

Rare Cost- Shifting Decision Illustrates Power of Defensible eDiscovery Strategy

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Rare Cost-Shifting Decision Illustrates Power of Defensible eDiscovery Strategy

In the second half of 2020, Kansas Magistrate Judge Angel D. Mitchell issued a novel and significant ruling to shift more than \$750,000 in electronic discovery costs to the plaintiff in *Lawson v. Spirit AeroSystems, Inc.* The U.S. District Court of Kansas’ potentially precedent-setting application of Rule 26(c)(1)(B) in the decision came after the defendant, Spirit AeroSystems, demonstrated that the plaintiff’s discovery requests constituted “undue burden and expense.”

Spirit was sued by its former CEO, Larry Lawson, for nonpayment of benefits under his retirement agreement. Spirit contended that Lawson was no longer eligible for the payments because he had breached a non-compete clause in the agreement by performing consulting services for an investor in one of Spirit’s competitors.

Prior to this ruling, the cost-shifting power of Rule 26(c) of the Federal Rules of Civil Procedure (FRCP) had most often been applied in context of whether the data was reasonably accessible, as established in rulings in *Zubulake v. UBS Warburg* in 2003-2005.

In the *Zubulake* case, the court held that the determination of whether production of documents is unduly

burdensome or expensive “turns primarily on whether it is kept in an accessible or inaccessible format.”

Under the amendments to the FRCP in 2015, a key revision to Rule 26(c)(1)(B) “confirmed the authority of the federal courts to shift costs to protect parties from undue burden or expense,” according to the *New York Law Journal*.¹

The decision hinged on Lawson’s insistence in pursuing broad electronic discovery despite detailed sampling results provided by Spirit that demonstrated the futility of such searches throughout. This interpretation of the 2015 amendments to the FRCP makes the ruling one of the more significant pieces of recent eDiscovery case law.



¹ [Court Orders Cost-Shifting For Needlessly Overbroad eDiscovery](#)

Lawson v. Spirit AeroSystems may set a precedent in that the court found sufficient evidence to shift the costs of electronic discovery to the plaintiff based on a different determination.

The crux of the legal dispute was whether there was business overlap between Spirit and the company for which Lawson provided consulting services. At Lawson's request, Spirit spent months on an electronically stored information (ESI) discovery process to find documents that would help resolve that legal question.

Legility supported Spirit's efforts — both in-house and through outside counsel — during the course of the litigation. The consultation and collaboration with Legility's senior consultants and data and technology team — along with the strategic use of Legility Managed Review — were critical components of demonstrating not only the reasonableness of Spirit's efforts but also the unreasonableness of Lawson's discovery requests.

Agile in eDiscovery: Essential to Success

As highlighted in the District Court's ruling, the judge found that Spirit demonstrated "extensive cooperation" with the plaintiff and that Spirit had already "shouldered its fair share of the expense by accommodating Lawson's many search requests for ESI custodians and search terms, by running sampling exercises, and by facilitating an auxiliary discovery process utilizing traditional discovery means, which ended up producing more responsive documents than Lawson's overwhelming electronic discovery."

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The auxiliary discovery process, which involved interviewing custodians “the old-fashioned way” to produce targeted document productions, had already yielded about 39,000 pages pertaining to the business issue.

While Spirit wanted to continue down the path of “targeted productions via custodian interviews,” the plaintiff pushed on with his demand for broad electronic discovery, this time in the form of a technology-assisted review (TAR).

Prior to the TAR, Spirit conducted a sampling process that predicted that the TAR would yield a low relevancy rate. The judge warned Lawson that his decision “would be at his own peril” and that the costs of the TAR could be shifted to him. Despite the repeated warnings, Lawson opted to move forward with the TAR.

Out of approximately 322,000 documents in the TAR, approximately 3.3% contained information that was responsive to

Lawson’s search terms. The court found that “even the documents that were technically responsive were of marginal (if any) relevance above and beyond what Spirit produced outside of the ESI/TAR process.”

As such, the court determined that the TAR had become disproportionate to the needs of the case and granted Spirit’s motion to shift more than \$750,000 in TAR costs to the plaintiff.

The Power of Rigorous Data Sampling

The power of sampling data set cannot be overstated. The combination of review of random samples as well as review of proposed search terms provides comprehensive insight into data. Too many times parties negotiate search terms and review the documents that have hits without any empirical data to determine the efficacy of the terms or the marginality of the returns.

[D]uring the review process, Legility collected and analyzed metrics to evaluate the efficacy of the TAR workflow and the quality of the data sets to be reviewed. Legility also imposed quality control measures to ensure that only responsive and non-privileged documents would be produced and conducted a final quality control check prior to production.

Angel D. Mitchell
Kansas Magistrate Judge



The court cited the results of reviewing multiple iterations of samples using Lawson’s proposed search terms, proposed custodians, and responsiveness of the data set as a whole. While Lawson and the court expected 85% of documents to be responsive to these searches, the sampling efforts by Spirit consistently demonstrated much lower responsiveness levels, which suggested the likely futility of moving forward with Lawson’s broad search terms.

Iterative Process Improvement

The purpose of sampling is not only for transparency and inspection, but also for adaptation. As the court’s order details, Lawson did not use this data or agree to tailor his approach based upon the sampling results. In fact, when the court suggested reducing custodians and limiting subject areas, Lawson increased the search terms to more than 800, some of which were common industry terms like “fasten” or “procure.” For each proposed action, Legility supported Spirit by sampling the results of these data sets and providing empirical results to the parties to further their discovery strategy and options.

