

Less Paper, More Danger?

New federal rules on electronic discovery are now in effect

By John F. Emerson

Introduction

The U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure pertaining to discovery of electronically stored information (ESI) that took effect on December 1, 2006. The new rules substantially alter prior practice by requiring litigants to, among other things, exchange, during the initial Rule 26(f) conference, detailed information about ESI, including how it is stored, whether it is being preserved and whether the information is reasonably accessible.

The amendments change language in rules 16, 26, 33, 34, 37, 45 and Form 35. The changes in Rule 26(f) require counsel for both sides to meet at the outset of litigation to discuss the exchange of electronically stored information, commonly referred to as “e-discovery.” Previously under Rule 26(f), the parties were required to confer to decide primarily such issues as the timing and scope of discovery and whether the parties want to agree to waive some of the initial disclosures required under Rule 26(a).

Summary of impact on discovery

Under the amended Rule 26(f), counsel must be prepared to discuss “any issues relating to disclosure or discovery of electronically stored information, including the form or

forms in which it should be produced.” The Committee Notes that accompany the new rules add that this conversation should cover the specific databases that may contain discoverable information, the ease with which they can be searched, whether certain databases cannot be searched in a cost-effective manner and issues revolving around preservation of data in light of the litigation. The Notes comment that the extent of the discussion will vary depending on, among other things, the dimensions of the case and the extent to which electronically stored information is likely to shed light on the facts of the case.

Summary of amendments

Rule 16(b)

Rule 16(b)(5) has been amended to explicitly state that the scheduling order issued by the court may include “provisions for disclosure or discovery of electronically stored information.” As before, the court is to issue a scheduling order after 26(f) reports are submitted by the parties, after a scheduling conference but no later than 90 days after the appearance by a defendant or 120 days after service of the complaint. The Committee Note adds that Rule 16(b) has been “amended to include among the topics that

may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection.”

Rule 26

Rule 26 has been amended in a number of respects.

26(a)(1)(B), regarding initial disclosures, now requires parties to provide “a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.” This is a sweeping change in that it requires counsel to outline, in fair detail, all potentially relevant ESI in the possession or control of his or her client.

26(b)(2)(B), regarding the scope and limits of discovery, gives parties the right to refuse to provide discovery of databases that are “not reasonably accessible because of undue burden or cost.” The rule outlines the procedure for a challenge and the authority of the court to uphold the decision to withhold, to compel production or to “specify condi-

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tions” for the production. The Committee Note states that a “party’s identification of sources of [ESI] as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence.”

26(b)(5)(A) addresses claims of privilege and protection of work product. It requires a party withholding information to specifically do so and to sufficiently describe the nature of the information withheld to allow the requesting party to evaluate the applicability of the privilege or protection asserted.

26(b)(5)(B) has been amended to permit a responding party, which has inadvertently produced ESI later regarded as subject to a privilege or protection as work product, to assert the privilege after the fact. The issuing party has a duty to destroy and refrain from using such information until any dispute is resolved. The issuing party may still interpose a challenge. The Committee Note states that “Rule 26(b)(5)(A) pro-

vides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute.”

26(f) addresses the required meeting of the parties in anticipation of a scheduling conference and from which a Form 35 is drafted. As noted above with regard to Rule 26(a), the parties are now required to discuss “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” The Committee Note adds that the requirement that the parties discuss the existence and extent of ESI in the 26(f) conference may require counsel “to become familiar with those systems before the conference.”

Rule 33

Rule 33 applies to ESI the same rules that allow a party to produce hard

copy documents in lieu of answering an interrogatory. Where the burden on the responding party to review documents or ESI to ascertain an answer to an interrogatory is equal to the burden on the serving party, the responding party may direct the serving party to the documents or ESI. The rule requires the responding party to indicate where the answer might be found with reasonable specificity.

Rule 34

34(a) expressly includes ESI as a proper category of information to be produced. It states that parties may request production of any data “stored in any medium from which information can be obtained” A very broad, non-exclusive list of examples is set forth.

