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Focus

Federal Litigators Face New Burdens in E-Data Discovery

By Joseph S. Wu

Starting in December, all parties appearing before the federal courts will have to grapple with a new set of amendments to the Federal Rules of Civil Procedure. These new rules emphasize the importance of electronically stored information throughout the life of any federal lawsuit, from requiring ESI disclosures as part of parties' initial obligations, to determining how a court's scheduling order will look and changing the parties' fact and expert discovery.

The new rules will place discovery of ESI front and center in virtually every lawsuit, with the potential effect of vastly increasing lawyers' obligations to dig early and deep into their clients' own ESI before hunting for smoking gun e-mails in an adversary's ESI.

Amendments' Evolution

In 1999, the Judicial Counsel's Committee on Rules of Practice and Procedure tackled the discovery of information stored on computer systems because of its realization that ESI presents a very different set of concerns from paper discovery. Likely the greatest of these differences is the sheer volume of electronic information generated and retained (even after deletion). Paper records are static, but electronic information is dynamic and, at times, incomprehensible when separated from the original system that created it.

After public hearings, the committee proposed the current set of amendments, which the U.S. Supreme Court adopted in April without comment. Unless rejected or modified by Congress (and there is no indication thus far that Congress will interfere), the amendments will become law on Dec. 1.

Initial Disclosures

Amended Rule 26(a)(1)(B) requires a party to disclose to its adversary, without awaiting a discovery request, "a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things [under its custody or control which] the disclosing party may use to support its claims or defenses."

The significance of this rule will depend on the disputes presented and the organizational complexity of a party's information system infrastructure. But for every case, large or small, new Rule 26(a)(1)(B) will obligate each party to disclose, by category and location, all potential sources of its ESI that may contain information it may want to use to establish either its claims or defenses in each litigation — at its infancy, including full disclosure of where and how all such ESI are stored.

Early Meeting of Counsel

Three changes also add to counsel's duties at the early meeting of counsel: (1) the preservation of discoverable information, (2) the form production of electronically stored information and (3) counsel's ability to make post-production privilege assertions.

Under amended Rule 26(f), counsel must be prepared "to discuss any issues relating to preserving discoverable information" at the early meeting. To have sufficient dialogue concerning ESI preservation, however, there must be adequate disclosure as to what preservation efforts have been made by each party. Counsel should describe a party's preservation efforts to date in sufficient detail to allow an adversary to comprehend when and what actual steps have been taken, how they were implemented and why. Short of being adequately prepared, a party likely will face an immediate preservation motion and lose credibility before the court.

The new rule also requires counsel to speak specifically on the particular formats in which discoverable ESI will be produced. This means that counsel not only must prepare for the dispute's usual legal and factual issues - normally quite enough for any litigator by the early meeting — but also must acquire sufficient expertise on information technology desired for the processing of ESI throughout the case. Counsel must therefore be prepared before the early meeting to investigate and discuss with the client the best ways for the client's ESI to be collected, processed and produced.

In addition, Rule 26(f) requires counsel to consider proposed stipulations on how parties may protect inadvertently disclosed ESI containing privileged information. The committee added this rule because it recognized that parties in large-volume ESI cases would need to address this issue upfront to prevent the subsequent claim of privilege waivers by parties (and nonparties).

Finally, the committee recommended changes to portions of Form 35 of the Federal Rules of Civil Procedure: "Report of Parties' Planning Meeting," Section 3: "Discovery Plan." The changes would make certain that counsel's Rule 26(f) reports cover issues about the discovery of ESI and any agreements of counsel made about post-production privilege protection.

Pretrial Conference Order

Under existing Rule 16(b), the court enters a scheduling order at the outset of the litigation to govern the parties' pretrial activities, including discovery.

The committee proposed two new subsections to Rule 16(b) to make certain that, as part of the final scheduling order,

the court inquires of counsel about the disclosure and discovery of ESI and whether any special provisions should be included in the scheduling order to allow the parties to make post-production privilege objections to inadvertently produced ESI.

