proportionality. “There can be little doubt that within those postings there will be information which is relevant to some issue in the litigation. It is equally clear that much of the information will be irrelevant.”

Gordon (cont.)

- Ultimately the court determined that the discovery requests should be tailored to obtain information related to the litigation at hand. The court ordered the plaintiff to produce Facebook records which related to the accident and any references to the alleged physical or emotional aftermath from the accident. It expanded the request slightly to include any Facebook records after the accident related to the plaintiff's level of activity.

Ortiz v. Amazon.com LLC

No. 17-cv-03820, 2018 WL 2383210 (N.D. Cal. May 25, 2018)

- Plaintiff Michael Ortiz claimed that his former employers, including Golden State, failed to compensate him for all the hours that he worked during his employment with them. Ortiz also alleged that Golden State did not allow him to take breaks during the day.
- During discovery Ortiz failed to produce his cell phone records. The court ordered Ortiz to produce his records but Ortiz refused. Ortiz claimed that his cell phone was in his "non-party wife's name" and he therefore lacked "possession or control of the records". Ortiz further refused to provide his wife's nature or account information and claimed that he wanted to keep his relationship with his wife "private".

Ortiz (cont.)

- The court ruled that the phone records went to the core of Ortiz's allegations that he was not properly compensated in that they could provide relevant information regarding his daily activities.
- The court ordered Ortiz to provide the account holder's name and address to Golden State so that it could subpoena the cell phone records. It also ordered Ortiz to file an explanation, under penalty of perjury, as to why he could not obtain the records himself.

FRCP 37(e) – Failure to Preserve ESI

- Provides for sanctions "[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."
  - 37(e)(1) where loss of ESI prejudices another party, may order measures no greater than necessary to cure the prejudice
  - 37(e)(2) only upon finding a party acted with intent to deprive can a court:
    - Presume the information lost was unfavorable to that party
    - Instruct the jury that it may/must presume the ESI was unfavorable
    - Dismiss the action or enter a default judgment
- Requires reasonable steps to preserve, not perfection
- Based on common law duty to preserve
- Was theoretically supposed to replace inherent authority, but not all courts have agreed

Experience Hendrix, L.L.C. v. Pitsicalis

No. 17-cv-1927, 2018 WL 6191039 (S.D.N.Y. Nov. 27, 2018)

- Plaintiff brought trademark and copyright claims, and sought sanctions for what the court called "defendants' persistent non-compliance with basic discovery obligations."
- Defendants had utilized two different cleaning software applications, one of them violated their duty to preserve because it affirmatively gave the user the option to delete files permanently.
- Additionally, defendants had not identified nor done anything with a seventh computer, established through a Facebook photo that had been in the president's office, but had been given away.
- Court found that the computer that was given away "without review or imaging likely contained relevant evidence."

Experience Hendrix (cont.)

- Court found that the computer that was given away "without review or imaging likely contained relevant evidence."
- Defendants' counsel testified that he thought the seventh computer was only a monitor, but that he did not have personal knowledge as to its location, and that he had neither reviewed the files to determine responsiveness nor contacted the new owner about its contents.
- Court found the spoliation was intentional
  - imposed an adverse inference instruction to the jury pursuant to F.R.Civ.P. 37(e)(2)
  - awarded the plaintiff costs and attorneys' fees up through the spoliation hearing

Paisley Park Enter., Inc. v. Boxill

No. 17-cv-1212, 2019 WL 1036059 (D. Minn. Mar. 4, 2019)

- Plaintiffs, representatives for Estate of Prince, alleged defendants stole and released previously unreleased music of Prince without permission. Complaint was filed in April 2017.
- Plaintiff sought text messages from cell phones of Staley and Wilson, principals of one defendant, who were added as parties in an amended complaint filed in June 2017.
- Defendants indicated they could not produce responsive text messages because they had not preserved their text messages.
  - Did not disengage the auto-delete function on their phones
  - Staley had wiped and discarded his phone in October 2017
  - Wilson wiped and discarded his phone in January 2018 and wiped and discarded his new phone in May 2018
  - No other back-up data existed for either

Paisley Park Enters., Inc. (cont.)