34(b) permits the serving party to specify the form or forms in which ESI is to be produced. If a responding party objects to the production of part of an “item or category,” that party shall produce the part to which no objection is interposed. If

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a responding party objects to the form of production requested, the serving party may move to compel under Rule 37(a). “[I]f a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable ... [A] party need not produce the same electronically stored information in more than one form.” The provisions about the form in which ESI is to be produced may become important as discovering parties move from demanding hard copies of ESI, to TIFF or PDF soft copies, to “native files,” which are files that are precise electronic duplicates of the ESI at issue.

Rule 37

37(f) has been amended to state that a court may not levy sanctions against “a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Rule 45

Rule 45 applies to the issuance of subpoenas the same standards generally used for ESI in discovery between parties. The amendments permit a party to subpoena ESI and allow the issuing party to designate the form in which the ESI is to be produced. If the issuing party does not designate a form, the changes allow the responding party to produce ESI in the form in which it is kept or in a form that is reasonably useable. A responding party need not produce the same ESI in more than one form. Under the amended rules, a responding party may refuse to produce ESI that is too burdensome or costly to obtain, though the issuing party may ask the court for an order compelling them to do so.

Form 35 is the form that is to be submitted to the court following the Rule 26(f) conference. It has been amended to reflect a discussion of ESI and any agreements into which

the parties have entered.

No more business as usual

To a large extent, the amendments merely formalize what has already been the practice between parties, particularly in larger cases in which ESI has played an increasingly significant role. However, there are changes reflected in the amendments that could cause heartburn for those businesses and other organizations that are unprepared and for the attorneys who serve them.

Of these changes, the most profound change appears to be the requirement under Rule 26(a) that initial disclosures include “*a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.*” The parties are required to discuss all initial disclosures at the 26(f) conference. These conferences are to take place at least 21 days in advance of the scheduling conference with the court, which is to take place no later than 120 days after the service of a complaint on a defendant or 90 days after any defendant makes an appearance. As a consequence, counsel will be expected to be familiar with his or her client’s inventory of ESI within the first 60 to 90 days of the litigation. Even if the client is organized and sophisticated, unwary counsel may be caught off guard by the requirements under the new rules and faced with a steep, and perhaps impossible, learning curve. Where the client does not have a firm grasp on its ESI inventory and/or is not used to being involved in litigation, the results may prove to be disastrous.

Kevin Jacobs, Vice-President of Technology Services for Document Technologies, Inc., of Atlanta, Georgia, says that many companies are surprised to learn of the variety of databases in which ESI may reside. Most of the less sophisticated organizations think of e-mail but often do not think beyond that. However, ESI can reside in many

different forms beyond e-mail, including letters, internal memoranda, files, records, drafts, scanned handwritten notes, records stored electronically such as computer files, word processing documents, voice mail, fax data, instant messages, calendars, spreadsheets, charts, graphs, scanned images, video, audio recordings, PowerPoint presentations, external hard drives, deleted items, archived e-mail and other data, and tape back-ups.

ESI resides in office desktop computers, laptops, home computers, flash drives, Blackberries and similar devices, fax servers, back-up drives, back-up tapes, shared servers, corporate/enterprise databases, accounting systems and elsewhere. According to Jacobs, one of the problems is that there is a “proliferation of data” with multiple copies in many different places, resulting in “unstructured data,” and no one knows where they are. He says some of the larger companies are developing litigation repositories into which key documents related to specific topics or employees are copied as a routine matter. In the event litigation is filed, they are prepared. These companies are developing what Jacobs calls a “process-based response” to litigation, rather than having to reinvent the wheel each time they are sued.

In light of the amendments, businesses and other organizations are advised to designate a coordinator, or a coordinating committee, to inventory ESI databases and be prepared to swiftly inform counsel of the location, structure and contents of these databases. Of course, retention policies should be evaluated and a form Document Retention Notice should be approved for distribution in the event litigation can be foreseen or is filed.

Organizations that operate or are subject to suit in multiple jurisdictions should be reminded that they will need to give consistent responses regarding ESI from one lawsuit to the next or be taken to task for their failure to do so.

Obviously, the more organized and coordinated an organization is in advance of litigation, the more

efficiently it can prepare for the Rule 26(f) conference as it relates to the discovery of ESI. Businesses and organizations that are less organized in this regard may have to call on IT consulting firms, at some expense, to help them identify and search the relevant databases.

