New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 29
TUESDAY, AUGUST 11, 2020

FEDERAL E-DISCOVERY

Court Orders Cost-Shifting for 'Needlessly Overbroad' Discovery


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The 2015 amendments to the Federal Rules of Civil Procedure represented an evolution in the law and practice of electronic discovery. Commentators and courts alike paid particular attention to the new sanctions law of Rule 37(e) and the restoration of proportionality to the scope of discovery in Rule 26(b)(1). The amendments, though, also included a key change to Rule 26(c)(1)(B) relating to allocation of expenses for discovery, more commonly known as cost-shifting. That change expressly confirmed the authority of federal courts to shift costs to protect parties from undue burden or expense.

The amendment to Rule 26(c), however, is not without limitation. The corresponding Advisory Committee Note cautions that "[r]ecognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding."

A recent decision brings renewed attention to the possibility of cost-shifting under Rule 26(c) and addresses when it may be appropriate. In this decision, a court found good cause to shift expenses for discovery of electronically stored information (ESI) after the plaintiff repeatedly insisted on exhaustive discovery of a specific topic, even after the defendant had demonstrated the marginal usefulness of those discovery efforts.

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'Lawson v. Spirit AeroSystems'

In *Lawson* v. *Spirit AeroSystems,* 2020 WL 3288058 (D. Kan. June 18, 2020), Larry Lawson, the former CEO of Spirit AeroSystems ("Spirit"), sued Spirit for non-payment of funds under his retirement agreement, estimated to be between $39 million and $53 million. The agreement contained non-compete obligations requiring Lawson to refrain from "being involved with 'any business that is competitive with the Business or any portion thereof.'" *Id.* at *2 (citation omitted). Spirit withheld payment, claiming that Lawson violated those obligations when he entered into a consulting arrangement with an investor in Spirit's competitor, Arconic. Lawson disagreed, arguing that Spirit and Arconic were not within the same "Business" as defined in the agreement.


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Lawson pursued extensive discovery on "whether Spirit and Arconic are in the same 'Business.'" *Id.* at *3. After the parties were unable to agree on custodians and search terms, Law-

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son moved to compel production of broad-ranging ESI. Spirit countered, "arguing Lawson's ESI demands were 'nothing short of a fishing expedition,' disproportionate to the needs of the case, and 'abusive,' and that Lawson was 'using discovery for the sake of creating obvious burden.'" *Id.*

In response, the court, in consultation with the parties, developed an ESI protocol regarding the custodians and search terms. The court "rejected Lawson's request for 69 custodians and encouraged Lawson to prioritize his list of custodians because at some point the court would start shifting costs." *Id.* at *4. In addition, the court directed the parties to cooperate on fine-tuning the search terms so that at least 85% of the reviewed documents were responsive to the discovery request. *See id.*

Lawson selected 10 custodians and asked Spirit to run a broad set of search terms. Spirit complied and then reviewed a representative sample set of search term hits, which revealed "that only 7.8% were responsive. … Of those, many were technically responsive but were actually irrelevant to the claims and defenses in this lawsuit." *Id.* at*5. The parties and the court then conferred again, and the court modified the ESI protocol, limiting the search terms Lawson could use and directing him to "tailor them according to custodian rather than running the same search terms across all custodians." *Id.* The overall results this time were no better; across the custodians in the new sample set, only 5.1% of search term hits were responsive. *Id.*

Technology-Assisted Review

Nevertheless, Lawson pressed for continued discovery, this time urging the use of TAR (technology-assisted review) on the 322,000 document set. *See id.* Spirit was reluctant to proceed with additional electronic discovery on the business overlap topic, as Lawson's requested methodology for this topic "was costly and yielded exceptionally low responsiveness rates." *Id.* at *6. Conducting discovery "the 'old-fashioned way' of targeted productions via custodian interviews …, Spirit had already produced about 39,000 pages of documents primarily on the issue of the 'Business,' and Spirit wanted to continue to proceed down that path." *Id.* (citation omitted).

The court "raised the possibility of adjusting the case schedule in order to allow the parties to proceed with TAR, with Lawson bearing the TAR costs. … The parties did not agree as to the allocation of costs at that time, but they agreed to move forward with the TAR process subject to Spirit filing a motion to shift those costs to Lawson." *Id.* Thus, the parties met and conferred to establish a TAR protocol and Spirit proceeded with the TAR exercise.

Despite achieving a 68.5% recall rate via TAR (the percentage of responsive documents in the data set correctly identified by TAR), Lawson urged Spirit to achieve an 80% recall rate, which Spirit did "with the understanding that continued review would be subject to this motion to shift costs." *Id.* at *7. In the end, only 3.3% of documents subject to TAR were determined to be responsive, but the exercise was estimated to cost $600,000. *See id.* at *8.

