



"Competitive Decisionmaking" is the Key to In-house Counsel's Access to Highly Confidential Documents in *Activevideo v. Verizon*

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We previously posted here on the dispute between Activevideo and Verizon over the terms of the protective order governing the parties' disclosure of documents. The Court took Verizon's side and [ruled](#) that each of the four in-house counsel from Verizon should be permitted access to Highly Confidential, Attorney Eyes Only documents. Explaining that the "leading case on point" is *Volvo v. Brunswick*, 187 F.R.D. 240 (E.D. Va. 1999), the Court instructs that the question of access to confidential information must be resolved on a counsel-by-counsel basis, regardless of whether counsel is in-house or retained. The primary determinant is whether the counsel is involved in "competitive decisionmaking" with its client. The Court recognized that in *Volvo*, the EDVA noted that some decisions by other courts considered additional factors, such as the nature of the litigation, whether it presents complex issues, and the possibility of alternative discovery measures. However, the Court also recognized that none of the Federal Circuit decisions had addressed those factors, but instead had focused solely on competitive decisionmaking; accordingly, the Court here did so as well.

On the merits, the Court credits each of the declarations submitted by Verizon's in-house counsel, in concluding that none of them is engaged in competitive decisionmaking, such that they should be denied access to Highly Confidential documents. In its analysis, the Court declines to adopt a per se bar against access by any counsel engaged in patent prosecution or patent licensing, or engaged in litigation settlement negotiations.

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