- Court found duty to preserve evidence arose no later than February 11, 2017 when Staley sent an e-mail regarding his plans to release the music. In email, he acknowledged the riskiness of his position and indicated that Prince Estate could challenge their actions.
- Court rejected defendants argument that they did not know that text messages should be preserved:
  - "In the contemporary world of communications, even leaving out the potential and reality of finding the modern-day litigation equivalent of a "smoking gun" in text messages, e-mails, and possibly other social media, the Court is baffled as to how Defendants can reasonably claim to believe that their text messages would be immune from discovery."

Paisley Park Enters., Inc. (cont.)

- The principles of "standard reasonableness framework" require a party to "suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents."
- "It takes, at most, only a few minutes to disengage the auto-delete function on a cell phone."

- Court found the conduct of defendants egregious, holding they willfully and intentionally destroyed discoverable information.
- Court ordered monetary sanctions.
- Court stated plaintiffs' request for order presuming evidence destroyed was unfavorable to defendants and/or for an adverse inference instruction may be justified but deferred consideration of those sanction to later date.

The Legal Hold Notice

- *Sedona Guideline No. 8*
  - In circumstances where issuing a legal hold notice is appropriate, such a notice is most effective when the organization identifies the custodians and data stewards most likely to have discoverable information, and when the notice:
  - (a) communicates in a manner that assists persons in taking actions that are, in good faith, intended to be effective;
  - (b) is in an appropriate form, which may be written, and may be sent by email;
  - (c) provides information on how preservation is to be undertaken, and identifies individuals who can answer questions about preservation;
  - (d) includes a mechanism for the recipient to acknowledge that the notice has been received, read, and understood;

The Legal Hold Notice (cont.)

- *Sedona Guideline No. 8 (cont.)*
  - (e) addresses features of discoverable information systems that may make preservation of discoverable information more complex (e.g., auto delete functionality that should be suspended, or small sections of elaborate accounting or operational databases);
  - (f) is periodically reviewed and amended when necessary; and
  - (g) is followed up by periodic reminder notices, so the legal hold stays fresh in the minds of the recipients.

N.M. Oncology and Hematology v. Presbyterian Healthcare Servs.

No. 1:12-cv-00527, 2017 WL 3535293 (D.N.M. Aug. 16, 2017)

- Defendants represented by sophisticated counsel
- Defendants' legal hold directive:
  - Was issued less than a week after the filing of the complaint
  - Initially went to 35 employees, and ultimately to another 174
  - Specified 17 subject matters and various forms of data
  - Required that recipients sign a written acknowledgement and submit names of other employees who might have relevant data
- Plaintiff argued that the hold was inadequate because it:
  - Did not address defendants' "email jail"
  - Did not [initially] go to several key witnesses
  - Allowed employees to assess relevance
  - Did not automatically preserve emails deleted from the Exchange server

N.M. Oncology (cont.)

- Employee discretion in determining relevance
  - While “a party cannot blithely (and self-interestedly) claim[] that all destroyed documents were irrelevant,” the court recognized that employee discretion is not per se inadequate “as long as routine procedures which might eliminate relevant information are no longer continued”
  - Court looked favorably upon fact that directive included an exhaustive list of subjects, instructed recipients to “be cautious and preserve” documents where there was uncertainty, and was not “a generic ‘retain relevant documents’ instruction”

N.M. Oncology (cont.)