Motion for Cost-Shifting

After completing the document production, Spirit moved the court "to shift all costs and attorneys' fees associated with the TAR to Lawson under Rule 26(c) … in order to enforce proportionality standards." *Id.* Lawson objected, arguing, in part, "that cost-shifting is only available for ESI that is not reasonably accessible[.]" *Id.*

The court disagreed, explaining that a court's authority to shift costs was never subject to such a limitation and that "Lawson's argument that the court may only shift costs for ESI that is not reasonably accessible misapprehends the applicable legal standards." *Id.* While some courts, including in the seminal first *Zubulake* decision in 2003, may have limited cost-shifting to less accessible information such as ESI on backup tapes, "other courts focused on Rule 26(b) proportionality factors to determine which party should bear the costs of discovery without regard to whether ESI was reasonably accessible or not." *Id.* at *9 (citation omitted).

Moreover, the 2015 amendment to Rule 26(c) provided further clarification; Rule 26(c)(1)(B) "now expressly authorizes a court to issue an order for good cause to protect a party from undue burden and expense including specifying the terms of discovery such as 'the allocation of expenses for the disclosure or discovery.'" *Id.* at *9 (citation omitted). Quoting the corresponding Advisory Committee Note, the court explained, "Rule 26(c)(1) was amended in 2015 'to include an express recognition of protective orders that allocate expenses for disclosure or discovery' in order to 'forestall the temptation that some parties may feel to contest' a court's authority to issue such orders." *Id.*

Thus, in a situation such as the one presented in *Spirit*, where a party has

brought a cost-shifting motion under Rule 26(c), a court has the ability to shift costs for discovery to protect a party from undue burden or expense regardless of whether the ESI at issue is readily accessible. As such, the court determined that it would analyze whether to shift costs under Rule 26(c)(1)(B), that Spirit had the burden to demonstrate good cause, and that it would determine whether the discovery imposed an undue burden or expense by reviewing the proportionality factors set forth under Rule 26(b)(1)—"the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* at *10.

Proportionality Analysis and Decision

As part of its analysis of the Rule 26(b)(1) proportionality factors, the court observed that "the $600,000 in TAR expenses are not necessarily unreasonable considering the fact that the amount in controversy far exceeds those TAR expenses." *Id.* at *11. Nevertheless, "[t]he fact that a plaintiff seeks millions in relief does not give him or her license to conduct fishing expeditions that run up the cost of discovery." *Id.* at *12.

The court ultimately concluded that "Lawson's continued pursuit of the ESI dataset via TAR was not proportional to the needs of the case." *Id.* at *21. The court found that Lawson insistently pursued continued discovery into the "Business" overlap issue despite "the hundreds of thousands of dollars [Spirit] spent on sampling exercises and discovery outside the ESI/TAR process. This substantial burden far outweighs any marginal benefit of the TAR process." *Id.* Moreover, the court "long ago warned Lawson that it would allocate ESI costs if he continued to pursue needlessly overbroad discovery." *Id.* (citation omitted). Therefore, the court found that the proportionality factors weighed in favor of allocating the TAR expenses to Lawson.

Being "mindful of the default rule that the producing party should ordinarily bear the costs of production," the court found "good cause to require both parties to bear some portion of the expenses for the overall ESI/TAR process on the issue of competitive overlap between Spirit and Arconic." *Id.* at *22. In granting Spirit's motion, the court cited Rule 26(c)(1)(B) and ruled that "[b]ecause Lawson is the party that wanted to proceed with the TAR process at a point in time when it was disproportional to the needs of the case, the court will allocate the TAR expenses to Lawson to protect Spirit from undue burden and expense." *Id.*

Noting that Spirit had borne about $150,000 in relevant ESI-related expenses prior to TAR, and then spent about $600,000 for the TAR itself, the court wrote that shifting the approximately $600,000 in TAR expenses to Lawson "results in the parties splitting the overall ESI/TAR expenses roughly 20%/80%." *Id.* The court did not yet "determine a specific dollar amount to allocate to Lawson because Spirit only had projected expenses available when the parties briefed the instant motion." *Id.* It directed that "Spirit should now be able to assemble its actual expenses incurred in connection with the TAR process, including vendor costs and attorneys' fees." *Id.* Spirit subsequently submitted its application for expenses, which included almost $792,000 in costs and attorney fees related to TAR, and approximately $35,000 in fees for preparation of the motion; the court has not yet ruled on Spirit's application.

Conclusion

The fact that parties often work out such e-discovery differences through processes short of a written decision of a magistrate judge may explain the paucity of case law on cost-shifting of discovery expenses. *Lawson*, thus, provides a rare decision on the topic and may serve as valuable precedent to guide courts and parties on when they should deny requests for discovery with marginal relevance, as well as on when cost-shifting may appropriately be used by courts to shield parties from undue burden and expense.