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ARE BACKUP TAPES ACCESSIBLE IN EDISCOVERY?

A look at the case Johnson v. Neiman to gauge how technology for reading backup tapes has advanced, even if the law concerning production of data from backup tapes in eDiscovery has not.

By Daniel Garrie

INTRODUCTION: BACKUP TAPES

In an era where search tools have become ever faster – and cheaper – it may be time for courts – and rule makers – to revisit the definition of inaccessible electronically stored information ("ESI"). The position of both courts and counsel has long been that archival media – backup tapes – are generally inaccessible. Federal Rule of Civil Procedure (Fed. R. Civ. P.) 26(b)(2)(B) states that parties do not need to provide discovery of ESI if it exists on sources that are "identified as not reasonably accessible because of undue burden or cost". At a State level, an adoption of similar (if not identical) rules has occurred over the past decade as well.

IMPLICATIONS IN THE EXISTANCE OF BACKUP TAPES

The State and Federal positions, however, do not account for two important concepts underlying the deployment of such technology. The first concept draws from the precept that companies utilizing backup tapes elected to use such technologies based on a business decision to invest in the backup technologies. This decision potentially enabled the company to realize significant savings. Thus, this particular company likely possess the necessary skills in-house to obtain the data sought in a manner that is much more cost effective and efficient manner than a third-party provider as the in-house team designed or built the system, operates it on a daily basis, resolves issues that arise with the system and is constantly working with the particular technology. The second concept is the maturation of the underlying technology such that tools exist today that enable the discovery of the data in a more efficient and inexpensive manner. The dogma that backup tapes are inaccessible has become a legal fiction.

JOHNSON V. NEIMAN

In Johnson v. Neiman, 2010 U.S. Dist. LEXIS 110496 (E.D. Mo. Oct. 18, 2010), a recent case in the Eastern District of Missouri, plaintiff *pro se* requested data from defendant that the defendant alleged was located on 5,880 backup tapes. Defendant asserted that the restoration of the data would take nearly 14,700 man-hours to restore, and that the creation of Outlook PST files for each e-mail account on the backup tapes would take about 1,222 man-hours. *Id*. In total, defendant estimated that restoring the backup tapes would cost over $1.2 million. *Id*. Note that this cost does not include the cost of *indexing* the tapes nor *reviewing* the data. The court used the seven-factor "Good Cause" test found in the advisory committee's notes to Fed. R. Civ. P. 26(b)(2) to conclude that a "slim likelihood that new and relevant information may be discovered does not outweigh the substantial burden and expense required to retrieve the information from the backup tapes."

The basis for which the court concluded that the backup tapes were "inaccessible" requires a review of the jurisprudence relating to tape restoration. First, until recently significant steps were required to restore the data from the backup tapes, such as creating an inventory of the backup tapes, profiling the contents, determining the original backup software used, identifying what email software was used by the company at the time the tape was created, and computing the amount of storage required per tape. After this laborious process, the data stored on the tapes were restored and placed online, at which point the restored data – including SPAM messages, system files, and other "junk" – could be indexed. At the conclusion of the indexing, the discovery process – filtering, de-duplication, keyword searches, and legal review – could begin. This process – the "old process" - when required by a court, can cost millions of dollars and take many months. The astronomical costs of money and time are set-forth in Johnson v. Neiman where the restoration alone was estimated to take more than 14,700 hours and to

cost over a million dollars, again, not even including the indexing and review.

DIRECT INDEXING

Advances in technology may have not been presented to the court in Johnson v. Neiman or may simply have been ignored there. The consuming process described above to restore data from tapes is no longer necessary in every case; backup tapes can now be indexed directly. This means that backup tapes can be indexed without requiring the copying or moving of the data off the tape. By indexing directly, litigants can reduce the amount of data required to be restored off the tapes, saving anywhere from twenty to fifty percent of the time and much of the cost. This savings enables litigants and the courts to perform keyword searches and document review with greater precision and restore only those files that are relevant or responsive. The current cost of such software and hardware to do the indexing process in the previously mentioned manner runs perhaps $250.00 per tape.

CONCLUSION

While discovery of ESI may still be expensive – and still may require a review of whether it was not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B) due to undue burden or cost – electronic discovery has continued its lightning-fast evolution and progression. As technology continues to improve, practitioners must keep on top of the latest technologies: the argument that saved your client millions a decade ago may lead to sanctions in 2011.

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We work with our clients, whether law firms, corporate organizations or government agencies, to resolve eDiscovery issues, perform electronic forensic examinations and investigations, and help bridge information and communication gaps between technologists and legal professionals.

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