



Smarter Discovery™

Know Your Client's ESI: You Really Don't Want a Judge Saying, "This is Unacceptable"

This may surprise a few people: There is another magistrate judge besides Judge Waxse writing ESI opinions in Kansas. Magistrate Judge Donald Bostwick issued an order granting in part and denying in part a motion to compel ESI in *Patterson v. Goodyear Tire & Rubber Co.*, 2009 U.S. Dist. LEXIS 34585, 15 (D. Kan. Apr. 23, 2009).

The parties in *Patterson* made a big mistake: They neglected their ESI obligations under both the Federal Rules of Civil Procedure and the United States District Court for the District of Kansas Guidelines for Discovery of Electronically Stored Information (ESI).

The Kansas Guidelines require attorneys to become familiar with their client's information systems before the Rule 26(f) conference. That did not happen. *Patterson*, 17.

Further complicating things for the parties, the Initial Order Regarding Planning and Scheduling directed the attorneys to familiarize themselves with the ESI provisions of the Federal Rules of Civil Procedure before Rule 26 (f) planning conference. *Patterson*, 15.



Three and a half months BEFORE the close of discovery, the Plaintiffs served Discovery requests for electronically stored information to the Defendants. In the words of the Court: "This is unacceptable." *Patterson*, 17.

The only chance the Plaintiffs had for any ESI being produced would turn on Defendants' back-up tapes subject to a litigation hold in a separate lawsuit. However, this hold only covered two of the three dates the Plaintiffs sought in Discovery.

The Court ordered the back-up tapes sampled for the names of

specific individuals on the available date ranges. While not wadding into the issue of search terms in any depth, the Court ordered the terms to include first names, abbreviated first names and last names. *Patterson*, 17-18.

The situation in *Patterson v. Goodyear Tire & Rubber Co.*, was entirely avoidable if the parties had not ignored the electronically stored information in the case. Electronically Stored Information is not something you ignore to the last minute. Parties are finding themselves having multiple conferences to agree on search terms, meetings with clients on sources of ESI and time with consultants to determine best practices for collection and processing. There are many issues to be aware of when dealing with electronically stored information. Procrastinating is really a bad plan.

