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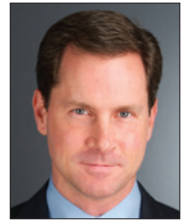
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FEDERAL E-DISCOVERY

Issuing Guidance on ESI Custodians, Court Defers to Responding Party



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A key aspect of determining the appropriate scope of discovery in litigation is defining the universe of custodians whose documents will be searched. “Custodian” is the term commonly used to describe an employee or other person or group with ownership, custody, or control over potentially relevant information. For example, an individual custodian’s electronically stored information (ESI) usually includes their mail file, whereas a group custodian’s ESI may include a shared network folder.

Federal Rule of Civil Procedure 26(b)(1) sets the permissible scope of discovery as “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’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and



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whether the burden or expense of the proposed discovery outweighs its likely benefit.” In the context of this Rule, what guidelines do practitioners have in choosing custodians and what standards do judges employ when resolving related disputes between parties? Perhaps surprisingly, judicial guidance on this issue is sparse. In a recent decision, a federal magistrate judge addressed this topic and advanced a set of principles that, similar to conclusions reached in many

other recent decisions in the discovery space, expressly defers to the responding party’s decision-making processes during discovery.

In the antitrust action *In re EpiPen (Epinéphrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 2018 WL 1440923 (D. Kan. March 15, 2018), Magistrate Judge Teresa James resolved a dispute between parties who could not agree on the inclusion of certain custodians. Pharmaceutical companies Sanofi and

Mylan, competitors in the epinephrine autoinjector market, each wanted the other to include former and current senior executives as custodians. Defendant Mylan objected to plaintiff Sanofi's request to include a former Mylan CEO as a custodian; Sanofi objected to Mylan's request to include both the current CEO and a former CEO as custodians.

In her decision, Judge James framed the dispute at hand in the context of Rule 26(b)(1), highlighting the importance of proportionality to any related analysis, stating "[d]iscovery of ESI—especially in cases where the parties anticipate a large amount of ESI to be searched, reviewed, and produced—makes proportionality considerations particularly significant." *Id.* at *1. However, Judge James recognized the paucity of legal precedent to guide her on this topic, noting that "[r]elatively little legal authority exists on the standards a court should apply when parties are unable to agree on designated ESI custodians and a party seeks to compel another party to designate an additional ESI custodian or custodians." *Id.* at *2. After reviewing the available case law, along with available commentary in *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (2018), she set forth the following general principles:

First, "determining what is relevant and proportional under the circumstances for each matter often requires a highly fact-specific inquiry." Second, absent agreement among the parties, the party who will be responding to discovery requests is entitled to select the custodians it deems "most likely to possess responsive information and to search the files of those individuals." Third, unless

the party's choice is "manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient," the court should not dictate the designation of ESI custodians. Fourth, the party seeking to compel the designation of a particular additional ESI custodian has the initial threshold burden of showing that the disputed custodian's ESI likely includes information relevant to the claims or defenses in the case. This is because the party responding to discovery requests is typically in the best position to know and identify those individuals within its organization likely to have information relevant to the case. Fifth, mere speculation that one's position as a senior executive might increase the relevance of that individual's files is not a basis for designating that individual as a custodian.

'In re EpiPen' breaks new ground on the standards for designating ESI custodians and, more broadly, on the proper scope of discovery under Federal Rule of Civil Procedure 26(b)(1).

Id. (citations omitted). Judge James also pointed to several cases offering other factors for consideration when the requested additional custodians are senior executives, including "whether the executive's relevant ESI is unique and would not be available from other designated custodians." *Id.*

Judge James applied these principles—along with the additional factor of whether the executive's ESI is unique—in her analysis of the three disputed custodians. As to the former CEOs, Judge James found each sufficiently involved

in the alleged events surrounding the litigation and concluded that each was likely to have ESI that was both unique and relevant to the claims and defenses in this case. See *id.* at *3-4. Thus, the requesting parties each presented evidence sufficient to overcome the presumption Judge James had recognized in her principles that ESI custodians should be limited to those designated by the responding party. But Mylan was unable to overcome this threshold with respect to its request to designate as a custodian Sanofi's current CEO, who the judge found was unlikely to possess unique, relevant ESI. Introducing EU data privacy considerations into her analysis, Judge James added that "[f]rom a proportionality standpoint, the Court also considers significant the fact that [the current CEO] resides in France and, as a result, there may be additional issues that make it unduly burdensome and expensive to search, review, and produce ESI within his custody." *Id.* at *4.

In re EpiPen breaks new ground on the standards for designating ESI custodians and, more broadly, on the proper scope of discovery under Federal Rule of Civil Procedure 26(b)(1). Judge James provides a clear and coherent set of principles for practitioners. The decision also builds on the growing body of case law supporting the notion that, absent compelling evidence to the contrary, responding parties are best positioned to make their own decisions regarding discovery.