As a last effort, Spirit produced 173 responsive documents and 77 non-responsive documents from the sample set to assist the plaintiff in determining why his search terms were yielding so few responsive documents and “next-to-no relevant documents,” which led to the recommendation for the TAR.

Choosing the Right Technology

Spirit and Lawson ultimately agreed to utilize Legility’s Catalyst’s Predict review technology, often referred to as TAR 2.0. Unlike TAR 1.0 models, where subject matter expert training and review are conducted consecutively, TAR 2.0 enables system training and document review to occur in tight alignment — with frequent re-ranking as attorneys learn and identify additional examples of relevant documents. As attorneys feed the system more details on what they’re looking for, TAR 2.0 uses that new information to search the database for similar documents – a process known as continuous active learning (CAL).

Despite the earlier agreement to use TAR 2.0, Lawson later challenged Legility’s use of the TAR 2.0 tool, arguing that a TAR 1.0 tool would have been less costly.

A declaration by Legility explained that a TAR 1.0 tool would have, in fact, resulted in higher costs because the tool yields a large number of irrelevant documents — in this case, some 12,000 documents — that would have needed review by subject matter experts. Given that subject matter experts charge between \$400 and \$800 per hour, it would have cost \$96,000 just to create a seed set for the machine learning. As a result, the court found that Legility’s use of TAR 2.0 was appropriate and cost-effective.

“The court is unpersuaded by Lawson’s argument that Spirit’s document review costs are unreasonable because Legility used a TAR 2.0 tool rather than a TAR 1.0 tool,” the judge wrote. The judge added that Legility had “adequately explained why Predict was appropriate under the circumstances and was just as cost-effective, if not more so.”

The court noted that “[d]uring the review process, Legility collected and analyzed metrics to evaluate the efficacy of the TAR workflow and the quality of the data sets to be reviewed. Legility also imposed quality control measures to ensure that only responsive and non-privileged documents would be produced and conducted a final quality control check prior to production.”

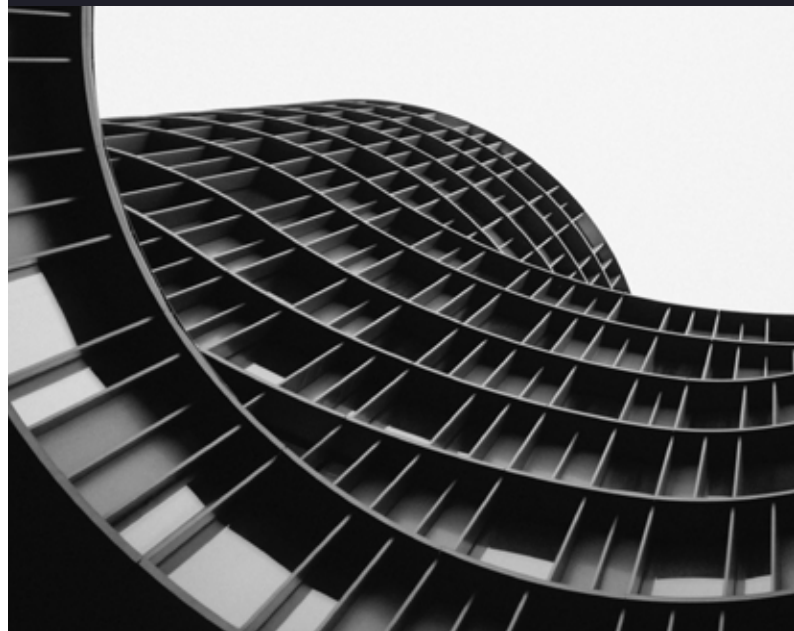
Continuous active learning (TAR 2.0) workflows automate the processes of transparency (showing where responsive documents are located); inspection; and adaptation, reprioritizing documents based on new information fed into the system.

Agile in eDiscovery: Essential to Success

An agile process is essential to supporting Legility’s clients with the information they need to understand their data and tailor their eDiscovery strategy for defensibility and efficiency.

Legility’s process is built on the processes of:

- **Transparency**
Showing where responsive documents are located
- **Inspection**
Rigorous data sampling
- **Adaptation**
Reprioritizing documents based on new information fed into the system.



Conclusion

In the end, Spirit AeroSystems won a rare cost-shifting decision; and the judge ordered more than \$750,000 in unnecessary eDiscovery expenses shifted to the plaintiff. Prior to this case, there was a paucity of case law on discovery cost shifting. Thus, the Lawson cost-shifting decision may become key case law and valuable precedent for parties and courts facing Rule 26 disputes in the future, potentially providing guidance on when courts and parties should discovery requests with marginal relevance, and when cost-shifting may be appropriately used to shield parties from undue burden and expense.

This case may also be helpful context for parties determining how to structure eDiscovery review. For example, it shows in clear terms that courts can and will shift costs if discovery is unduly burdensome and expensive for the responding party. This case has the potential to help future courts decide when it is appropriate to use more advanced TAR methodologies.

And the case is instructive to attorneys about the importance of cost estimation, technical skillsets, and process defensibility when using advanced review solutions.

Legility's choice of technology and workflows, meticulous data management, and declarations to the court provided evidence that was pivotal to the unusual court decision to shift the costs of eDiscovery to the plaintiff.

The focus of the court's ruling was on proportionality, but the ability to win a cost-shifting case hinges on developing a strategic process, having the right service providers who can skillfully deploy the most appropriate technology and manage data, and having effective counsel who can articulate findings in a meaningful way.

Ultimately, the outcome of Lawson v. Spirit is a warning for those seeking to use overly broad discovery requests as a tactic to increase the cost of discovery and force favorable settlements.



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