# When and How Might a Court Limit Discovery Due to Cost of Producing Electronic Information?



*By Ron Hedges*

The production of electronically stored information (ESI) by healthcare providers in response to requests made by plaintiffs in actions brought in United States district courts is my focus in this month's post. Every dispute about production begins with the governing law—for the purposes of this post, this will be the Federal Rules of Civil Procedure—and is resolved through the application of particular facts to that law. A recent decision demonstrates how courts resolve these disputes.

*Wagoner v. Lewis Gale Med. Center, LLC* is an action in the United States District Court for the Western District of Virginia. The plaintiff was hired by the defendant as a security guard. He alleged that he suffered from dyslexia, which made it difficult for him to read and copy his work schedule and that two supervisors denied his request for a written one. He was discharged after two months' employment and commenced an action in which he alleged that he was wrongfully terminated in violation of the Americans with Disabilities Act. The plaintiff sought production of e-mail over a four-month period kept by the supervisors and proposed specific terms for the search of the e-mail. In response, the defendant argued that the e-mail was not subject to discovery, that the search would be disproportionate to the needs of the action, and that the email to be searched for was located on sources that were "not reasonably accessible."

In a decision on July 13, 2016, the court rejected the defendant's arguments. First, it considered whether the ESI sought was within the scope of discovery prescribed by Rule 26(b)(1): "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ***." Measured against that definition of scope, the court had no difficulty in finding the e-mail was relevant. The following is an excerpt:

> "Wagoner contends that his dyslexia caused him to have difficulty reading and copying his posted work schedule, that Lewis Gale denied his request for a written copy of the schedule, and that his termination violated the ADA. Compl. ¶¶ 21-23. E-mails or other memoranda written by Wagoner's supervisors, Frank Caballos and Bobby Baker, between April and July 2014 and containing the search terms listed above are relevant to Wagoner's claim. Indeed, Lewis Gale largely conceded at the hearing that Wagoner's request was relevant, arguing only that the keyword searches were too broad. Accordingly, I find that Wagoner's requested ESI search is relevant to the claims and defenses asserted in this case. Admittedly, Lewis Gale has produced e-mail and other documents maintained by Caballos and Baker, but the scope of the computer search by Lewis Gale has been limited to these individuals' search of their own information for discoverable items.[4] Lewis Gale has provided no information showing that this search effort would yield deleted or archived ESI which may be available through a keyword search across the relevant electronic formats."

The court then turned to the defendant's argument that the discovery sought was not proportionate because the plaintiff's potential recovery was "limited" and the email was not reasonable accessible under Rule 26(b)(2)(B) (Specific Limitations on Electronically Stored Information):

> "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause…"

The defendant conceded that it could not conduct a search in-house and that it would be required to contract with a third-party vendor to do so. Seven computers would have to be searched at an estimated total cost of about $69,000. Nonetheless, the court ordered production:

> "…it is difficult to conclude that the ESI sought is not proportional or 'not reasonable accessible' due to undue burden and expense because Lewis Gale apparently chose to use a system that did not automatically preserve e-mails for more than three days, and did not preserve e-mails in an readily searchable format, making it costly to produce relevant e-mails when faced with a lawsuit. *See AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443 (2007) (noting 'the Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.')…"

The court also denied the defendant's request that, if the discovery were to be allowed, costs be shifted to the plaintiff.

What lessons can be drawn from *Wagoner*? First, proofs are important. The defendant does not appear to have presented information sufficiently detailed to satisfy the court. Second, when courts apply the facts before them to resolve a discovery dispute they exercise their discretion in resolving disputes. That discretion is broad. Third, it is extremely rare for a court to shift the cost of review and production of ESI to a producing party. All this means that parties should attempt to resolve discovery requests between themselves if possible through compromise.

***Editor's note: The views expressed in this column are those of the author alone and should not be interpreted otherwise or as advice.*

*Ron Hedges, JD, is a former US Magistrate Judge in the District of New Jersey and is currently a writer, lecturer, and consultant on topics related to electronic information.*

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