THE BUZZ
REDGRAVE LLP
ON INFORMATION MATTERS

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Are the standards changing for determining where to search for information?

A recent case from the Eastern District of North Carolina presents an issue that should confront any practicing lawyer dealing with discovery in both the Rule 34 and Rule 45 context: Do you need to worry about employees' home computers or personal computing devices, such as iPads, tablets and smartphones?

The straightforward answer to this question is "yes" in that in-house and outside counsel need to ask custodians about their home computing and mobile device practices – on both company supplied devices as well as personally owned devices. Best practices guidance from organizations such as The Sedona Conference® confirms such advice. But a more difficult question comes from the follow-up: can you trust the custodian's answers?

The court in Wood v. Town of Warsaw, 2011 WL 6748797 (E.D.N.C. De. 22, 2011) considered objections raised to a Rule 45 subpoena that sought, among other things, access to the personal computer of an individual who was a former employee of the town of Warsaw, North Carolina. Notably, the former employee, Mr. Burell, was previously the supervisor who had terminated the plaintiff, Wood, when Burrell was still employed by the township. Among other objections that Burrell asserted to the Rule 45 subpoena was a relevance objection noting that he had not conducted work-related activities on his personal computer. The Magistrate Judge overruled that objection, stating:

> While Burrell is a non-party, he is alleged to have been Plaintiff's supervisor at the time the events at issue occurred and is alleged to have terminated Plaintiff. In this age of smart phones and telecommuting, it is increasingly common for work to be conducted outside of the office and through the use of personal electronic devices. Therefore, it is not unreasonable, despite Burrell's assertion to the contrary, that some relevant information may be found on his personal computer's hard drive.

While it is important to ask questions of custodians and, in certain instances, conduct separate inquiries (such as examining system access logs, conducting additional interviews or reviewing information management patterns), the broad line of reasoning announced by the magistrate judge in Wood goes too far. A relevance argument regarding the breadth of search should not be decided on a broad generalization of possible work habits. Similarly, the good faith representations of a custodian should not be lightly disregarded simply based on conjecture that some relevant evidence "may" be found on the personal computing device.

While this case may be an outlier (and may have its own unique facts that are not reported in the decision but might have influenced the result), it does serve as a wake-up call for in-house counsel and outside

counsel to continuously consider and question the practices and habits of custodians when it comes to mobile and home computing devices. Ensure that you understand how employee and departments are deploying technologies and how employees are accessing corporate data on a regular basis. You should also recognize that your understanding will need to be continually refreshed as the technology and workforces keep evolving in this regard. Further, ask questions during custodial interviews designed to understand habits and practices as they may impact the location of relevant information for a matter. Additionally, be prepared to follow-up with additional inquiries or collection efforts in those circumstances that warrant attention. Finally, be ready to explain how you assessed and investigated these issues to defend the scope of your preservation and collection activities.

Contact Us: For further information or if you have any questions regarding this Alert, please contact your Redgrave LLP attorney or Managing Partner Victoria Redgrave at (202) 681-2599 or vredgrave@redgravellp.com.