The Costs of Cost Shifting

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The 2015 amendments to the Federal Rules of Civil Procedure marked a turning point in the evolution of electronic discovery. The amendments propelled litigants into an era of proportional discovery and, through Rule 26(c)(1)(B), authorized courts to shift discovery costs to a requesting party making overly burdensome demands. While the advisory note cautions that the change "does not imply that cost shifting should become common practice," responding parties are increasingly moving for courts to shift costs to protect them from the undue burden or expense of conducting discovery.

These disputes highlight the limits on a party's duty to cooperate and the need for upfront negotiation of comprehensive discovery protocols regarding electronically stored information (ESI), including how available technologies, such as technology-assisted review (TAR), should be considered and used. Cost shifting should be considered a last resort to protect a party from the expense of excessive and marginal discovery demands.

Rule 26(f) requires the parties to cooperate in formulating ESI protocol. Sedona Conference Principle 6 recognizes that the "responding parties are best suited to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI]." These two competing guidelines reflect the crossroads between autonomy and cooperation in selecting discovery protocols.

Competent counsel is fundamental to a client's ability to exercise independence during negotiation. An attorney must understand a client's information systems and electronic documents while also keeping "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." ABA Model Rule 1.1, cmt. 8. This knowledge enables counsel to negotiate a protocol identifying what technologies the parties will use to conduct ESI discovery, such as TAR. Cooperation does not, however, require capitulation, and when a requesting party insists the responding party utilize a specific technology disproportionate to the case, Rule 26(c)(1)(B) authorizes a court to issue an order protecting a responding party from undue burden by allocating "expenses for the disclosure or discovery."

The decision in *Lawson v. Spirit AeroSystems* provides instructive guidance on which Rule 26(b)(1) proportionality factors may influence a court to grant or deny a motion to shift costs when a requesting party presses the responding party to utilize TAR. Lawson, the former Spirit CEO, sued his prior employer for nonpayment of funds pursuant to his retirement agreement. Spirit claimed Lawson was not entitled to the retirement funds because he violated a noncompete agreement by consulting with a "competitive business." After the parties had difficulty "meeting and conferring productively," the court entered an ESI protocol using traditional e-discovery methods involving keyword searches and custodian interviews.

The process yielded a large data set, but a low responsiveness rate. Lawson then pressed Spirit to utilize the TAR process on the same data. Spirit argued that the new request was burdensome because it would cost $600,000 without a likelihood of improved responsiveness rates. The court "raised the possibility" of ordering a TAR on the condition that the requesting party bear the cost of the review. Spirit conducted the TAR and moved to shift the costs for the TAR process.

The court examined Rule 26(b)(1)'s proportionality factors "to determine whether the discovery request imposes an undue burden or expense such that allocating expenses under Rule 26(c)(1)(B) is warranted." When the court examined whether the discovery sought information "at the very heart of the litigation," the court found the TAR process that Lawson demanded, based on three earlier sampling efforts, added minimal value. The court found that Lawson stubbornly pursued continued discovery despite knowing that the TAR process would likely produce "marginal (if any) relevan[t] documents" while Spirit already spent "hundreds of thousands of dollars" on the same data set using non-TAR technologies. Ultimately, the court found that the TAR-related costs were disproportionate to the needs of the case. In a subsequent decision, the court awarded Spirit over $750,000 to satisfy the TAR-related costs and attorney fees to protect the company from incurring the undue burden and expense.

The *Lawson* decision highlights how critical it is for litigants to develop a comprehensive ESI protocol earlier in a case to avoid costly downstream disputes over litigation about litigation. Counsel must work closely with clients to independently evaluate the efficacy of TAR and other technologies to advance the ability to conduct discovery with a meaningful degree of autonomy. When litigants reject using a certain technology, like TAR, the parties should disclose in the protocol what collection process they considered and explain why they determined what was and what was not appropriate. A well-negotiated protocol will protect against a requesting party's unilateral attempts to insist on a previously rejected technology mid-discovery that may yield marginal results. It may also reveal when a cost-shifting request is appropriate to shield a responding party from undue burden and expense. LN

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Lawson v. Spirit AeroSystems, No. 18-1100-EFM-ADM, 2020 U.S. Dist. LEXIS 106817 (D. Kan. June 18, 2020), *aff'd*, No. 18-1100-EFM, 2020 U.S. Dist. LEXIS 221260 (D. Kan. June 24, 2020).