Two-Tiered Discovery

The new Rule 26(a)(1)(B) is structured to permit a party (at least initially) to exclude from its discovery obligations any discovery of ESI "from sources that the party identifies as not reasonably accessible because of undue burden or cost." This means that, upon a proper "not reasonably accessible" designation, a party responding to a Rule 34(a) document demand need not review or produce any ESI contained within designated NRA sources, even if these sources contain relevant ESI.

For example, discovery of disaster recovery back-up tapes that may contain relevant ESI may be excluded when it is supported only by legacy systems that are no longer available.

Upon motion by the party seeking discovery to challenge a NRA designation, the responding party bears the burden of demonstrating specific facts to support the designation. The stakes may be high, because a successful NRA designation will protect against the enormous costs and delays necessitated by the review and production of such ESI. Yet, even when a NRA designation is affirmed, a court may order discovery of ESIs contained in such sources upon the requesting party's demonstration of good cause, taking into consideration the factors listed in Rule 26(b)(2)(C) (for example, whether the discovery is cumulative, whether burden of production outweighs the benefit and whether there are cost shifting/sharing justifications).

Requesting ESI Production

Amended Rule 34(a) grants the requesting party express rights to "inspect, copy, test or sample" any electronically stored information, including "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information may be obtained - translated, if necessary, by the respondent into reasonably usable form."

Amended Rule 34(b) also permits the requesting party to specify in the request the form(s) in which particular ESI is to be produced. For example, the requesting party may request that discoverable e-mails be produced in theirs original Outlook format, that Word and PowerPoint files be produced in searchable PDF format and that spreadsheets be produced in their original native format. And if the responding party objects to the requested ESI form of production (or if the request is silent), the responding party must state in its written response the particular forms of ESI production it intends to use, and it must produce discoverable, responsive ESI as it is "ordinarily maintained" or in a "reasonably usable" form.

Once production is made in a format specified by the requesting party, amended Rule 34(b) makes clear that the respondent need produce the same ESI in only one form.

Limited Safe Harbor

Likely the most popular (and probably most misunderstood) new rule is Rule 37(f). While often referred to as a safe harbor provision, the rule has surprisingly limited applicability. It states, "Absent exceptional circumstances, a court may not impose sanctions under these rules on 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 37(f) provides protection only for ESI lost because of the routine operation of an existing electronic information system. The added requirement of good faith is also key. For the rule is most likely not applicable if a party switches its computer system or adjusts its automatic deletion parameters with knowledge that potentially discoverable ESI may become unavailable. Further, the requirement of good faith likely will be interpreted in view of a party's preservation duties under common law. Once a party's duty to preserve discoverable information becomes evident, the Rule 37(f) safe harbor protection may no longer have applicability.

Finally, Rule 37(f) is limited to shield a party from sanctions under "these rules" — only. For example, Rule 37(f) is not meant to limit a court's exercise of its inherent authority to sanction a party for abuses engaged in litigation, including discovery abuses, or to issue monetary or other sanctions authorized under other applicable statutes or regulations.

With the new rules, parties will be forced to front-load the tremendous time and expense they must spend to deal with myriad likely ESI issues, including a potential surge in early motion practice resulting from ESI-related disputes. Gone may be the days of limiting intense discovery battles to the final weeks of discovery and/or during trial preparations. Now, as more obligations create more opportunities for neglect, discovery battles may rage shortly after a case is filed and continue throughout discovery.

All federal-court litigants should keep two things in mind: One, be prepared upfront with an active and robust data management system in order to take the sting out of the narrow window a party has to be ready at its Rule 26(f) early meeting of counsel; two, work cooperatively with opposing counsel, in good faith, to anticipate (and prepare for) all likely ESI-related issues before ESI discovery spats get out of control.

Preparation by knowledgeable counsel will increase greatly the odds of a party obtaining useful ESI from effectively conducted e-discovery strategies, including that elusive smoking gun e-mail. The reverse is also true. A lack of preparation also could quickly turn a case into one that's determined not on its merits but on repeated procedural violations of these new rules.

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