



Tell it to the Judge

Andrew J. Peck

United States Magistrate Judge



Andrew J. Peck
United States Magistrate
Judge

Thank you for being here today

August 19, 2014

Topics

We have an hour to cover 5 topics.

1. The 502(d) issue...
2. Search – How did we get where we are?
3. Judge Peck's view on the next chapter in assisted review.
4. How has electronic discovery changed & how will it continue to evolve?
5. Proposed 2015 rules amendments

Controlling Effect of a Court Order- A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

Federal Rule of Evidence 502 (d)

(Text of Federal Rule of Evidence)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RULE 502(d) ORDER

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ANDREW J. PECK, United States Magistrate Judge:



1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

SO ORDERED.

Dated: New York, New York
[DATE]

Andrew J. Peck
United States Magistrate Judge

Copies by ECF to: All Course:
Judge _____

1. The production of privileged or work-product protected documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding. This Order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).
2. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

1) Unless otherwise limited by court order...: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Rule 26 (b) (1) Scope of Discovery

(PROPOSED Text of Federal Rule of Evidence)

“(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:

- (1) Upon finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice; OR
- (2) Only upon a finding that the party acted with the intent to deprive another party of the information’s use in the litigation,
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.”

Rule 37(e) – Failure to Preserve

(PROPOSED Text of Federal Rule of Evidence)

(B) *Permitted Contents*. The scheduling order may:

(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information;

(iv) include any agreements the parties reach for asserting claim of privilege or of protection as trial preparation material after information is produced including agreements reached under Federal Rule of Evidence 502;

(v) direct that before moving for an order relating to discovery the movant must request a conference with the court;

[Present (v) and (vi) to be renumbered]

Rule 16 (b) (3) PRETRIAL CONFERENCES- SCHEDULING MANAGEMENT

(PROPOSED Text of Federal Rule of Evidence)

Questions

We'll now open it up for questions

Thank You