- Email jail
  - Required employees to delete/archive emails once they ran out of inbox space
  - But employees knew that hold directive superseded email jail
  - Defendants acknowledged that certain emails may have been deleted "in the ordinary course of business" by custodians who did not receive first notice or believed the emails were irrelevant
  - Court accepted defendants' description of such emails as "relat[ing] to tangential or peripheral issues that have only tenuous relevance to the underlying claims"
- Live Exchange "dumpster"
  - Absent evidence that hold notice recipients violated the directive, the absence of a server-side hold has no impact on potential spoliation

N.M. Oncology (cont.)

- Hold notice recipients
  - Plaintiffs cited seven specific individuals and one category of employees who were omitted from first hold
  - Court accepted that four of the individuals, and the one category of employees, were sent the initial hold notice at a later date prior to the issuance of the second wave of notices
  - As to the remaining three, one had left the company before the issuance of the first hold, and the other two were deemed not to be key players
  - Additionally, plaintiffs failed to establish that the mere fact that 174 additional individuals were subsequently sent the hold notice necessarily establishes that their initial omission constituted a discovery failure

N.M. Oncology (cont.)

- Plaintiff moved for spoliation sanctions in the form of a default judgment against defendants or, in the alternative, an adverse inference jury instruction
- The court recognized the seriousness of an adverse inference instruction, describing it as “a powerful sanction” that “brands one party as a bad actor and necessarily opens the door to a certain degree of speculation by the jury”
- The court ultimately held that while there were some “imperfections” in the hold, including (i) the absence of a preferred server-side hold; (ii) the failure to disable the email jail; and (iii) the unexplained delay between the first and second hold waves, there was no showing of bad faith or spoliation; a “theoretical possibility” is not enough

Bouchard v. United States Tennis Assoc.

No. 15 Civ. 5920, 2017 WL 3868801 (E.D.N.Y. Sep. 5, 2017)

- Plaintiff moved for sanctions, alleging that defendants intentionally destroyed security camera recordings of the night she slipped, fell, and hit her head in the women's locker room
- Magistrate Judge denied motion for sanctions, and plaintiff objected to that order
- District court agreed that defendants did not act with intent to deprive plaintiff of the information when the video footage was destroyed given that defendants had already produced three hours of recordings of the area immediately outside the locker room and did not have any cameras in the locker room itself
- The absence of a formal litigation hold was not dispositive since relevant evidence was fully preserved and produced notwithstanding the lack of a hold notice

Cannata v. Wyndham Worldwide Corp.

No. 2:10-cv-00068, 2011 WL 3495987 (D. Nev. Aug. 10, 2011)

- Plaintiffs served defendants with a 30(b)(6) notice on topics including the litigation hold and ESI
- After the parties were unable to agree to the scope of the deposition during the meet-and-confer process, defendants filed an emergency motion for a protective order requesting:
  - That the scope of the litigation hold topic be limited to who received the hold notice and the instructions they were given
  - That the information be provided via interrogatory response rather than deposition testimony since a summary of email retention and litigation hold practices had already been provided

Cannata (cont.)

- Court noted that litigation hold letters are generally not discoverable absent spoliation being at issue
- However, parties are entitled to know "what kinds and categories of ESI" custodians were told to preserve, and "what specific actions they were instructed to undertake"
- Plaintiffs represented that they were "not interested in the actual attorney-client communication," but instead in "what has actually happened in this case, including:
  - When and to whom the hold letter was given
  - What kinds and categories of ESI were specified
  - What specific actions employees were instructed to take
  - When the automatic deletion feature was disabled
- Court denied defendants' motion as to the litigation hold

Implementation and Oversight

- *Sedona Guideline No. 9*
  - An organization should consider documenting the procedure of implementing the legal hold in a specific case when appropriate.

- *Sedona Guideline No. 10*
  - Compliance with a legal hold should be regularly monitored.

EPAC Tech. Inc. v. Harpercollins Christian Pub'lg., Inc.

