

Don't Bank on this Strategy to Compel Electronically Stored Information

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The Court finds the parties could have avoided the expenses of this Motion by conferring appropriately early in the case about ESI.

United States Magistrate Judge Michael R. Merz, *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 70514 (S.D. Ohio July 24, 2009).

Banks really should cooperate on electronic discovery issues when they sue each other.

Instead, Wells Fargo and LaSalle exchanged broadsides over searching back-up tapes and spoliation claims very late in the litigation. The Court denied the dueling motions and dressed down the parties for not conferring about ESI earlier in the case.



The Parties were bound by several scheduling orders, which included them conferring on the production of electronically stored information and a discovery cut-off date that was extended several times. *Wells Fargo Bank, N.A.*, 3-4.

Plaintiff Wells Fargo Bank brought a motion to compel and sanctions motion against Defendant LaSalle Bank National. The Court summarized the parties' dispute as follows:

Essentially Wells Fargo contends that LaSalle did not search a number of backup tapes for relevant documents and should be subject to spoliation sanctions for not maintaining all of the backup tapes which might have contained responsive ESI. LaSalle responds that ESI on backup tapes is not readily accessible in that it would take six months and almost half a million dollars to restore the backup tapes. LaSalle counterpunches by accusing Wells Fargo of the same sins — not producing documents from backup tapes, not placing a litigation hold on backups, etc. *Wells Fargo Bank, N.A.*, 5.

The Court was less than thrilled with the Parties in this case not conferring on electronically stored information and starting an ESI grudge match four months after the close of discovery and two months before trial. *Wells Fargo Bank, N.A.*, 7. As the Court bluntly stated:

The current dispute is a mild example of the sorts of problems which result when counsel do not deal systematically with ESI problems and possibilities at the outset of litigation, instead of filing one-paragraph boilerplate statements about ESI and waiting for the explosion later. *Wells Fargo Bank, N.A.*, 6-7.



The Court found that restoring the back-up takes was "disproportionate to the likely utility

of doing so.” *Wells Fargo Bank, N.A.*, 7. Moreover, the cost of the restoration was out of proportion to the amount in controversy. *Wells Fargo Bank, N.A.*, 8. Additionally, the Defendant’s practice of printing hard copies of “important” loan documents that had been produced in discovery made the chances of finding anything new remote. *Wells Fargo Bank, N.A.*, 8.

The Court very curtly denied the Motion to Compel and Sanctions Motion. *Wells Fargo Bank, N.A.*, 8.

Bow Tie Lessons

Electronically stored information must be addressed early in the lawsuit in the Rule 26(f) Conference, not on the eve of trial.

The Court gave some practice pointers for having an effective meet and confer process by citing to the Sedona Conference Cooperation Proclamation. The Court included the following six points to aid counsel on ESI matters:

1. Utilizing internal ESI discovery “point persons” to assist counsel in preparing requests and responses;
2. Exchanging information of relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;
3. Jointly developing automated search and retrieval methodologies to cull relevant information;
4. Promoting early identification of form or forms of production;
5. Developing case-long discovery budgets on proportionality principles; and
6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

Wells Fargo Bank, N.A., 6, citing The Sedona Conference Cooperation Proclamation, July, 2008, available at thesedonaconference.org.

As an old friend once said, “Bad news does not get better with age.” Neither does ignoring electronically stored information until after the close of discovery.