Ask a RIM Law Expert

This is part of a syndicated column I have created for ARMA chapters. My column is devoted to answering information governance, records management, privacy and related legal questions from Chapter Members or sharing my thoughts on current hot topics. As you read my column, please note that although I am an attorney specializing in these areas of law, these are only my opinions. My opinions should not be construed as legal advice. Kindly consult with an attorney for more formal advice.

This month there are five e-discovery cases worth discussing. We begin with a technology-assisted review opinion.

Judge Andrew J. Peck of the U.S. District Court for the Southern District of New York signed an order on March 2, 2015 in Rio Tinto PLC v. Vale S.A. In it he approved a discovery protocol for the use of technology-assisted review (TAR). In his ruling, Peck stated that "it is now black letter law that where the producing party wants to utilize TAR for document review, the court will permit it." Nevertheless, Judge Peck noted in a footnote, possibly with a sense of irony, that "where the requesting party has sought *to force* the producing party to *use TAR*, the courts have refused." (Emphasis added.)

The Rio Tinto decision is notable, not only because of Judge Peck's continuing support of TAR in e-discovery, but because he took the time to succinctly explain how TAR works. The process begins with keyword searches that are conducted on a data set. The top-ranked documents from each search are manually coded as either responsive or not. This is where TAR really comes into play. The coded documents are then considered the seed set used to train a learning algorithm that ranks documents "by the likelihood that it contains responsive information." At the end of training, the coded training documents are put in the learning algorithm, which identifies a subset as "likely responsive." These documents are deemed to be responsive and thus receive a score that exceeds a pre-set threshold value. The review set is manually coded, and thus responsive documents are produced.

The above explanation, coupled with the courts' continuing support of TAR, now begs the question: can we somehow apply this technology and a similar protocol to identify "records" for records management purposes, without relying on end users to declare and classify?

Blue Sky Travel & Tours, LLC v. Al Tayyar, 2015 WL 1451636 (4th Cir. Mar. 31, 2015) is a duty to preserve documents case. The defendants had failed to produce relevant documents despite a court order. As a result, the Federal Magistrate imposed sanctions using a standard that required the defendants to stop their normal document retention policy once they were on notice of pending litigation. The appellate court found the Magistrate's standard to be an abuse of discretion. The court of appeals determined that the correct legal standard for preservation should be more narrow than simply a notice of the pending litigation. The defendants were only required to preserve documents the defendants knew, or should have known, were or could be relevant to the parties' dispute.

The distinction in this case is subtle but important: mere notice of pending litigation is not enough according to this court. The court deemed that an element of knowledge of what they knew or should have known to preserve is the more correct standard for sanctions.

In Perez v. Metro Dairy Corp., 2015 WL 1535296 (E.D.N.Y. Apr. 6, 2014), the plaintiffs sought sanctions for the defendants' failure to produce certain employment documents. The defendants objected on the ground that those documents had been collected in connection with a different court order on another case. They also claimed they had not had the opportunity to back up their data or make any copies. The court held that "under the specific circumstances of this case," the defendants had no obligation to make copies of their data before complying with the court order. The court found no indication that they "acted with any intent or knowledge that the records would be unavailable to plaintiffs in discovery." Thus, the court could not find that the defendants acted with the "requisite culpable state of mind" and denied plaintiffs' motion for sanctions.

Gladue v. Saint Francis Medical Center, 2015 WL 1359091 (E.D. Mo. Mar. 24, 2015) is an employment case. The plaintiff sought sanctions for the spoliation of emails. After the plaintiff had been terminated from employment, but before the plaintiff had filed suit, the defendant deleted the plaintiff's emails as part of a routine audit procedure. Once defendant learned of the lawsuit, it attempted to retrieve the emails by conducting a systemwide search for emails sent to or received from the plaintiff in the accounts of every employee identified in the parties' Rule 26 disclosures. This resulted in 24,000+ email threads. However, the defendant admitted that in all likelihood it had not retrieved every relevant deleted document. Thus, plaintiff sought sanctions for spoliation. Under these facts, the court held that the defendant had no duty to preserve when it deleted the emails after the plaintiff's termination of employment, since it did not know of the pending lawsuit or did not anticipate it. The court lauded the medical center's attempt to recover the deleted emails, which exercise actually yielded a sizable amount of emails. All that said, the court deemed that that the missing emails were not relevant to plaintiff's claim, and thus denied plaintiff's request for sanctions.

Both Perez and Gladue demonstrate how the courts are already beginning to back off the former knee-jerk temptation to issue sanctions at the mere claim that information was destroyed. The pendulum may be swinging in the other direction.

Lunkenheimer Co. v. Tyco Flow Control Pacific Party Ltd., 2015 WL 631045 (S.D. Ohio Feb. 12, 2015) is almost a case of "anticipated litigation," but not quite. The key fact here is that Tyco Flow is an Australian corporation. The discovery issue concerned whether the defendant had a duty to preserve prior to answering the complaint and consenting to jurisdiction in the United States. The court found that although the defendant was a foreign corporation with no presence or significant sales in the United States, it was not excused from its duty to preserve solely because it was a foreign company. Nevertheless, the court found that the duty to preserve "arose when Defendant was served with the complaint in December 2011."

It is surprising that the court did not delve into Tyco Flow's knowledge of anticipated litigation prior to service of the complaint. It appears the court gave the defendant the benefit of the doubt because it was foreign.

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