No. 3:12-cv-00463, 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018)

- Plaintiff printing company complained that defendant publisher had not produced evidence about their disputed contract.
- Defendant's general counsel issued a broad, detailed legal hold directive to employees to disable automatic deletion of email, cease rotation of backup tapes and create images of personal hard drives.
- The manager of the warehouse management system failed to start preserving for several years. More than 750,000 emails were purged because the network administrator assumed, but did not verify, that the retention period in the system was ten years when in fact it was one.

EPAC Tech. Inc. (cont.)

- Court held hold directive was a "boilerplate form deployed without guidance, follow up or expectation that those to whom it was directed would or could carry out the tasks required" and was "ignored by all recipients."
- Defendant "failed to take its preservation obligations seriously," and that its "halfhearted attempts" to "impose a litigation hold that was not implemented with sufficient guidance or monitored by counsel" allowed evidence to be lost.
- Court decided to:
  - instruct the jury that defendant failed to preserve its warehouse data
  - permit plaintiff to re-depose defendant's witnesses at defendant's expense
  - assess costs and fees incurred in the Special Master proceedings

Franklin v. Howard Brown Health Center

No. 17-cv-8376, 2018 WL 4784668 (N.D. Ill. Oct. 4, 2018), adopted 2018 WL 5831995 (Nov. 7, 2018)

- Plaintiff sought emails and text messages concerning alleged harassment. Defendant produced only a handful.
- Defendant issued a litigation hold, but acknowledged that no in-house or outside counsel oversaw the process, leaving employees to decide responsiveness.
- When one of the accused harassers left the company, his computer was wiped seven days later despite the legal hold.
- Defendant's general counsel directed that plaintiff's computer be sequestered when she threatened litigation, but did not provide any storage instructions and two years later it could not be located.
- Counsel also misunderstood how instant messages were retained and failed to stop their automatic deletion.

Franklin (cont.)

- Holding that the defendant had "bollixed its litigation hold . . . to a staggering degree and at every turn," the court found there was "little question that sanctions are warranted, if for no other reason than such irresponsibility with regard to discovery cannot be countenanced."
- Court found no evidence of intent to deprive plaintiff of the material, only gross negligence.
- The court considered sanctions pursuant to Rule 37(e)(1) which empowers the court impose sanctions no greater than those necessary to cure the prejudice caused.
- Magistrate Judge recommended that the parties be allowed to present evidence and argument to the jury about defendant's failure to preserve, and that the jury be instructed as the trial judge deems appropriate.

Indus. Quick Search, Inc. v. Miller, Rosado & Algois, LLP

No. 13-cv-5589, 2018 WL 264111 (S.D.N.Y. Jan. 2, 2018)

- Industrial Quick Search ("IQS") alleged that defendant law firm ("Miller") had failed to properly
  - advise them on the law governing document preservation
  - adequately supervise document production
  - offer an adequate defense at a spoliation hearing in the underlying action
- In the underlying litigation, IQS and its principal and investor, Meiresonne, were sued by Thomas Publishing for copyright violations
- During discovery in the underlying litigation, former employees of IQS reported that prior to production documents had been removed from the files that were relevant to the litigation
- IQS and Meiresonne admitted removing only files that they believed were not responsive.

Indus. Quick Search, Inc. (cont.)

- Thomas Publishing moved to strike IQS's answer, claims and counterclaims on the basis that it had intentionally destroyed relevant discovery.
- After a spoliation hearing, the court found that IQS and Meiresonne had destroyed relevant documents
- The court granted Thomas Publishing's motion and entered default judgment on liability.
- In the malpractice action, IQS contended that Miller had failed to
  - issue a litigation hold
  - inform them that destroying relevant documents was improper
  - monitor IQS's compliance with the discovery requests.

Indus. Quick Search, Inc. (cont.)

- Miller argued that they had no duty to advise plaintiffs of their preservation obligation because they were retained after plaintiffs were served with the cease-and-desist letter, that once a client has been made aware of potential litigation, attorneys have no duty to institute a hold or oversee compliance.
- The court rejected Miller's argument
  - once a litigation hold is in place, a party and its counsel "must make certain that all sources of potentially relevant information are identified and placed "on hold."'