Attorneys can run but they cannot hide

Despite the wide use of desktop computers in many South Carolina law firms for many years, some lawyers have been dragged kicking and screaming into the world of computer technology and ESI. In the mid-90s, long after their secretaries and support staff had computers for word processing, large firm lawyers were starting to get desktops of their own. The story is told that, in those days, one of two senior lawyers with adjacent offices had a computer installed. Seeing this, the other one demanded that management give him a TV, too. Some large firm lawyers still have staff print hard copies of all electronic communications, and that is the only way they see it. A few small law offices use no computer at all.

These Luddites experienced another shock when the U.S. District Court for the District of South Carolina instituted its system of electronic case filing (ECF) and stopped accepting hard copy on September 1, 2005. South Carolina lawyers who practice in federal court can no longer disregard the new technology. With the new rules comes an implicit obligation to understand the systems on which our clients maintain ESI.

As noted above, in the event of litigation, counsel will be expected to have a good understanding of the ESI maintained by clients, where it is located, how it can be searched, the extent to which it is likely to be relevant and whether it is being preserved. Many businesses are going to resist the charge to take stock. Many more are going to resist the intrusion of counsel into the fine details of their databases. Kevin Jacobs says that many smaller companies are resisting the requests from their own lawyers in counsel's

quest to understand their ESI. But the amended rules would seem to require that counsel push on this, insist on meeting with IT personnel, obtaining first-hand knowledge of the systems and requiring verifications from clients as to representations by them that cannot easily be confirmed. Counsel may even wish to use the vehicle of the engagement letter to inform each prospective client of the necessary burden and expense of acquiring a comprehensive understanding of its ESI.

Counsel issuing requests to produce may choose to receive ESI in the form of hard copy or TIFF files because they are easier to manage and absorb. However, those equipped to process native files, files that are electronically identical to what the party has in its system, will have a substantial advantage. According to Jacobs, whereas the TIFF version of an e-mail may contain seven fields of information, a native file of the same document may contain as many as 50 fields. The issuing party that understands how to handle such files is going to have a substantial advantage in gathering information.

Further, for uninformed counsel, there may be a very uneven, and unlikely, balance of power at the 26(f) conference. An individual plaintiff in litigation with a large corporation, for example, has nothing to lose by insisting on very wide parameters for discovery of ESI from a corporate defendant. This may create an enormous burden on the responding corporation, thus creating leverage at a very early stage in the litigation. The ill-informed defense counsel will be less nimble at properly defining the terms.

The dangers of proceeding with inadequate information or understanding are many. Perhaps of greatest importance, a lack of understanding on the part of counsel can lead to inadvertent disclosure of privileged or confidential information. Or it can lead to a misrepresentation to opposing counsel or the court as to the ESI actually maintained and available. Such conduct may result in sanctions. A flurry of recent opinions illustrates the

penalties for parties *and* attorneys for failing to effect, disseminate and educate about retention policies and litigation hold letters. Attorneys are expected to ensure their clients comply with these requirements, and sanctions are being handed down for failure to take proper steps. *See, in particular, Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) and its predecessor cases. *See also Leon v. IDX Systems Corp.*, 464 F.3d 951 (9th Cir. 2006) (affirming dismissal of claims and imposition of a \$65,000 fine upon plaintiff in employment case who, during the pendency of litigation, scrubbed 2,200 files from the hard drive of a company-owned laptop he had retained).

In addition to the foregoing dangers associated with a failure to grasp the technology and to have a comprehensive understanding of the client's ESI, lawyers may run afoul of ethical obligations to ensure they are conversant with the areas in which they practice. The Rules state "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." SCACR 407, Rule 1.1. For an excellent discussion of this, see *Unintended Consequences: Maintaining Basic Understandings of Technology—An Ethical Obligation*, by Eleanor B. Kellett, in the November 2006 edition of this publication.

Conclusion

The amended rules will undoubtedly be interpreted differently in the different districts and divisions, and only time will tell how, as a practical matter, they will be applied. But one thing is certain. Attorneys who practice in federal court are going to have to master ESI ASAP.

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