

02-ED-016

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Via E-mail

Date sent: Wed, 25 Jun 2003 16:54:54 -0500  
From: charles.a.beach@exxonmobil.com  
Subject: Re: E-Discovery  
To: marcusr@uchastings.edu

Thanks for your note. If the comments that I sent are helpful, feel free to use them even if doing so will result in linking the comments to ExxonMobil.

Since sending the comments, I remembered the following incident:

The day after filing a putative class action against my company and several other oil companies, the lawyer for the putative class filed a motion to require the defendants to keep all documents, including back-up tapes. The filing of the motion, put us in the position of having to stop recycling back-up tapes or risk accusations of spoliation of evidence if the motion was eventually granted. The case lacked merit. The complaint and first amended complaint were both dismissed with leave to re-plead, and the case was settled for a very nominal amount before the claimants' attorney re-pleaded for the third time. Although the case lacked merit, the allegations were inflammatory. If we had continued to recycle back-up tapes, the attorney for the putative class would have turned the case from a dispute on the merits to a dispute over destruction of documents and improper corporate behavior. The rules should make clear that parties have no obligation to go to extraordinary measures, such as stopping recycling of back-up tapes, prior to a court order that requires the cessation, sets reasonable limits, and makes an appropriate allocation of cost.

Thanks for your consideration.

Regards,  
Chuck Beach

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Date sent: Fri, 20 Jun 2003 18:31:43 -0500  
From: charles.a.beach@exxonmobil.com  
Subject: E-Discovery  
To: marcusr@uchastings.edu

Professor Marcus:

I understand that you are the Reporter for the Discovery Subcommittee of the Civil Rules Advisory Committee and that you are interested in receiving informal comments concerning problems practitioners have experienced related to e-discovery. I have listed two comments below. I would prefer that you not link my company directly with either of the two comments in any written material that is likely to become public. Thank you.

1. We are a large company. We have numerous data centers that produce hundreds of back-up tapes for email and other types of electronic documents each day. Since the back-up tapes are for disaster recovery of our computer systems and not for storing information that employees need to access in the ordinary course of business, the tapes are recycled periodically. Under the current rules, we do not know if we risk sanctions for spoliation of evidence if we continue to recycle tapes when we are sued. Since we have thousands of lawsuits pending at any given time, we would never be able to recycle tapes if we must preserve every tape that might have a "relevant document" in every case to which we are a party. The rules should make clear that parties have no obligation to preserve back-up tapes unless a court orders them to do so, and the court should set appropriate conditions, including reasonable limits on the number of tapes and shifting of costs except in extraordinary circumstances.

2. In one matter, our company was required to stop recycling back-up tapes for email and office documents (e.g., Word, Excel, etc.) at 9 of our data centers for more than a year. We retained over 1600 tapes per month at a cost of more than \$120,000 per month--just for extra tapes, exclusive of any labor or overhead charges. We produced large volumes of hard copy and electronic documents, but we were never required to search the back-up tapes, and none of the documents that we produced came from those tapes. The rules should provide that the retention of back-up tapes is an extraordinary discovery request and that the party demanding preservation of such tapes should bear the initial cost. The court would have discretion to require reimbursement of the cost if the party demanding preservation prevails and if preservation of the tapes proved essential for discovery of material evidence.

Regards,  
Chuck Beach