Indus. Quick Search, Inc. (cont.)

- The court held that counsel must "take reasonable steps to ensure the preservation of relevant information" and that an attorney's failure to fulfill that obligation falls below the ordinary and reasonable skill possessed by members of the legal bar.
- Miller also argued (unsuccessfully) that that they had issued an oral litigation hold, and cited testimony by Meiresonne that he had not advised his counsel of his intent to destroy documents.

Release of the Legal Hold

- *Sedona Guideline No. 11*
  - Any legal hold process should include provisions for releasing the hold upon the termination of the duty to preserve, so that the organization can resume adherence to policies for managing information through its useful life cycle in the absence of a legal hold.

The Impact of Data Security Laws

- *Sedona Guideline No. 12*
  - An organization should be mindful of local data protection laws and regulations when initiating a legal hold and planning a legal hold policy outside of the United States.

The Impact of Data Security Laws

- General Data Protection Regulation (GDPR)
  - Took effect May 25, 2018
  - Has extraterritorial effect

- California Consumer Privacy Act (CCPA)
  - Passed June 28, 2018
  - Scheduled to take effect January 1, 2020

Corel Software, LLC v. Microsoft Corp.

No. 2:15-cv-00528, 2018 WL 4855268 (D. Utah Oct. 5, 2018)

- Plaintiff moved to compel defendant to produce certain "telemetry data"
- Defendant moved for a protective order, in part on the grounds that producing such data would first require burdensome anonymization steps to comply with the GDPR
- The court denied defendant's motion for a protective order, holding that the production of the telemetry data was proportional to the needs of the case, considering the factors set forth in Rule 26(b)(1)
- The court did not directly address GDPR compliance in finding the requests proportional

Royal Park Invs. SA/NV v. HSBC Bank USA

No. 14 Civ. 8175, 2018 WL 745994 (S.D.N.Y. Feb. 6, 2018)

- Plaintiff objected to Magistrate Judge's order compelling it to re-produce documents located in Belgium in unredacted form
- Documents had previously been produced without custodial information and with substantial redactions of names and email addresses throughout, purportedly to comply with the pre-GDPR Belgian Data Privacy Act
- The court held that considerations of international comity under the Supreme Court's *Aerospatiale* decision ultimately weighed in favor of requiring that the documents be produced in unredacted form with custodian information restored, even if the Belgian Act prohibits disclosure

Knight Capital Partners Corp. v. Henkel

290 F. Supp. 3d 681 (E.D. Mich. 2017)

- Plaintiff moved to compel production of documents located in Germany; defendant and its U.S. subsidiary (a non-party subpoenaed by plaintiff) sought protective order and right to redact in light of German blocking statute, the German Federal Data Protection Act, which implements/supplements the GDPR
- The court cited the plain language of the statute, which carved out cross-border data transfers "necessary . . . for the establishment, exercise or defence of legal claims"
- Despite the potential civil and criminal penalties for violations of the German Federal Data Protection Act, the court found that the *Aerospatiale* factors weighed in favor of compelling disclosure, particularly absent a showing of a plausible risk of an enforcement action by Germany authorities
- The court viewed model contractual clauses as "aspirational"

Key Takeaways

- Provide clear, written instructions to clients describing the information to be preserved, why it must be preserved, how best to do so, and the potential consequences of failing to do so, as well as a contact for questions
- Make a full investigation of clients' data sources and custodians, and document that effort
- Determine which data sources are subject to automatic deletion and direct that it be stopped, and document those efforts
- Require acknowledgement of the legal hold by each recipient
- Monitor clients' compliance and document those efforts
- Be wary of relying on international data protection statutes/regulations as a basis to reduce/avoid U.S. discovery obligations

Questions?

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